SC97307

IN THE SUPREME COURT OF MISSOURI

LAWRENCE G. REBMAN,

Respondent,

v.

MIKE PARSON, et al.,

Appellants.

From the Circuit Court of Cole County, Missouri
The Honorable Jon E. Beetem, Judge

APPELLANTS' OPENING BRIEF

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JURISDICTION

Jurisdiction lies with this court under Article V, Section 3 of the Missouri constitution because this direct appeal is about the constitutionality of a state appropriations statute. *Schweich v. Nixon*, 408 S.W.3d 769, 773 (Mo. 2013) (citing *Shipley v. Cates*, 200 S.W.3d 529, 534 (Mo. 2006); *State v. Planned Parenthood of Kan. and Mid–Mo.*, 37 S.W.3d 222 (Mo. 2001)).

Below, the Circuit Court of Cole County invalidated part of the recent appropriations bill for the Department of Labor and Industrial Relations, HB 2007 (2018) (App. 22, 38).

Appellate jurisdiction thus is proper in this Court to review the circuit court's final judgment partially invalidating the appropriations statute. RSMo. § 512.020(5).

INTRODUCTION

This case is about a state appropriations bill that reduced funding for administrative law judges in the Missouri Department of Labor and Industrial Relations. The appropriations statute gave the department less money than the department needs to employ its 28 preexisting administrative law judges at last year's salaries. It funded 27 administrative law judges, not 28.

The appropriations statute also made clear which categories of administrative law judges the legislature would fund. The statute appropriated funds to pay administrative law judges appointed on or before January 1, 2012 and to pay administrative law judges appointed on or after January 1, 2015. But the legislature did not fund administrative law judges appointed *between* January 1, 2012 and January 1, 2015.

Under this statute, the department lacks authority to pay any administrative law judge appointed between January 1, 2012 and January 1, 2015. The department thus ended Respondent Lawrence G. Rebman's position, as he had taken office during this time.

In response, Mr. Rebman sued, asking the Circuit Court of Cole County to order the department to take money from the state treasury to pay him anyway. The circuit court then ordered the department to pay Mr. Rebman from the funds that the legislature had appropriated to pay the other administrative law judges. The circuit court held that the appropriations

statute conflicted with the separation of powers, Mo. Const. art. II, § 1 (App. 23); *id*. art. IV, § 19 (App. 28); the guarantee of equal treatment, Mo. Const. art. I, sec. 2 (App. 22); the prohibition against special legislation, Mo. Const. art. III, § 40(30) (App. 25); and Section 287.610 RSMo, which the circuit court held prohibits the removal of administrative law judges without cause, App. 31-32. D14 p.3; App. 3.

The department appeals this order because no court can order an executive department to draw money from the treasury for a purpose that the legislature has not appropriated. The Missouri Constitution grants the legislature plenary authority over appropriations and the funding of state offices, including the authority to fund or eliminate positions for administrative law judges. *Herschel v. Nixon*, 332 S.W.3d 129, 137 (Mo. Ct. App. 2010). This appropriations power provides a salutary democratic check on executive personnel and policy decisions.

The legislature may thus fund or not fund any administrative law judge positions it pleases, and the legislature gave no reason for its decision to not fund positions appointed between January 1, 2012 and January 1, 2015. But if this court to were require a reason for the appropriations statute, the legislature likely considered Mr. Rebman's past actions as director of the department. His tenure gave rise to several allegations by two senior female department officials of sex and age discrimination, which resulted in

significant out-of-court settlements—costing the State 3.1 million dollars. App. 48, 51, 61. Mr. Rebman admitted at a hearing that these facts would preclude any member of the public from trusting him or hiring him in a legal position. Tr. 29-33. The department houses the Missouri Commission on Civil Rights, and the legislature could have acted well within its authority to end the perceived public scandal (and future financial risk) of retaining Mr. Rebman as a quasi-judicial officer within the same department.

Moreover, even if the statute were not constitutional, the circuit court's order to draw money from the state treasury remains improper because a permanent injunction may only issue to prevent irreparable injury. Mr. Rebman has sustained no irreparable harm because future money damages could repair Mr. Rebman's financial losses.

This Court thus should reverse the judgment below.

STATEMENT OF FACTS

I. The Department of Labor and Industrial Relations's duty is to protect employees and to safeguard the worker funds entrusted to its care.

In many ways, the state treasury is like a bank, where the owners of money can direct and limit how the bankers are to protect or release their money. A fund in the state treasury is like a bank account: a way of accounting for money in state government, allowing the agency to segregate money according to restrictions. Tr. 60. And an appropriation is like a check being

drawn to give permission to draw money from a bank account (permission to spend money specific to a division from a fund). Tr. 60. In state government, many types of funds exist in the state treasury for many purposes with many restrictions. A general fund has few restrictions; federal funds have federal restrictions from grant agreements or applications; and special revenue funds have state statutory limits on their collection or disbursement. Tr. 60.

Under the Governor, the Missouri Department of Labor and Industrial Relations houses many funded agencies that protect employees, including divisions in charge of unemployment compensation, worker's compensation, workers' safety, human rights, the State Board of Mediation, and the Labor and Industrial Relations Commission, among other functions. Tr. 46, 55. The Missouri Commission on Human Rights, for instance, enforces the Missouri Human Rights Act to protect employees who have been the victims of workplace discrimination. Tr. 46, 55. And the department's Division of Workers' Compensation collects reports of injury, and it acts as mediator or judge between employers and individuals who claim an injury. Tr. 24-25, 55.

Each year, the department files a budget request for appropriations for each division, and the Governor reviews and makes a recommendation on the request to the state house and senate committees. Tr. 56. The department does not draw money from a fund unless the legislature appropriates money to the fund that the division may withdraw. Tr. 61-62, 85.

If the department spends money from a state fund for a purpose that the legislature did not appropriate, it would violate the state constitution and statutes. And several practical consequences could follow. Tr. 64. First, the department could be subject to a legal audit. Tr. 61-62, 65. Second, the legislature could question the department in the next appropriation cycle and take the money away. Tr. 64-65. And third, officials might risk the bonds they post to cover any misappropriation of funds or illegal acts. Tr. 65-66.

The department's workers' compensation fund is a state special revenue fund numbered 0652 subject to appropriation. Tr. 61. Under Section 287.690-710, RSMo, the fund draws on a premium tax on workers' compensation policies. Tr. 62. The legislature usually appropriates the workers' compensation fund with money to cover division staff, administrative law judges, court reporters, and docket clerks, among other expenses. Tr. 62-63, 79-80. The department has a duty to safeguard this fund under Section 287.710.5, RSMo. App. 35-36; Tr. 61.

By statute, all salaries for employees of the workers' compensation division must come from the workers' compensation fund. Section 287.640.1, RSMo provides that "All salaries, expenses and costs under this chapter shall be paid monthly out of the state treasury from the fund for the support of the division of workers' compensation of the department of labor and industrial relations." App. 34. Under Section 287.800, RSMo, this law is strictly

construed. App. 37. The department thus has never paid, and could not lawfully pay, administrative law judges from another fund. Tr. 61-63.

II. As department director, in the past Mr. Rebman removed administrative law judges for lack of funds.

The legislature has defunded administrative law judge offices before in annual appropriations bills. Tr. 26. In 2009, the plaintiff-respondent here, Mr. Rebman served as the Director of the Department of Labor and Industrial Relations. Tr. 40. That year, the legislature eliminated five administrative law judge positions because Mr. Rebman had asked the legislature in his budget testimony to make five cuts. Tr. 41-42.

The legislature left it to him to decide whom to cut, and Mr. Rebman, a Democrat, decided to fire only administrative law judges appointed by a Republican governor, rather than cut positions based on total civil service seniority or other non-partisan criteria. Tr. 26-27; 48-49. Some of the fired administrative law judges then sued him. Tr. 27.

In depositions, Mr. Rebman defended cutting these administrative law judge positions, citing the legislature's plenary authority to abolish state offices. He testified that "administrative law judges, like other State employees, are subject to appropriation . . . [Appropriation is one of] the three mechanisms by which an administrative law judge may be removed." Tr. 43. And, when asked whether "the Governor and the General Assembly [may]

remove [administrative law judges] from their appointments through the appropriations process in an arbitrary way that is not based on any evidence or based on any study or analysis?" he answered that "The legislature can do what it wants." Tr. 43-44.

Mr. Rebman also testified that administrative law judges have no for-cause removal protection from budget cuts. Tr. 44. He said that "administrative law judges in your division" are not "statutorily-protected" "from being removed from the budget." Tr. 44. And he argued that, if he had not cut these administrative law judges or if the court enjoined the law, the department would have had to lay off other employees. Tr. 44.

He also testified that when he decided which administrative law judges to cut, he made no analysis of "performance or conduct or productivity." Tr. 44. He could have fired people according to length of service in state government rather than administrative law judge service, which is how the department had made cuts in the past. Tr. 44-45. But he chose to use length of administrative law judge service rather than state service to protect a specific chief administrative law judge. Tr. 45-46. And the method he chose just so happened to eliminate administrative law judges appointed by the previous Governor, who was of a different political party. Tr. 45-46.

III. In *Herschel v. Nixon*, the Court of Appeals upheld Mr. Rebman's termination of administrative law judges because the legislature has plenary authority to defund positions and statutory for-cause removal procedures recognize this appropriations authority.

The circuit court enjoined Mr. Rebman's termination of the administrative law judges.

But on appeal in *Herschel v. Nixon*, 332 S.W.3d 129, 137 (Mo. Ct. App. 2010), the Court of Appeals upheld the budget cuts. It held that the legislature has plenary authority to defund administrative law judge positions. The "legislature 'may, of course, attempt to control the executive branch ... by the power of appropriation.'" *Id.* (citing *Mo. Coal. for Env't v. Joint Comm. on Admin. Rules*, 948 S.W.2d 125, 134 (Mo. 1997)). "[A]bsent constitutional inhibition, there is 'no doubt of the power of the legislature to refuse to make an appropriation for the payment of the salary and expenses of any public officer,'" *id.* (quoting *State ex rel. Tolerton v. Gordon*, 236 Mo. 142, 139 S.W. 403, 407 (1911)), or of "'the power of the legislature which creates an office to abolish it or to change it,'" *id.* (quoting *State ex rel. Voss v. Davis*, 418 S.W.2d 163, 168 (Mo.1967)). And, as a matter of statutory interpretation, the Court of Appeals held that the statutory for-cause removal procedures in Section 287.610 are not the only way to remove administrative law judges: by their plain test and legislative amendments, they do not preclude removing administrative law judges for lack of appropriated funds. *Id.* at 133-38.

Since *Herschel*, the legislature has relied on the Court of Appeals's decision periodically to defund more administrative law judge positions. D14 p.3; App. 3; App. 47; Tr. 69.

IV. As director, Mr. Rebman's conduct separately led to allegations of sex and age discrimination, which the State paid millions of dollars to settle.

During the four-plus years that he served as department director but before he became an administrative law judge, Mr. Rebman's conduct also led to litigation under the Missouri Human Rights Act. D14 p.3; App. 3; Tr. 47. A senior female department official, Gracia Backer, accused him of creating a hostile work environment and of discriminating against older, female employees. Tr. 47, 87-90.

Two weeks later, Ms. Backer was discharged. That same day, the Governor appointed Mr. Rebman to be an administrative law judge in the department's Division of Workers' Compensation. D14 p.1; App. 1.

Following his appointment, Cindy Guthrie—another older, female state employee whom Mr. Rebman fired—joined Ms. Backer in her suit. They both alleged that Mr. Rebman committed a course of discriminatory misconduct against them for years.

Their suits received widespread media coverage, in part because Ms. Backer is a fellow Democrat who had been the first woman to serve as house party floor leader. Jason Hancock & Steven Kraske, *Ex-Missouri House leader*

wins $2 million settlement in age, sex discrimination case, Kansas City Star (Dec. 12, 2016). And the lawsuits consumed staff time and state resources.

Eventually, the Attorney General's Office opted to settle the suits without admitting liability rather than risk greater financial exposure at trial. App. 48 (Defendant's Exhibit 26); D14 p.3; App. 3; Tr. 47. To compensate Ms. Backer, State of Missouri paid her $2 million. App. 61: Tr. 47. And to settle Ms. Guthrie's suit, the State paid her $1.1 million. App. 51; Tr. 47. The State agreed to these settlements—a combined $3.1 million—in December 2016, App. 65-66, and in September 2017, App. 57-59. And the department had to pay them from its own funds. App. 48; Tr. 47, 75.

Mr. Rebman and the other defendants did not admit liability, and he did not pay any of the litigation costs or the settlement amounts charged to the state. Tr. 47.

V. This year, the legislature did not appropriate funds for judges appointed between January 1, 2012 and January 1, 2015.

