SC97284

IN THE SUPREME COURT OF MISSOURI

DARRELL COPE and THE MISSOURI DEMOCRATIC PARTY,
Appellants,

v.

GOVERNOR MICHAEL L. PARSON and LIEUTENANT GOVERNOR MIKE KEHOE,
Respondents.

Circuit Court of Cole County, Missouri
Case Number 18AC-CC00230
The Honorable Jon E. Beetem, Circuit Judge

RESPONDENTS' BRIEF

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INTRODUCTION

When Governor Michael L. Parson became Governor of Missouri on June 1, 2018, the office of Lieutenant Governor became vacant. Exercising his authority under Article IV, § 4 of the Missouri Constitution to "fill all vacancies in public offices," Governor Parson appointed Mike Kehoe to the office of Lieutenant Governor. This appointment was valid. Governor Parson had constitutionally vested authority to fill the vacancy in the office of Lieutenant Governor, and no provision of Missouri law purports to displace this constitutionally vested authority. This Court has adopted a "strong presumption against a legislative intent to create a condition that might result in a vacancy in public office." This presumption and every other applicable principle of interpretation confirm Governor Parson's authority to fill this vacancy.

When they filed their petition, Plaintiffs requested sweeping declaratory and injunctive relief seeking to remove Lieutenant Governor Kehoe from office. Confronted with overwhelming authority holding that private plaintiffs cannot seek the removal of statewide officials through litigation, Plaintiffs strategically abandoned any request for legally binding relief against Governor Parson or Lieutenant Governor Kehoe. In making that concession, however, they deprived the circuit court of jurisdiction to decide their claims, because a judgment with no binding effect on any party is a quintessential advisory opinion. In addition, Plaintiffs lack standing because their alleged injuries are speculative and conjectural, and their claims are no longer redressable. This Court should affirm the judgment of the circuit court and reaffirm the validity of Lieutenant Governor Kehoe's service to the State of Missouri and its people.

STATEMENT OF FACTS

A. The Critical Role of the Lieutenant Governor in Missouri Government.

Under the Missouri Constitution and its statutes, the Lieutenant Governor plays a critical role in the government of Missouri and constitutes an important representative of numerous public interests. The Lieutenant Governor serves as the "ex officio president of the senate." MO. CONST. art. IV, § 10. "In the committee of the whole he may debate all questions, and he shall cast the deciding vote on equal division of the senate and on joint vote of both houses." *Id.* The Lieutenant Governor is first in order of succession to replace the Governor, and he or she serves as acting Governor when the Governor is absent from the State or subject to disability. *Id.* §§ 11(a), (b).

The General Assembly has conferred numerous statutory duties and responsibilities on the office of Lieutenant Governor as well. By statute, the Lieutenant Governor serves on the Board of Fund Commissioners, § 33.300, RSMo; the Board of Public Buildings, § 8.010; the Missouri Community Service Commission, § 620.586, RSMo; the Missouri Development Finance Board, § 100.265, RSMo; the Missouri Housing Development Commission, § 215.020, RSMo; the Missouri State Capitol Commission, § 8.003, RSMo; the Tourism Commission, § 620.455, RSMo; and the Special Health, Psychological, and Social Needs of Minority Older Individuals Commission, § 208.533, RSMo. The Lieutenant Governor also supervises the Office of Advocacy and Assistance for Senior Citizens and provides advocacy services for elderly persons throughout Missouri. § 660.620, RSMo. The Lieutenant Governor also acts as an advisor to the elementary and

secondary education department with respect to the Parents as Teachers programs. § 178.695, RSMo.

By tradition, the Lieutenant Governor has additional non-constitutional and non-statutory responsibilities as well. For example, the Lieutenant Governor serves as the State's veterans' advocate, making it a priority to increase awareness of state and federal programs to assist veterans and their families and to connect veterans with programs offered through entities such as the Missouri Veteran's Commission, the Missouri Military Family Relief Fund, and the Missouri National Guard. The Office of Lieutenant Governor has also created a national "Buy Missouri" economic development initiative to actively promote the products that are grown, manufactured, processed, or made in Missouri. The "Buy Missouri!" campaign organizes community events, entertainment attractions, and trade shows to promote tourism, business, and economic developments which will showcase Missouri-made products and businesses.

B. Governor Parson Appoints Lieutenant Governor Kehoe.

On June 1, 2018, then-Lieutenant Governor Michael L. Parson took the oath of office as Governor of Missouri, following the resignation of previous Governor Eric Greitens. When Lieutenant Governor Parson became Governor, the Office of Lieutenant Governor became vacant. *See* LF Doc. 2, at 2.

On June 18, 2018, Governor Parson appointed Senator Mike Kehoe to succeed him as Lieutenant Governor of Missouri. *Id.* at 3. Promptly thereafter, Cole County Circuit Judge Patricia Joyce administered the oath of office to Lieutenant Governor Kehoe. *Id.*; *see also* Marshall Griffin, *Judge Rejects Lawsuit to Remove Kehoe from Lieutenant*

Governor's Office, ST. LOUIS PUBLIC RADIO (July 11, 2018), *at* http://news.stlpublicradio.org/post/judge-rejects-lawsuit-remove-kehoe-lieutenant-governors-office#stream/0 (displaying a photograph of Judge Joyce administering the oath of office to Lieutenant Governor Kehoe).

Before deciding to appoint Lieutenant Governor Kehoe, Governor Parson consulted with "two respected legal experts on the matter, one Republican and one Democratic," including "Joe Bednar, who was chief counsel for Governors Carnahan and Wilson, and Lowell Pearson, who was the top attorney for Governor Matt Blunt." Jennifer Moore, *To Appoint, or Not to Appoint a Lieutenant Governor: a Missouri Question for Nearly Fifty Years*, ST. LOUIS PUBLIC RADIO (June 22, 2018), *at* http://news.stlpublicradio.org/post/appoint-or-not-appoint-lt-governor-missouri-question-nearly-50-years#stream/0. Prior to Lt. Gov. Kehoe's appointment, these two attorneys publicly set forth the rationale for their opinion supporting Governor Parson's authority to make the appointment. *See* Joe Bednar and Lowell Pearson, *We're of Different Parties, But Agree: Parson Has Power to Name His Lieutenant*, KANSAS CITY STAR (June 16, 2018), at https://www.kansascity.com/opinion/readers-opinion/guest-commentary/article213327294.html. Bednar and Pearson concluded that "[t]he governor has the constitutional authority, and mandate, to fill the vacancy." *Id.*

Similarly, in addition to Governor Parson, four former Governors (including two Republicans and two Democrats) made statements agreeing that Governor Parson has authority to fill a vacancy in the office of Lieutenant Governor. *See* Benjamin Peters, *Governor Parson Names Mike Kehoe as Next Lieutenant Governor*, MISSOURI TIMES (June

18, 2018), at https://themissouritimes.com/51834/governor-parson-names-mike-kehoe-as-next-lieutenant-governor/. In particular, these former Governors have stated:

- Governor Christopher S. Bond: "The people of Missouri deserve a full slate of constitutional officials serving them and the governor needs a lieutenant governor. I applaud Governor Parson for demonstrating leadership by filling this vacancy in a thoughtful and deliberate manner." *Id.*
- Governor Jay Nixon: "Missourians are best served by having a Lt. Governor in office. In 1992, Missouri voters added significant additional duties to the office that would be unmet if the position remained vacant. Also, Missouri's unique succession laws could cause constitutional challenges if the governor becomes disabled when the Lt. Governor's Office remained vacant. As Attorney General and later Governor, I researched this issued extensively and firmly believe the Governor has the authority to fill a vacancy in this office by appointment." *Id.*
- Governor Bob Holden: "The Legislature has not provided any alternative to the Governor making the appointment to fill the Lt. Governor's position when vacant, and past practices based on legal counsel from prior Governors based on their legal opinions of the Missouri constitution and the statutes is that the Governor shall make an appointment to fill the Lt. Governor's position." *Id.*
- Governor Matt Blunt: "Governor Parson has made another great decision in appointing Mike Kehoe as the next Lieutenant Governor. Mike is a dedicated

> public servant who will fulfill all his new responsibilities with skill and integrity. I believe our constitution empowers the governor to fill this and other vacancies. Given the many assigned responsibilities of the Lieutenant Governor it is clear to me that the intent was and is that Missouri should have a leader in that role." *Id.*

In addition to these statements by former Governors Bond, Nixon, Holden, and Blunt, former Governor Roger Wilson—who himself had filled a vacancy in the office of Lieutenant Governor by appointing Joe Maxwell in 2000—also publicly declared his support for the authority of Governor Parson to fill a vacancy in the office of Lieutenant Governor. Prior to the appointment, Governor Wilson stated that "he knows from personal experience that filling the lieutenant governor's seat soon is important, especially during the transition of a new governor." Alisa Nelson, *Former Missouri Lieutenant Governor-Turned-Governor Says Having a Second in Command Soon Is Important*, MISSOURINET.COM (June 7, 2018), *available at* https://www.missourinet.com/2018/06/07/former-missouri-lieutenant-governor-turned-governor-says-having-a-second-in-command-soon-is-important/.[1]

Consistent with the opinions of this bipartisan group of five Governors and two of their chief counsel, Governor Parson exercised his constitutional authority to fill the vacancy and appointed Lieutenant Governor Kehoe on June 18, 2018.

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[1] This Court may take judicial notice of these public statements and opinions of former Governors and Governors' counsel as matters that "can be reliably determined by resort to a readily available, accurate and credible source." *Pous v. Dir. of Revenue*, 998 S.W.2d 129, 132 (Mo. App. W.D. 1999) (collecting cases).

C. Plaintiffs Challenge the Appointment of Lieutenant Governor Kehoe.

That same day, June 18, 2018, Plaintiffs-Appellants the Missouri Democratic Party and Darrell Cope (collectively, "Plaintiffs") filed their Verified Petition for Injunctive and Declaratory Relief in Cole County Circuit Court against Governor Parson and Lieutenant Governor Kehoe. LF Doc. 2. The petition alleged that Governor Parson lacked legal authority to fill a vacancy in the office of Lieutenant Governor, and that the office must remain vacant until the next general election in 2020. LF Doc. 2, at 4.

