MISSOURI SUPREME COURT

Case No. SC97284

DARRELL COPE AND
THE MISSOURI DEMOCRATIC PARTY

Appellants,

vs.

MICHAEL L. PARSON AND
MIKE KEHOE,

Respondents.

APPELLANTS' REPLY BRIEF

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I. The proper interpretation of "unless otherwise provided by law" in Missouri Constitution Article IV, Section 4 is that it authorizes the General Assembly to affect the Governor's power to fill vacancies in public office established by that Section; the General Assembly exercised this authority when it enacted Section 105.030 barring the Governor from filling vacancies in, among other elected offices, the office of Lieutenant Governor.

Appellants and the State have provided several ways to interpret the phrase, "unless otherwise provided by law."

As appellants stated in their opening brief, a law "provides otherwise" if it displaces "required adherence." *Opening Brief* at 30-31, citing *Becker Glove International, Inc. v. Dubinsky,* 41 S.W.3d 885, 887-888 (Mo. 2001).

A law "provides otherwise" if it is contrary. *Opening Brief* at 35, citing *Marx v. General Revenue Corp.,* 560 U.S. 371, 377 (2013).

A law "provides otherwise" if it makes a "stipulation" that is "different." *Marx*, 560 U.S. at 389 (Sotomayor, J., dissenting) ("In common usage, to 'provide otherwise' means to 'make a ... stipulation' that is 'differen[t].' *Webster's Third New International Dictionary* 1598, 1827 (2002) (*Webster's Third*) (defining 'provide' and 'otherwise,' respectively)").

"One definition of the word 'provide' as found in Webster's New International Dictionary, is 'to stipulate.' It is in that sense we believe the Legislature used the words 'provided for' in the exception clause." *Holder v. Elms Hotel Co.*, 92 S.W.2d 620, 622 (Mo. 1936).

"The word 'otherwise,' as defined by Mr. Webster, means ... 'differently; contrarily.'" *Lynch v. Murphy*, 24 S.W. 774, 775 (Mo. 1893); *see also State ex rel. Tripp v. District Court*, 305 P.2d 1101, 1108, (Mont. 1957) ("Used as an adverb '*otherwise*', is variously defined in Webster's New International Dictionary as meaning: '... contrarily' and when used as an adjective it means, 'Different; other than denoted'").

The State, relying on *Webster's Second New International Dictionary*, defines the phrase "unless otherwise provided by law" as, "unless the law furnishes or supplies a different manner." *Respondents' Brief* at 35.

Although all of these several definitions are correct, and are all really mere glosses on a singular, central meaning, how "unless otherwise provided by law" is defined does not answer the critical question of *what* is "otherwise being provided for by law." Thus, the Court must determine what subject is being modified by the phrase, "unless otherwise provided by law," as used in Article IV, Section 4.

Appellants see three possibilities.

The first is that the phrase modifies *the Governor's authority*. Article IV of the Missouri Constitution is titled, "Executive Department," and Section 4 of that Article is titled, "Power of appointment to fill vacancies." The Governor is the subject of Article 4, Section 4 — "The *governor* shall fill all vacancies in public offices unless otherwise provided by law, and *his* appointees shall serve ..." (emphasis added). Thus, it is reasonable to conclude that the phrase, "otherwise provided by law," is intended to modify *the Governor's power*.

Under this first interpretation, Article 4, Section 4 would be understood as meaning that, *The Governor shall fill all vacancies in public offices unless the law changes the Governor's authority to do so*. This interpretation is consistent with the definitions of "otherwise" and "provide" discussed above, and would allow the General Assembly to limit or eliminate the Governor's authority to make appointments to fill vacancies in office.

A second possibility is that the phrase modifies *vacancies* generally. Under this interpretation, Article 4, Section 4 would be understood as meaning that, *The Governor shall fill all vacancies in public offices unless the law furnishes a different manner or another way of treating or handling a vacancy*. This interpretation follows the State's interpretation of the phrase when used in Missouri's Sunshine Law — "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." *Respondents' Brief* at 44, referring to Section 610.011.1, RSMo. "Them," in the Sunshine Law context, is the subject modified by the phrase "unless otherwise provided by law." Here, under this second potential interpretation, "vacancies" would be the subject modified by the phrase, "unless otherwise provided by law."

Like the first interpretation, the second interpretation is consistent with appellants' contention that the General Assembly can decide to leave an office vacant rather than have the Governor fill it. Leaving an office vacant is treating the vacant office "otherwise" than filling it.