The next fiscal year, the department asked the legislature to increase funding for administrative law judges. D3 p. 2-3; D14 p.2; App. 2; Tr. 12, 68. For FY 2019, the present fiscal year, the department asked to keep 28 core full-time equivalent positions and to restore eight administrative law judges cut the prior year, for 36 total administrative law judges. D14 p.2; App. 2; App. 47 (Defendant's Exhibit 6); Tr. 68. The department also asked for two extra chief

administrative law judges, who receive an extra $5000 per year, for seven total chief administrative law judges. App. 47; Tr. 69.

Instead, the General Assembly appropriated less money, providing for one less administrative law judge salary than the year before. D14 p.2; App. 2; Tr. 14, 68. The appropriation also declined more funds for chief administrative law judge positions, preventing the agency from elevating two administrative law judges to chief administrative law judges. App. 47; Tr. 68-69. More detail about the differences between the department's budget requests and the legislature's appropriations bills are in the appendix, which includes a chart showing the various headcount changes requested and made in the department for the past four fiscal years. App. 47; D14 p.3; App. 3; Tr. 59-60, 68-70.

The appropriations bill also specified which administrative law judge positions that it would fund. D14 p.2; App. 2. Administrative law judges make $122,762 in salary per year. Tr. 18, 68. Under Section 7.840 of HB2007, the appropriations bill for Fiscal Year 2019, the legislature appropriated $2,480,240 to the department of Labor and Industrial Relations "For the purpose of funding Administrative Law Judges appointed on or prior to January 1, 2012." App. 22. It also appropriated $859,334 "For the purpose of funding Administrative Law Judges appointed on or after January 1, 2015." App. 22. One less full-time equivalent position was funded.

The legislature thus did not fund administrative law judges appointed between January 1, 2012 and January 1, 2015. D14 p.2; App. 2. Of the division's 28 administrative law judges, 20 took office before January 1, 2012 and seven took office after January 1, 2015. The department ended Mr. Rebman's administrative law judge position because he was appointed between January 1, 2012 and January 1, 2015. D14 p.2; App. 2; Tr. 9, 68, 71; D6 p. 1; D14 p.2-3; App. 2-3.

VI. Now an administrative law judge, Mr. Rebman sued, claiming that the legislature cannot defund administrative law judge positions appointed between January 1, 2012 and January 1, 2015.

Mr. Rebman then sued the Governor and several other state officials, alleging that Section 7.840 of the appropriations bill was unlawful in four main respects. App. 22; D1 p. 1-3; D14 p.1; App. 1. Mr. Rebman claimed that the appropriations statute violates three state constitutional provisions:

- the separation of powers, Mo. Const. art. II, § 1 (App. 23); *id*. art. IV, § 19 (App. 28);
- and the guarantee of equal treatment, Mo. Const. art. I, sec. 2 (App. 22);
- and the prohibition against special legislation, Mo. Const. art. III, § 40(30) (App. 25).

D1 p. 10-18. And he asserted that by statute the department could only remove him for cause but that he had received no votes of "no confidence" from the

bipartisan administrative law judge review committee that evaluates administrative law judge performance under § 287.610 RSMo. (App. 31-32). D14 p.2; App. 2; Tr. 48.

The circuit court temporarily enjoined the law because Mr. Rebman complained that he would suffer the alleged irreparable harm of (1) a backlog in his administrative law judge docket, (2) lost income, and (3) the inconvenience of relying on COBRA health insurance coverage. D1 p.7; D7 p.1-4; D8 p.1.

The circuit court then held an expedited hearing on the merits. D1 p.8; D14 p.1; App. 1.

B. Before the hearing, the defendant state officials submitted written suggestions opposing the injunction, arguing that

- the Legislature has plenary authority to defund administrative law judges and the decision here did not violate any other constitutional prohibition;
- that Mr. Rebman did not suffer any irreparable injury justifying an injunction, as opposed to possible future money damages; and he also cannot raise claims of possible delays for litigants before him as a judge;
- that the people have a strong public interest in enforcing duly enacted laws like the budget.

D11 p.1-21; Tr. 50-51; 102-105.

On the merits, the state officials explained that any injunction would violate the separation of powers. Any remedy ordered would require the department to spend money beyond its appropriations authority, and the department did not have enough funds to pay his salary from the pool for administrative law judges. Tr. 105, 108-09. An injunction ordering the department to pay him money thus would:

- exercise the power of appropriations properly belonging to the Legislature under article III, § 36,
- exercise the power of the executive to appoint and remove executive officials,
- order the executive to act beyond its statutory duty and constitutional powers by requiring it to appropriate and pay money that it does not have and that the Legislature has not appropriated, and
- interfere with and attempt to control an exercise of discretion by an executive department.

D11 p.8; Tr. 51, 98-99.

VII. The state officials explained that the legislature has plenary appropriations authority under *Herschel* and that this year's appropriations statute violates no constitutional provision.

The state officials also argued that this statute does not conflict with any other constitutional restriction.

First, under the equal rights clause, the state officials showed that, although the legislature gave no reason for its decision to not fund positions appointed between January 1, 2012 and January 1, 2015, the legislature may have considered Mr. Rebman's past actions as director of the department. And so, "under rational basis review, the law furthers the accomplishment of a legitimate interest—the protection of the public fisc and the promotion of propriety in quasi-judicial office." D11 p.11-13; Tr. 98-102.

Second, under the special law clause, the state officials argued that the budget act is not a special law. Rather than identifying a person by name who may not hold public office now or in the future. It creates open-ended classes that it funds and it abolishes an office that it does not fund. D11 p.13-16; Tr. 99-100, 110-111, 114-117.

But, the state officials argued, even if the legislature had to give a reason for the bill, its likely reason would pass scrutiny. The legislature did not state a reason for its decision but it is probable that the legislature considered Mr. Rebman's past actions as director of the department. And the legislature "may seek to protect its administrative apparatus from the appearance of

impropriety raised by quasi-judicial officers who have had to settle accusations of sex and age discrimination, as well as to protect state employees from the risk of age and sex discrimination and thus to protect state resources from future potential costly [Missouri Human Rights Act] litigation." D11 p.16-19; Tr. 100-102. As a result, this law would have served a general interest: the legislature would have had "strong interests in averting the fact or appearance of impropriety in quasi-judicial officials and in avoiding retaining officials whose conduct has led to large and costly settlements of alleged age and sex discrimination misconduct." D14 p.3; App. 3.

Nor, the state officials argued, does any statute require Mr. Rebman's reinstatement or forbid his discharge for lack of funds. Under *Herschel*, the State may fire administrative law judges "'based either on the individual performance of a particular [administrative law judge] or based on the General Assembly's appropriation of funds to the Division.'" D11 p.10 (quoting *Herschel*, 332 at 134); Tr. 102.

The state officials incorporated these arguments at the hearing, Tr. 50-52, 98-106, and in their answer, D13 p. 1-23, and they re-urged them in detailed proposed findings after the hearing. D12 p.1-51.

The state officials also provided evidence of the discrimination suits and settlements against Mr. Rebman. And the circuit court took judicial notice of the settlements, docket sheets, and key filings in the *Backer* and *Guthrie* suits.

The court admitted these public records into evidence not for the truth or falsity of the allegations but for the fact that the women had made the allegations. App. 48 (Defendant's Exhibit 26); Tr. 87-90.

VIII. Mr. Rebman conceded that the discrimination settlements would preclude the public from trusting him or hiring him in a legal position.

At the hearing, Mr. Rebman admitted that he fired the administrative law judges in *Herschel* because of budget cuts. And he admitted that he had testified in that case and prevailed on the ground that the legislature has plenary authority to defund administrative law judge positions. Tr. 43.

Mr. Rebman also agreed that administrative law judges are an important office visible to the public, housed within the same agency as the Missouri Commission on Human Rights. Tr. 36, 46. He agreed that administrative law judges should be impartial and the public should perceive administrative law judges to have integrity. Tr. 36-37. And he agreed that citizens have a right to judges who avoid the appearance of impropriety. Tr. 37.

But Mr. Rebman conceded that these settlements occurred. Tr. 29. To explain them, he asserted only that the cases "were settled without a hearing, and I didn't approve of any of the settlements, that was run by the Attorney General's office." Tr. 28.

He also admitted that the claim of retaliatory termination by Ms. Backer was "essentially indefensible since they fired Gracia Backer seven days after getting a letter saying . . . saying I was mistreating people based on age." Tr. 29-31.

And, because of the public's perception of the discrimination suits, Mr. Rebman admitted that the public would be unlikely to hire him now for any position in the private sector. Tr. 33.

Specifically, he conceded that he would be unlikely to be able to get another job because no one would hire him as a lawyer because of the allegations made against him in the discrimination suits and because he is suing the department for reinstatement. Tr. 33. He explained

> *Well, given the publicity of the previous cases, if you Google my name, it comes up as Larry Rebman did bad things and, you know, was fired from his position, so that is a problem finding another job.* Presumably I would look for a job in the workers' comp world, I think I have a very good reputation amongst the defendants and the claimants and that creates a conflict when I -- If I win this case and want to be a judge again, I would be conflicted out of cases. You know, there is the idea that who wants to hire somebody that is still wanting to keep their old job, presumably or possibly be a temporary job and you would be distracted by that

litigation, and it would create a conflict for that firm and so we are kind of in a catch 22 in trying to look for employment.

Tr. 33 (emphasis added).

Mr. Rebman thus asserted that, if the department cut his position, he would be unable to find any other work, he would lose his salary and fringe benefits, and that he would have to pay for his own COBRA health insurance. Tr. 30-31, 40. In his case-in-chief, he testified:

Q: And so if you were eventually re-instated, if you lost your job now and were eventually re-instated a year from now, two years from now, you would obviously be out the salary between now and then?

A. Correct.

Q. But you would also have a difficult time finding alternative employment and would have difficulty meeting your wife's medical needs. Is that correct?

A. Yes.

Tr. 33.

As more evidence of irreparable harm, Mr. Rebman also claimed that eliminating his position would cause irreparable harm to the department or the public by slowing work in the workers' compensation division. Tr. 35.

But Mr. Rebman also admitted that other judges would absorb his caseload, Tr. 34-35, and that he conceded that the department can cope with fewer administrative law judges. Administrative law judges often handle dockets in different locations, and from time to time dockets get transferred between adjudication offices. Tr. 41-43. New judges can take over cases from judges who left service, and court reporters sometimes travel, too. Tr. 37-38. He and other administrative law judges cover dockets for example when administrative law judges go on vacation, are sick, or their car needs service. Tr. 37.

IX. The department lacks appropriations for the purpose of paying Mr. Rebman to continue as an administrative law judge.

At the hearing, Mr. Rebman asked the court to order the department to pay him but he did not show where the department could find the money. Nor could he. The Department has no money that it may lawfully spend on his salary.

Federal Funds. The department holds federal funds as a part of its administrative funds, including unemployment insurance funds, division of labor standards funds, and a human rights commission fund. Tr. 66. These federal funds come from federal grants. Tr. 66. The grant agreements restrict the funds and the federal agencies provide guidance on how to use the funds. 42 U.S.C. Section 503 (App. 10); Tr. 66-67. Under the grant agreements or the

guidance, if the department spent federal funds on non-federal programs, the department would be in non-compliance, be written up in an audit, its costs could be disallowed, and it could have to repay funds from non-federal sources. Tr. 41, 66-67.

Federal funds make up 72-78% of administrative fund 0122 and get mixed with non-federal funds for costs of cross-department services. Tr. 67. If the department were to start to pull money from this administrative fund, and there were not enough state funds there, the department would start pulling federal funds. Tr. 68.

In pleadings, Mr. Rebman suggested that the department pay him from an administrative fund, which could be the fund mentioned in Section 7.800 of the appropriations statute. Tr. 71-72. But that fund does not have enough state money in it. Tr. 72. So if the department paid him from this fund, it would start pulling from federal grants of unemployment insurance money. Tr. 72. This would violate federal law. 42 U.S.C. § 503 (App. 10).

Administrative Funds. The department also has an administrative fund for the department that pays for general expenses like HR, legal services, IT, and so forth. Tr. 63-64. The department administrative fund 0122 is separate from the workers' compensation fund. Tr. 64. Redirecting this state money to Mr. Rebman would prevent using the funds for other staff and purpose for which the legislature appropriated them. Tr. 71-72. This impact

cannot be mitigated by not filling unfilled positions because not enough vacancies exist. Tr. 72.

Other Workers' Compensation Funds. Mr. Rebman also requested that the department pay him from line 7 of Section 7.840, which provides $4,745,599 in the workers' compensation fund 0652 for non-administrative law judge staff in the workers' compensation division. App. 22; Tr. 73-75. But the provision of $4 million in Line 7 pays for 116.25 other positions, including court reporters and docket clerks. Tr. 74. Drawing money from this fund would imperil these staff positions. So, too, would removing money for equipment and expenses for these functions. Tr. 84.

Other Administrative Law Judge Funds. Finally, Mr. Rebman asked the department to pay him from lines 12 and 16 of Section 7.840, which provide salaries for administrative law judges based on appointment dates. App. 22; Tr. 73-75. Both appropriations go to the workers' compensation fund 0652. *Id*. But the department cannot pay Mr. Rebman from lines 12 and 15, because appropriation authority exists for 27, not 28 administrative law judges. *Id*. At the prior salary rate, there is not enough for 28 administrative law judges at full salary for the full year. *Id*.