In their prayer for relief, Plaintiffs requested that the circuit court "enter preliminary and permanent injunctions" that would (1) "enjoin[] Governor Parson from appointing a Lieutenant Governor," (2) "enjoin[] Governor Parson from appointing Mike Kehoe Lieutenant Governor," and (3) "prohibit[] Mike Kehoe from serving as Lieutenant Governor." LF Doc. 2, at 5. Plaintiffs also asked the circuit court to "enter a judgment declaring" that (4) "Governor Parson is without legal authority to appoint a Lieutenant Governor," that (5) "Governor Parson's purported appointment of Mike Kehoe as Lieutenant Governor was ineffective," and that (6) "Mike Kehoe is not the Lieutenant Governor of the State of Missouri." LF Doc. 2, at 5.

On June 25, 2018, Governor Parson and Lieutenant Governor Kehoe (collectively, "the State") filed a motion to dismiss the petition. LF Doc. 3. Among other things, the State's motion to dismiss contended that "once Lieutenant Governor Kehoe was appointed and sworn in to office, he became the *de facto* officeholder" of the office of Lieutenant Governor, and that "[a] private litigant lacks authority to remove a *de facto* holder of statewide office via litigation—the sole and exclusive method to remove a Lieutenant

Governor from office is impeachment by the General Assembly under Article VII of the Missouri Constitution." LF Doc. 3, at 1. The motion to dismiss also argued that Governor Parson had constitutional authority to fill the vacancy in the office by appointing then-Senator Kehoe to become Lieutenant Governor, and that both Plaintiffs lacked standing to assert their claims. *Id.*

In their response to the motion to dismiss, Plaintiffs did not dispute that Lieutenant Governor Kehoe is the *de facto* holder of the office of Lieutenant Governor, and they did not dispute that they (as private plaintiffs) lacked authority to seek the removal of the *de facto* Lieutenant Governor through litigation. *See* LF Doc. 4. In fact, they failed to make any argument addressing the State's contention that, as private plaintiffs, they lacked authority to seek the removal of Lieutenant Governor Kehoe through litigation. *Id.* As the State's reply in support of the motion to dismiss stated, "Plaintiffs' Response in Opposition does not even address this dispositive argument. Thus, they effectively concede that their Petition should be dismissed in its entirety." LF Doc. 5, at 2.

D. Plaintiffs Abandon Any Request for Legally Binding Relief.

On July 5, 2018, the circuit court held a hearing on the State's motion to dismiss. At the hearing, Plaintiffs' counsel once again did not dispute that Lieutenant Governor Kehoe is the *de facto* officeholder, and did not dispute that Plaintiffs lacked authority to seek his removal from office through litigation. Instead, Plaintiffs' counsel adopted a new strategy in attempt to evade these problems. At oral argument, he expressly abandoned Plaintiffs' request for injunctive relief, and he expressly abandoned his request for any declaratory relief that would be legally binding on the Defendants. Instead, Plaintiffs asked

the trial court to provide a declaration of the law that (as he proposed) would not be binding upon Governor Parson and Lieutenant Governor Kehoe, and that would not impose any legal obligation on those officials to follow it. Plaintiffs' counsel admitted that such a declaration would leave Lieutenant Governor Kehoe free to disregard the court's opinion and remain in office. But he suggested that Lieutenant Governor Kehoe might resign out of respect for the court's advice if the court were to decide the merits in Plaintiffs' favor, or that the Attorney General or the elected prosecutor of Cole County might be inspired to initiate a *quo warranto* proceeding against Lt. Gov. Kehoe if the court issued an opinion deciding the merits in Plaintiffs' favor. *See* LF Doc. 10, at 3 (the circuit court's judgment describing these concessions). By contrast, the State's counsel argued that Plaintiffs' novel position amounted to a request for a quintessential advisory opinion.

Because the circuit court's court reporter was unavailable that day, no transcript of the hearing on the oral argument exists. But in their appellate brief, Plaintiffs do not dispute the circuit court's characterization of their concessions at oral argument. *See id.* In addition, numerous contemporaneous accounts of the oral argument confirm the circuit court's characterization of these concessions, and Plaintiffs' counsel himself made public statements confirming them as well. *See, e.g.*, Blake Nelson, *Judge Weighing Whether to Dismiss Lieutenant Governor Case*, ASSOCIATED PRESS (July 5, 2018), *available at* https://www.usnews.com/news/best-states/missouri/articles/2018-07-05/judge-weighing-whether-to-dismiss-lt-gov-case ("Matt Vianello, a lawyer for the Democratic Party, told Judge Jon Beetem that he was just looking for him to declare the appointment illegal. What happened after that, he said, was up to Parson and Kehoe."); Marshall Griffin, *Missouri*

Lawyers Argue Over Validity of Lieutenant Governor Appointment, ST. LOUIS PUBLIC RADIO (July 5, 2018), *at* http://news.stlpublicradio.org/post/missouri-lawyers-argue-over-validity-lieutenant-governor-appointment#stream/0 (reporting that Plaintiffs' counsel is "no longer asking Circuit Judge Jon Beetem to remove Kehoe from office . . . . Instead, Vianello wants Beetem to declare that Parson lacked authority to appoint Kehoe. If that happens, he said that Kehoe should voluntarily step down or face removal by the attorney general."); Garrett Bergquist, *Case to Decide on Kehoe as Lieutenant Governor in Judge's Hands*, KRCG-TV.COM (July 5, 2018), *at* https://krcgtv.com/news/local/case-to-decide-on-kehoe-as-lieutenant-governor-in-judges-hands (recounting that, at oral argument, when the circuit court "repeatedly pressed Vianello on what kind of ruling plaintiffs wanted," he requested a ruling that "would state what the law was but would not carry any force of law"). Thus, Plaintiffs do not dispute, and they have no good-faith basis to dispute, that they abandoned any request for *legally binding* relief. Instead, they requested from the circuit court only an advisory opinion that would not impose any legal obligation on Defendants to follow it.

E. The Circuit Court Dismisses the Lawsuit with Prejudice.

On July 11, 2018, the circuit court granted the State's motion to dismiss and entered a final judgment dismissing the lawsuit with prejudice. LF Doc. 10. The circuit court's judgment rested on several independently sufficient grounds. First, the circuit court held that "under Missouri law, a private plaintiff lacks authority to seek the removal of a public official through litigation. Rather, a private party seeking to oust a public official from office must proceed under the *quo warranto* statute, § 531.010, RSMo." *Id.* at 1. The court

held that "[t]he *quo warranto* statute provides the exclusive procedure under Missouri law to remove a state officer by litigation," *id.* at 2, and that "a private plaintiff lacks authority to initiate a *quo warranto* action—the participation of a government attorney, such as the Attorney General or an elected prosecutor, is required." *Id.* at 3. The circuit court further noted that, in their briefing, "Plaintiffs did not even address this fatal deficiency in their petition." *Id.*

The circuit court then stated that, "[a]t oral argument on the Motion to Dismiss, in an attempt to evade this fatal problem, Plaintiffs' counsel argued for the first time that Plaintiffs would abandon their claims for injunctive relief and seek only a declaratory judgment regarding the validity of Lieutenant Governor Kehoe's service, which (they proposed) would have no binding effect on Lieutenant Governor Kehoe." *Id.* "In this way, Plaintiffs seek to avoid the prohibition against private actions seeking to oust state officials, but still obtain a court order attacking the validity of Governor Parson's appointment." *Id.* The circuit court held that this proposal was "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." *Id.* "An opinion about the law with no binding effect on any party is a quintessential advisory opinion." *Id.*

The circuit court also addressed the merits in the alternative, emphasizing that the issue "should be addressed sooner rather than later" because of "the important role of the Lieutenant Governor with the General Assembly." *Id.* at 4. On the merits, the circuit court held that "Governor Parson had authority to appoint Lieutenant Governor Kehoe under Article IV, § 4 of the Missouri Constitution." *Id.* Rejecting Plaintiffs' central arguments,

the circuit court held that neither Article VII, § 7 of the Constitution, nor § 105.030, RSMo, displaced the authority that Article IV, § 4 vests in the Governor to fill a vacancy in the office of Lieutenant Governor. *Id.* at 6. The circuit court also noted that Plaintiffs' position—which would require that important office to remain vacant for over two and a half years—would generate an "unreasonable and anomalous result." *Id.* at 7.

The circuit court also concluded that all Plaintiffs lacked standing to sue, because "no Plaintiff has alleged a pecuniary or personal interest directly in issue or jeopardy which is subject to some consequential relief." *Id.* (quotation omitted). The court held that the Missouri Democratic Party's theory of standing—*i.e.*, that it would be more difficult for a Democratic candidate to oppose a Republican incumbent in the 2020 election—was "conjectural, hypothetical, and speculative." *Id.* "It is entirely unknown and unknowable whether Lieutenant Governor Kehoe will decide to run for office of Lieutenant Governor in 2020; whether he will prevail in the Republican primary if he does run; which Democratic candidates, if any, might run against him; and whether his incumbency would provide any material advantage in the election if he does run and win the primary." *Id.*

The circuit court also rejected Plaintiff Darrell Cope's claim of taxpayer standing. The circuit court concluded that his "allegation of taxpayer standing fails because he does not seek the only relief that a taxpayer could pray for in this context." *Id.* at 8. "Mr. Cope purports to challenge the direct expenditure of funds generated through taxation that occurs from the funding of Lieutenant Governor Kehoe's office," but "his Petition does not pray for an order blocking the expenditure of taxpayer funds for this purpose." *Id.* "Instead, it seeks . . . sweeping declarations and injunction against Governor Parson and Lieutenant

Governor Kehoe." *Id.* "Because Mr. Cope has not requested the only relief that a taxpayer could seek in this context," the circuit court held that "he lacks taxpayer standing to pursue this action." *Id.* at 8-9.

