SC96828

IN THE SUPREME COURT OF MISSOURI

HAROLD LAMPLEY AND RENE FROST,

Appellants,

v.

MISSOURI COMMISSION ON HUMAN RIGHTS
AND ALISA WARREN, EXECUTIVE DIRECTOR,

Respondents.

From the Circuit Court of Cole County, Missouri
The Honorable Patricia S. Joyce, Judge

RESPONDENTS' SUPPLEMENTAL BRIEF

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QUESTIONS PRESENTED

This Court ordered supplemental briefing on these questions.

1. Did Appellants adequately seek non-contested case review via mandamus in the circuit court and, if so, should their appeal be dismissed pursuant to *Bartlett v. Missouri Department of Insurance*, 528 S.W.3d 911 (Mo. banc 2017), or reviewed on the merits pursuant to *State ex rel. Tivol Plaza, Inc. v. Missouri Commission on Human Rights*, 527 S.W.3d 837 (Mo. banc 2017)?

2. If this appeal is reviewed on the merits, was the executive director's decision that the complaints pleaded discrimination based on sexual orientation subject to review by the circuit court as authorized by § 536.150.1 (i.e., "unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion"), subject to the general standard for mandamus, or subject to both? Is the general standard for mandamus inconsistent with review authorized by § 536.150.1?

SUMMARY OF ARGUMENT

This Court should dismiss this appeal because of Appellants' failure to follow the mandamus procedures. But if this Court overlooks these procedural deficiencies and chooses to reach the merits, Section 536.150 provides that the standard of review is the normal standard for mandamus.

Appellants did not adequately seek non-contested case review under Section 536.150 through mandamus in the trial court or on appeal. They failed to seek a preliminary writ in the circuit court and they filed no new petition for a writ of mandamus in the appeals court when they lost in the circuit court. Because they did not follow these procedures, this Court should dismiss this appeal under *Bartlett v. Missouri Department of Insurance*, 528 S.W.3d 911 (Mo. banc 2017)—where this Court warned that it would not routinely excuse litigants' failure to follow the writ procedures.

Even if as a matter of grace this Court exercises its discretion to review this case on the merits, the mandamus standard of review still applies. Section 536.150 provides for review in non-contested cases through writs like mandamus, and Appellants purported to seek a writ of mandamus—and only a writ of mandamus—under Section 536.150. Contrary to Appellants' new position urged for the first time in their supplemental appellate brief, Section 536.150 creates no free-flowing cause of action separate from the historical writ actions and their well-established standards of review. Instead, because they

petitioned for mandamus relief—and because mandamus would be the proper remedy under their theory of relief—the mandamus standard of review applies to their claims.

The appeal thus should be dismissed, or, in the alternative, the circuit court's judgment should be affirmed.

ARGUMENT

I. Appellants did not adequately seek non-contested case review through mandamus in the circuit court. (Responds to Appellants' Supplemental Point I)

A. Question Presented & Short Answer

Question I. This Court's first question for supplemental briefing is

> Did Appellants adequately seek non-contested case review via mandamus in the circuit court?

Answer. Appellants did not adequately seek non-contested case review through mandamus in the circuit court under Rule 94 because they failed to seek a preliminary writ, file a new writ on appeal, or follow the other procedures for a mandamus action.

B. Section 536.150 provides for review by writ of mandamus.

1. Chapter 536 governs review of decisions of the Missouri Human Rights Commission. The legislature has provided that, "[a]ny person who is aggrieved by a final decision, finding, rule or order of the commission may obtain judicial review." RSMo § 213.085.2. "Judicial review shall be in the manner provided by chapter 536, as it may be amended or superseded from time to time." RSMo § 213.085.3.

Chapter 536 provides different procedures for judicial review depending on whether the case is contested. If the case is contested, the court reviews the agency action under Section 536.140; if the case is non-contested, the court reviews the agency action under Section 536.150 through a writ. A contested case "means a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing." RSMo § 536.010.

This case is a non-contested case subject to judicial review under Section 536.150. The commission need not conduct an administrative hearing to determine its jurisdiction, and no other form of judicial review is available. *Painter v. Missouri Comm'n on Human Rights*, 251 S.W.3d 408, 411 (Mo. Ct. App. 2008).