As a third possibility, the phrase could be interpreted as modifying only the *filling* of vacancies. This is the State's preferred interpretation. According to the State, the phrase means, "unless the law furnishes or supplies a different manner *of filling the vacancy*." *Respondents' Brief* at 35 (emphasis added).

A. The State's interpretation of Article IV, Section 4 is not reasonable in light of Section 105.030, which was enacted under authority of the constitutional provision and which provides that the Governor does not fill vacancies in the office of Lieutenant Governor.

While the State's interpretation could be a reasonable interpretation if Article IV, Section 4 could be read standing alone, the constitutional provision

does not stand alone. There is also a statute, Section 105.030, enacted by the General Assembly under the authority given it by the same constitutional provision, that needs to be considered. Interpreting, "unless otherwise provided by law," as modifying only the filling of vacancies, as the State contends, is not reasonable because this interpretation would nullify the statute the General Assembly enacted while exercising its constitutional authority under Article IV, Section 4.

"When, after a statute has been construed by a court of last resort, the legislature re-enacts it, carries it over without change, or re-incorporates the exact language previously construed, we presume that the legislature knew of and adopted the judicial construction given to that language." *Gaynor v. Washington University*, 261 S.W.3d 650, 653-654 (Mo. App. 2008), *citing State ex rel. Dean v. Daues*, 14 S.W.2d 990, 1002 (Mo. 1929).

Here, this Court held back in 1912 that, "This section of [the predecessor to Section 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 ..." *State ex rel. Major v. Amick*, 152 S.W.591, 595-596 (Mo. 1912) (emphasis added).

More than 40 years ago, this Court noted in *Labor's Educational & Political Club-Independent v. Danforth*, 561 S.W.2d 339, 348 (Mo. 1977), that,

"Art. IV, sec. 4, Mo. Const., provides that the governor shall fill all vacancies in public offices unless otherwise provided by law. Few offices if any (other than the lieutenant governor) would remain vacant in Missouri."

While the *Danforth* Court did not cite Section 105.030 in asserting that Lieutenant Governor was one of the few elected offices that if vacated would remain vacant under Missouri law, that statute was the only law to which the Court could have been referring for this proposition.

The General Assembly has amended Section 105.030 at seven times in the century-plus since this Court decided *Amick*, and three times in the 40 years since this Court decided *Danforth*. *See 1919 § 4786; 1929 § 10216; RSMo 1939 § 11509; A.L. 1955 p. 728,;A.L. 1983 S.B. 250; A.L. 1990 S.B. 580; A.L. 2018 H.B. 1428*. Each of these many amended versions of the statute has contained the critical language at issue: "Whenever any vacancy, caused in any manner or by any means whatever, shall occur or exist in any state or county office originally filled by election by the people, other than the office of Lieutenant-Governor ..."

The Court should conclude that because the General Assembly kept the same language in all seven amended versions of Section 105.030 after this Court analyzed the section in *Amick*, and in all three amended versions after this Court spoke in *Danforth*, the General Assembly "knew of and adopted" the Court's interpretation of Section 105.030 right through the law's most recent readoption.

Through its repeated readoption of the key statutory language, the General Assembly is presumed to have adopted this Court's prior interpretation of Section 105.03. Proper respect for the General Assembly requires the Court to defer to the General Assembly's presumed interpretation: "the General Assembly has the power to do whatever is necessary to perform its functions except as expressly restrained by the Constitution. Deference due the General Assembly requires that doubt be resolved against nullifying its action if it is possible to do so by any reasonable construction of that action or by any reasonable construction of the Constitution." *Liberty Oil Co. v. Director of Revenue*, 813 S.W.2d 296, 297 (Mo. 1991). This required deference should not be difficult here, because the General Assembly's interpretation is, after all, the Court's own prior interpretation.

Because it is reasonable to interpret the phrase, "unless otherwise provided by law," as modifying either the Governor's appointment authority or how vacancies are to be dealt with generally, as opposed to merely how vacancies are to be filled, these reasonable interpretations should prevail over the State's interpretation because the State's interpretation would effectively nullify the General Assembly's repeated reenactment of a statute previously interpreted as allowing the Lieutenant Governor's office to be left vacant if vacated.

B. The State's public policy arguments should not change the result because leaving the office of Lieutenant Governor vacant if vacated does not materially adversely affect the operations of the State.

The State advances multiple purported public policy arguments in support of its interpretation. Each is inapplicable.