Plaintiffs filed a timely notice of appeal. LF Doc. 11.

ARGUMENT

Standard of Review. This Court reviews *de novo* the trial court's order granting the State's motion to dismiss for lack of jurisdiction and for failure to state a plausible claim for relief. *State ex rel. Hawley v. Pilot Travel Centers, LLC*, No. SC96885, -- S.W.3d --, 2018 WL 3979467, at *2 (Aug. 21, 2018).

I. Plaintiffs Deliberately Abandoned Their Request for Any Legally Binding Relief Against Governor Parson and Lieutenant Governor Kehoe, and Thus Plaintiffs Sought Only a Quintessential Advisory Opinion. (Responds to Appellants' Point I)

Having requested sweeping declaratory and injunctive relief in their Petition, Plaintiffs then radically switched gears and abandoned any request for relief other than a judicial opinion that would not bind or impose any obligations on Governor Parson or Lieutenant Governor Kehoe. Plaintiffs are bound by their own strategic concession. Because they sought only a quintessential advisory opinion, they deprived the circuit court of jurisdiction over their claims. And even if they had not made that strategic concession, their claims would still have to be dismissed. Private plaintiffs have no authority to seek any legally binding judgment that would have the effect of forcing Lieutenant Governor Kehoe from office.

A. The circuit court lacked jurisdiction because Plaintiffs requested a judicial opinion with no binding legal effect on Defendants—in other words, an advisory opinion.

As discussed above, at oral argument on the motion to dismiss, Plaintiffs' counsel abandoned their request for injunctive relief. He also abandoned any request for declaratory relief that would have legally binding effect on Governor Parson or Lieutenant Governor Kehoe, or would impose any legal obligation on Defendants to comply with it. LF Doc. 10, at 2. These strategic concessions are binding on Plaintiffs. *See State ex rel. Nixon v. Estes*, 108 S.W.3d 795, 797 n.3 (Mo. App. W.D. 2003) (deeming a point of appeal waived because the party's "attorney explicitly abandoned it during oral argument of this case"). Accordingly, the *only* relief Plaintiffs sought was a declaration of the law with no binding effect on any party—*i.e.*, a quintessential advisory opinion.

A judicial decree that does not bind or impose obligations on any party, but leaves each party free to disregard its guidance, constitutes a quintessential advisory opinion. In pursuing a declaratory-judgment action, Plaintiffs "must present a real and substantial controversy admitting of *specific relief* through a decree of *conclusive character*, as distinguished from a decree which is merely advisory as to the state of the law upon purely hypothetical facts." *County Court of Washington County v. Murphy*, 658 S.W.2d 14, 16 (Mo. banc 1983) (emphases in original) (quoting *State ex rel. Chilcutt v. Thatch*, 221 S.W.2d 172, 176 (Mo. banc 1949)). "Actions . . . are merely advisory when the judgment would not settle actual rights." *Id.* (quoting *Chilcutt*, 221 S.W.2d at 176). "Plaintiff must present a state of facts . . . against those he names as defendants with respect to which he

may be entitled to some *consequential relief* immediate or prospective." *Id.* (emphasis in original) (quoting *Chilcutt*, 221 S.W.2d at 176).

Here, Plaintiffs do not and cannot dispute that they abandoned any request for relief "of conclusive character" or "consequential relief." *Id.* At oral argument, Plaintiffs' counsel admitted that, under his proposal, Lieutenant Governor Kehoe would be free to disregard the court's advice and continue to serve in office, even if the court decided the merits against his position. LF Doc. 10, at 2; *see also, e.g.*, Nelson, *supra*; Griffin, *supra*; Bergquist, *supra*. Thus, Plaintiffs sought only a judicial opinion that would advise the parties about the law without binding them or imposing any legal obligation upon them—in other words, an advisory opinion. A judicial opinion that left all parties free to disregard it without any legal consequences would not have "conclusive character," would not "settle actual rights," and would not provide "consequential relief" to the plaintiffs. *County Court of Washington County*, 658 S.W.2d at 16.

The circuit court correctly concluded that it lacked jurisdiction to enter such an advisory opinion. The prohibition against advisory opinions is one of the most deeply rooted principles of American jurisprudence, extending back to the administration of President George Washington and the Chief Justiceship of John Jay. "[I]t is quite clear that the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (quotation omitted). When plaintiff seeks only an advisory opinion, the trial court has "no jurisdiction to enter any order whatever or to take any action in the declaratory judgment suit, other than to dismiss the same." *County Court of Washington County*, 658 S.W.2d at

16 (quoting *Chilcutt*, 221 S.W.2d at 176). A judgment that is "merely an advisory opinion" is "a nullity." *Local Union 1287 v. Kansas City Area Transp. Auth.*, 848 S.W.2d 462, 464 (Mo. banc 1993).

Plaintiffs contend that the declaratory judgment act creates an implied exception to the universal rule against advisory opinions, arguing that "[a] petition for declaratory judgment is not objectionable as seeking an advisory opinion because it only seeks declaratory relief." App. Br. 10. Overwhelming authority contradicts this argument. "The Declaratory Judgment Act does not authorize the issuance of advisory opinions." *Witty v. State Farm Mut. Auto. Ins. Co.*, 854 S.W.2d 836, 838 (Mo. App. S.D. 1993); *Carpenter-Vulquartz Redevelopment Corp. v. Doyle Dane Bernbach Advertising, Inc.*, 777 S.W.2d 305, 309 (Mo. App. W.D. 1989) ("The Declaratory Judgment Act does not authorize the issuance of advisory opinions."); *Harris v. State Bank & Trust Company of Wellston*, 484 S.W.2d 177, 178 (Mo. 1972) (holding that "the declaratory judgment act . . . is not a general panacea for all real and imaginary legal ills, nor is it a substitute for all existing remedies"). Missouri courts, including this Court, have repeatedly rejected attempts to obtain advisory opinions under the guise of declaratory-judgment actions. *See id.* When confronted with a request for an advisory opinion in a declaratory-judgment action, the court has "no jurisdiction to enter any order whatever or to take any action in the declaratory judgment suit, other than to dismiss the same." *County Court of Washington County*, 658 S.W.2d at 16 (quotation omitted).

At oral argument in the trial court, Plaintiffs admitted that their proposed judgment would leave Lieutenant Governor Kehoe free to disregard the court's advice and remain in

office. This Court's statement in *Missouri Soybean Association* is thus equally applicable here: "At oral argument, the appellants could not even predict the effect such a declaratory judgment would have. Clearly, a declaratory judgment here would not have a 'conclusive effect' or 'lay to rest the parties' controversy' if the appellants cannot even predict such judgment's effect." *Missouri Soybean Ass'n v. Missouri Clean Water Com'n*, 102 S.W.3d 10, 26 (Mo. 2003) (quoting *Jones v. Carnahan*, 965 S.W.2d 209, 214 (Mo. App. W.D. 1998)).

In their brief in this Court, Plaintiffs fail to mention the concessions they made at oral argument on the State's motion to dismiss in the trial court. But they impliedly concede that the judgment they requested from the trial court would have no binding effect on the Defendants, and that Lieutenant Governor Kehoe would be free to disregard their requested judgment without any legal consequences. They argue that, "with regard to the 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." App. Br. 10. Notably, Plaintiffs do not contend that the circuit court would have any *enforcement authority* against Lieutenant Governor Kehoe if he were to disagree with the circuit court's legal opinion, or that Plaintiffs could move for enforcement or for sanctions if Defendants disregarded the court's advisory opinion.

Nor can Plaintiffs salvage their position by arguing, as they did below, that a judgment opining that Governor Parson lacked authority to appoint Lt. Gov. Kehoe might inspire the Attorney General or the Cole County prosecutor to initiate a *quo warranto*

proceeding against Lt. Gov. Kehoe. Plaintiffs did not name the Attorney General or the Cole County prosecutor as defendants in their lawsuit, so they are not parties and would not be bound by any judgment. Because Plaintiffs proposed a judgment that would not even bind the actual parties to the case—Governor Parson and Lt. Gov. Kehoe—*a fortiori* their proposed judgment would have no binding or obligatory effect on the Attorney General or the Cole County prosecutor. Moreover, the circuit court would have no authority to issue such a judgment. In deciding whether to initiate a *quo warranto* proceeding, "[t]he discretion of the government attorney is complete." *State ex inf. Graham v. Hurley*, 540 S.W.2d 20, 23 (Mo. banc 1976).

In short, because Plaintiffs abandoned any request for declaratory or injunctive relief that would be legally binding on Defendants, they requested only an advisory opinion, which the circuit court lacked jurisdiction to grant.

B. Plaintiffs, as private parties, had no authority to seek to remove Lieutenant Governor Kehoe from office through litigation.

Moreover, even if Plaintiffs had not abandoned their claims for binding declaratory and injunctive relief, their claims would have been subject to dismissal. Under Missouri law, private plaintiffs have no authority to seek to remove statewide officials from office through litigation. By statute, the exclusive method to remove statewide officials from office is a *quo warranto* action initiated with the cooperation of a government attorney, *i.e.*, the Attorney General or the local elected prosecutor. And here, Plaintiffs' claims faced an even more fundamental obstacle, because the sole and exclusive method to remove from office a statewide "elective executive official," such as the Lieutenant Governor, is

impeachment by the General Assembly under Article VII, § 1 of the Missouri Constitution. Because Plaintiffs lack authority to impeach Lieutenant Governor Kehoe or to initiate a *quo warranto* action against him, they lack authority to seek a binding judgment that would effectively remove him from office.

The circuit court held, and Plaintiffs do not dispute, that Lieutenant Governor Kehoe is the *de facto* occupant of the Office of Lieutenant Governor. LF Doc. 10, at 2. As the circuit court stated, "Plaintiffs do not dispute that Lieutenant Governor Kehoe is the *de facto* holder of the office of Lieutenant Governor." *Id.* "He was appointed by Governor Parson and sworn into office by Cole County Circuit Judge Patricia Joyce, and at least two former Governors have made similar appointments to fill vacancies in the office of Lieutenant Governor." *Id.* "Lieutenant Governor Kehoe plainly 'holds office by some color of right and title,'" and "the acts of that officer are not invalid as to third persons and the public." *Id.* (quoting *Benne v. ABB Power T&D Co*., 106 S.W.3d 595, 599 (Mo. App. W.D. 2003)).