Nor do Appellants contend that this case is a contested case. Supp. Br. 3 n.1. Instead, they agree that "Review under § 536.140 was unavailable." *Id.* (citing *State ex rel. Martin-Erb v. MCHR*, 77 S.W.3d 600, 602 (Mo. banc 2002)).

2. Section 536.150 provides for review of an agency action in a non-contested case by injunction or original writ. Under Section 536.150, the agency's "decision may be reviewed by suit for injunction, certiorari, mandamus, prohibition or other appropriate action." RSMo § 536.150. For the courts to review the agency's action in this non-contested case, Appellants thus

had to bring an action under Section 536.150 through an appropriate original writ.

Appellants tried to bring this action through a petition for a writ of mandamus under Section 536.150. In his petition, Mr. Lampley sought "judicial review of said administrative closure pursuant to the provisions of RSMo 213.085, which provides for judicial review in accordance with RSMo 536.140 or, in the alternative, mandamus, pursuant to RSMo 536.150(1)." LF9 ¶10. Appellants did not ask for judicial review through any other form of writ under Section 536.150—such as for a petition for an injunction, certiorari, prohibition, or "any other appropriate action." Each time that they invoked Section 536.150, they expressly sought only a writ of mandamus, and they never mentioned any other request for review under that statute. LF9.

Setting aside the incorrect request for judicial review under Section 536.140, Appellants were correct that an action for mandamus under Section 536.150 would have been the proper procedural course. LF1.

C. Appellants did not follow the Rule 94 mandamus procedures.

But, even though Appellants purported to seek review through mandamus under Section 536.150, they did not follow Rule 94's four requirements for mandamus actions. "Rule 94 prescribes the practice, procedure, and pleading for mandamus proceedings in circuit court, including

the requirement that a circuit court issue a preliminary writ before an answer and decision on the merits." *Bartlett v. Missouri Dep't of Ins.*, 528 S.W.3d 911, 912 (Mo. 2017).

Under Rule 94, any person who petitions for a writ of mandamus under Section 536.150 must follow procedures that differ from an ordinary civil case. Rule 94.01. Rule 94 provides four chief requirements:

- First, a mandamus action must be a "civil action in which the person seeking relief is relator and the person against whom such relief is sought is respondent." Rule 94.02.
- Second, the petition must "contain a statement of the facts, the relief sought, and a statement of the reasons why the writ should issue," and the petition must attach "suggestions in support." Rule 94.03.
- Third, if the circuit court believes that the preliminary order in mandamus should be granted, the circuit court must issue a preliminary order in mandamus directing an answer. Rule 94.04-94.05.
- Fourth, if the court denies the writ, no appeal lies. Instead, when "the court does not grant a preliminary order, the petitioning party then must file its writ petition in the next higher court." *State ex*

rel. Ashby Rd. Partners v. State Tax Comm'n, 297 S.W.3d 80, 83 (Mo. banc 2009); Rule 84.22.

Appellants did not follow any of these four mandamus procedures.

- First, they did not style the case as Rule 94.02 requires as a civil action in which Appellants are the relators and the commission or its director is respondent. LF8. Instead, they styled the petition as an ordinary civil case. LF8.
- Second, they did not draft the petition as Rule 94.03 requires with a statement of the facts, the relief sought, and a statement of the reasons why the writ should issue, accompanied by suggestions in support. LF8. Instead, they filed a standard civil petition. LF8.
- Third, the circuit court thus did not a preliminary order in mandamus under Rules 94.04 and 94.05. LF2-7. Instead, the circuit court issued summonses, and Appellants litigated this case as a normal civil action to judgment, not as a petition for mandamus. LF2-7.
- And fourth, when they lost in the circuit court, Appellants filed no new writ petition in the next higher court, as this Court's precedent requires. Instead, they filed an appeal. LF2-7.