The State cites *State ex rel Lamkin v. Tennyson*, 151 S.W.2d 1090, 1091 (Mo. 1941), for the proposition that "courts indulge a strong presumption against a legislative intent to create a condition that might result in a vacancy in public office." *Respondents' Brief* at 39. There is such a presumption, but it does not exist in a vacuum. The presumption exists because, "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." *Respondents' Brief* at 40, citing *Baxter v. Danny Nicholson, Inc.*, 690 S.E.2d 265, 268 (N.C. 2010).

Here, however, even the State's brief makes it clear that a vacancy in the office of Lieutenant Governor would not impact Missouri's ability to serve its citizens. The State notes that the Lieutenant Governor sits on various boards, serves as an advisor to others, and breaks ties in the Senate. Each board referenced by the State, however, has other members capable of voting; those

advised by the Lieutenant Governor can still act even if less fulsomely advised; and a tie in the Senate absent a tie-breaker simply means a bill does not pass, one of the two possible results even with a Lieutenant Governor in office.

Under all circumstances, our state's government will continue to function and provide services to Missourians with or without a Lieutenant Governor. Therefore, the underlying justification for the "strong presumption" asserted does not exist when considering the office of Lieutenant Governor because the functions of his office are not particularly vital.[1]

The State asserts, "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." *Respondents' Brief* at 40. It hard to imagine, however, a clearer statement of the

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[1] Perhaps the closest analogies to Missouri's Lieutenant Governor with regard to the importance of the office are the Vice President of the United States, discussed below, and The Lord High Executioner of the fictional Town of Titipu, whom, we are assured in his introduction, is, "A personage of noble rank and title — A dignified and potent officer, Whose functions are particularly vital!" *The Mikado*, Gilbert & Sullivan (Act I, Part V). Introduction notwithstanding, however, The Lord High Executioner, like the Lieutenant Governor, does nothing that is vital in the government.

General Assembly's intent to leave the office vacant than its repeated reenactment of a Section 105.030 that excludes the office of Lieutenant Governor from those elected offices to be filled by the Governor. The State's contention, moreover, ignores the essence of the phrase, "unless otherwise provided by law," which vests in the General Assembly the ultimate authority to address vacancies in public offices. *See Hunter v. County of Morgan*, 12 S.W.3d 749, 759 (Mo. App. 2000) ("The provision of the statute, requiring approval of salaries by the commission, is qualified by the phrase, 'unless otherwise provided by law.' This indicates an intent by the legislature to subject this general provision to exceptions created by it pursuant to other provisions in the law").

The State next asserts that appellants' interpretation should be rejected because to accept it would lead to "unreasonable or absurd results." *Respondents' Brief* at 41. **For 150 years, however, our State did not find it unreasonable or absurd to be without a Lieutenant Governor**. And, by analogy, for nearly 200 years, the American people did not find it unreasonable or absurd to be without a Vice President. The latter finally changed in 1967, following the assassination of President John F. Kennedy, by the enactment of the 25th Amendment to the U.S. Constitution, which provided, for the first time, for the filing of the office of Vice President when vacated.

In addition to providing a more detailed order of succession to the President, the 25th Amendment provided for the first time in American history a method for the filling of a vacancy in the office of Vice President. The United States Constitution provides for the filling of many offices by the President with the advice and consent of the Senate, but the office of the Vice President was not included among them. U.S. Constitution, Article II, Section 2, Clause 2. Indeed, the Constitution from its origin was silent on the issue of filling a vacancy in the office of Vice President. It was not until the 25th Amendment that the U.S. Constitution finally spoke on the issue.

The 25th Amendment states:

> Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

U.S. Constitution, Amendment 25, Section 2. Before this Amendment was ratified, the office of Vice President was frequently vacant.

The Congressional Research Service ("CRS"), an arm of the Library of Congress, researches and prepares authoritative reports on American political life. The CRS prepared a report on the filling of Presidential and Vice-Presidential vacancies. The CRS report states:

> Since 1789, Vice Presidents have succeeded to the presidency on nine occasions, eight times due to the death of the incumbent, and once due to resignation. (See Table 1). The vice presidency has become vacant on 18 occasions since 1789. Nine of these occurred when the Vice President succeeded to the presidency; seven resulted from the death of the incumbent; and two were due to resignation. (See Table 2).

Presidential and Vice Presidential Succession: Overview and Current Legislation, CRS Report for Congress No. RL31761, Neale, Thomas, Government and Finance Division, Congressional Research Service, The Library of Congress (updated Sept. 27, 2004) (hereinafter, "*CRS Report*").