X. The circuit court enjoined the state appropriations statute and ordered the department to fund Mr. Rebman's administrative law judge position.

Given Mr. Rebman's role in *Herschel*, the circuit noted that the "irony was extensive." Tr. 120.

But, even though the legislature declined to appropriate funds to cover his office, the circuit court entered a permanent injunction against the department. D14 p.1; App. 1. It reversed the abolishment of Mr. Rebman's administrative law judge position and ordered the department to pay Mr. Rebman from the pool of funds that the legislature appropriated for the other administrative law judges' salaries.

Its opinion drew largely from the proposed opinion filed by Mr. Rebman and it rested on four main grounds.

A. First, the circuit court held that the appropriations statute violates the constitutional separation of powers under Mo. Const. art. II, § 1 (App. 23), *id*. art. IV, § 19 (App. 28). D14 p.4-5; App. 4-5.[1]

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[1] Article II, § 1 provides that

> The powers of government shall be divided into three distinct departments—the legislative, executive and judicial—each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers

The circuit court held that the legislature may not use its appropriations authority to displace executive authority over personnel decisions. D14 p.5; App. 5. "To be sure, the Legislature may control some operations of the Executive by withholding funding or FTEs [full-time equivalent positions] from particular departments for particular programs, projects, or positions." *Id.* (citing *State ex rel. Tolerton v. Gordon*, 139 S.W. 403, 410 (1911)). But the court held that "the Legislature may not dictate which specific employees the Executive must hire or fire." D14 p.5; App. 5. "By appropriating funds for all Workers' Compensation [administrative law judges] except [Mr. Rebman]—the only [administrative law judge] appointed between January 1, 2012 and January 1, 2015—the Legislature has attempted to force the Division of Workers' Compensation to fire a specific [administrative law judge] whom the legislature disfavors." *Id.*

> properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.

Mo. Const. art. II, § 1. Article IV, Section 19 provides that the "head of each department may select and remove all appointees in the department except as otherwise provided in this constitution, or by law." Mo. Const. art. IV, § 19.

And, although the statute reduced funding by one salary just as in *Herschel*, the circuit court asserted that the appropriation "does not reduce the number of allowed F.T.E.s from FY2018." D14 p.8; App. 8. In its view, this statute stands "in contrast to the reduction of 5 F.T.E.s expressly made in *Herschel*. 332 S.W.3d at 138. "In this sense, only the funding was eliminated, not the position." *Id*.

B. Second, the circuit court held that the appropriations statute conflicts with the guarantee of equal treatment, Mo. Const. art. I, sec. 2 (App. 22), because it fails rational-basis review. D14 p.5-6; App. 5-6. Article I, sec. 2. provides, "that all persons are created equal and are entitled to equal rights and opportunity under the law."

The circuit court held that because Mr. Rebman "is not a member of a suspect class and does not allege a violation of any fundamental right, the Equal Rights Clause is satisfied as long as it bears a reasonable relationship to a legitimate state purpose.'" D14 p.5; App. 5 (quoting *Glossip v. Missouri Dep't of Transp. & Highway Patrol Employees' Ret. Sys.*, 411 S.W.3d 796, 801 (Mo. 2013)).

But the circuit court held that defunding Mr. Rebman's position does not promote the state interests in promoting public integrity and protecting against the risk of paying future discrimination settlements, as the state had argued. D14 p.6; App. 6. The circuit court asserted that "the only evidence

presented at the preliminary injunction hearing was that [Mr. Rebman] denied the prior allegations made against him, that there was no admission of liability by the State, and that the Attorney General's Office decided to settle that case without [Mr. Rebman]'s approval." *Id*. "In these circumstances, speculation that the legislature believed [Mr. Rebman] posed 'a risk of future discrimination settlements' is not a rational basis for treating him differently from all other similarly situated workers' comp [administrative law judges]." *Id*.

C. Third, the circuit court held that the appropriations statute was a special law that conflicts with Mo. Const. art. III, § 40(30) (App. 25). D14 p.3-4; App. 3-4. It asserted that the appropriations statute rests on "a closed-ended characteristic based on historical fact and results in a class of one person whose salary is not funded." D14 p.4; App. 4 (citing *Tolerton v. Gordon*, 139 S.W. 403, 405 (1911)).

And the circuit court held that the legislature lacked a substantial justification for the appropriations statute. "The only justification proffered by [the state officials] in this case is that the Legislature singled out [Mr. Rebman] due to 'public perception' that he discriminated against former employees while he was the Director of [the department]." D14 p.4; App. 4. The state officials "have offered no evidence of public perception regarding the prior allegations against [Mr. Rebman]." *Id*. "Mere allegations of past wrongdoing—

especially when they have been expressly denied by [the state officials"] predecessors in office—are not substantial justification for enacting special legislation applying only to [Mr. Rebman]." *Id*. "More importantly, no evidence was offered to support that any subsequent claims have even been made during [Mr. Rebman]'s five (5) year tenure as an [administrative law judge]." *Id*.

D. Fourth, the circuit court held that removing any particular administrative law judge requires conflicts with the procedures for for-cause removal in Section 287.610 RSMo, which it believes is the sole method to remove an administrative law judge position. D14 p.6; App. 6.

The circuit court declined to rely on *Herschel* because "*Herschel* did not decide any issue involving special laws, separation of powers, or equal rights." D14 p.6; App. 6. "That decision concerned only a statutory challenge to an appropriation bill under § 287.610 RSMo." D14 p.6; App. 6. And circuit court held that the "Legislature's otherwise plenary authority over appropriations is nonetheless constrained by several provisions of the Missouri Constitution." D14 p.6-7; App. 6-7. "'Plenary' authority does not permit the General Assembly to enact special laws, or laws that invade the constitutional powers of the Executive branch, or laws that deprive Missourians of equal rights." D14 p.7; App. 7.

E. As a remedy, the circuit court held that "[e]quity demands" enjoining the state officials from removing Mr. Rebman. D14 p.7; App. 7. The circuit

court declared Section 7.840 of HB 2007 unconstitutional "to the extent it restricts the appropriation for the payment of [administrative law judge] salaries based on the date of their appointment." D14 p.7; App. 7. Citing *Herschel*, which held that "it is constitutionally permissible to eliminate an [administrative law judge] position by defunding it," the circuit court "sever[ed] only the 'appointed on or prior to January 1, 2012' and the 'appointed on or after January 1, 2015' language." D14 p.8; App. 8. "The remainder of the appropriations language remains in full force and effect." *Id*. The court also declared the statute "invalid only to the extent it purports to remove [Mr. Rebman] from his position for cause without following the procedures required under § 287.610 RSMo." *Id*.

The circuit court also reversed the department's decision to terminate Mr. Rebman's employment "because the decision was made in reliance on the severed language." *Id*. And the circuit court permanently enjoined the state from terminating his employment based on the severed language. *Id*. The court noted that the department would remain free otherwise to end any administrative law judge position "to not exceed its appropriation for administration, so long as the basis for the termination is otherwise constitutionally and legally permissible." *Id*.

The state officials now appeal this final judgment. D15 p. 1-2.

POINTS RELIED ON

I. The trial court erred in enjoining Mr. Rebman's termination and ordering payment of his salary because the legislature has plenary constitutional authority to defund administrative law judges, in that the appropriations power is a chief democratic check on executive personnel decisions and the court may not order the department to draw funds from the treasury without an appropriation.

The principal authorities are

- Mo. Const. art. IV, § 28 (App. 29);
- Mo. Const. art. III, § 36 (App. 24);
- *Herschel v. Nixon*, 332 S.W.3d 129 (Mo. Ct. App. 2010); and
- *State ex rel. Tolerton v. Gordon*, 236 Mo. 142, 139 S.W. 403, 407 (1911).

II. The trial court erred in enjoining Mr. Rebman's termination and ordering payment of his salary because the department's appropriations statute does not violate the right to equal protection in that the legislature had a rational basis to fire a person responsible for conduct that led to large sex and age discrimination settlements and the lower court clearly erred when it ignored or discounted evidence of this state interest.

The principal authorities are

- Mo. Const. art. I, § 2 (App. 22).

- *Glossip v. Missouri Dep't of Transp. & Highway Patrol Employees' Ret. Sys.*, 411 S.W.3d 796, 801 (Mo. 2013);
- *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993); and
- *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432,441–42 (1985).

III. The trial court erred in enjoining Mr. Rebman's termination and ordering payment of his salary because the appropriations law does not violate the prohibition against special laws in that it is a general, open-ended law subject only to rational-basis review and, even if it were a special law, the legislature had a substantial justification for the law in avoiding the appearance of impropriety in quasi-judicial officers and mitigating future financial risk and the lower court clearly erred when it ignored or discounted evidence of this state interest.

The principal authorities are

- Mo. Const. art. III, §40 (App. 25);
- *Herschel v. Nixon*, 332 S.W.3d 129 (Mo. Ct. App. 2010);
- *Alderson v. State*, 273 S.W.3d 533, 538 (Mo. 2009); and
- *State ex rel. Tolerton v. Gordon*, 236 Mo. 142, 139 S.W. 403, 407 (1911).

IV. The trial court erred in enjoining Mr. Rebman's termination and ordering payment of his salary because Section 287.610 does not limit the

department's ability to end administrative law judge positions in that the statute provides no private cause of action, Mr. Rebman failed to satisfy the standards or procedures for a writ under Section 536.150, and Section 287.610 recognizes the legislature's ability to remove administrative law judge positions through its appropriations authority.

The principal authorities are

- Section 287.610 RSMo (App. 31-32).
- *Herschel v. Nixon*, 332 S.W.3d 129 (Mo. Ct. App. 2010); and
- *Friends of Responsible Agric. v. Bennett*, 542 S.W.3d 345, 351 (Mo. Ct. App. 2017).

V. The trial court erred in enjoining Mr. Rebman's termination and ordering payment of his salary because the balancing of harms and the public interest do not support injunctive relief in that Mr. Rebman's job loss is not irreparable injury, the State suffered irreparable injury from retaining Mr. Rebman, his interests do not outweigh the interests of other administrative law judges, and the public interest supports enforcing democratically adopted statutes as written.

The principal authorities are

- *State ex rel. Dir. of Revenue v. Gabbert*, 925 S.W.2d 838, 839-40 (Mo. 1996);
- *Eberle v. State*, 779 S.W.2d 302, 304 (Mo. Ct. App. 1989);

- *Maryland v. King*, 567 U.S. 1301, 1303 (2012); and
- *Missouri State Med. Ass'n v. State*, 256 S.W.3d 85, 89 (Mo. 2008).

VI. The trial court erred in enjoining Mr. Rebman's termination and ordering payment of his salary because its remedy transgressed the separation of powers in that it ordered the expenditure of funds without identifying any fund that the legislature appropriated for this purpose.

The principal authorities are

- Mo. Const. art. IV, § 28 (App. 29);
- *Herschel v. Nixon*, 332 S.W.3d 129 (Mo. Ct. App. 2010);
- Section 287.640.1, RSMo (App. 34); and
- 42 U.S.C. Section 503 (App. 10).

STANDARD OF REVIEW

An injunction does not "issue as a matter of right" but as "an exercise of judicial discretion." *Eberle v. State*, 779 S.W.2d 302, 304 (Mo. Ct. App. 1989). "Injunction is a harsh remedy to be used sparingly and only in clear cases." *Id.* "It is the movant's obligation to justify the court's exercise of such an extraordinary remedy." *State ex rel. Dir. of Revenue v. Gabbert*, 925 S.W.2d 838, 839 (Mo. 1996).

Because an injunction is "an extraordinary and harsh remedy," it "should not be employed where there is an adequate remedy at law." *Farm Bureau Town & Country Ins. Co. of Missouri v. Angoff*, 909 S.W.2d 348, 354 (Mo. 1995). And, even if "a claim for injunctive relief is founded on violations of constitutional rights, there remains the necessity of showing irreparable injury." *Id.*

For a preliminary injunction or a stay of agency action to issue, the court balances four factors: "(1) the likelihood that the party seeking the stay will prevail on the merits; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *Gabbert*, 925 S.W.2d at 839-40 (quoting *Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm.,* 812 F.2d 288, 290 (6th Cir. 1987)). "[T]he party seeking a

stay must provide the court with evidence supporting each of these assertions." *Gabbert*, 925 S.W.2d at 840.

Although this Court does not appear to have directly addressed the standard for a permanent injunction, in general, the "standard for preliminary and permanent injunction [is] essentially the same, except for permanent injunction plaintiff must show actual success on the merits." *United States v. Green Acres Enterprises, Inc.*, 86 F.3d 130, 133 (8th Cir. 1996). Under this standard, even if the plaintiff has succeeded on the merits, the court still weighs the threat of irreparable harm to the movant, the balance between this harm and the harm to the other party if the injunction is granted, and the public interest before exercising discretion to grant an injunction. *Bank One, Utah v. Guttau*, 190 F.3d 844, 847 (8th Cir. 1999)

On the merits, Mr. Rebman faces an even higher burden here because he seeks to "thwart a state's presumptively reasonable democratic processes," and this Court must give "appropriate[] deferen[ce]" to the legislature. *1-800-411-Pain Referral Serv., LLC v. Otto*, 744 F.3d 1045, 1053-54 (8th Cir. 2014). And he must establish also that his "success on the merits and irreparable harm decidedly outweigh any potential harm to the other party or to the public interest," *Gabbert*, 925 S.W.2d at 839-40 (emphasis added).