D. Appellants had to follow the Rule 94 mandamus procedures.

1. Rather than defend their failure to follow any of these four basic mandamus procedures, Appellants assert that they still adequately sought non-contested case review because they assert that they pleaded an action for review under Section 536.150 *apart* from a petition for mandamus. Supp. Br. 2-3. In support, they cite a decision by the Southern District holding that Section 536.150 allows for judicial review not only through mandamus but also by any other appropriate action. *Id.* (citing *Ard v. Shannon County Comm'n*, 424 S.W.3d 468, 475 (Mo. App. S.D. 2014)).

But Appellants quotes no part of their petition that requests relief under Section 536.150 other than through mandamus. Nor could they. Appellants' petition expressly and only asked for a writ of mandamus under Section 536.150. The petition seeks "judicial review of said administrative closure pursuant to the provisions of RSMo 213.085, which provides for judicial review in accordance with RSMo 536.140 or, in the alternative, mandamus, pursuant to RSMo 536.150(1)." LF9 ¶10.

Appellants also assert that, even if they did not bring this claim expressly, a court would be free to "look to the substance of the factual allegations in the petition, along with the relief sought, rather than the form of the petition." *Smith v. City of St. Louis*, 409 S.W.3d 404, 423 (Mo. App. E.D.

2013). They thus ask this Court to construe their petition liberally, citing a case in which the Courts allowed liberal amendments to petitions, *Smith v. City of St. Louis*, 409 S.W.3d 404, 423 (Mo. App. E.D. 2013), even though they never sought to amend their petition to request any form of relief other than mandamus.

But mandamus is the right choice of writ here under Appellants' theory of the merits. Even if misconceiving the precisely applicable remedy might not be fatal, *Hagely v. Bd. of Educ. of Webster Groves Sch. Dist.*, 841 S.W.2d 663, 670 (Mo. 1992), Appellants asked for the right remedy here when they asked for mandamus. A writ of mandamus is the appropriate vehicle when the litigants claim that they have "a clear, unequivocal, specific right." *U.S. Dep't of Veterans Affairs v. Boresi*, 396 S.W.3d 356, 359 (Mo. 2013) (citations omitted). Their petition asks for an order to the commission to issue the right-to-sue letter to which they claim they are entitled. Appellants thus seek to compel the commission to perform what they view as a clear, mandatory duty. This Court should not be in the position of theorizing some other appropriate form of writ that would apply here, not when Appellants did not request it anywhere in the petition.

2. Furthermore, Section 536.150 creates no cause of action apart from the writ requirements. An aggrieved person may seek review under Section 536.150 through a "suit for injunction, certiorari, mandamus, prohibition or

other appropriate action," but Appellants are incorrect when they assert that this language excuses compliance with writ requirements. The phrase "other appropriate action" means any other similar traditional writ, like the forms of actions that Section 536.150 authorizes by name, not a non-writ action for wide-ranging review akin to Section 536.140. After all, if no writ action were necessary, the legislature could have included Section 536.150's review of non-contested cases in Section 536.140, with no need for proceeding through a writ at all. But the legislature did not choose to do so.

The traditional canons of construction also confirm that the legislature meant to permit review under Section 536.150 only through the historical writs often used in state courts. Under the *ejusdem generis* canon, this Court "looks at the context in which a term is used to determine its meaning," including "the other types of entities listed in the statute to assist it in determining how the [relevant term] is employed in a particular subsection." *Circuit City Stores, Inc. v. Dir. of Revenue*, 438 S.W.3d 397, 401 (Mo. 2014). This canon provides that, "where general words follow an enumeration of two or more things, they apply only to person or things of the same general kind or class specifically mentioned." Scalia & Garner, Reading Law § 32 (2012). For instance, when "a drafter has tacked on a catchall phrase at the end of an enumeration of specifics, as in *dogs, cats, horses, cattle, and other animals*," this canon "implies the addition of the word *similar* after the word *other*, meaning other similar

animals." *Id.* Likewise, under this canon, "a document referring to 'horses, cattle, sheep and other animals' will usually be construed as including goats, but not bears or tigers." *Standard Operations, Inc.*, 758 S.W.2d at 444.