Despite the 18 vacancies in the office of Vice President, vacancies in that office have only been filled twice — both after the passage of the 25th Amendment. The first time was in 1973, when Gerald R. Ford was appointed Vice President following the resignation of Spiro T. Agnew. The second was in 1974, when Nelson A. Rockefeller was appointed Vice President following Ford's elevation to President. *CRS Report* at CRS-22 (Table 2).

> Prior to ratification of the 25th Amendment, the vice presidency was vacant on 16 occasions. Eight resulted when the Vice President succeeded to the presidency. Seven resulted from the Vice

President's death: George Clinton (Democratic Republican — DR), 1812; Elbridge Gerry (DR), 1814; William R. King (D), 1853; Henry Wilson (R), 1875; Thomas A. Hendricks (D), 1885; Garret A. Hobart (R) 1899; and James S. Sherman (R), 1912. One Vice President resigned: John C. Calhoun (D), in 1832.

CRS Report at CRS-22 n.60.

Thus, under the U.S. Constitution, using constitutional language remarkably similar to that in the Missouri Constitution, the office of Vice President when vacated remained vacant — and it remained vacant on numerous occasions. This remained the case until the U.S. Constitution was amended in 1967 to provide for the filling of a vacancy in the office. Thus, the notion that it would be unreasonable or absurd to leave this kind of office vacant is not supported by history.

Missouri similarly has a long history of the office of the Lieutenant Governor being left vacant when vacated. *Brief* at 42-44. The history of vacancies appellants provided spans from 1825 to 2001. The State nevertheless contends, "Plaintiffs' invocation of historical understanding and practice is selective," *Respondents' Brief* at 50, referencing Governor Wilson's appointment of Joe Maxwell as Lieutenant Governor.

Contrary to the State's implication, appellants discuss Maxwell's appointment. *Opening Brief at* 43-44. Maxwell's appointment is the exception that proves the rule, as he was appointed Lieutenant Governor only *after* the People elected him to that office. Maxwell simply filled the office *to which he was elected*, then vacant, for the few months between his election and the normal date he would have taken office. This hardly supports the notion that someone not elected Lieutenant Governor by the People should be permitted to occupy that office contrary to all prior practice and legal authority.

While the State is correct when it says that "construction of a statute should avoid unreasonable or absurd results." *Respondents' Brief* at 41, *citing Aquila Foreign Qualifications Corp. v. Director of Revenue*, 362 S.W.3d 1, 4 (Mo. 2012), an absurd result would only result from an adoption of the State's construction of Section 105.030.

Section 105.030 states: "Whenever any vacancy, caused in any manner or by any means whatsoever, occurs or exists in any state or county office originally filled by election of the people, *other than in the offices of lieutenant governor*, state senator or representative, sheriff, or recorder of deeds in the city of St. Louis, the vacancy shall be filled by appointment by the governor ..." (emphasis added).

The State argues that because the General Assembly expressly legislated in Section 105.030 that a vacancy in the office of Lieutenant Governor is not a vacancy that shall be filled by appointment by the Governor, but did not say who, *if anyone*, is to fill that vacancy, then the Governor shall fill the vacancy. Stated otherwise, the State argues that the General Assembly's decision that the Governor does not fill the vacancy means that the Governor fills the vacancy.

This is an "unreasonable or absurd" result. The State's interpretation should be rejected.

C. The State's interpretation could result in a person becoming Governor without receiving the vote of the People or the approval of the People's elected representatives.

If the State's interpretation of Article IV, Section 4 prevails and Governor Parson leaves office before his term expires, then Kehoe will become Governor. Our Governor is the person vested by our State's Constitution with "the supreme executive power." Article IV, Section 1, Missouri Constitution. Kehoe would have attained the supreme power of Missouri's highest elected office without ever facing the People, receiving Their vote, or even receiving the approval of the People's elected representatives.

Short of a coup or an invasion, it is hard to imagine a less democratic way for a person to become our State's chief executive.

If, however, the office of the Lieutenant Governor remains vacant after being vacated, the president *pro tempore* of the senate and the speaker of the house, respectively, will be the next in line to succeed to the governorship. Article IV, Section 11(a), Missouri Constitution.