Because Lt. Gov. Kehoe is the *de facto* officeholder, private plaintiffs like the Plaintiffs in this lawsuit have no authority to seek his removal by litigation. This conclusion holds true even if there were a colorable claim that the Governor lacked legal authority to appoint him. *Benne*, 106 S.W.3d at 597-98. In *Benne*, a private litigant challenged the validity under the Missouri Constitution of one of Governor Holden's appointments to the Labor and Industrial Relations Commission. 106 S.W.3d at 597-98. On appeal, the private litigant argued that it should have been permitted to submit evidence regarding the putative constitutional invalidity of the appointment before the LIRC. *Id.* at

598. But the Court of Appeals held that any such evidence would have been irrelevant, because a private plaintiff lacks authority to challenge the legality of a public officer's service through litigation. "Even had a proper record been developed," the Court held, "this court is not in the position to rule via this case on the issue of whether [the commissioner] was properly on the LIRC. Rather, the proper method for challenging the constitutional validity of an officer's service is through a *quo warranto* action." *Id.* "[G]enerally the courts will not inquire into an officer's qualifications except in a collateral proceeding by *quo warranto*." *Id.* at 600.

A private litigant lacks authority to initiate a *quo warranto* action. The participation of a public official, either the Attorney General or an elected prosecutor, is required. *Hurley*, 540 S.W.2d at 23. Under Missouri law, "[t]he discretion of the government attorney is complete," and without the participation of such a government attorney, "the private relator can proceed no farther." *Id.* Thus, a private litigant—such as the Missouri Democratic Party or Mr. Cope—has no authority to seek to remove a statewide officer through litigation.

In reaching this conclusion, the Court of Appeals relied on the well-established *de facto* doctrine for public officeholders. "The *de facto* doctrine is a long standing rule to the effect that when an individual holds an office under a cloud as to current qualifications for the office, the acts of that officer are not invalid as to third persons and the public." *Benne*, 106 S.W.3d at 599. "The doctrine is founded on the societal need for stability arising from confidence in the acts of government when there is an issue as to legal qualification of a person holding office." *Id.* "An officer '*de facto*' holds office by some

color of right and title." *Id.* Because the LIRC commissioner in *Benne* was the *de facto* officeholder, the court had no authority to consider the validity of his appointment except in a duly authorized proceeding in *quo warranto*. *Id.*

Benne's holding comports with the plain text of the *quo warranto* statute. That statute provides: "In case *any person* shall usurp, intrude into or unlawfully hold or execute any office or franchise, the attorney general of the state, or any circuit or prosecuting attorney of the county in which the action is commenced," may initiate a *quo warranto* proceeding to remove that person from office. § 531.010, RSMo (emphasis added). Because Plaintiffs contended that "any person"—*i.e.*, Lieutenant Governor Kehoe—is "intrud[ing] into or unlawfully hold[ing]" the office of Lieutenant Governor, and because their petition originally sought declaratory and injunctive relief to remove him from that office, their petition constituted a thinly disguised *quo warranto* action. They had no authority to file such a petition. Without the participation of the Attorney General or the elected prosecutor of Cole County, "the private relator can proceed no farther." *Graham*, 540 S.W.2d at 23.

Moreover, this case presents an even more fundamental obstacle to the lawsuit by private plaintiffs. Under Article VII of the Missouri Constitution, the holders of the five statewide elective offices—including the Lieutenant Governor—can be removed only by impeachment. Thus, even if Plaintiffs had the consent of a government attorney to proceed against the Lieutenant Governor in *quo warranto*, the Missouri Constitution would bar their request for the removal of the Lieutenant Governor from office. "The single method provided in the Constitution for removal from office of statewide elective executive

officials . . . is impeachment." *State ex inf. Nixon v. Moriarty*, 893 S.W.2d 806, 808 (Mo. banc 1995) (citing MO. CONST. art VII, §§ 1-3). "The exclusivity of this method is further emphasized by Article VII, section 4, regarding the removal of state officers not subject to impeachment." *Id.* "The plain reading of these sections of the Constitution can allow only one conclusion. Elective executive officials may be removed from office solely and exclusively by impeachment pursuant to article VII, sections 1-3 of our Constitution." *Id.*

Though it agreed that plaintiffs lack authority to sue to oust Lieutenant Governor Kehoe from office, the circuit court disagreed with the State's analysis of Article VII, § 1 and *Moriarty*. *See* LF Doc. 10, at n.1. The court reasoned that because Lieutenant Governor Kehoe was *appointed* to the office of Lieutenant Governor, he is not a statewide *elected* official and thus is not removable solely by impeachment under Article VII, § 1. *See* LF Doc. 10, at 2 n.1 (reasoning that Lieutenant Governor Kehoe "is better described as a statewide appointed executive official"). The State respectfully submits that this analysis improperly conflates the constitutional word "elective" with the word "elected." Even though Lieutenant Governor Kehoe was never *elected* to the office of Lieutenant Governor, he still holds that statewide *elective* office. *See* WEBSTER'S SECOND, at 825 (defining "elective" as "appointed, filled, bestowed, or passing, by election"). Because the office of Lieutenant Governor is ordinarily "appointed, filled, [or] bestowed" by a statewide election, *id.*, the office is "elective," and an appointed Lieutenant Governor constitutes a statewide "*elective* executive official of the state" under Article VII, § 1. MO. CONST. art. VII, § 1 (emphasis added). In any event, even if Article VII, § 1 and *Moriarty* did not apply here, the circuit court correctly concluded that Lieutenant Governor Kehoe

"is the *de facto* holder of his office," and that Plaintiffs lacked authority to sue to remove him from office under the *quo warranto* statute. LF Doc. 10, at 2 n.1.

Plaintiffs have never disputed any of this analysis, either in the circuit court or in this Court. In the circuit court, their response to the State's motion to dismiss did not even address these issues. *See* LF Doc. 4. At oral argument in the circuit court, they sought to evade these questions by withdrawing their request for any binding relief that would oust Lieutenant Governor Kehoe from office. And, even though these considerations formed the principal basis of the circuit court's judgment, their opening brief in this Court likewise does not address any of these issues. Thus, they have effectively conceded that they have no substantive response. *See, e.g., Nicholson v. Surrey Vacation Resorts, Inc.*, 463 S.W.3d 358, 368 n.8 (Mo. App. S.D. 2015) (holding that, because respondents "failed to respond to many of the points raised by Surrey, including this point, we can only assume that they have no basis for a contrary opinion"). This Court should "not become an advocate for [Plaintiffs] by speculating as to arguments that have not been made." *Id.*

Thus, even if this Court were to hold that Plaintiffs were not seeking an impermissible advisory opinion, their claims would immediately founder, because they have never disputed that they lack authority to seek anything *but* an impermissible advisory opinion.

In sum, the circuit court's judgment should be affirmed because Plaintiffs, as private parties, lacked authority to seek a judicial order to remove a statewide official like Lieutenant Governor Kehoe from office. Plaintiffs have never disputed this conclusion. Instead, they attempted to evade this fatal deficiency by strategically abandoning any claim

for a judgment that would have binding effect on Governor Parson or Lieutenant Governor Kehoe. But in making this strategic concession, they reduced their case to a request for an advisory opinion, and thus deprived the circuit court of jurisdiction to rule on their claims. As the circuit court concluded, "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." LF Doc. 10, at 3. "Missouri courts have repeatedly declined to allow private plaintiffs to seek advisory opinions under the guise of declaratory-judgment actions." *Id.* at 3-4. "Plaintiffs lack authority to seek the removal of Lieutenant Governor Kehoe by litigation," and this Court should affirm the judgment. *Id.* at 4.

II. Governor Parson Had Authority to Appoint Lieutenant Governor Kehoe, Because Article IV, § 4 of the Missouri Constitution Vests Authority in the Governor to Fill a Vacancy in the Office of Lieutenant Governor, and No Missouri Statute Purports to Displace This Authority. (Responds to Appellants' Point V)

Article IV, § 4 of the Missouri Constitution confers authority on Governor Parson to fill vacancies in public offices, including the office of Lieutenant Governor. No other constitutional provision, statute, or provision of Missouri law purports to displace that authority. For these reasons, addressing the merits in the alternative, the circuit court held that "Plaintiffs' Petition lacks merit as a matter of law, because Governor Parson had authority to appoint Lieutenant Governor Kehoe under Article IV, § 4 of the Missouri Constitution." LF Doc. 10, at 4. This holding was correct. If this Court reaches the merits, it should affirm the judgment on this ground.

A. Article IV, § 4 of the Missouri Constitution confers authority of the Governor of Missouri to fill a vacancy in the office of Lieutenant Governor, unless the law furnishes another method of filling the vacancy.

Article IV, § 4 of the Missouri Constitution provides: "The governor shall fill all vacancies in public offices *unless otherwise provided by law*, and his appointees shall serve until their successors are duly elected or appointed and qualified." MO. CONST. art. IV, § 4 (emphasis added). A vacancy in the office of Lieutenant Governor constitutes a "vacanc[y]" in a "public office" that the Governor may "fill" under Article IV, § 4, unless "otherwise provided by law." *Id.*

When interpreting provisions of the Missouri Constitution, the Court must "give effect to their plain, ordinary, and natural meaning." *Gray v. Taylor*, 368 S.W.3d 154, 156 (Mo. banc 2012). "If a word used is not defined, the Court determines the plain and ordinary meaning of the word as found in the dictionary." *In re Finnegan*, 327 S.W.3d 524, 526 (Mo. banc 2010).