Here, this canon implies the word *similar* at the end of the list of appropriate writ actions in Section 536.150, making the statute provide for judicial review through suits "for injunction, certiorari, mandamus, prohibition or other *similar* appropriate action[s]." This canon thus gives the phrase "other appropriate action" the meaning of any other similar traditional writ action.

The legislature thus kept open the possibility that another writ, besides the writs they named, might be appropriate. And the rules governing special actions, Rule 85 to 103, suggest several other similar traditional writs that might be available under various circumstances not present here, such as writs for replevin or habeas corpus.

3. Because Appellants sought non-contested case review only through mandamus, and because they did not follow the procedures for mandamus, they are left asking this Court to overlook their mistakes, as the lower courts did. Supp. Br. 3. They are correct that, though they "sought mandamus, the circuit court issued summonses and entered judgment, treating the case as one for judicial review not mandamus." Supp. Br. 3.

But, even if this Court or the lower courts could—incorrectly—overlook Appellants' failure to bring a mandamus action under proper procedures, that

does not mean that *they* adequately sought non-contested case review through mandamus in the circuit court. And, as this brief will now explain in response to this Court's second question, this Court should not exercise its discretion to overlook Appellants' failure to bring a mandamus action through any of the proper procedures

II. The appeal should be dismissed under *Bartlett*, not reviewed on the merits under *Tivol*. (Responds to Appellants' Supplemental Point II)

A. Question Presented & Short Answer

Question II. This Court's second question for supplemental briefing is:

> If Appellants adequately sought non-contested case review via mandamus in the circuit court, should the appeal be dismissed pursuant to *Bartlett v. Missouri Department of Insurance*, 528 S.W.3d 911 (Mo. banc 2017), or reviewed on the merits pursuant to *State ex rel. Tivol Plaza, Inc. v. Missouri Commission on Human Rights*, 527 S.W.3d 837 (Mo. banc 2017)?

Answer. This Court should dismiss the appeal under *Bartlett*, not review it on the merits under *Tivol*. Appellants did not adequately seek non-contested case review through mandamus in the circuit court and they did not follow any of the procedural rules for mandamus. Nor did they plead any other viable cause of action that would keep the appeal alive.

B. As in *Bartlett*, this Court need not overlook Appellants' failure to follow the mandamus procedures.

Appellants did not adequately seek relief, and so this Court need not reach the merits of their arguments. They filed no proper petition in the circuit court, they sought no preliminary writ in the circuit court, and they filed no new petition for a writ of mandamus in the appeals courts. Because they failed to follow these elementary procedures for a mandamus action, and because they offer no excuse for their failure to do so, this Court is well within its rights to dismiss their appeal under *Bartlett v. Missouri Department of Insurance*, 528 S.W.3d 911 (Mo. banc 2017).

1. A party may only appeal "from the denial of a writ petition when a lower court has issued a preliminary order in mandamus but then denies a permanent writ." *U.S. Dep't of Veterans Affairs v. Boresi*, 396 S.W.3d 356, 358 (Mo. banc 2013). "An appellate court reviews the denial of a petition for a writ of mandamus for an abuse of discretion," and an abuse of discretion exists when the circuit court rules incorrectly on the law, such as by misapplying the applicable statutes. *State ex rel. Tivol Plaza, Inc. v. Missouri Comm'n on Human Rights*, 527 S.W.3d 837, 841 (Mo. 2017). When a court grants no preliminary writ, a party may seek relief only by requesting a new writ in the next higher court. *Bartlett*, 528 S.W.3d at 914.

Here the circuit court issued no preliminary writ under Rule 94. Instead, it proceeded as in *Bartlett* by issuing summonses and denying relief on the merits as in a normal civil action. *Bartlett*, 528 S.W.3d at 913. Appellants then appealed, and the appeals court overlooked their failure to seek a new original writ on appeal.