While neither the president pro tempore of the senate nor the speaker of the house are elected by the People, they at least obtain their leadership positions by winning the vote of a majority of the People's elected representatives in the Senate and House, respectively, which at least provides a measure of indirect democratic election. Moreover, because vacant senate and house seats can only be filled through special elections, Article III, Section 14, Missouri Constitution there will never be a situation where either of these leaders have obtained their positions other than by the direct vote of at least some of the People.

An interpretation of Article IV, Section 4, such as that pushed by the State, that could result in a person becoming Governor without the vote of the People, either directly by being elected Governor or Lieutenant Governor or indirectly through the People's elected representatives, should be avoided. The State, however, would enable such a situation. Although not literally absurd, such a result would be contrary to the norms of democracy and representative

government up on which our country and this State are founded, and the avoidance of such a situation presents a strong, additional ground to reverse the judgment below.

In summary, the State assumes without authority that the phrase "unless otherwise provided by law" modifies how vacancies are *filled*. While the State's interpretation could be reasonable, standing alone, it is only one of several such reasonable interpretation. The State's interpretation should be rejected, however, because it is inconsistent with prior interpretations of law by this Court, is inconsistent with the presumption that the General Assembly adopts this Court's prior interpretations when it reenacts a law, is inconsistent with the history of the State of Missouri showing that the office of Lieutenant Governor has regularly and frequently been left vacant, is inconsistent with the history of the United States showing that the analogous position of Vice President was regularly and frequently left vacant, and is inconsistent with the doctrine that statutory interpretations should above results that are unreasonable or absurd. The State's interpretation, and its argument, should therefore be rejected.

II. The State's contention that appellants seek an advisory ignores the standard of review and the record on appeal, and relies on inadmissible hearsay reports that were never presented to the trial court and that would, in any case, be wholly irrelevant and immaterial in considering a motion to dismiss.

A. An action for declaratory judgment does not seek an advisory opinion if the plaintiff presents a judiciable controversy.

The State contends that appellants "sought only a quintessential advisory opinion," and that, therefore, the case was properly dismissed.

The State does not analyze what makes the requested declaration advisory, although it suggests a declaration is advisory if the court could not force a defendant to comply with its declaration. Thus, because the court below could not order Kehoe removed as Lieutenant Governor except through a separate *quo warranto* action, the State characterizes the declaratory judgment as advisory.

Declaratory judgments are authorized by statute: "The circuit courts of this state, within their respective jurisdictions shall have power to declare rights, status, and other legal relations *whether or not further relief is or could be claimed*" (emphasis added). Missouri allows declaratory judgments, suggesting that declarations are not necessarily advisory. Section 527.010, RSMo.

Where a justiciable controversy exists, a request for declaratory relief is not a request for an advisory opinion. "In the context of a declaratory judgment action, a justiciable controversy exists where the plaintiff has a legally protectible interest at stake, a substantial controversy exists between parties with genuinely adverse interests, and that controversy is ripe for judicial determination. In other words, justiciability requires that the plaintiff's claim is ripe and that the plaintiff has standing to bring the underlying claim." *Mercy Hospitals East Communities v. Missouri Health Facilities Review Comm*ittee, 362 S.W.3d 415, 417-418 (Mo. 2012) (internal citations, brackets, and quotations omitted); *see also Opening Brief* at 10-13.

In its brief, the State ignores Section 527.010 and the requirement of "a justiciable controversy." Instead, the State quotes *Missouri Soybean Association v. Missouri Clean Water Commission*, 102 S.W.3d 10, 26 (Mo. 2003), albeit out of context, and contends that because the circuit court purportedly would have no power to enforce its declaratory judgment against defendants, its declaration must be purely advisory. *Respondents' Brief* at 27.

The State is mistaken. First, the quote on which the State relies — "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" — cannot be properly understood without considering the immediately preceding sentence: "Yet, what useful purpose could a declaratory judgment serve here since the EPA has already accepted and modified Missouri's 303(d) list and the federal courts have already rejected a challenge to the EPA's listing?" *Missouri Soybean*, 102 S.W.3d at 26.

Thus, the quote is about whether a claim is ripe, and thus justiciable, and not about whether an advisory opinion was sought. Here, ripeness is not at issue. *Opening Brief* at 12-13. Thus, the quoted language from *Missouri Soybean* is inapposite.

A declaratory judgment does not become advisory merely because a defendant may decide to disobey the judgment. "Inherent in the court's power to enter a declaratory judgment, however, is the power of the court to enforce the judgment through other forms of relief where a party acts contrary to a court's declaratory judgment." *Taylor v. State*, 247 S.W.3d 546, 549 (Mo. 2008). Civil contempt, for example, would be available to enforce the circuit court's declaratory judgment should the defendants choose to disobey it.