Within this framework, the constitutional validity of a statute is a question of law subject to de novo review. *State ex rel. Sunshine Enters. of Mo.,*

Inc. v. Bd. of Adjustment of the City of St. Ann, 64 S.W.3d 310, 314 (Mo. banc 2002). But lawmakers' discretion in defining a class to which a law applies should be disturbed only when the created class is arbitrary, unreasonable, and unjust. *See Hawkins v. Smith*, 242 Mo. 688, 147 S.W. 1042, 1044 (1912). On appeal, all fact issues on which no specific findings are made will be considered as having been found in accordance with the result reached. Mo. Sup. Ct. R. 73.01. An appeals court reviews the decision for an abuse of discretion, which "occurs when the district court bases its decision on an erroneous application of the law or a clearly erroneous finding of fact." *Taylor Corp. v. Four Seasons Greetings, LLC*, 403 F.3d 958, 967 (8th Cir. 2005).

This Court also defers to the agency's interpretation of a statute if the agency's interpretation is reasonable and consistent with the statute. *Morton v. Missouri Air Conservation Comm'n*, 944 S.W.2d 231, 236 (Mo. Ct. App. 1997). The "interpretation and construction of a statute by an agency charged with its administration is entitled to great weight." *Mercy Hospitals East Communities v. Missouri Health Facilities Review Comm.*, 362 S.W.3d 415, 417 (Mo. 2012).

ARGUMENT

I. The trial court erred in enjoining Mr. Rebman's termination and ordering payment of his salary because the legislature has plenary constitutional authority to defund administrative law judges, in that the appropriations power is a chief democratic check on executive personnel decisions and the court may not order the department to draw funds from the treasury without an appropriation.

The legislature has plenary authority over appropriations and may use its power of the purse to check the Executive Branch.

A. Under Article IV, Section 28 of the state constitution, "No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law." Mo. Const. art. IV, § 28 (App. 29). Article III, Section 36 makes this requirement doubly clear: "All revenue collected and money received by the state shall go into the treasury and the general assembly shall have no power to divert the same or to permit the withdrawal of money from the treasury, except in pursuance of appropriations made by law." Mo. Const. art. III, § 36 (App. 24).

Under these sections, "the people prohibit the general assembly from enacting any law which would, directly or indirectly, permit the withdrawal of money from the treasury for any purpose other than one specified in an appropriation law." *State ex inf. Danforth v. Merrell*, 530 S.W.2d 209, 213 (Mo. 1975). Because the legislature "has the power of appropriation, it can grant or deny an appropriation, just as it can enact or refuse to enact a law; and the

only check on this power is public opinion." *Special Legislation Discriminating Against Specified Individuals and Groups*, 51 Yale L.J. 1358, 1366 (1942).

As the state constitution provides, "'the legislature has full power and control over the disposition of'" tax revenues. *St. Louis Cty. v. University City*, 491 S.W.2d 497, 499 (Mo. banc 1973) (citation omitted). Money that the State acquires by taxation "'is the property of the state, which may be used for any public purpose the Legislature may deem wise.'" *School Dist. of Kansas City v. State*, 317 S.W.3d 599, 606 (Mo. 2010) (quoting *State ex rel. Clark v. Gordon*, 170 S.W. 892, 895 (Mo. 1914). The General Assembly thus has "full power to direct what should be done with the taxes." *Billings Special Rd. Dist. v. Christian Cty.*, 5 S.W.2d 378, 382 (Mo. 1928) (quoting *City of Hannibal v. Cty. of Marion*, 69 Mo. 571, 577 (Mo. 1879)). And the "power of the Legislature over these matters, subject to constitutional limitations, is supreme." *State ex rel. Davis v. Smith*, 75 S.W.2d 828, 830 (Mo. 1934).

One "obvious purpose" of this constitutional provision is "to prevent expenditures by the state from exceeding revenues and appropriation." *State ex rel. Knowles v. Reser*, 633 S.W.2d 450, 452 (Mo. Ct. App. 1982). After all, "each legislature must have discretion to respond to the financial needs of the times," and executive officers should not be able to spend as much money as they wish without being accountable to the people. *State ex rel. Kansas City Symphony v. State*, 311 S.W.3d 272, 278 (Mo. Ct. App. 2010) (emphasis added).

Another purpose of the appropriations power is to provide democratic oversight on the expenditure of public funds, and, if necessary, to check the executive. As this Court has held, under this power, the legislature "may, of course, attempt to control the executive branch ... by the power of appropriation." *Mo. Coal. for Env't v. Joint Comm. on Admin. Rules*, 948 S.W.2d 125, 134 (Mo. 1997).

The appropriations requirement thus "should be strictly construed" and enforced as the chief limitation on spending state money. *State ex rel. Thompson v. Bd. of Regents for Ne. Missouri State Teachers' Coll.*, 305 Mo. 57, 65, 264 S.W. 698, 700 (1924).

B. Under its plenary appropriations authority, the legislature may "refuse to make an appropriation for the payment of the salary and expenses of any public officer holding office," and it may "abolish any office not provided for by the Constitution." *State ex rel. Tolerton v. Gordon*, 236 Mo. 142, 139 S.W. 403, 407 (1911). This power includes the power to abolish the office of a single person. *Wilcox v. Rodman*, 46 Mo. 322, 326 (1870).

Simply put, the state tax revenues do not belong to the department, to Mr. Rebman, or to any other state executive employee to which the State has paid a salary. "There is hardly an office in the State, except that of judges, that is not subject to the risk of change of salary or fees." *Wilcox v. Rodman*, 46 Mo. 322, 325 (1870). And for good reason: the appropriations power checks

scandalous or otherwise problematic executive personnel decisions. *Mo. Coal. for Env't v. Joint Comm. on Admin. Rules*, 948 S.W.2d 125, 134 (Mo. 1997). The wisdom of the legislature's judgment about the distribution of tax revenues, or whether that distribution operates "justly or unjustly," is thus not a matter for this Court's determination. *City of Hannibal*, 69 Mo. at 576-77; *see St. Louis Cty.*, 491 S.W.2d at 499.

Nor does the legislature's plenary appropriations power encroach on the Governor's authority to control executive appointments. The Missouri Constitution provides: "The head of each department may select and remove all appointees in the department except as otherwise provided in this constitution, or by law." Mo. Const. art. IV, § 19 (App. 28). But the appropriations statute here does not dictate *which* employee must be hired; it abolishes an office entirely, so that no one may hold the defunded position.

The offices of administrative law judges were created by statute, not Art. VII, § 1 (App. 30), and are therefore subject to legislative abolishment, Mo. Rev. Stat. § 287.610 (App. 31-32). Offices provided for by the state constitution include "those specified in Sec. 1, Art. VII, namely, all elective executive officials of the state, and judges of the supreme court, courts of appeals and circuit courts." *State ex rel. Voss v. Davis*, 418 S.W.2d 163, 169 (Mo. 1967).

C. Below, the state officials submitted written suggestions opposing the injunction, arguing that the Legislature has plenary authority to defund

administrative law judges. D11 p.1-21; Tr. 50-51; 102-105. And, at the hearing, the state officials explained that any injunction would violate the separation of powers by requiring the department to spend money beyond its appropriations authority. Tr. 105, 108-09; D11 p.8; Tr. 51, 98-99.

In response, the lower court held that abolishing a single state office raised separation of powers problems, but the Western District Court of Appeals' opinion in *Herschel* made clear that there is no separation of powers problem with defunding a public office, including by selectively defunding administrative law judges. *Herschel v. Nixon*, 332 S.W.3d 129, 137 (Mo. Ct. App. 2010). The Western District had "no doubt of the power of the legislature to refuse to make an appropriation for the payment of the salary and expenses of any public officer," and "no doubt of the power of the legislature which creates an office to abolish it or to change it." *Id.* at 137 (quoting *State ex rel. Voss v. Davis*, 418 S.W.2d 163, 168 (Mo.1967); *State ex rel. Tolerton v. Gordon*, 236 Mo. 142, 139 S.W. 403, 407 (1911)). State agency heads thus must ensure "that expenditures during the fiscal year are not exceeding appropriations" and must reduce employee headcounts as necessary to stay within the appropriated funds. *State ex rel. Knowles v. Reser*, 633 S.W.2d 450, 452 (Mo. Ct. App. 1982).

The Court of Appeals also stressed the need to interpret Section 287.610 to be in harmony with other constitutional provisions. The Missouri Constitution only permits the General Assembly to "make appropriations for

one or two fiscal years." Mo. Const. art. IV, § 23. This rule ensures that "one general assembly cannot tie the hands of its successor." *State ex rel. Fath v. Henderson*, 160 Mo. 190, 60 S.W. 1093, 1097 (1901). In *Herschel*, the trial court interpreted section 287.610 to "insulate[ ] and protect[ ] administrative law judges from budgetary pressures." *Id.* at 139. But, as the Court of Appeals, explained, this "well meaning" interpretation of section 287.610 "would fly in the face of the constitutional principle that prohibits one legislature from binding the appropriations authority of subsequent legislatures" and so that "interpretation must yield" to the state constitution's "appropriations principle." *Id.* at 139.

The legislative power to abolish administrative law judge positions through the appropriations power is thus "consistent with long-standing and fundamental principles of Missouri law." *Id.* at 137. "Although the legislature's participation typically ends once legislation is enacted, the Missouri Supreme Court has recognized that the legislature 'may, of course, attempt to control the executive branch ... *by the power of appropriation.*'" *Id.* (citing *Mo. Coal. for Env't v. Joint Comm. on Admin. Rules*, 948 S.W.2d 125, 134 (Mo. 1997)).

The bottom line is that, under Sections 28 and 36 of this article, "the people prohibit the general assembly from enacting any law which would, directly or indirectly, permit the withdrawal of money from the treasury for any purpose other than one specified in an appropriation law." *State ex inf.*

Danforth v. Merrell, 530 S.W.2d 209, 213 (Mo. 1975). "These sections of the constitution are unambiguous," "require no construction," and their "meaning is clear: money may not be withdrawn from the state treasury for any purpose other than that specified in an appropriation law." *Id.* Any executive action "authorizing the incurring of an obligation and the payment of state money for any purpose other than that specified in an appropriation law" and "[a]ny withdrawal of money from the state treasury by a warrant drawn for a purpose other than that specified in an appropriation law" violates the state constitution. *Id.*

And so, even if courts have ordered the *performance* of duties for the State that the State must perform, they cannot order *compensation* for these services because no officer may withdraw money from the state treasury other than by an appropriation law. *State ex rel. Gibson v. Grimm*, 540 S.W.2d 17, 18 (Mo. 1976). The state treasurer may pay out funds only "in pursuance of an appropriation by law." *Nacy v. Le Page*, 341 Mo. 1039, 1041 (1937). In *Gibson*, for example, the courts had ordered lawyers to represent indigent clients to satisfy the State's constitutional duty to provide representation. 540 S.W.2d at 18. But even though the court could order the lawyers to assume this work, and even if it the state's failure to perform this duty was unlawful or even unconstitutional, because the appropriations power is supreme and absolute

in the legislature, the court could not order the State to pay the lawyers without an appropriated fund. *Id*.

As a result, even if declining to fund Mr. Rebman's position is unlawful, the court still could not order the department to take money from the treasury to fund it.

D. Mr. Rebman's own statements, recorded in depositions taken in *Herschel*, confirm this position. In 2009, Mr. Rebman as the Director of the Department of Labor and Industrial Relations, agreed that legislative appropriation was a valid method to remove administrative law judges. "[A]dministrative law judges, like other State employees, are subject to appropriation . . . [Appropriation is one of] the three mechanisms by which an administrative law judge may be removed." Tr. 43. He agreed that "the Governor and the General Assembly [may] remove [administrative law judges] from their appointments through the appropriations process in an arbitrary way that is not based on any evidence or based on any study or analysis": in fact, he said, "The legislature can do what it wants." Tr. 43-44.

Methods of reducing administrative law judge headcount by appropriations other than by seniority are also within the legislature's power. In *Herschel*, the legislature did not specify to the department which administrative law judge offices to cut. Tr. 40-42. And so the agency chose to remove positions based on seniority until it met the cost reductions. *Id*. But the

Court of Appeals went out of its way to say that, it did "not intend to suggest that these represent the only scenarios wherein the Division has the authority to discharge" administrative law judges. *Herschel*, 332 S.W.3d at 137.