As this Court has warned, the case should not have proceeded in this way. *Tivol Plaza, Inc.*, 527 S.W.3d at 842. This Court held in *Bartlett* that the "practice of issuing a summons in lieu of a preliminary writ is not authorized by Rule 94," and this Court has repeatedly warned just last year that it will not endlessly exercise its discretion to treat a summons as a preliminary writ. *Bartlett v. Missouri Dep't of Ins.*, 528 S.W.3d 911, 912 (Mo. 2017) (citing *Boresi*, 396 S.W.3d at 359 n.1). Even if this Court may choose to treat the case as if Appellants had properly filed it, since 2013, this Court "is not required to exercise its discretion in like manner in the future." *Id.* "Parties should not expect unending tolerance from the appellate courts for such failures to follow Rule 94.04"—"particularly when the question is not of such general interest or when the parties were made aware of the failure to follow Rule 94, as in *Bartlett*." *Tivol Plaza, Inc.*, 527 S.W.3d at 842.

The failure to follow these procedures prejudices everyone—the petitioner, the respondent, and the court. Mandamus procedures exist because writ actions differ from ordinary civil cases. As Chief Justice Fischer has

written, "the issuance of a summons does not serve all the purposes of a preliminary order and is not authorized by Rule 94 (mandamus) or 97 (prohibition)." *Boresi*, 396 S.W.3d at 365 (Fischer, J., dissenting). For the respondent, the "purpose of requiring a preliminary order at the outset of a writ proceeding is to require some judicial evaluation of the claim to determine if the respondent should even be required to answer the allegations." *Id.* And, for the petitioner, "a preliminary order in mandamus or prohibition does more than a summons, which satisfies notice to a person that an action has been filed so that the person may appear and defend against the action, because the preliminary order often prohibits further action until further order of the court." *Id.* Then, on appeal, the failure to follow the proper writ procedures "leads to confusion as to the proper standard of review." *Id.* In fact, just this sort of confusion has resulted from Appellants' failure to follow the mandamus procedures. This Court has had to ask supplemental questions on the proper standard of review.

C. The circuit court treated this case as a mandamus action at summary judgment.

In their supplemental brief, Appellants claim that this Court should review the case on its merits because the parties litigated the merits and the lower court did not enforce the mandamus rules. Sup. Br. 3-5.

But even if "the circuit court acquiesced in the treatment of the mandamus proceedings as a normal civil action until the very end," petitioners for mandamus "who choose to disregard the procedures and requirements of Rule 94 do so at their own risk." *Bartlett*, 528 S.W.3d at 914. Were this Court never to enforce the procedural rules, no litigant or trial judge would ever follow them. *Tivol Plaza, Inc.*, 527 S.W.3d at 842.

Appellants offer no excuse for their lack of compliance with the writ rules. They cannot and does not dispute that this Court's precedents—issued more than two years before they filed this case—set forth the mandamus procedures that they must follow to sue the commission. *Boresi*, 396 S.W.3d at 359 n.1.

D. The commission objected to treating this case as anything but a mandamus action.

Appellants also assert that this Court should review the case on its merits asserts because they claim that the commission did not challenge the form of the action in the circuit court.

Not so. True, *Appellants* did not title their petition as a writ action and *Appellants* litigated this case through summonses and as a normal civil action. LF153. But *the commission* objected to their attempt to skirt the mandamus standards. *The commission* argued that this court was subject to review as a mandamus action at five key stages.

- First, when the commission moved to dismiss the petition for mandamus, under *Lemay Fire Prot. Dist. v. St. Louis Cty.*, 340 S.W.3d 292, 294 (Mo. Ct. App. 2011), the commission argued that the mandamus standards governed review on the merits. LF19-20.
- Second, the commission's answer explained to the court that no review was possible as a contested case because the commission need not hold a hearing to determine its own jurisdiction. LF48, 50.
- Third, when Appellants moved for summary judgment (Appellants did so first), and the commission cross-moved for summary judgment, the commission made these arguments again. LF5. In its suggestions in support of its motion for summary judgment, the commission re-urged the court to apply the mandamus standard of review—which Appellants had ignored. LF145-46.
- Fourth, the circuit court adopted the commission's proposed opinion and denied a writ of mandamus. The circuit court recited the mandamus standard of review and held that under Section 536.150, mandamus "is appropriate where the MCHR's executive director's actions in issuing the right-to-sue letter violated prescribed procedures and applicable law." LF174-75 (citing *State ex rel. Martin-Erb v. Mo. Comm'n on Human Rights*, 77 S.W.3d

600, 608 (Mo. 2002)); *see* Proposed Judgment, Docket No. 15AC-CC00296 (Nov. 8, 2016).