Thus, the fact that the circuit court could not remove Kehoe as Lieutenant Governor outside of a *quo warranto* action does not mean the court is toothless and its declaration merely advisory. To the contrary, given the ripe and real nature of the controversy, this is an appropriate case for declaratory relief.

B. The State ignores the applicable standard of review from orders granting motions to dismiss and improperly relies on inadmissible assertions and hearsay that was not part of the record in the trial court and is not part of the record on appeal.

The law does not support the State's position. The standard of review does not support the State's reliance on purported facts, since facts are irrelevant on a motion to dismiss. The record does not support the State's position because the State continually and consistently rely on "facts" from outside the record, as contained in news reports about the argument in the case and the reported views of former Governors about the issues in the case. The State relies on all of this improper material in developing its contention that appellants "deliberately abandoned their request for any legally binding relief." *Respondents' Brief* at 23.

The State is gravely mistaken. Contrary to the State's assertions, beginning with their petition, and continuing through the hearing on the motion to dismiss and in post-hearing filings, appellants have consistently pursued a judgment declaring that, "Governor Parson is without legal authority to appoint a Lieutenant Governor." [Appeal Doc. 2 (petition)]. What appellants abandoned, once the motion to dismiss was filed, was their request for *injunctive relief*.

Appellants concluded that the State was correct in stating that an injunction was not available. The request for a declaratory judgment was never abandoned.

When the State moved to dismiss the petition, appellants responded, stating they were requesting "prospective relief in the form of a declaration that Gov. Parson's purported appointment of Kehoe as lieutenant governor was unauthorized." [Appeal Doc. 4].

Appellants' proposed order to deny the State's motion to dismiss, filed the day after argument on the motion, asserted, through the putative mouth of the circuit court: "Because plaintiffs are no longer requesting injunctive relief, this Order does not address whether plaintiffs are entitled to that relief. The Court does, however, order plaintiffs to file an amended petition within five days of the date of this Order removing their request for injunctive relief, consistent with their representations to the Court." [Appeal Doc. 8 at fn. 1].

At page 5 of their proposed order, appellants asserted: "Here, because plaintiffs have standing and no one contends that their petition is not ripe, a justiciable controversy exists. Thus, plaintiffs are not simply seeking an advisory opinion, as defendants contend, and are entitled to request a declaratory judgment." [Appeal Doc. 8 at 5].

Appellants' opening brief here stated in the first paragraph of the argument: "Appellants filed a petition for injunctive and declaratory relief.

Concluding that injunctive relief was also unavailable, appellants at the hearing on the motion to dismiss only requested declaratory relief." *Brief* at 9.

The State's argument is an example of the old adage that, "If the law is against you, argue the facts; if the facts are against you, argue the law; and if they both are against you, pound the table and attack your opponent." *United States v. Griffin*, 84 F.3d 912, 927 (7th Cir. 1996). Here, the State pounds the table and attacks appellants by citing news articles that are not part of the record on appeal — and misquoting the articles to boot — to contend that appellants had abandoned their claims.[2]

The State fails to recognize one consequence of its insistence that supposed in-court statements unsupported by the record on appeal are determinative of any issue on appeal. That is, if these statements were material, the judgment must be reversed and remanded to develop a record. Here the record on appeal does not include a transcript because the motion argument was not transcribed. The State says: "Because the circuit court's court reporter was unavailable that day, no transcript of the hearing on the oral argument exists." *Response* at 19.[3]

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[2] The State also goes outside of the record to insert the purported opinions of former Governors into the appeal.

[3] More likely, the argument was not transcribed because a motion to dismiss tests the sufficiency of the petition, and thus a transcript would be superfluous.

A situation such as this, where a party is relying on untranscribed purported statements in court, can be handled in one of two ways. First, the Court can disregard the State's contentions about off-the-record statements because the State could have requested that the argument be on the record but did not. "If the parties, their attorneys, or the trial court desired to have proceedings that took place 'off the record' take place 'on the record,' it was their obligation to so request at the time the hearing occurred. Parties cannot acquiesce, by silence or otherwise, to an informal handling of a matter at trial without a record and then seek on appeal to have the appellate court determine the sufficiency of the evidence when nothing was preserved for review." *Potter v. Potter*, 90 S.W.3d 517, 523 (Mo. App. 2002).