Here, the plain and ordinary meaning of the constitutional phrase "unless otherwise provided by law" is "unless the law furnishes or supplies a different manner of filling the vacancy." Both at the time the Constitution of 1945 was adopted and now, the plain and ordinary meaning of the word "otherwise" is "in a different manner; in another way, or in other ways." WEBSTER'S SECOND NEW INTERNATIONAL DICTIONARY ("Webster's Second") at 1729 (1950); *see also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY ("Webster's Third") at 1958 (1986) (defining "otherwise" as "in a different manner"). The plain and ordinary meaning of the word "provide" is "[t]o furnish; supply." WEBSTER'S SECOND, at 1994; *see also* WEBSTER'S THIRD, at 1827 (defining "provide" as "to supply

what is needed for sustenance or support . . . supply, furnish"). Thus, taking these definitions together, the plain and ordinary meaning of "otherwise provided by law" in Article IV, § 4 is "unless the law furnishes or supplies a different manner or another way of filling the vacancy." WEBSTER'S SECOND, at 1729, 1994. In other words, the Governor has constitutionally vested authority to fill a vacancy in the office of Lieutenant Governor, unless some other provision of law affirmatively "furnishes" or "supplies" a "different manner" or "another way" of filling the vacancy.

The conclusion that the law must affirmatively furnish or supply an alternative method of filling the vacancy draws additional support from the immediate context of the statute. As this Court has frequently emphasized, words take their meaning from context. *State ex re. Goldsworthy v. Kanatzar*, 543 S.W.3d 582, 585 (Mo. banc 2018) ("The plain and ordinary meaning . . . is determined from the words' usage in the context of the entire statute."). Here, the immediate context of Article IV, § 4 refers to the filling of vacancies in offices. *See* Mo. Const. art. IV, § 4 ("The governor shall fill all vacancies in public offices unless otherwise provided by law . . . ."). In this immediate context, the words "provide," "furnish," and "supply" naturally refer to another method of *filling a vacancy in a public office*.

Missouri law does not "furnish" or "supply" a method of filling the vacancy in the office of Lieutenant Governor "in different manner" or "another way" than that provided in Article IV, § 4. Plaintiffs do not dispute this. They expressly pled in their Petition that "Missouri law . . . provides no way to fill a vacancy in the office of Lieutenant Governor." LF Doc. 2, ¶ 16 (emphasis added). And they cite no constitutional provision or statute that

provides another method of filling the vacancy. Accordingly, Governor Parson had authority to appoint Lieutenant Governor Kehoe, and nothing to the contrary is "otherwise provided by law." MO. CONST. art. IV, § 4.

B. Section 105.030 does not strip the Governor of the authority to fill a vacancy in the office of Lieutenant Governor.

Plaintiffs' principal argument is that § 105.030, RSMo, strips the Governor of the constitutional authority to fill a vacancy in the office of Lieutenant Governor, but this argument has no merit for at least two reasons. First, as Plaintiffs concede, § 105.030 does not "furnish" or "supply" a "different manner" or "another way" of filling the vacancy in the office of Lieutenant Governor, so it does not displace the Governor's authority to fill the vacancy under Article IV, § 4. *See* LF Doc. 2, ¶ 16. They expressly pled that "Missouri law . . . provides no way to fill a vacancy in the office of Lieutenant Governor." *Id.* Because no statute furnishes or supplies another way to fill the office, the Governor retains that power under Article IV, § 4 of the Constitution.

Second, even if Plaintiffs' broader interpretation of "otherwise provided by law" were correct, § 105.030 would still be unavailing. Plaintiffs argue that the General Assembly could "otherwise provide[] by law" by enacting a statute that *prohibited* the Governor from filling the vacancy, even if the statute failed to provide any other method of filling the vacancy. *See* App. Br. 38 (arguing that the General Assembly could pass a statute that "otherwise provided by law" if it "entirely precluded the Governor from acting"). As discussed above, this interpretation contradicts the plain and ordinary meaning of the Constitution, as confirmed by multiple dictionaries. *Supra* Part II.A.

In any event, even if Plaintiffs' interpretation of "otherwise provided by law" were correct, their argument would still fail, because the legislature has *not* enacted a statute that purports to "entirely preclude[] the Governor from acting." App. Br. 38. The statute on which Plaintiffs rely—§ 105.030, RSMo—does not purport to strip away the Governor's constitutionally vested authority to fill vacancies under Article IV, § 4. Nothing in § 105.030 prohibits the Governor from filling a vacancy in the office of Lieutenant Governor pursuant to *some other* provision of law—it merely exempts that office from that specific statutes's *own* authorization of appointments to fill vacancies.

This interpretation comports with the plain meaning of the statute. Section 105.030 states: "Whenever any vacancy . . . 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 . . . ." § 105.030, RSMo (emphasis added). By its plain terms, section 105.030 merely exempts the office of Lieutenant Governor from the authorization of gubernatorial appointments provided in that particular statute, section 105.030. *See id.* The statute does not purport to prohibit the Governor from filling such a vacancy pursuant to *some other* legal authorization, such as that provided in Article IV, § 4 of the Missouri Constitution. For example, the statute does not say, "the Governor is prohibited from filling a vacancy in the office of lieutenant governor pursuant to any other provision of law"—rather, it merely states that the authorization of appointments extends to offices "other than . . . the office of lieutenant governor." § 105.030, RSMo. Because it specifically exempts the office of Lieutenant Governor from its own coverage, § 105.030

does not *itself* authorize the Governor to fill this vacancy, but it also does not foreclose the Governor from doing so pursuant to another provision of law. Thus, Article IV, § 4 provides a separate authorization for Governor Parson to appoint Lieutenant Governor Kehoe, and § 105.030 does not "otherwise provide" that he cannot do so.

C. Plaintiffs' interpretation of Article IV, § 4 and § 105.030 contradicts deeply rooted principles of interpretation.

Moreover, even if there were any ambiguity in the interpretation of Article IV, § 4 or § 105.030, that ambiguity must be resolved in favor of Governor Parson's authority to fill the vacancy, for at least three reasons.

1. This Court adopts a "strong presumption" against an interpretation that would lead to vacancies in public offices.

First, this Court has adopted a "strong presumption" against interpreting statutes in a way that would lead to vacancies in public offices. In *State ex inf. Lamkin ex rel. Harrison v. Tennyson*, this Court interpreted a statute that created the office of recorder of deeds in counties of population of 20,000 or more, and it rejected an interpretation of that statute that would have resulted in a vacancy in that office when the county crossed that population threshold, even though the legislature had not provided for a means of filling the vacancy. 151 S.W.2d 1090, 1091 (Mo. banc 1941). In support of this conclusion, this Court held that "courts indulge a *strong presumption* against a legislative intent to create a condition that might result in a vacancy in public office." *Id.* (emphasis added). Applying this presumption, the Court filled the gap created by legislative silence to prevent a situation that could result in a vacancy in the office of recorder of deeds. *Id.*

This Court's "strong presumption" against interpretations that would create prolonged vacancies in public offices is deeply rooted in American jurisprudence. Numerous other cases have adopted this presumption against interpreting statutes to allow for prolonged vacancies in public offices. *See, e.g., Baxter v. Danny Nicholson, Inc.*, 690 S.E.2d 265, 268 (N.C. 2010) ("Our reading [of the statute] likewise conforms with the long-standing public policy of this State against vacancies in both elected and appointed offices"); *Schweisinger v. Jones*, 68 Cal. App. 4th 1320, 1325 (1998) ("As a general rule, there is a strong presumption against a legislative intent to create a condition which may result in a vacancy.") (citing cases); *Johnson v. Collins*, 464 P.2d 647, 651 (Ariz. App. 1970) (same).

Notably, in *Lamkin*, this Court applied this "strong presumption" to avoid a vacancy in the office of county recorder of deeds. *A fortiori*, this Court should apply the presumption to avoid an interpretation that would result in a prolonged vacancy in the much more important office of Lieutenant Governor. "[O]ur state government would be less able to serve its citizens effectively if significant gaps in time existed between when one official leaves office and his or her successor begins serving." *Baxter*, 690 S.E.2d at 268.

2. The legislature must speak very clearly to displace a core executive power constitutionally vested in the office of the Governor.

Second, if the legislature wished to displace the Governor's constitutionally vested authority to fill a vacancy in the office of Lieutenant Governor, one would have expected a very clear statement to that effect. As the circuit court reasoned, "if the legislature wished to displace the Governor's constitutionally vested authority to fill vacancies in public

offices, it would have to speak far more clearly than it did in § 105.030." LF Doc. 10, at 6. This Court and other courts apply such clear-statement rules in other contexts where legislative action would significantly alter other constitutional or common-law baselines. *See, e.g., Overcast v. Billings Mut. Ins. Co.*, 11 S.W.3d 62, 69 (Mo. banc 2000) ("Where the legislature intends to preempt a common law claim, it must do so clearly."); *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014) (holding that Congress must make a "clear statement" if it intends to abrogate the Constitution's background principles of federalism). The power to appoint executive officers is a core executive power. *See Morrison v. Olson*, 487 U.S. 654, 705-06 (1988) (Scalia, J., dissenting). And because of the office's critical importance for all Missourians, the power to appoint the Lieutenant Governor is one of the most important incidents of that core executive power. One would expect the legislature to speak clearly if it wished to strip such an important power from the Governor. For the reasons discussed above, § 105.030 provides nothing close to such a clear statement.

3. Plaintiffs' interpretation results in unreasonable or absurd results.

Third, "construction of a statute should avoid unreasonable or absurd results." *Aquila Foreign Qualifications Corp. v. Dir. of Revenue*, 362 S.W.3d 1, 4 (Mo. banc 2012); *see also Akins v. Dir. of Revenue*, 303 S.W.3d 563, 565 (Mo. banc 2010); *Pitts v. Williams*, 315 S.W.3d 755, 762 (Mo. App. W.D. 2010). Here, Plaintiffs "contend that *no one* has authority to fill a vacancy in the office of Lieutenant Governor, and that the office must remain vacant until after the next general election." LF Doc. 10, at 6 (emphasis in original). But Plaintiffs' own pleadings emphasize the importance of the office and the critical role that the Lieutenant Governor plays in Missouri's constitutional scheme. *See, e.g.*, LF Doc.