Mr. Rebman's administration exercised an enormous amount of discretion in determining which administrative law judges to fire in *Herschel*. There was no analysis of "performance or conduct or productivity" in deciding who to cut. Tr. 44. Mr. Rebman could have cut positions according to service in state government, which is how the department made cuts in the past, rather than administrative law judge service. Tr. 44-45. But Mr. Rebman chose to use length of administrative law judge service rather than state service, and his deposition shows that the decision was motivated by the desire to protect a specific chief administrative law judge. Tr. 45-46. The method selected by Mr. Rebman, a Democrat, also just so happened to eliminate exclusively Republican-appointed administrative law judges. Tr. 45-46. In contrast, the legislature's method of elimination here was far less arbitrary than Mr. Rebman's own approach.

II. The trial court erred in enjoining Mr. Rebman's termination and ordering payment of his salary because the department's appropriations statute does not violate the right to equal protection in that the legislature had a rational basis to fire a person responsible for conduct that led to large sex and age discrimination settlements and the lower court clearly erred when it ignored or discounted evidence of this state interest.

Article I, Section 2 of the Missouri Constitution guarantees "equal rights and opportunity under the law." Mo. Const. art. I, § 2 (App. 22). The circuit court held that the appropriations statute conflicts with the guarantee of equal treatment, Mo. Const. art. I, sec. 2 (App. 22), because it fails rational-basis review. D14 p.5-6; App. 5-6.

But, for two reasons, there is no equal protection violation here. First, the law implicates no fundamental right or suspect class. Second, although the legislature gave no reason for its decision to not fund positions appointed between January 1, 2012 and January 1, 2015, the legislature may have considered Mr. Rebman's past actions as director of the department. And, under rational basis review, the law would thus further the accomplishment of a legitimate interest—the protection of the public fisc and the promotion of propriety in quasi-judicial office.

1. The circuit court correctly held that because Mr. Rebman "is not a member of a suspect class and does not allege a violation of any fundamental right, the Equal Rights Clause is satisfied as long as it bears a reasonable relationship to a legitimate state purpose.'" D14 p.5; App. 5 (quoting *Glossip v.*

Missouri Dep't of Transp. & Highway Patrol Employees' Ret. Sys., 411 S.W.3d 796, 801 (Mo. 2013)).

State statutes may constitutionally distinguish between groups of people. *Dodson v. Ferrara*, 491 S.W.3d 542, 559 (Mo. 2016). "As a practical necessity, most legislation makes distinctions among people for a variety of purposes." *Estate of Overbey v. Chad Franklin National Auto Sales North, LLC,* 361 S.W.3d 364, 378 (Mo. 2012). If a law treats similarly situated individuals or groups differently, then it must provide an adequate justification. *Dodson*, 491 S.W.3d at 559.

The standard for adjudicating the adequacy of the justification depends on whether the law "impacts a fundamental right" or distinguishes between groups based on a "suspect classification." *Id.* Laws that impact a "fundamental right" are subject to strict scrutiny, which requires the state to show that its law is necessary to accomplish a compelling state interest. *In re Marriage of Kohring*, 999 S.W.2d 228, 232 (Mo. 1999). If no fundamental right is at stake, the law is subject to rational basis review. *Id.* Fundamental rights are First Amendment freedoms or similar rights protected in constitutional text, and a suspect class status "traditionally has been reserved for classifications based on race, national origin, and illegitimacy, and in some cases, gender." *Marriage of Kohring*, 999 S.W.2d at 232 (citing *Call v. Heard*,

925 S.W.2d 840, 846–47 (Mo. 1996) and *State v. Stokely*, 842 S.W.2d 77, 79 (Mo. 1992)).

Mr. Rebman alleges no fundamental right at stake, and the time provisions in § 7.840 are facially neutral. App. 22. They never mention a suspect class such as race, national origin, or gender. Nor does he allege that the State discriminated against him for being a member of a protected group.

Mr. Rebman essentially makes a "class-of-one" claim, which is not subject to heightened scrutiny. This claim is subject to rational basis review, which recognizes that states can and do make individualized decisions in discretionary cases. *Robbins v. Becker*, 794 F.3d 988, 995-97 (8th Cir. 2015). And "a class-of-one claim cannot be used to challenge discretionary governmental action." *Katz-Crank v. Haskett*, 843 F.3d 641, 649 (7th Cir. 2016).

2. And so, at most, under exceedingly deferential rational basis review, the state appropriations statute is "valid as long as the classification is reasonably related to a legitimate state interest." *Glossip*, 411 S.W.3d at 806. Rational basis review "accord[s]" laws "a strong presumption of validity." *Heller v. Doe*, 509 U.S. 312, 319 (1993). Courts uphold the state law "as long as there is a plausible reason for the legislature's decision." *Kansas City Taxi Cab Drivers Ass'n, LLC v. City of Kansas City, Mo.*, 742 F.3d 807, 809 (8th Cir. 2013). The State need not produce evidence in support of its interests and a

reviewing court may rely on any conceivable legislative interest as a reason to uphold the law. For this reason, rational basis review has been called a "paradigm of judicial restraint." *FCC v. Beach Communications*, 508 U.S. 307, 314 (1993). When no suspect class or fundamental right is affected, courts must be "very reluctant" to "closely scrutinize legislative choices as to whether, how, and to what extent [a State's] interests should be pursued." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432,441–42 (1985).

Here, the legislature gave no reason for its decision to not fund positions appointed between January 1, 2012 and January 1, 2015. But the legislature likely considered Mr. Rebman's past actions as director of the department.

The classification in the state appropriations statute is thus reasonably related to furthering the state interest in protecting the public fisc and removing an unnecessary public office. The legislature has legitimate interests in "protect[ing] a public entity's financial stability and "protect[ing] the public treasury." *Winston v. Reorganized Sch. Dist. R-2, Lawrence Cty., Miller*, 636 S.W.2d 324, 329 (Mo. 1982). And it also has forward-looking interests in promoting "administrative efficiency and controlling costs." *Glossip*, 411 S.W.3d at 806.

Under its broad spending powers, the legislature may make a financial decision to cut staff and offices. *School Dist. of Kansas City v. State*, 317 S.W.3d 599, 606 (Mo. 2010). This sort of difficult decision occurs often in the

appropriations process, and it is not irrational for the legislature to think that the removal of an administrative law judge position would save money. As also discussed below in the section about the substantial justification for this law, this law furthers state interests by promoting public integrity and protecting against the risk of paying future discrimination settlements. App. 48; D14 p.3; App. 3; *Winston*, 636 S.W.2d at 329.

Nor, under this deferential standard of review, should this Court second-guess which administrative law judge position the legislature defunds. Rational basis review is "not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). The legislature need not act with mathematical precision in serving all interests at all costs, but may achieve its cost-reduction ends by partial means. *Id*. To the contrary, "[a]ssessing the wisdom of the legislature's reliance" on various forms of data "would invade the legislature's deliberative process and violate the separation of powers between the judicial and legislative branches of government." *Comm. for Educ. Equal. v. State*, 294 S.W.3d 477, 494 (Mo. 2009).

But the circuit court held that defunding Mr. Rebman's position does not further state interests in promoting public integrity and protecting against the risk of paying future discrimination settlements. D14 p.6; App. 6. It asserted that "the only evidence presented at the preliminary injunction hearing was

that [Mr. Rebman] denied the prior allegations made against him, that there was no admission of liability by the State, and that the Attorney General's Office decided to settle that case without [Mr. Rebman]'s approval." *Id*. "In these circumstances, speculation that the legislature believed [Mr. Rebman] posed 'a risk of future discrimination settlements' is not a rational basis for treating him differently from all other similarly situated workers' comp [administrative law judges]." *Id*.

This holding was incorrect for two reasons.

First, if this holding is a factual finding, it is clearly erroneous. The public filings from the *Garcia* and *Backer* suits were widely publicized, introduced into evidence, and taken under judicial notice. App. 48 (Defendant's Exhibit 26); Tr. 87-90. They allege that Mr. Rebman was responsible for a pattern of sex and age discrimination. The record evidence includes the facts of substantial cash settlements paid out of public funds from the department charged with enforcing the Missouri Human Rights Act. App. 48-61; D14 p.3; App. 3.

The legislature, like earlier courts, may draw its own conclusions from these settlements and the parties between whom they were reached. As other courts commenting on settlements have noted, the "size of the settlement in proportion to" the allegations "suggests that the [allegations] were not just idle talk"; the defendants "were clearly concerned enough about [their] claims to

pay" a large settlement. *Good Luck Nursing Home, Inc. v. Harris*, 636 F.2d 572, 579 (D.C. Cir. 1980). And the size of settlements is "especially telling" when both sides to the agreements were "composed of sophisticated parties" and the settlements were still "a very substantial amount." *In re Credit Default Swaps Antitrust Litig.*, No. 13MD2476 (DLC), 2016 WL 2731524, at *8 (S.D.N.Y. Apr. 26, 2016).

What is more, Mr. Rebman *admitted* that the claim of discriminatory termination by Ms. Backer was "essentially indefensible since they fired Gracia Backer seven days after getting a letter saying . . . saying I was mistreating people based on age." Tr. 29-31. And Mr. Rebman himself *volunteered* that *no* person in the private sector would employ him because of these scandalous allegations—allegations the Attorney General's Office settled for millions of dollars. Tr. 33; App. 48-61; D14 p.3; App. 3.

Second, if the circuit court's holding is a legal conclusion, it is incorrect. As the state officials argued below, the State has an important interest in averting the fact or appearance of impropriety in quasi-judicial officers. D11 p.11-13; Tr. 98-102; Tr. 50-52, 98-106; D13 p. 1-23; D12 p.1-51. Canon 2 of the Code of Judicial Conduct for administrative law judges provides that a "Workers' Compensation administrative law judge shall avoid impropriety and the appearance of impropriety in all activities." Canon 2, Code of Judicial Conduct for Mo. Workers' Compensation Admin. Law Judges. Likewise, under

federal due process principles, an administrative tribunal must "be free of actual bias or the probability of actual bias." *State ex rel. Praxair, Inc. v. Missouri Pub. Serv. Comm'n*, 344 S.W.3d 178, 191 (Mo. 2011). For this reason, the State in its discretion as a public employer may take a prophylactic approach that goes beyond what due process or a public ethics code requires—to avoid having any quasi-judicial officer whose conduct "could spark adverse public comment." *Prof'l Air Traffic Controllers Org. v. Fed. Labor Relations Auth.*, 685 F.2d 547, 599 (D.C. Cir. 1982) (Robinson, J., concurring). Like Caesar's wife, quasi-judicial officers "ought to be above suspicion," and the department may seek to "avoid even the appearance of impropriety." *State v. Ross*, 829 S.W.2d 948, 951 (Mo. 1992) (quotations omitted).

The circuit court also held that defunding Mr. Rebman's position is not "reasonably related to furthering the state interest in protecting the public fisc and removing an unnecessary public office," as the state had argued—not even when it reduces the risk of having to settle future suits for future similar allegations. D14 p.5-6; App. 5-6. "That rationale may support a reduction in the total number of [administrative law judges] for which funds are appropriated collectively, but it does not provide a rational basis for eliminating funding for a specific [administrative law judge]." D14 p.6; App. 6.

But another substantial justification to end Mr. Rebman's position is thus to avoid the risk of future allegations. The lack of further accusations of

misconduct is thus irrelevant if there is no for-cause requirement to remove an administrative law judge, *Herschel*, 332 S.W.3d at 137.

And, under rational basis review, when no suspect class or fundamental right is affected, courts must be "very reluctant" to "closely scrutinize legislative choices as to whether, how, and to what extent [a State's] interests should be pursued." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432,441–42 (1985). Rational basis review is "not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). The legislature need not act with mathematical precision in serving all interests at all costs, but may achieve its cost-reduction ends by partial means. *Id.* And here, Mr. Rebman differs from his fellow administrative law judges in that *their* conduct has not led to litigation, and they did not take actions from which grew a public scandal of this kind.

These justifications suffice because the appropriations power does not require fact-finding or proof comparable to statutory removal procedures or to courtroom adjudication. A "legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) (quotations omitted). Instead, "those attacking the rationality of the legislative classification have the burden "to negative every conceivable basis which might support it." *Id.* (quotations omitted). And courts "never require a legislature to

articulate its reasons for enacting a statute," and so, even if there were no evidence of the actual legislative motivation, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Id.* "'Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.'" *Id.* (quotations omitted). The legislature thus may draw its own view of the facts from the known public information.

III. The trial court erred in enjoining Mr. Rebman's termination and ordering payment of his salary because the appropriations law does not violate the prohibition against special laws in that it is a general, open-ended law subject only to rational-basis review and, even if it were a special law, the legislature had a substantial justification for the law in avoiding the appearance of impropriety in quasi-judicial officers and mitigating future financial risk and the lower court clearly erred when it ignored or discounted evidence of this state interest.