Alternatively, the court could reverse the judgment and remand for a new hearing. "In cases where there is an incomplete record on appeal because no record was made of the trial court proceeding, we must reverse the judgment of the trial court and remand so that a proper record can be made." *A.L.C. v. D.A.L.*, 421 S.W.3d 569, 570 (Mo. App. 2014), see also *Silman v. Director of Revenue*, 914 S.W.2d 832 (Mo. App. 1996) ("Nonexistence of the transcript of the trial precludes appellate review and requires that the judgment of the trial court be reversed and remanded to permit the parties to try the case with a proper record").

The Court should hold that the petition for declaratory relief did not seek an advisory opinion. A party's threat to disregard an adverse declaratory judgment should place that party in peril. It should not be brandished as ground for asserting that the court lacks jurisdiction to enter the judgment.

III. The *de facto* doctrine highlights the binding impact of a declaration that Governor Parson's appointment of Kehoe as Lieutenant Governor was unauthorized.

As an alternative to its contention that the petition for declaratory relief really seeks an advisory opinion, the State does an about-face and contends that the petition is really an unauthorized action in *quo warranto*. According to the State: "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." *Respondents' Brief* at 29.

This *quo warranto* argument disregards what is actually written in the petition. Instead, the State construes the petition in a way that favors its position. This contradicts the standard of review: "When this Court reviews the dismissal of a petition for failure to state a claim, the facts contained in the petition are treated as true and they are construed liberally in favor of the plaintiffs." *Lynch v. Lynch*, 260 S.W.3d 834, 836 (Mo. 2008).

Appellants do not seek to remove a *de facto* Lieutenant Governor through a *quo warranto* action; they seek a declaration that Governor Parson had no power to appoint a Lieutenant Governor. As appellants explained in their opening brief, "appellants did not file a *quo warranto* action. Appellants filed a petition for injunctive and declaratory relief. Concluding that injunctive relief was also unavailable, appellants at the hearing on the motion to dismiss only requested declaratory relief." *Brief* at 9.

The State's reliance on the *de facto* officer doctrine not only misreads the petition, it also attempt to use the doctrine in a context in which it does not apply. The doctrine does not exist to protect an usurper's "right" to the office he occupies; it exists to protect the rights of the public and other parties in their dealings with government officials, legitimate or otherwise:

> 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*. The doctrine is founded on the societal need for stability arising from confidence in the acts of government where there is an issue as to legal qualification of a person holding office.

Benne v. ABB Power T&D Company, 106 S.W.3d 595, 599 (Mo. App. 2003) (emphasis added).

The *de facto* doctrine applied in *Benne* because the issue there was whether a public officer's actions was valid as to third persons. *Id.* In that context, the court stated that, "the proper method of challenging the constitutional validity of an officer's service is through a *quo warranto* action." *Id.* at 598. Here, appellants do not challenge the validity of any action taken by Kehoe as *de facto* Lieutenant Governor. The doctrine is therefore irrelevant.

The fact that Kehoe is currently acting as Lieutenant Governor does, however, highlight the justiciability and importance of a declaratory judgment determining whether Governor Parson's appointment of Kehoe to that office was unauthorized under Missouri law. "An officer '*de facto*' holds office by some color of right or title, while a mere 'usurper' or 'intruder' intrudes on an office and assumes to exercise its functions without legal title or color of right thereto." *Id.* at 599. Thus, if the Court declares that Governor Parson's appointment was unauthorized, Kehoe becomes a usurper — and from that point forward, the public and third parties will be unable to rely on any action that he may take as the court-determined office usurper.

Moreover, once the court determines that Kehoe is a usurper, the Attorney General will become statutorily obligated to file a *quo warranto* action. Section

531.010, RSMo., states: "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, ***shall*** exhibit to the circuit court, or other court having concurrent jurisdiction therewith in civil cases, an information in the nature of a quo warranto" (emphasis added).

The State contends that the Attorney General would not be obliged to pursue *quo warranto*, but that contention relies on the State literally replacing "shall" with "may" in Section 531.010, which the State misquotes in its brief as follows:

> 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.

Respondents' Brief at 31 (emphasis added; emphasis in original omitted).

Thus, the declaratory judgment sought by appellants would have real world impacts as a judgment, and would not be a mere advisory opinion. These impacts would include discrediting any actions taken by Kehoe as a declared usurper and requiring the Attorney General to act to remove Kehoe from his usurped office.

IV. The State's contention that Kehoe can only be removed through impeachment is irrelevant and contrary to the plain language of Article VII, Section 1 of the Missouri Constitution.