2, at ¶ 9 (emphasizing the importance of the Lieutenant Governor as a traditional advocate for veterans and the elderly); *see also supra*, Statement of Facts, Part A. As the circuit court concluded: "Given the importance of the office of Lieutenant Governor, this Court is reluctant to adopt an interpretation of Missouri law that would generate such an unreasonable and anomalous result." LF Doc. 10, at 7; *see also Lamkin*, 151 S.W.2d at 1091 ("It is not conceivable that the legislature intended to avoid a vacancy on the statutory decrease in population, and, by the same enactment, to create a condition that might cause a vacancy on a statutory increase in population.").

D. Plaintiffs' various arguments to the contrary have no merit.

In their opening brief on appeal, Plaintiffs advance a series of novel arguments to support their position, most of which were never raised below. None of these arguments has any merit.

1. Other cases interpreting the phrase "otherwise provided by law" and similar phrases in different legal provisions support the State's interpretation, not Plaintiffs' erroneous interpretation.

First, Plaintiffs argue that cases in interpreting phrases similar to "otherwise provided by law" in other constitutional and statutory provisions undermine the State's argument. App. Br. 30-38. As an initial matter, all of these cases are distinguishable, because none of them involves: (1) an immediate statutory context that refers to filling of vacancies in public offices, which context confirms that the phrase "otherwise provided by law" means to affirmatively "furnish" or "supply" another method of *filling a vacancy*, *see Kanatzar*, 543 S.W.3d at 585; (2) "a strong presumption against a legislative intent to create a condition that might result in a vacancy in public office," *Lamkin*, 151 S.W.2d at 1091;

or (3) a clear-statement rule requiring the legislature to speak clearly before purporting to displace a core, constitutionally vested power of the chief executive, *see Overcast*, 11 S.W.3d at 69. Thus, none of these cases involves the compelling interpretive reasons to reject Plaintiffs' interpretation that are present in this case.

In any event, these cases do not support the Plaintiffs. On the contrary, the great majority of these cases actually support the State's interpretation of the plain and ordinary meaning of "otherwise provided by law." In most of these cases, the phrase "otherwise provided by law" was interpreted to mean furnishing or supplying a different manner or another way of addressing the question at issue. And the few remaining cases that Plaintiffs cite are simply inapposite to the interpretive questions here.

First, *Becker Glove International, Inc. v. Dubinsky* held that § 517.031, RSMo, established an alternative set of procedures for cases in an associate circuit division, and thus it was "otherwise provided by law" that the compulsory-counterclaim rule of Rule 55.32(a) did not apply in such cases. 41 S.W.3d 885, 888 (Mo. banc 2001). Emphasizing the "informal, simplified nature of chapter 517," *id.*, this Court held that Chapter 517 affirmatively establishes an alternative set of procedures for such cases: "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.* "[C]hapter 517 permits, but does not require, counterclaims." *Id.* In other words, consistent with the State's interpretation of "otherwise provided by law" in Article IV, § 4, *Becker Glove* held that different procedures were "otherwise provided by law" because the statute affirmatively furnished alternative procedures for cases in an associate circuit division. *See id.*

Similarly, *City of Jefferson v. Missouri Dep't of Natural Resources*, 863 S.W.2d 844, 849 (Mo. banc 1993), supports the State, not Plaintiffs. That case did not interpret the phrase "otherwise provided by law," but the different phrase "in the manner provided by law," in Article VI, § 16 of the Constitution. *Id.* In any event, this Court's interpretation of that different phrase accords with the State's interpretation here. Article VI, § 16 provides that municipalities and political subdivisions may contract or cooperate with others "in the manner provided by law." MO. CONST. art. VI, § 16. Section 260.305 authorized the creation of solid waste management districts within regions and provided procedures for their creation. *City of Jefferson*, 863 S.W.2d at 846-47. In *City of Jefferson*, this Court held that, consistent with Article VI, § 16, the legislature could direct that solid waste management districts be formed within specified geographical regions. *Id.* Thus, in *City of Jefferson,* the statute at issue *did* "furnish" and "supply" a "different manner" or "another way" of forming solid waste management districts, and established procedures to do so. *See id.* Again, this case is consistent with the State's interpretation of "otherwise provided by law."

Likewise, the provisions of the Sunshine Law cited by Plaintiffs, *see* App. Br. 34-35, also support the State's interpretation. Section 610.011.1 states: "It is the public policy of this state that meetings, records, votes, actions, and deliberations of public governmental bodies be open to the public *unless otherwise provided by law*." § 610.011.1, RSMo (emphasis added). In other words, public records are presumed to be open records unless the law "furnishes" or "supplies" a "different manner" or "another way" of treating them—such as providing that such records be closeable at the public agency's discretion, or

directing that they are mandatorily closed. This interpretation of "otherwise provided" is exactly the same as the State's interpretation in Article IV, § 4. The same analysis applies to the same phrase in section 610.015, as interpreted by the Court of Appeals in *Oregon County R-IV School District v. Le Mon*, 739 S.W.2d 553, 557 (Mo. App. W.D. 1987). Section 610.015 states: "Except . . . as *otherwise provided by law*, all votes shall be recorded, and if a roll call is taken, as to attribute each 'yea' and 'nay' vote, or abstinence if not voting, to the name of the individual member of the public governmental body." § 610.015, RSMo. Again, just as with section 610.011.1, all votes at public meetings are treated as open records unless another statute "furnishes" or "supplies" a "different manner" or "another way" of treating them, such as treating them as closeable or closed.

Exactly the same analysis that applies to the provisions of Missouri's Sunshine Law, discussed above, also applies to the similar provisions of Louisiana's Public Records Law in the case from the Middle District of Louisiana that Plaintiffs cite. *See Texaco, Inc. v. Louisiana Land & Exploration Co.*, 805 F. Supp. 385, 389 (M.D. La. 1992). Just as with Missouri's Sunshine Law, these provisions state that public records shall be open unless another statute furnishes or supplies a different manner or another way of treating them, such as treating them as closeable or closed. *See id.*

May v. Ellis, 92 P.3d 859, 861 (Ariz. 2004), also supports the State here. *May* interpreted one provision of the Uniform Probate Code that allowed "a decedent's creditors to look to non-probate transfers to satisfy their claims," unless it was "otherwise provided by law." *Id.* Another provision of the UPC directed that "life insurance proceeds are not subject to creditors' claims." *Id.* The court held that "life insurance proceeds are not among

the non-probate transfers available to satisfy the claims of creditors under" the former provision. *Id.* In other words, because a separate provision of law furnished or supplied a different manner or another way to treat life-insurance proceeds during probate proceedings, such funds were not subject to the provision making other funds subject to the decedent's creditors. *Id.*

Furthermore, *United States v. Berry*, 839 F.2d 1487, 1488 (11th Cir. 1988), supports the State, not Plaintiffs. *Berry* involved a federal statute that fixed a default date for a prisoner's parole eligibility which applied unless "otherwise provided by law." *Id.* at 1488 (quoting 18 U.S.C. § 4205(a)). The Eleventh Circuit held that a separate statutory provision that authorized a federal district judge to impose a different parole eligibility date—either earlier or later than the default provision—satisfied the condition that another date was "otherwise provided by law." *Id.* In other words, in *Berry*, the other statutory provision "furnished" or "supplied" a "different manner" or "another way" of imposing a parole eligibility date. Once again, this case directly supports the State's interpretation.

The remaining cases cited by Plaintiffs are simply inapplicable. First, *De May v. Liberty Foundry Company*, 37 S.W.2d 640 (Mo. 1931), is not on point. In that case, the Court upheld a statute preventing circuit courts from hearing new evidence on appeals from the Workmen's Compensation Commission. *Id.* at 653. But this holding was not based on interpreting the phrase "otherwise provided by law" in the Constitution, or any other constitutional phrase. It was based on this Court's determination that there was no constitutional right to appeal at all, and thus the legislature had plenary authority to dictate the terms on which appeals would be taken. *Id.* at 652-53. This Court held: "In determining

the constitutional questions herein raised and presented by the appellant, it must be borne in mind that the right to an appeal is, and always has been, purely statutory, and was unknown to the common law." The Court reasoned that an appeal "is a remedy which the legislature may in its discretion grant or take away, and it may prescribe in what cases, and under what circumstances, and from what courts appeals may be taken;" and that "unless the statute expressly or by plain implication provides for an appeal from a judgment of a court of inferior jurisdiction, none can be taken." *Id.* *De May*, therefore, has no application here.

Finally, *Marx v. General Revenue Corp.*, 568 U.S. 371 (2013), is also inapplicable. That case interpreted a federal rule that allows for an award of costs to the prevailing party unless a federal statute, rule, or court order "provides otherwise." *Id.* at 377. In that case, the phrase "provides otherwise" was used in a very different context than here. Unlike the question of how a vacancy should be filled—which can be done in many ways—the question whether costs should or should not be awarded is inherently binary. Where there is only one possible way in which a statute can "provide otherwise," *i.e.* by prohibiting cost-shifting, the plain meaning of the phrase naturally encompasses that sole alternative possibility.

2. Neither *State ex rel. Major v. Amick* nor *Labor's Educational & Political Club-Independent v. Danforth* supports Plaintiffs' interpretation.

Plaintiffs rely on *State ex rel. Major v. Amick*, 152 S.W. 591, 595-96 (Mo. 1912), which states that a predecessor version of § 105.030, RSMo, "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." *Id.* This case provides no support to Plaintiffs, because the State does not contend that *the statute* authorized the appointment of Lieutenant Governor Kehoe. Rather, the State contends that Article IV, § 4 of the Constitution authorized Governor Parson to make the appointment. As discussed above, the language exempting the office of Lieutenant Governor from the statute's coverage does not purport to displace the Governor's power to make an appointment pursuant to another provision of law.