- And fifth, on appeal, the commission cited the mandamus standards to this Court in its section on the standard of review in its appellate brief. And the commission pointed out that "mandamus is also inappropriate on appeal" because, as the Western District had held, Appellants filed no new writ in an appellate court. Response Br. 25-26, 28, 32, 82.

The burden to comply with the mandamus procedures is on the petitioner seeking relief. Appellants have failed to carry that burden of showing their compliance with the mandamus procedures.

III. If this appeal proceeds to the merits, the executive director's decision is subject to the general standard for mandamus actions. (Responds to Appellants' Supplemental Point III)

A. Question Presented & Short Answer

Question III. This Court's third question for supplemental briefing is:

> If this appeal is reviewed on the merits, was the executive director's decision that the complaints pleaded discrimination based on sexual orientation subject to review by the circuit court as authorized by § 536.150.1 (i.e., "unconstitutional, unlawful,

unreasonable, arbitrary, or capricious or involves an abuse of discretion"), subject to the general standard for mandamus, or subject to both?

Answer. If this Court decides this appeal's merits, the general standard for mandamus applies to review of the executive director's decision that the complaints pleaded discrimination based on sexual orientation.

B. Section 536.150 incorporates the mandamus standards.

If this Court chooses to overlook Appellants' procedural lapses and to review this case on the merits, the mandamus standard of review applies. Under Section 536.150, review in non-contested cases must be in the form of a writ action. And Appellants sought, though inadequately, a writ of mandamus when they filed this case—the correct type of writ. The standards for a writ of mandamus thus apply.

Contrary to Appellants' new position advocated for the first time in this supplemental briefing, Section 536.150 creates no new free-standing cause of action separate from writ actions. Nor does it create a new cause of action under which the most advantageous standard of review possible applies. Instead, as addressed above in Parts I and II, the statute incorporates traditional writ actions, including for a writ of mandamus.

Unlike Section 536.140, which governs contested case, Section 536.150 mandates no universal standard of review in all non-contested civil actions.

Section 536.150 provides that the agency's "decision may be reviewed by suit for injunction, certiorari, mandamus, prohibition or other appropriate action." RSMo § 536.150. And, Section 536.159 states that, as necessary under each writ, "the court may determine whether such decision, in view of the facts as they appear to the court, is unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion." *Id.*[1]

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[1] In full, Section 536.150.1 provides

> 1. When any administrative officer or body existing under the constitution or by statute or by municipal charter or ordinance shall have rendered a decision which is not subject to administrative review, determining the legal rights, duties or privileges of any person, including the denial or revocation of a license, and there is no other provision for judicial inquiry into or review of such decision, such decision may be reviewed by suit for injunction, certiorari, mandamus, prohibition or other appropriate action, and in any such review proceeding the court may determine the facts relevant to the question whether such person at the time of such decision was subject to such legal duty, or had such right, or was entitled to such privilege, and may hear such evidence on such question as may be properly adduced, and the court may determine whether such decision, in view of the facts as they appear to the court, is unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion; and the court shall render judgment accordingly, and may order the administrative officer or body to take such further action as it may be proper to require; but the court shall not substitute its discretion for discretion legally vested in such administrative officer or body, and in cases where the granting or withholding of a privilege is committed by law to the sole discretion of such administrative officer or body, such discretion lawfully exercised shall not be disturbed.

The traditional canons of statutory interpretation confirm that this language incorporates the traditional writ standards.