The State contends that the only way to remove an appointed Lieutenant Governor from office is through impeachment. Because appellants are not seeking a judgment of ouster, this contention is irrelevant. Even if it were relevant, the State is incorrect.

Missouri Constitution Article VII, Section 1 states: "all elective executive officials of the state … shall be liable to impeachment."

The State defines "elective" as "appointed, filled, bestowed, or passing, *by election*." *Respondents' Brief* at 32 (emphasis added). Appellants agree. The State, however, confuses "elective official" with "elective office," and contends that because Lieutenant Governor is an "elective office," Kehoe must therefore be an elective official. *Id*. at 32.

Article VII, Section 1 refers to *elective officials*. It does not reference *elective offices*. The plain language of the Section means, *all executive officials filling their office* ***by election*** *shall be liable to impeachment*. Here, Kehoe is not occupying the office of the Lieutenant Governor "by election." He was purportedly appointed. Therefore, Article VII, Section 1 by its own terms does not apply.

V. The State's standing arguments are not supported by law.

The State asserts numerous arguments for why it believes appellants lack standing to bring this action. The State's arguments are not supported by the law. The State also fails in any material respect to respond to appellants' arguments in the opening brief.

First, the State argues that appellants lack standing because appellants supposedly abandoned their request for any binding relief. *Respondents' Brief* at 54. The premise is false, as argued at length throughout this reply, so the argument fails.

Second, the State argues that Darrell Cope lacks taxpayer standing because: 1) Cope did not seek an injunction to block the expenditure of funds, which the State asserts is "the only relief that is available to a taxpayer in this context," *Id.* at 56*;* and 2) taxpayer standing is not available in the *quo warranto* context. *Id.*

The State has not cited a single case holding that taxpayers only have standing to block payment of expenditures. That is because there are none. Cope did not purport to file a *quo warranto* action, so whether a taxpayer has standing to bring such an action is inapposite.

Third, the State argues that the Missouri Democratic Party does not have competitive standing because the "alleged injuries were too remote and

speculative to support standing." This argument ignores the standard of review. "The circuit court was required to accept these allegations as true and liberally grant the Party all reasonable inferences therefrom." *Brief* at 21, citing *Duggan v. Pulitzer Publishing Company*, 913 S.W.2d 807, 809-810 (Mo. App. 1995). The State would have the Court reject the allegations in the petition and give the State the benefit of the inferences. The State does not explain why the standard of review should be reversed.

The rest of the State's arguments against "competitive" standing were addressed in the opening brief. *Brief* at 19-22.

The State argues the Missouri Democratic Party does not have associational standing. *Respondents' Brief* at 59. The State's arguments were mostly addressed in the opening brief. *Brief* at 23-29. The State now asks that the Court require organizations asserting associational standing to identify in their petition at least one member. *Respondents' Brief* at 60. The State asserts that "this Court has apparently never addressed the question" of whether organizations must identify a member to claim associational standing.

This Court adopted a three-part test to determine associational standing. That test does not include identifying individual members. *Brief* at 23, citing *Missouri Bankers Association v. Director of the Missouri Division of Credit Unions*, 126 S.W.3d 360 (Mo. 2003); see also *Missouri Outdoor Advertising*

Association v. Missouri State Highways & Transportation Commission, 826 S.W.2d 342, 344 (Mo. 1992). The State never mentions the Court's associational standing test or makes any attempt to analyze the test. The State offers no reason why the Court should add more elements to a test consistently and satisfactorily used by Missouri courts since 1992. The State never explains why it now believes that listing organizational members would improve the existing associational standing test.

The law as it exists is contrary to the State's position. The State finds this inconvenient. The State's *ad hoc* attempt to change established laws it finds inconvenient should be rejected.

CONCLUSION

The judgment should be reversed and the case remanded with instructions to the circuit court to enter its judgment declaring that Governor Parson was not authorized to appoint Mike Kehoe — or anyone else — as Lieutenant Governor of the State of Missouri.

Respectfully submitted,

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CERTIFICATES

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

- This brief complies with the limitations contained in Rule 84.06(b).
- The brief contains 7,030 based on the word count function in Google Documents, not including those portions of the brief permitted to be excluded under Rule 84.06(b).
- The electronic PDF version of this brief filed with the court has been scanned for viruses and was determined to be virus-free.
- Copies of this brief were served on all counsel of record through the court's electronic filing system on October 9, 2018.

/s/ Matt Vianello