Plaintiffs also rely on *Labor's Educational & Political Club-Independent v. Danforth*, 561 S.W.2d 339 (Mo. banc 1977), *see* App. Br. 41-42, but that case is not availing. In *Labor's Educational*, this Court addressed a campaign-finance reform statute that imposed starkly different penalties on candidates who violated it, depending on which office the candidate sought. "[I]f the particular office involved is one for which the governor is authorized to call a special election, the violator's election will be declared void and such election will be held. Where the office involved is one for which the governor is not authorized to call a special election, the violator will be denied the right to be a candidate for public office for ten years." *Id.* at 347. The Attorney General defended the statute on the ground 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 held that this rationale was unconvincing because Article IV, § 4 of the Constitution "provides that the governor shall fill all vacancies unless otherwise provided by law." *Id.* The Court then

noted that, under this provision, "[f]ew offices, if any (other than the lieutenant governor) would remain vacant in Missouri." *Id.*

This statement is classic *obiter dictum*. No party briefed the question whether the Governor may fill a vacancy in the office of Lieutenant Governor—the Court explicitly noted that the Attorney General had *not* identified any office that would remain vacant—and the Court provided no analysis or context to support the comment made in passing. *Id.* Moreover, the question whether the Governor could fill a vacancy in the office of Lieutenant Governor was not essential to the Court's holding in *Labor's Educational*. On the contrary, the Court's reasoning would have been *strengthened* by the fact that the Governor has authority to do so, because that fact supports the Court's reasoning that "few, if any" such offices would remain vacant. *See id.* These are the hallmarks of non-binding dictum. *See Vogl v. State*, 437 S.W.3d 218, 224 n.8 (Mo. banc 2014) (defining dicta as "expressions of opinion, not in anywise necessary for the actual decision of any question before the court" (citation omitted)). In fact, at oral argument on the Motion to Dismiss, Plaintiffs' counsel conceded that the statement in *Labor's Educational* was non-binding dictum.

3. Plaintiffs' reliance on the canon against superfluous statutory language is misplaced.

Citing the canon against reading statutes to employ superfluous or meaningless language, Plaintiffs contend that "[t]he only way to give meaning to" the phrase "other than the office of lieutenant governor" in § 105.030 is "to interpret it as a specific limitation on the Governor's appointment authority." Br. 40. This argument is incorrect. As discussed

above, that phrase excludes the office of Lieutenant Governor from the authorization of gubernatorial appointments in that particular statute, § 105.030, and thus it has a significant independent meaning *within the context of that statute*. That language prevents § 105.030 from authorizing the appointment of a Lieutenant Governor. But that phrase does not purport to impose a blanket restriction against such an appointment pursuant to another provision of law that independently authorizes the appointment—such as Article IV, § 4.

4. Plaintiffs' reliance on Article IV, §§ 11(a) and 11(b) of the Missouri Constitution has no merit.

Plaintiffs contend that Article IV, §§ 11(a) and 11(b) of the Missouri Constitution "contemplate[] that the Office of Lieutenant Governor is to remain vacant if vacated." App. Br. 42. This argument has no merit. By establishing an orderly succession, those provisions establish a contingency plan for when multiple vacancies in high statewide offices occur at the same time. *See* MO. CONST. art. IV, §§ 11(a), 11(b). Nothing in those provisions *mandates* that the office of Lieutenant Governor must remain vacant. Likewise, Article IV, § 11(c) implies that the office of Lieutenant Governor shall be deemed vacant if the Lieutenant Governor is acting as Governor, but it does not address how to fill a vacancy in the office of Lieutenant Governor. *Id.* § 11(c).

5. Plaintiffs' invocation of historical understanding and practice is selective and does not contradict the plain meaning of the Constitution, confirmed by many principles of interpretation.

Plaintiffs argue that, at various times in Missouri history, the office of Lieutenant Governor became vacant and remained vacant until the next general election. App. Br. 42-44. To be sure, such historical examples have persuasive value in discerning the meaning

of constitutional provisions. *See NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014) (noting that "the longstanding practice of the government can inform our determination of what the law is") (quotations omitted). But historical practice cannot alter or vary the plain meaning of constitutional and statutory provisions, which confer authority to fill this vacancy on Governor Parson for all the reasons stated above.

Plaintiffs' reliance on historical practice suffers from two additional weaknesses. First, all of Plaintiffs' examples concern vacancies that *were not* filled, but Plaintiffs offer no specific evidence of any general understanding that such vacancies *could not* be filled by the Governor. Plaintiffs' reliance on historical examples of vacancies does not demonstrate that the power to fill those vacancies did not exist—it only demonstrates that the power was not exercised in those cases.

Second, Plaintiffs' reliance on historical examples is selective. They ignore extensive evidence of historical understanding and practice that undermines their position. As discussed above, Governor Parson's decision to appoint Lieutenant Governor Kehoe drew bipartisan support from five former Governors of Missouri and two well-respected chief counsels for former Governors. Most notably, in November 2000, Democratic Governor Roger Wilson appointed Democrat Joe Maxwell to fill the vacancy created by Governor Wilson's accession to the office of Governor upon the untimely death of Governor Mel Carnahan. *See* Office of Missouri Lieutenant Governor, History of the Office of Lieutenant Governor, *at* https://ltgov.mo.gov/history-office-lieutenant-governor/. Governor Wilson—who filled a vacancy in the same office—stated recently that "he knows from personal experience that filling the lieutenant governor's seat soon is important,

especially during the transition of a new governor." Alisa Nelson, *Former Missouri Lieutenant Governor-Turned-Governor Says Having a Second in Command Soon Is Important*, MISSOURINET.COM (June 7, 2018), *available at* https://www.missourinet.com/2018/06/07/former-missouri-lieutenant-governor-turned-governor-says-having-a-second-in-command-soon-is-important/. These recent, specific historical authorities and practices contradict Plaintiffs' one-sided portrayal of the historical record.

6. Constitutional provisions from other States uniformly support the State's interpretation of the Missouri Constitution.

Finally, Plaintiffs argue that constitutional provisions from other States support their interpretation of the Missouri Constitution. App. Br. 44-46. In fact, the opposite is true. As one would expect, there is variation among the phrasing of the various constitutional provisions, but each of them adopts the same constitutional principle that is reflected in the plain meaning of Article IV, § 4. Each of these provisions instructs that the Governor shall have the authority to fill vacancies in public offices *unless some other provision of law affirmatively supplies another method of filling the vacancy*. *See* App. Br. 44; *see also* ARIZ. CONST. art. V, § 8 (the Governor shall fill all vacancies where "no mode shall be provided by the Constitution or by law for filling such vacancy"); ARK. CONST. art. 6, § 23 (similar); IOWA CONST. art IV, § 10 (similar); MISS. CONST. art. 4, § 103 (directing that the legislature shall fill all vacancies where it is "not otherwise provided for in this constitution"); NEV. CONST. art. V, § 8 (authorizing the Governor to fill vacancies where

"no mode is provided by the Constitution and laws for filling such vacancy"); UTAH CONST. art. VII, § 9 (similar); WYO. CONST. art. 4, § 7 (similar).

In fact, Plaintiffs' reliance on Article 4, § 103 of the Mississippi Constitution is particularly unfortunate, because that provision uses the same phrase "otherwise provided" as in Article IV, § 4 of the Missouri Constitution, and Plaintiffs concede that this provision of the Mississippi Constitution is one that "displace[s] the . . . vacancy appointment power only when the law provided an alternative mode or manner of filling a vacancy." App. Br. 44. In other words, Plaintiffs admit that the phrase "otherwise provided" in the Mississippi Constitution means exactly what *the State* contends the phrase "otherwise provided" means in the Missouri Constitution. Their argument is thus at war with itself. The natural inference to draw from these parallel provisions in other States' constitutions is that Missouri's Constitution vests its Governor with the same appointment authority that can only be displaced by a statute that supplies another method of filling the vacancy.

For all these reasons, if it reaches the merits, this Court should affirm the judgment of the circuit court and uphold the authority of Governor Parson to fill a vacancy in the office of Lieutenant Governor by appointing Lt. Gov. Kehoe.

III. Plaintiffs Lacked Standing Because Their Claims Became Non-Redressable When They Abandoned Their Request for Legally Binding Relief, Darrell Cope Lacked Taxpayer Standing, and the Missouri Democratic Party Lacked Direct or Associational Standing Because its Alleged Injuries Were Speculative and Conjectural (Responds to Appellants' Points II, III, and IV).

To establish standing to sue, a plaintiff must allege "a pecuniary or personal interest directly in issue or jeopardy which is subject to some consequential relief, either immediate or prospective." *Vowell v. Kander*, 451 S.W.3d 267, 271 (Mo. App. W.D. 2014). "A

legally protectable interest exists only if the plaintiff is affected directly and adversely by the challenged action or if the plaintiff's interest is conferred statutorily." *Id.* Here, no Plaintiff identified such a "pecuniary or personal interest" that was subject to "some consequential relief," *id.*, and the circuit court correctly dismissed their claims on this ground as well. LF Doc. 10, at 7-9.

A. Because Plaintiffs abandoned their request for any binding relief, Plaintiffs' claims were non-redressable, and thus all Plaintiffs lacked standing (Responds to Appellants' Points II, III, and IV).

As discussed above, at oral argument on the motion to dismiss, "Plaintiffs' counsel argued for the first time that Plaintiffs would abandon their claims for injunctive relief and seek only a declaratory judgment regarding the validity of Lieutenant Governor Kehoe's service, which (they proposed) would have no binding effect on Lieutenant Governor Kehoe." LF Doc. 10, at 3. Plaintiffs conceded that Governor Parson and Lieutenant Governor Kehoe would be free to disregard any judicial opinion in their favor and remain in office, even if they were to prevail on the merits.

In addition to seeking an unauthorized advisory opinion, this concession fatally undermined Plaintiffs' standing. A judgment that would not grant direct relief to Plaintiffs, but would rely entirely upon the voluntary actions of a third party beyond the court's control to grant them relief, could not redress any injury to Plaintiffs.