Under the related-statutes canon, statutes *in pari materia* are to be interpreted harmoniously, as though they were one law. Scalia & Garner, Reading Law § 39 (2012). As this Court has explained, the "primary rule of statutory interpretation is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words in their plain and ordinary meaning." *In re Boland*, 155 S.W.3d 65, 67 (Mo. banc 2005). Thus, a statute's "words must be considered in context and sections of the statutes *in pari materia*, as well as cognate sections, must be considered in order to arrive at the true meaning and scope of the words." *State ex rel. Evans v. Brown Builders Elec. Co.*, 254 S.W.3d 31, 35 (Mo. 2008) (citation omitted). "The provisions of a legislative act are not read in isolation but construed together, and if reasonably possible, the provisions will be harmonized with each other." *Id.*

"Statutes are *in pari materia* when they are upon the same matter or subject, and the rule of construction in such instances proceeds upon the supposition that the statutes in question were intended to be consistent and

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RSMo § 536.150.

harmonious in their several parts and provisions." *Rothschild v. State Tax Comm'n of Missouri*, 762 S.W.2d 35, 37 (Mo. 1988). "The rule is particularly applicable when the two acts are passed at the same legislative session." *Id.*

Because under this canon provisions of a statute must be read to be consistent with each other if possible, the best reading of this twin language in Section 536.150 is that Section 536.150's provision that the agency's "decision may be reviewed by suit for injunction, certiorari, mandamus, prohibition or other appropriate action" incorporates the writ standards for each case. And then, under the provision, within the rubric of these standards, the court as necessary "may determine whether such decision, in view of the facts as they appear to the court, is unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion."

A mandamus action is thus subject to the mandamus standards, an action for prohibition is subject to the standards for a writ of prohibition, and so on. The trial court may review the agency's action in whatever way is necessary under each writ's standard of review.

And this Court has adopted this interpretation of the statute in past cases: this Court applies the mandamus standards under Section 536.150 in suits against the commission. *E.g.*, *Pub. Sch. Ret. Sys. of Sch. Dist. of Kansas City v. Missouri Comm'n On Human Rights*, 188 S.W.3d 35, 41-42 (Mo. Ct. App. 2006).

Appellants are thus incorrect when they assert that, even though Section 536.150.1 governed the circuit court's review, the mandamus standards need not apply. Supp. Br. 4-6. Section 536.150 does not displace the mandamus standards to provide review in every case of whether the agency action was "unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involve[d] an abuse of discretion." RSMo 536.150.

C. Appellants cannot satisfy the mandamus standards.

Under the correct mandamus standards, Appellants face an insuperable obstacle in this appeal because they seek to persuade the commission and the courts to adopt a novel interpretation of the MHRA that no Missouri court has yet adopted. In other words, they seek to adjudicate and establish a new right through mandamus, rather than merely to enforce a preexisting right. As this Court held in an oft-quoted case: "[M]andamus is clearly inappropriate" where "the question [at issue] has not previously been decided by a Missouri court. Relator attempts to establish a right through a writ of mandamus, rather than to enforce a clearly established and presently existing right. This cannot be done." *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 576-77 (Mo. banc 1994); *see also State ex rel. Reif v. Jamison*, 271 S.W.3d 549, 550 (Mo. banc 2008) ("The purpose of a writ of mandamus is to execute a clear, unequivocal and specific right, not to adjudicate.").

IV. The general mandamus standard is the standard of review under § 536.150.1 for cases brought as mandamus actions. (Responds to Appellants' Supplemental Point IV)

A. Question Presented & Short Answer

Question IV. This Court's fourth and final question for supplemental briefing is

> Is the general standard for mandamus inconsistent with review authorized by § 536.150.1?

Answer. Because Section 536.150.1 incorporates the writ standards, the general standard for mandamus does not conflict with Section 536.150's standard of review.

B. Section 536.150 and the mandamus standards are in harmony.

Section 536.150 and the mandamus standards do not conflict because, as just discussed in Part III, Section 536.150.1 incorporates the mandamus standards for cases brought as mandamus actions. And because Section 536.150.1 incorporates the writ standards in each case, here it incorporates the mandamus standard for Appellants' petition.

The standard for issuing a writ of mandamus is high. *See* Response Br. 25-26, 28, 32, 82; 24 Mo. Prac., Appellate Practice § 12.2 (2d ed.). A writ of

mandamus is only appropriate "when there is a clear, unequivocal, specific right to be enforced." *Mo. Growth Ass'n v. State Tax Comm'n*, 988 S.W.2d 786, 788 (Mo. 1999). "Mandamus is only appropriate to require the performance of a ministerial act." *Id*. Under Section 536.150, mandamus is only appropriate to the Commission when the refusal to issue a right-to-sue letter violated established law or procedures. A 24; *State ex rel. Martin-Erb v. Mo. Comm'n on Human Rights*, 77 S.W.3d 600, 608 (Mo. 2002).