Mr. Rebman challenges the general provisions of the department appropriations statute, alleging that it is a special law under Mo. Const. art. III, §40. App. 25. Article III, Section 40(30) prohibits the General Assembly from passing any "special law" where a general law can be made applicable. When reviewing the constitutionality of a statute under Missouri Constitution art. III, §40, this Court begins by categorizing the law as general or special, and then applies the corresponding standard of review. This Court construes the constitutional limitation "in favor of the power of the Legislature" and

requires limits on its plenary authority to be "expressly declared or clearly implied." *State ex rel. United Rys. Co. of St. Louis v. Pub. Serv. Comm'n of Missouri*, 192 S.W. 958, 960 (Mo. 1917).

A. Appropriations laws that defund an office are not special laws.

A general law is "a statute which relates to persons or things as a class"; a special law is "a statute which relates to particular persons or things of a class." *Bd. of Educ. of City of St. Louis v. Missouri State Bd. of Educ.*, 271 S.W.3d 1, 9 (Mo. 2008) (quotations omitted).

The original goal of the special law-clause was to avoid having the State invest taxpayer money in speculations that benefited only a few wealthy people while serving no public interest. "Until the mid- to late-nineteenth century, state legislatures mostly enacted local, private, and special legislation, and very little general legislation." Robert M. Ireland, *The Problem of Local, Private, and Special Legislation in the Nineteenth-Century United States*, 46 Am. J. Legal Hist. 271, 271 (2004). A raft of special charters, state financing, and state subscriptions of stock typical in the early 1800s benefited a small class of wealthy and connected interests but caused several states to default on their debts. Anthony Schutz, *State Constitutional Restrictions on Special Legislation As Structural Restraints*, 40 J. Legis. 39, 45 (2014); *see also* Ireland, *supra* at 279-87. These special laws benefited "the few at the expense of the

many" and ignored the "salutary maxim of equal rights to all, special privileges to none." Ireland, *supra* at 279 (quotation omitted).

Restrictions on special and local laws, like Missouri's law enacted in 1865, checked this special treatment of powerful interests by prohibiting grants of "special" or "exclusive" privileges against the public interest. Schutz, *supra* at 46; Mo. Const. of 1865, art. IV, sec. 27; Mo. Const. of 1875, art. IV, sec. 53; Mo. Const. of 1945, art. III, sec. 40(30) (App. 25). Reflecting this history, this Court understands special legislation to be "statutes that apply to localities rather than to the state as a whole and statutes that benefit individuals rather than the general public." *Jefferson Cty. Fire Prot. Districts Ass'n v. Blunt*, 205 S.W.3d 866, 868 (Mo. 2006), holding modified on other grounds by *City of Normandy v. Greitens*, 518 S.W.3d 183 (Mo. 2017) (citing Ireland, *supra* at 271).

A special law prohibition thus "does not prohibit an appropriation to a private person but prohibits appropriations for any purpose in a private law." *Cremer v. Peoria Hous. Auth.*, 78 N.E.2d 276, 280 (Ill. 1948) (quotation omitted). That is, it forbids a law without a public purpose in which "State funds were sometimes appropriated in connection with acts of a purely 'private' character." *Id.*

To determine whether a statute is a special law or a general law, the Court looks to whether the statute's applicability is based on opened-ended or

closed-ended characteristics. *Alderson v. State*, 273 S.W.3d 533, 538 (Mo. 2009). A law based on open-ended characteristics is entitled to a presumption of constitutionality, *id.*, and is not a local or special law on its face, *id.*; *Treadway v. State*, 988 S.W.2d 508, 510 (Mo. 1999). This Court presumes that laws based on open-ended characteristics like population are constitutional and thus subjects them only to rational basis review. *City of Normandy*, 518 S.W.3d at 191 (citations omitted). Laws based only on closed-ended characteristics such as closed historical facts, limited geography, and constitutional status are presumptively unconstitutional because members cannot leave the class, and non-members cannot join the class, and thus are only a general law the legislature had a substantial justification not to make the law sweep more broadly. *Id.*

Laws that abolish an office are not special laws. *State ex rel. Tolerton v. Gordon*, 236 Mo. 142, 139 S.W. 403, 407 (1911). Special laws are laws that single out one of many several counties for special benefits or burdens, or that single out special interest groups out of the general population for special favors or punishments. *City of Normandy*, 518 S.W.3d at 191. For example, classifications "based on population are open-ended and, therefore, they are generally presumed to be constitutional." *Jackson Cty. v. State*, 207 S.W.3d 608, 611 (Mo. 2006). County classification and charter status are also open-ended because they are subject to change. *Treadway*, 988 S.W.2d at 510-11.

At the same time, appropriations bills by their nature grant money for specific government programs as a way to benefit the public as a whole. So, by necessity, they must make some hard-and-fast specific distinctions, or else the legislature could never end or reduce a program or office. And the prohibition on special laws does not prevent this normal use of the appropriations power. For example, appropriating funds to buy a specific piece of real estate like the Alamo or a famous natural park—but not to buy other land—is not an unconstitutional special law: the State has the right to purchase property to benefit the people as a whole, even if it buys only one particular parcel. *King v. Sheppard*, 157 S.W.2d 682, 684 (Tex. Civ. App. 1941); *see also, e.g.*, *State ex rel. Zoological Bd. of Control v. City of St. Louis*, 1 S.W.2d 1021, 1025 (Mo. 1928). "Just as constitutional texts prohibit states from taking private property without a public purpose, special laws clauses prohibit states from giving public property without a public purpose." Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 Clev. St. L. Rev. 719, 721 (2012).

The key for whether an appropriations statute is unconstitutionally special is thus whether a more general law would serve the legislature's public purpose with equal effectiveness. The scope of the "class" is determined by the public purpose. *Cremer*, 78 N.E.2d at 280. Many payments need to be for specific people or things. As a Kentucky court put it, "It is not to be supposed that in restricting special legislation upon the subjects and purposes listed the

Constitutional Convention in framing it or the people adopting it had in view any intention to deny the Legislature the power to authorize the payment of a just and equitable claim, founded upon public service and producing public benefits." *Dep't of Fin. v. Dishman*, 298 Ky. 545, 550, 183 S.W.2d 540, 544 (1944). Missouri courts also recognize the broad power of the legislature to define the public interest and make narrowly tailored laws to achieve its public purposes. After all, the plenary power to fund or defund particular public offices and programs reflects the power to make an important policy choice, which often requires narrowly-tailored political judgment calls about specific projects and beneficiaries. *Tolerton*, 139 S.W. at 407.

Because the legislature has plenary power to defund public offices and programs, an appropriations law defunding an office amounts to a special law *only* when the law specially forbids one person from being paid to hold an office *and* the law lets other people hold the specific office, rather than abolishing the position through lack of funds. *Id*.

This rule squares with the basic principle that a general law is "a statute which relates to persons or things as a class"; a special law is "a statute which relates to particular persons or things of a class." *Bd. of Educ. of City of St. Louis v. Missouri State Bd. of Educ.*, 271 S.W.3d 1, 9 (Mo. 2008) (quotations omitted).

And this rule appears also to be the historical practice at the federal level, where Congress may forbid an agency to maintain an office held by a single person but cannot say a single person is ineligible for federal employment. *Special Legislation Discriminating Against Specified Individuals and Groups*, 51 Yale L.J. 1358, 1366 (1942).

Plus, it comports with this Court's longstanding rule that "constitutional limitations upon legislative action must be construed in favor of the power of the Legislature." *State ex rel. United Rys. Co. of St. Louis v. Pub. Serv. Comm'n of Missouri*, 192 S.W. 958, 960 (Mo. 1917).

B. The appropriations statute is an open-ended, general law subject to rational-basis review

The appropriations statute is a general law based on open-ended characteristics, and thus is subject only to rational-basis review. It funds broad categories of administrative law judges, and new administrative law judges may join the class of funded administrative law judges, including Mr. Rebman were he to be re-appointed.

"Classifications are open-ended if it is possible that the status of members of the class could change." *Glossip*, 411 S.W.3d at 808 (citing *Harris v. Missouri Gaming Comm'n*, 869 S.W.2d 58, 65 (Mo. 1994). Laws based on closed-ended characteristics are "facially special because others cannot come into the group nor can its members leave the group." *City of DeSoto v. Nixon*,

476 S.W.3d 282, 287 (Mo. 2016) (emphasis added). A law can be open-ended even if a class member cannot exit a class, so long as more members may enter the class. Outside the special law context, a class of beneficiaries is open if others may join the class, regardless of their current legal status (such as children who parents may adopt in the future) or even whether they have been born. *See, e.g., Rouner v. Wise*, 446 S.W.3d 242, 245 (Mo. 2014); *Bank One, Youngstown, N.A. v. Heltzel*, 602 N.E.2d 412, 414-15 (Ohio Ct. App. 1991).

That principle applies here. This statute funds administrative law judge offices held before 2012 or after 2015. The group of administrative law judges appointed after 2015 that the statute funds is an open-ended class because others can come into the group. *DeSoto*, 476 S.W.3d at 287. And the group of administrative law judges appointed before 2012 is an open-ended class because its members may leave. *Id*. The statute thus is not facially special.

This is an open-ended class that others may join because more administrative law judges may take office in the future and receive salaries from this pool of funds. Nor is this speculative: more administrative law judges took office during the legislative deliberations on this statute. And future administrative law judges still may receive compensation under this law. In fact, Mr. Rebman himself is free to seek reappointment and hold one of these offices if a vacancy arises, just like past administrative law judges whose offices the legislature abolished may apply.

Excluding some employees from a compensation scheme, but funding others, is a general law subject to rational-basis review, so long as new employees may join the funded class. For example, a similar situation arose in *Alderson v. State*, where a state benefits statute included some public employees at the county level but excluded others, and this Court held that the law "created an open-ended class, entitling the classification to a presumption of constitutionality." 273 S.W.3d 533, 538 (Mo. 2009). In that case, the legislature had allowed enrollment in the County Employees Retirement Fund for all employees hired by the county but not by any employees hired and supervised by the circuit court or chief juvenile officer in the county who are eligible for other funds. *Id.* at 536-37. As this Court explained, because "employees come and go from the eligible class as they are hired and fired," this statute creates "an open class because eligibility turns on their relationship to their employer." *Id.* And, under rational-basis review, the legislature had drawn a reasonable line: "there is a reasonable basis under a special law analysis for classifying these employees based on their being hired, fired, directed, and controlled" by the county public employer. *Id.* at 537–39. Likewise, in *Zimmerman v. State Tax Comm'n of Missouri*, this Court held that the method of appointment to an officer is a reasonable consideration for the legislature in creating law. 916 S.W.2d 208, 209 (Mo. 1996). In that case, the legislature could create rules for appointed county tax assessors that did not

apply to elected county tax assessors, and the distinction among county employees did not amount to a special law. *Id.*

Under this precedent, it does not matter how many administrative law judges may take office during this fiscal year to share in the department's pool of administrative law judge salary funds. It is impossible to know how many vacancies will arise, but, when they do, the legislature will have funds to pay them to replace their predecessors. And the fact that the statute applies only to administrative law judges appointed at the time of the law "does not necessarily make the act a special law because the act can apply to other" administrative law judges appointed in the future. *Treadway v. State*, 988 S.W.2d 508, 511 (Mo. 1999) (quotation omitted).

Because the legislature declined to fund Mr. Rebman's position of administrative law judge, the statute is a legislative abolishment of his office. The law does not give his job to someone else: it ends it. The legislature also left Mr. Rebman free to seek and hold any other administrative law judge or state position: it did not block him from holding any office. Nor did it block the department from reappointing him or condition future funds on Mr. Rebman exiting state government in favor of another, preferred officeholder. The statute does not affect the department's discretion to re-employ Mr. Rebman.

For these reasons, the laws held unconstitutional in *State ex rel. Harris v. Herrmann* and *State ex rel. Tolerton v. Gordon* differ from the recent

appropriations statute. The law at issue in *State ex rel. Harris v. Herrmann*, 75 Mo. 340 (1882), allowed notaries public appointed between March 1881 and June 1881 to "hold their offices unmolested" while those appointed before March 1881 had to "vacate their offices." *Id* at 342. This Court decided that the law was "special legislation, forbidden by the constitution" because by directing people to vacate offices, it made some people ineligible to hold positions that others could hold. *Id* at 343. *Tolerton*, 139 S.W. at 40, dealt with a similar law. The appropriation in *Tolerton* refused to fund a Missouri agency in charge of game and fish so long as the present director remained in office. *Tolerton*, 139 S.W. at 405. This Court held that the appropriation fell "directly within the definition of special laws" because it targeted a particular individual and prohibited him from holding the office—rather than ending the office as a whole. *Id* at 408.

A crucial difference between this case and *Herrmann* and *Tolerton* is that, unlike the offices in those cases, the legislature completely abolished Mr. Rebman's office on impersonal terms state-wide. The legislature did not bar some people from holding an office that remained funded: the appropriations statute speaks in general terms, not in particular terms, about offices it will fund. It did not even mention Mr. Rebman. In contrast, the appropriation in *Herrmann* did not abolish the offices of notaries public; it forced the then-present notaries public to vacate those offices. *Herrmann*, 75 Mo. at 341.