"If the plaintiff's grounds for relief and remedy sought cannot alleviate the alleged injury, then, by necessity, the litigation cannot vindicate the plaintiff's alleged personal interest or stake in the outcome of the litigation. If that is the case, then the plaintiff has no standing to bring the claims he or she alleges." *St. Louis County v. State*, 424 S.W.3d

450, 453 (Mo. banc 2014) (citations and internal quotation marks omitted). For this reason, "to establish standing," a plaintiff is "required to demonstrate that the relief he seeks would redress the injury he has allegedly suffered." *City of Slater v. State*, 494 S.W.3d 580, 590 (Mo. App. W.D. 2016). "[W]hether Appellant has standing" to seek injunctive relief depends on "the extent to which Appellant is suffering harm addressable through an injunction." *Eaton v. Doe*, No. ED106000, -- S.W.3d --, 2018 WL 2122907, at *1 (Mo. App. E.D. May 9, 2018) (citing cases).

Plaintiffs here lacked standing because they "failed to allege a direct and ongoing injury that an injunction would have remedied." *Id.* In abandoning their request for legally binding relief, they conceded that Lieutenant Governor Kehoe would be free to remain in office even if the circuit court issued the advisory opinion they requested. Any actual relief would depend on speculation as to whether Lieutenant Governor Kehoe would voluntarily resign if the circuit court issued an advisory opinion in Plaintiffs' favor, or whether the Attorney General or the Cole County prosecutor would voluntarily initiate a *quo warranto* action to remove him from office. But, to support standing, it "must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

B. Plaintiff Darrell Cope lacked taxpayer standing (Responds to Appellants' Point II).

The only theory of standing that Plaintiff Darrell Cope advances on appeal is his claim of taxpayer standing. *See* App. Br. 13-18. This theory fails for three reasons.

First, in his petition, Cope did not seek the only relief that is available to a taxpayer in this context, and he did not sue the officials charged with making the disbursements that he contends are illegal. To establish taxpayer standing, the "taxpayer must show: '(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.' *Airport Tech Partners, LLP v. State*, 462 S.W.3d 740, 745 (Mo. banc 2015) (quoting *Manzara*, 343 S.W.3d at 659). Cope alleges only the first category of taxpayer standing, involving challenges to "a direct expenditure of funds generated through taxation." *Id.* "To establish taxpayer standing resulting from a direct expenditure of funds generated through taxation, the showing of an expenditure is mandatory." *Id.* (quotation omitted).

Taxpayer standing does not provide a passport to explore the legality of every official action of the State. *Airport Tech*, 462 S.W.3d at 745. Accordingly, this Court should hold that a taxpayer who sues to block a direct expenditure of taxpayer funds must seek an injunction against that particular disbursement, and must sue the state official responsible for the allegedly illegal disbursement of funds. Plaintiffs argue that this Court came to a different conclusion in *Lebeau v. Commissioners of Franklin County*, 422 S.W.3d 284, 288 (Mo. banc 2014), but that case did not squarely address the questions of who is the proper defendant and what is the proper form of relief to request in a taxpayer-standing action. *See id.*

Second, Darrell Cope lacked taxpayer standing because such standing does not authorize a disguised *quo warranto* proceeding to remove a public official from office. As the circuit court held, "[e]ven if some form of taxpayer standing was to be recognized,

Missouri courts have held that *quo warranto* is the exclusive remedy to determine, among other things, the legality of an appointment to public office." LF Doc. 10, at 9 (citing *Boggess v. Pense*, 321 S.W. 667, 671 (Mo. banc 1959).

Third, because Cope did not seek *any* legally binding relief for the reasons discussed above, he did not seek any relief that could prevent the "direct expenditure of funds generated through taxation." *Airport Tech Partners*, 462 S.W.3d at 745.

C. The Missouri Democratic Party lacked direct or "competitive" standing (Responds to Appellants' Point III).

Plaintiffs contend that "political parties have standing to challenge government actions that may create an electoral disadvantage." App. Br. 19. But Plaintiffs' reliance on the so-called doctrine of "competitive standing" for political parties is misplaced. Like all standing doctrines, a political party cannot rely on so-called "competitive standing" if the alleged injury becomes "too attenuated from the wrongs alleged." *Taitz v. Democrat Party of Mississippi*, No. 3:12-CV-280-HTW-LRA, 2015 WL 11017373, at *20 (S.D. Miss. Mar. 31, 2015). The showing of a "concrete and personalized" injury is still required for standing. *Gottlieb v. Fed. Election Com'n*, 143 F.3d 618, 622 (D.C. Cir. 1998) (holding that voters did not have standing to challenge transfer of campaign funds, because the injury to the voter's preferred candidate was too speculative and remote); *see also 24th Senatorial Dist. Republican Comm. v. Alcorn*, 820 F.3d 624, 633 (4th Cir. 2016) (holding that an individual and political party lacked competitive standing to challenge candidate selection process); *Hollander v. McCain*, 566 F. Supp. 2d 63, 68 (D.N.H. 2008) (noting that "competitive standing has never been extended to voters challenging the eligibility of

a particular candidate"); *Drake v. Obama*, 664 F.3d 774, 784 (9th Cir. 2011) (holding that challengers to President Obama's eligibility for office did not have standing once the election had passed); *Berg v. Obama*, 586 F.3d 234, 239 (3d Cir. 2009) (holding that a voter did not have standing to challenge Barack Obama's eligibility to run for President because "Berg was not directly injured because he could always support a candidate he believed was eligible").

Here, the Democratic Party's alleged injuries were too remote and speculative to support standing. Whether Lieutenant Governor Kehoe will run as an incumbent in 2020, whether he might win the Republican primary if he does run, and which Democratic candidate might run against him, are all matters of speculation and conjecture. It is not enough to allege that incumbents generally have a "statistical and economic" advantage, because in many election scenarios, the opposite may be true. Plaintiffs must allege a concrete, particularized harm to their election chances in 2020—not a generalized, hypothetical, and speculative concern. They failed to do so here.

For these reasons, the circuit court correctly concluded that the Missouri Democratic Party lacked direct standing because its allegations were "conjectural, hypothetical, and speculative." LF Doc. 10, at 7. "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; which Democratic candidates, if any, might run against him; and whether his incumbency would provide any material advantage in the election if he does run and win the primary." *Id.* Plaintiffs'

theory of standing "piles speculation upon conjecture," and "[n]o injury in fact can arise simply from incumbency." *Id.*

Finally, Plaintiffs complain that the circuit court should have granted them leave to amend the complaint to add further allegations regarding the Democratic Party's standing. App. Br. 22. But Plaintiffs never asked the circuit court for leave to amend, and the court cannot be faulted for not granting relief that was never requested. In any event, any amendment would have been futile for the reasons stated above. Any alleged "facts" that purported to predict unknowable future contingencies would have been inherently speculative, conjectural, and hypothetical.

D. The Missouri Democratic Party lacked associational standing (Responds to Appellants' Point IV).

The Democratic Party also argues that it has associational standing because "its members will be hurt at the ballot box." App. Br. 23. In particular, they contend that "Governor Parson's actions have reduced the effectiveness of its members' future votes." App. Br. 28. As the circuit court correctly concluded, this argument has no merit.

First, "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." LF Doc. 10, at 8. Whether Democratic voters will suffer any injury from Lieutenant Governor Kehoe's supposed incumbency advantage in 2020 depends on a chain of speculative assumptions, including whether he will run for that office in 2020, whether he will prevail in the Republican primary, and whether his incumbency will confer any electoral advantage. LF Doc. 10, at 7.

Second, as the circuit court correctly noted, "courts have repeatedly rejected this exact theory of 'voter' standing." LF Doc. 10, at 8. Courts have frequently rejected arguments that a voter has standing to challenge any provision that might conceivably confer an electoral advantage on a candidate that the voter opposes. *See, e.g., Gottlieb v. Fed. Election Com'n*, 143 F.3d 618, 622 (D.C. Cir. 1998) ("The Clinton campaign may have received extra funds, but this did not prevent the voters from engaging in any of the numerous activities open to all politically active citizens."); *Becker v. Fed. Election Com'n*, 230 F.3d 381, 390 (1st Cir. 2000) ("The only derivative harm Nader's supporters can possibly assert is that their preferred candidate now has less chance of being elected. Such 'harm,' however, is hardly a restriction on voters' rights and by itself is not a legally cognizable injury sufficient for standing."); *Hollander v. McCain*, 566 F. Supp. 2d 63, 68 (D.N.H. 2008) ("Hollander does not have standing based on the harm he would suffer should McCain be elected President despite his alleged lack of eligibility . . . . That harm, standing alone, would adversely affect only the generalized interest in all citizens in constitutional governance."); *id.* ("[T]hat notion of 'competitive standing' has never been extended to voters challenging the eligibility of a particular candidate."); *Berg v. Obama*, 586 F.3d 234, 239 (3d Cir. 2009) (holding that "Berg's status as a voter did not provide him standing to challenge Obama's candidacy," and that "Berg was not directly injured because he could always support a candidate he believed to be eligible").

Third, though this Court has apparently never addressed the question, it is well-established in federal court that an organization that pleads associational standing must *identify* at least one individual member who has standing. *See Summers v. Earth Island*

Institute, 555 U.S. 488, 497-98 (2009) (requiring "plaintiff-organizations to make specific allegations establishing that at least one *identified* member had suffered or would suffer harm") (emphasis added); *Ouachita Watch League v. United States Forest Service*, 858 F.3d 539 (8th Cir. 2017) (holding that an organization could not establish associational standing to sue based on a complaint that failed to "nam[e] the affected members" of the organization). Because the Democratic Party did not identify any individual member with standing in its petition, it lacked associational standing for this reason as well.

CONCLUSION

For the foregoing reasons, Governor Parson and Lieutenant Governor Kehoe respectfully request that this Court affirm the judgment of the circuit court.

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that Respondent's Brief was electronically filed and served via Missouri Case.Net this 12th day of September, 2018, upon:

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I hereby certify that this brief contains the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b), and contains 14,207 words exclusive of cover, signature block, and certificates.

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