C. Review by writ is an adequate remedy under Section 536.150.

In their supplemental brief, Appellants asserts that the standards for mandamus, particularly its discretionary nature, make the writ an imperfect tool for implementing Section 536.150. Supp. Br. 5-6. They note that litigants have no right to mandamus and that mandamus affords a limited review than the standard for contested cases under Section 536.140. *Id*.

Appellants are, of course, correct that in general mandamus is a discretionary writ, and a litigant lacks a right to the writ. *State ex rel. Missouri Growth Ass'n v. State Tax Comm'n*, 998 S.W.2d 786, 788 (Mo. 1999), as modified on denial of reh'g (Sept. 21, 1999).

But neither does Section 536.150 provide a right to relief. Section 536.150 *guarantees* no review of a non-contested case—it *permits* review. Under Section 536.150 and the common law, the agency's "decision *may* be

reviewed by suit for injunction, certiorari, mandamus, prohibition or other appropriate action." RSMo § 536.150 (emphasis added). And the court "*may* determine whether such decision, in view of the facts as they appear to the court, is unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion." *Id.* (emphasis added). Nor do they cite any other provision of state law that requires any other form of review in this circumstance.

Appellants are also incorrect to worry that mandamus could be an unduly limited scope of review for discretionary agency decisions. Their assertions that mandamus has no role in cases reviewing discretionary agency actions still does not square with precedent. "Although the writ of mandamus will not ordinarily issue to control the discretion of an administrative body such as the [commission], an 'exception to the general rule is recognized where the administrative board (or court) has acted unlawfully or wholly outside its jurisdiction or authority or has exceeded its jurisdiction, and also where it has abused whatever discretion may have been vested in it.'" *State ex rel. Office of Pub. Counsel v. Pub. Serv. Comm'n of State*, 236 S.W.3d 632, 635 (Mo. 2007) (quoting *State ex rel. Keystone Laundry & Dry Cleaners, Inc. v. McDonnell*, 426 S.W.2d 11, 14 (Mo.1968)). As this Court has held, the commission's "failure to follow proper procedures in the exercise of discretion is an abuse of discretion controllable by mandamus." *State ex rel. Martin-Erb v. Missouri Comm'n on*

Human Rights, 77 S.W.3d 600, 607 (Mo. 2002). Mandamus review of agency actions, though highly deferential, is not toothless.

Next, Appellants object to the adequacy of mandamus review because no litigant may appeal the denial of a preliminary writ of mandamus. *Bartlett*, 528 S.W.3d at 913. But this procedural rule does not thwart judicial review—whenever "the court does not grant a preliminary order," the petitioner may still "file its writ petition in the next higher court." *State ex rel. Ashby Rd. Partners v. State Tax Comm'n*, 297 S.W.3d 80, 83 (Mo. banc 2009); Rule 84.22. Appellants could have availed themselves of that procedure here, if they had wished.

Finally, if Appellants disagree with the legislature's policy choices about the best way to structure administrative review, that question is of course beyond this Court's domain. "This Court did not make this the law, but is obligated to enforce the law as duly enacted by the legislature." *Goerlitz v. City of Maryville*, 333 S.W.3d 450, 456 (Mo. 2011). "Therefore, this Court must defer to the plain language of the statute, the time-honored principle of separation of powers and the recognition that policy decisions such as presented in this case are within the providence of the legislature." *Id.*

CONCLUSION

The appeal should be dismissed, or, in the alternative, the circuit court's judgment should be affirmed.

Respectfully submitted,

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September 17, 2018

CERTIFICATE OF SERVICE

I certify that I served the above Supplemental Brief of Respondents electronically by Missouri CaseNet e-filing system on September 17, 2018 to all parties of record.

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 5,979 words exclusive of cover, signature block, and certificates.

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