Likewise, the legislature did not seek to abolish the office of director for game and fish in *Tolerton*; it tried to pressure the then-director to vacate that position. In both these past cases, the legislature was not exercising its "unquestioned" plenary power to abolish any office.

The Court can and should end its analysis here. The burden to show substantial justification does not arise unless the challenged statute is facially special. *City of Normandy*, 518 S.W.3d at 196 (citing *O'Reilly v. City of Hazelwood*, 850 S.W.2d 96, 99 (Mo. 1993); *Bd. of Educ. of City of St. Louis*, 271 S.W.3d at 10). Because the appropriations statute is not facially special, its open-ended provisions are subject only to rational-basis review. *Glossip v. Missouri Dep't. of Transp.*, 411 S.W.3d 796, 808 (Mo. 2013).

But another key difference between the decisions in *Hermann* and *Tolerton* and Mr. Rebman's case today is the operation of the special law analysis. The Court today recognizes that even if a law appears special on its face, the State can overcome the presumption of invalidity by offering "evidence of a substantial justification." *City of Normandy*, 518 S.W.3d at 196 (citing *O'Reilly*, 850 S.W.2d at 99).

C. The appropriations statute satisfies any level of scrutiny.

The rational-basis test applies to statutes that are not facially special. *City of St. Louis v. State*, 382 S.W.3d 905, 915 (Mo. 2012). Under that test, a statutory "classification is constitutional 'if *any* state of facts can be reasonably

conceived that would justify it.'" *Alderson*, 273 S.W.3d at 537 (emphasis added) (quoting *Missourians for Tax Justice Educ. Project v. Holden*, 959 S.W.2d 100, 103 (Mo. 1997)).

But, even if the appropriations statute were facially special because of how it describes the classes of administrative law judges, the statute would still be constitutional unless there "was no substantial justification for creating the class." *City of Sullivan v. Sites*, 329 S.W.3d 691, 694 (Mo. 2010).

"This burden shifting was first established in 1993 in *O'Reilly v. City of Hazelwood*, 850 S.W.2d 96, 99 (Mo. banc 1993)." *City of Normandy*, 518 S.W.3d at 196. "*O'Reilly*, in analyzing the meaning of article III, section 40(30), found this provision does not bar special legislation; rather, it '"requires the judiciary to determine whether a general law could have been made applicable 'without regard to any legislative assertion on that subject.'" *Id.* (quoting 850 S.W.2d at 99). The problem with "special laws is that they do not embrace all of the class to which they are naturally related," and so "the question in every case is whether any appropriate object is excluded to which the law, but for its limitations, would apply." *City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177, 184 (Mo. 2006) (quotations omitted). When the designation of a class is substantially justified, the statute avoids this problem. *City of Sullivan v. Sites*, 329 S.W.3d 691, 694 (Mo. 2010). Identifying a "substantial justification" for the law is thus another way to see that the law actually does

"embrace all of the class to which they are naturally related," showing how the Act is general, even if it does not appear that way on its face. *Id.*

Under this test, even if a law is a facially special law, this Court will uphold the law if "the vice that is sought to be corrected" is "so unique to the persons, places, or things classified by the law that a law of general applicability could not achieve the same result." *Treadway*, 988 S.W.2d at 511 (quotation omitted).

This "test for whether a statute is a special law because there is no reasonable basis for its classifications in this context is similar to the rational basis test used in equal protection analyses." *Estate of Overbey v. Chad Franklin Nat'l Auto Sales N., LLC*, 361 S.W.3d 364, 380–81 (Mo. 2012) (citing *Jefferson Cnty. Fire Protection Dists. Ass'n v. Blunt*, 205 S.W.3d 866, 868 (Mo. banc 2006)). "The burden is on the party challenging the constitutionality of the statute to show that the statutory classification is arbitrary and without a rational relationship to a legislative purpose." *Id.* (quotation omitted).

The appropriations statute here satisfies any level of scrutiny because, as before under the equal protection analysis, the appropriations statute furthers important interests in averting the fact and appearance of judicial impropriety about a specific holder of an administrative law judge office. D14 p.3; App. 3. The legislature gave no reason for its decision to not fund positions appointed between January 1, 2012 and January 1, 2015. But if the legislature

considered Mr. Rebman's past actions as director of the department, it would have had a substantial justification to pass this law: to restore the public confidence in judicial integrity in administrative law judges when the public had grave reason to doubt the integrity of the judge. *See supra* Pt. II.

As the state officials argued below, the public has strong interests in the avoidance of the appearance of impropriety in quasi-judicial officials resolving administrative disputes, and in avoiding the financial risks imposed by retaining officials whose conduct has led to large and costly settlements of alleged age and sex discrimination misconduct. App. 48; D14 p.3; App. 3. Because of this important justification, the appropriations statute satisfies either rational-basis review or the substantial-justification test.

Here, "the vice that is sought to be corrected" appears "unique" to the office or person classified by the law, and so "a law of general applicability could not achieve the same result." *Treadway*, 988 S.W.2d at 511 (quotation omitted). When Mr. Rebman served as the director of the department, two older, female employees accused him of sex and age discrimination, including creating a hostile work environment. Two weeks after an employee filed a complaint against him, she was discharged, and the same day he was appointed to be an administrative law judge. D14 p.1; App. 1. The State then had to settle the suits against Mr. Rebman, and the department had to pay $3.1 million to compensate the female employees. App. 48-61; D14 p.3; App. 3.

The legislature may seek to protect its administrative apparatus from the appearance of impropriety raised by quasi-judicial officers who have had to settle accusations of sex and age discrimination. App. 48-61. Addressing discrimination is a "substantial justification" for a special law. *Bd. of Educ. of the City of St. Louis*, 271 S.W.3d at 10.

This interest is even stronger here than in a normal case because Mr. Rebman's position as administrative law judge is under the department, which houses the Missouri Commission on Human Rights and enforces the Missouri Human Rights Act. Tr. 36, 46. The legislature could rightly turn a skeptical eye on employing any person who has had to settle claims of Missouri Human Rights Act violations for millions of dollars—let alone to serve in a quasi-judicial role within the department responsible for protecting citizens against sex and age discrimination. App. 48-61; D14 p.3; App. 3.

The legislature may also seek to protect state employees from the risk of age and sex discrimination and thus to protect state resources from future potential costly Missouri Human Rights Act litigation. These age and sex discrimination lawsuits consumed staff time and state resources. Protecting the state from more multi-million dollar lawsuits thus provides another "substantial" justification for a narrowly tailored law.

Substantial justifications existed when a city charged a special sewer fee to residents in a particular location because that area "had benefited from

previous sewer improvements." *City of Sullivan v. Sites*, 329 S.W.3d 691, 694 (Mo. 2010). Removing a person whose conduct led to discrimination settlements in the millions of dollars, App. 48-61; D14 p.3; App. 3, is far more substantial a justification than charging a sewer fee to one group because they had benefitted from a previous fee.

What is more, reducing the total amount of taxpayer money spent on administrative law judge salaries is also a substantial justification for a budget law. Under the state constitution, usually "'the legislature has full power and control over the disposition of'" tax revenues. *St. Louis Cty. v. University City*, 491 S.W.2d 497, 499 (Mo. banc 1973) (citation omitted). The state budget, and the revenue impact of not cutting or reducing funds spent on public programs, can be a substantial justification for a facially special law. *See Union Elec. Co. v. Mexico Plastic Co.*, 973 S.W.2d 170, 174 (Mo. Ct. App. 1998). In *Mexico Plastic Co.*, the classification in the ordinance was a reasonable limitation that balanced economic development incentives with the need for "sound municipal revenue" that would benefit the community at large. *Id*. Here, the reduction in the number of administrative law judges benefited the public by reducing overall spending, including spending on the salary of an administrative law judge with a history of conduct that led to multi-million dollar settlements from the department's budget. App. 41-61; D14 p.3; App. 3.

Below, Mr. Rebman referenced a proviso from *Tolerton* when the Court expressed a concern that giving the legislature "the right to deny salary for service in office to one or more persons of a class" would essentially result in a partisan "cleansing" each time political regimes change. But ruling in the State's favor would not make *Tolerton's* concern a reality because Section 7.840 did not preserve or restrict Mr. Rebman's office – it abolished it. App. 22. A political cleanse which requires the dominant party to abolish offices is unlikely to occur because the dominant party needs those offices to exist for the government to function, and loyalists cannot take over for themselves salaries that do not exist.

In contrast, ruling in favor of Mr. Rebman would open the door to the political targeting that concerned the Court in *Tolerton* because the effect of the elimination method upheld in *Herschel* was to purge the former regime's appointees. It would reverse *Herschel*. And it would hold that the legislature may use an arbitrary length-of-service method that allows for the sweeping partisan removal of administrative law judges appointed by a Governor of the opposite party—but that the legislature cannot reduce administrative law judges using a precise, calculated, justified method.

But even if Mr. Rebman were innocent as he claims, the public has an interest in more than avoiding the *fact* of impropriety; it has an interest in avoiding any *appearance* of impropriety. In fact, he testified under oath that

the appearance of impropriety from these allegations and settlements would preclude *anyone* from hiring him as a lawyer in private practice. If this perception of impropriety is enough to justify any reasonable person declining his services as a lawyer, even more should the State be free not to retain him in a quasi-judicial role in the same department as the commission.

Under the Code of Conduct for Administrative Law Judges, the State has an important public interest in averting both the fact and appearance of impropriety in quasi-judicial officials. Canon 1 provides that a "workers' compensation administrative law judge shall participate in establishing, maintaining and enforcing high standards of conduct and shall personally observe those standards of conduct so that the integrity and independence of the administrative judiciary will be preserved." And canon 2 provides that a "Workers' Compensation administrative law judge shall avoid impropriety and the appearance of impropriety in all activities." Canon 2, Code of Judicial Conduct for Mo. Workers' Compensation Admin. Law Judges.

This canon reflects the overarching principle the "an independent, fair and competent administrative judiciary will interpret and apply the laws that govern consistent with American concepts of justice." Preamble, Code of Judicial Conduct for Mo. Workers' Compensation Admin. Law Judges. The "workers' compensation administrative law judges, individually and collectively, must respect and honor their office as a public trust and strive to

enhance and maintain confidence in our legal system." *Id.* After all, "administrative law judges decide questions of fact and law for the resolution of disputes and are highly visible symbol of the executive branch of government under the rule of law." *Id.*

But the circuit court held that the legislature lacked a substantial justification for the appropriations statute. D14 p.4; App. 4. It held that the state officials "have offered no evidence of public perception regarding the prior allegations against [Mr. Rebman]." *Id.* "More importantly, no evidence was offered to support that any subsequent claims have even been made during [Mr. Rebman]'s five (5) year tenure as an [administrative law judge]." *Id.*

First, if this holding is a factual finding, it is clearly erroneous. The public filings from the *Garcia* and *Backer* suits were widely publicized in the media, and so both the circuit court and this court may take judicial notice of the obvious public perception of Mr. Rebman. App. 48 (Defendant's Exhibit 26); Tr. 87-90.

These public legal filings—including the docket sheet, key pleadings, and settlements, all entered into evidence and for which the circuit court took judicial notice—show that Mr. Rebman is the chief person alleged to be responsible for a pattern of sex and age discrimination. App.; Tr. 87-90.

Nor did the public forget about the scandal of appointing Mr. Rebman under these circumstances. The media coverage of Mr. Rebman's alleged

misconduct continues to this day. *E.g.*, Bob Watson, *Judge to hold status hearing on Rebman lawsuit*, Jefferson City News-Tribune, 2018 WLNR 19536416 (June 26, 2018); Bob Watson, *Kerr case costs among the state's higher expenses*, Jefferson City News-Tribune, 2017 WLNR 40404579 (December 31, 2017). As the main paper in Kansas City reported just last year, "As Department of Labor's director, [Mr. Rebman] had been the focus of a white-hot age and gender discrimination case against the Nixon administration that cost the state $2 million to settle last year. Republicans and Democrats were incensed about this for good reason. On the very day that the plaintiff in the case was fired from her job for complaining about Rebman, Nixon appointed him to the administrative law judge job." Steve Kraske, *GOP targets Jay Nixon appointees, and the former governor should only blame himself*, Kansas City Star (April 20, 2017).

But there is more evidence than just this.

Mr. Rebman testified that the claim of discriminatory termination by Ms. Backer was "essentially indefensible since they fired Gracia Backer seven days after getting a letter saying . . . I was mistreating people based on age." Tr. 29-31. And Mr. Rebman admitted on the stand that no member of the public in the private sector would employ him because of the scandalous allegations made against him—accusations that the Attorney General's Office settled for millions of dollars. Tr. 33. And he explained that the reason for this was the

media attention for his case and how easily the public knew the information. Tr. 33. He testified that the discrimination suits would be a reason no one would hire him:

> *Well, given the publicity of the previous cases, if you Google my name, it comes up as Larry Rebman did bad things and, you know, was fired from his position, so that is a problem finding another job.*

Tr. 33 (emphasis added). This judicial admission made under oath is binding, and it was clear error to ignore Mr. Rebman's own concession.

And second, if the circuit court's holding is a legal conclusion, it is incorrect. D11 p.13-19; Tr. 99-102, 110-111, 114-117; D14 p.3; App. 3. The State need not submit evidence for an obvious proposition subject to judicial notice. The lack of further accusations of misconduct are irrelevant if prior misconduct is a substantial reason to end his position and if there is no for-cause requirement to remove an administrative law judge. Indeed, a substantial justification to end his position is to avoid the risk of future allegations.

The circuit court also asserted that it is unfair that mere accusations would be enough to create a justification to abolish his office, but that misstates the case. D14 p.4; App. 4.

The evidence includes more than accusations: it includes the facts of substantial cash settlements paid out of public funds from the department

charged with enforcing the Missouri Human Rights Act. App. 48-61; D14 p.3; App. 3. The public and the legislature may draw their own conclusions from the allegations—and from the fact that the Missouri Attorney General's Office settled these claims for such large amounts. D14 p.3; App. 3; *Good Luck Nursing Home, Inc. v. Harris*, 636 F.2d 572, 579 (D.C. Cir. 1980); *In re Credit Default Swaps Antitrust Litig.*, No. 13MD2476 (DLC), 2016 WL 2731524, at *8 (S.D.N.Y. Apr. 26, 2016). In any event, the appropriations power does not require fact-finding or proof comparable to statutory removal procedures or to courtroom adjudication. Nor, as shown below, does the statutory for-cause removal procedures pose an obstacle to the legislature defunding an administrative law judge position. *See supra* Part IV.

In sum, Mr. Rebman has not met his burden of showing that the classification in the appropriations statute is arbitrary and "lacks a rational relationship to a legislative purpose." *Jackson Cty. v. State*, 207 S.W.3d 608, 612 (Mo. 2006).

IV. The trial court erred in enjoining Mr. Rebman's termination and ordering payment of his salary because Section 287.610 does not limit the department's ability to end administrative law judge positions in that the statute provides no private cause of action, Mr. Rebman failed to satisfy the standards or procedures for a writ under Section 536.150, and Section 287.610 recognizes the legislature's ability to remove administrative law judge positions through its appropriations authority.

Finally, the lower court lacked statutory authority to grant relief under Section 287.610 because that statute provides no private cause of action under which Mr. Rebman could sue and Mr. Rebman failed to satisfy the standards or procedures for a writ of mandamus or prohibition under Section 536.150. App. 31-32. More important, the for-cause removal statute does not provide that it is the exclusive way to end an administrative law judge position. Nor could it: under the canon of constitutional avoidance, the statute should not be read to infringe on the legislative check on the executive branch to remove appropriations for public offices.

A. Section 287.610 provides no private cause of action.

A private cause of action is necessary to sue an agency challenging a statute or agency act. *Friends of Responsible Agric. v. Bennett*, 542 S.W.3d 345, 351 (Mo. Ct. App. 2017), reh'g and transfer denied (Jan. 30, 2018), transfer denied (Apr. 3, 2018).

Mr. Rebman has no cause of action for a statutory claim under Section 287.610 (App. 31-32). The "Declaratory Judgment Act cannot serve as a basis

for relief when the party seeking to invoke the Declaratory Judgment Act does not have a direct cause of action concerning the matter on which declaratory relief is sought." *Neighbors Against Large Swine Operations v. Cont'l Grain Co.*, 901 S.W.2d 127, 132 (Mo. Ct. App. 1995). Nor does Section 287.610 provide for a cause of action: it is silent about any rights of administrative law judges to challenge the failure to follow proper procedures. § 287.610 RSMo. And, even if the state constitution includes an implied private right of action at equity to challenge governmental action under constitutional provisions and obtain declaratory or injunctive relief, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 (2010), but not damages, *Moody v. Hicks*, 956 S.W.2d 398, 402 (Mo. Ct. App. 1997), this equitable right to seek constitutional relief does not apply to a statutory claim. Nor does a request for an injunction suffice: "an injunction is a remedy and not a cause of action; therefore, it must be based on some recognized and pleaded legal theory." *Goerlitz v. City of Maryville*, 333 S.W.3d 450, 455 (Mo. 2011). But "[w]hen the legislature has established other means of enforcement, we will not recognize a private civil action unless such appears by clear implication to have been the legislative intent." *Johnson v. Kraft Gen. Foods, Inc.*, 885 S.W.2d 334, 336 (Mo. 1994). Because a court lacks statutory authority to hear a case without a cause of action, the judgment below cannot stand.

B. Mr. Rebman failed to satisfy the standards or procedures for a writ under Section 536.150

Nor would Section 536.150 provide a cause of action in this situation. This case is a non-contested case subject to judicial review under Section 536.150: the department need not conduct an administrative hearing to discharge an employee. But even though the lower court purported to grant relief under Section 536.150, which allows for review of non-contested agency cases by writ, neither Mr. Rebman nor the court observed any of the writ procedures necessary.

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. 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. 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. And, 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.

But Mr. Rebman failed to seek a preliminary writ in the circuit court, proceeded under summonses, and did not style his petition as a petition for

mandamus or any other writ. Because he did not follow these procedures, this Court should decline to provide relief, as it did in *Bartlett v. Missouri Department of Insurance*, 528 S.W.3d 911 (Mo. 2017)—where this Court warned that it would not routinely excuse litigants' failure to follow the writ procedures.

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), the right remedy here under Mr. Rebman's theory of relief would have been 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). "Mandamus is only appropriate to require the performance of a ministerial act." *Mo. Growth Ass'n v. State Tax Comm'n*, 988 S.W.2d 786, 788 (Mo. 1999). The circuit court ordered the department to reinstate him. He thus seeks to compel the department to perform what he views as a clear, mandatory duty. And this Court should not be in the position of theorizing some other appropriate form of writ that would apply here, not when Mr. Rebman did not request it anywhere in the petition.

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 this language requires 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 like 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." *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, 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.

For this reason, 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.*[2]

[2] 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

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. *Rothschild v. State Tax Comm'n of Missouri*, 762 S.W.2d 35, 37 (Mo. 1988). 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. 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*

> 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.

RSMo § 536.150.

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 harmonious in their several parts and provisions." *Rothschild*, 762 S.W.2d at 37. "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 fit 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. *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). Section 536.150 thus 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.

But Mr. Rebman faces an obstacle in this appeal because he seeks to persuade this court to adopt a novel interpretation of the state constitution and statutes that no Missouri court has yet adopted. In other words, he seeks 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. 1994); *see also State ex rel. Reif v. Jamison*, 271 S.W.3d 549, 550 (Mo. 2008) ("The purpose of a writ of mandamus is to execute a clear, unequivocal and specific right, not to adjudicate.").

After all, the standard for issuing a writ of mandamus is high. *See* 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*. And 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),

And even if the proper remedy were prohibition, not only did Mr. Rebman still not follow its procedures, but also the standard of review would still be high. Rule 97 provides that petitions for writs of prohibition still follow the same form as petitions for writs of mandamus. Rule 97.01. It is also not a writ as of right; it also requires a high showing of harm; and it issues only "with great caution and forbearance and only in cases of extreme necessity." *State ex rel. Douglas Toyota III, Inc. v. Keeter*, 804 S.W.2d 750, 752 (Mo. 1991).

Because Mr. Rebman has not satisfied the procedures or standards for a writ, the circuit court lacked authority to enter the judgment below.

C. Section 287.610's for-cause removal procedures do not prevent the legislature from cutting administrative law judge positions for lack of funds.

Nor does defunding an administrative law judge position conflict with the statutes that allow for-cause removal of administrative law judges through executive action. Below, the state officials argued, no statute requires Mr. Rebman's reinstatement: the State may fire administrative law judges "'based either on the individual performance of a particular [administrative law judge] or based on the General Assembly's appropriation of funds to the Division.'"

D11 p.10 (quoting *Herschel v. Nixon*, 332 S.W.3d 129, 134 (Mo. Ct. App. 2010)); Tr. 50-52, 98-106; D12 p.1-51.

Under *Herschel*, the appropriations power is a separate way to end administrative law judge offices apart from the statutes providing for the removal of administrative law judges only for cause. Nor is this rule created only to penalize administrative law judges: the courts have applied this rule for decades to all sorts of state employees laid off because of a lack of appropriated funds. *State ex rel. Knowles v. Reser*, 633 S.W.2d 450, 453 (Mo. Ct. App. 1982).

The Western District Court of Appeals thus held that the State may fire administrative law judges "based either on the individual performance of a particular administrative law judge *or* based on the General Assembly's appropriation of funds to the Division." *Herschel*, 332 S.W.3d at 134. This is a dual removal mechanism, and so "for cause" protection does not supersede the legislative decision to defund administrative law judges. The legislature may cut as many or as few positions as it wishes, whether or not there is cause to remove the administrative law judge. *Id*. Any lack of negative performance votes for Mr. Rebman thus is irrelevant.

More important, the for-cause removal statute does not provide that it is the exclusive way to end an administrative law judge position. Nor could it: under the canon of constitutional avoidance, the statute should not be read to

infringe on the legislative check on the executive branch to remove appropriations for public offices.

As the petition acknowledges, the Western District Court of Appeals held in *Herschel*, the State may fire administrative law judges "based *either* on the individual performance of a particular [administrative law judge] *or* based on the General Assembly's appropriation of funds to the Division." 332 S.W.3d at 134. This is a dual removal mechanism, and so "for cause" protection does not supersede a legislative decision to defund administrative law judges. The legislature may cut as many or as few positions as it wishes, whether or not there is cause to remove the administrative law judge. *Id.* Any lack of negative performance votes for Mr. Rebman thus lacks relevance.

Herschel was correct. The legislature has plenary authority to defund administrative law judge positions. And the statutory for-cause procedures do not preclude removing administrative law judges because of budget cuts.

As the Court of Appeals noted, despite their name, administrative law judges do not receive the same forms of independence and protection as state judges. Administrative law judges "are not constitutionally created under article V of the Missouri Constitution (i.e. judicial branch of government)." *Id.* at 133. Instead, they are state employees, creatures of Missouri's workers' compensation statute, and in office only to resolve employee claims for workplace injury compensation, subject to the Labor and Industrial Relations

Commission's de novo review. *Id.* at 132-33; Tr. 24-25, 56. Administrative law judges like other executive branch employees are thus "subject to removal via methods that are excluded from article V of the Missouri Constitution." 332 S.W.3d at 133.

Under the statute, "the division may appoint additional administrative law judges for a maximum of forty authorized administrative law judges" but these positions are subject to appropriations. § 287.610(1), RSMo (App. 31-32).[3] Section 287.610 states that "Appropriations shall be based upon necessity, measured by the requirements and needs of each division office." *Id.* As the court of appeals commented, this "legislative amendment is consistent with the unexpressed thought that government is not ever-expanding and can and must sometimes contract as a matter of necessity." 332 S.W.3d at 139.

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[3] Section 287.610.1 provides, in relevant part:

> 1. After August 28, 2005, the division may appoint additional administrative law judges for a maximum of forty authorized administrative law judges. Appropriations shall be based upon necessity, measured by the requirements and needs of each division office. Administrative law judges shall be duly licensed lawyers under the laws of this state.

§ 287.610(1), RSMo.

Section 287.610 thus "expressly recognizes two independent bases for discharging [administrative law judges] based either on the individual performance of a particular [administrative law judge] or based on the General Assembly's appropriation of funds." *Id.* at 134-37. "Section 287.610.2 through .5 describes a process by which an individual [administrative law judge] can be removed following a performance audit process resulting in two votes of no confidence." *Id.* at 134. But this performance audit process does not provide "the sole and only basis for removal of an [administrative law judge], once appointed." *Id.* at 134. Instead, "section 287.610.1 affords the Division the alternative authority to discharge [administrative law judges] based on the requirements and needs of the Division as evidenced by appropriations from Missouri's General Assembly." *Id.* at 134.

As the Court of Appeals held, this interpretation rests on the canon of construction that courts must "give effect to all provisions of a statute, and to ascertain the intent of the legislature from the language used, considering the words in their plain and ordinary meaning." *Id.* at 134 (citing *Cmty. Fed. Sav. & Loan Ass'n v. Dir. of Revenue*, 752 S.W.2d 794, 798 (Mo. 1988)). Here the "plain language of section 287.610.1 clearly envisions that the tenure of [administrative law judges] within the Division is subject to the legislature's appropriation of funds to the Division." *Id.* at 134. "Just as the first sentence of section 287.610.1 necessarily incorporates the Division's inherent authority

to discharge [administrative law judges] should the legislature modify the statute to reduce the maximum number of [administrative law judges] that can be appointed, so does the second sentence of section 287.610.1 incorporate the Division's inherent authority to discharge [administrative law judges] in response to a reduction in legislative appropriations." *Id.* at 136–37.

This conclusion is also "reinforced by review of the legislative evolution of section 287.610.1." *Id.* Courts must "afford significance to legislative modifications of a statute, particularly where a concept once clearly articulated, such as the directive that the only way to remove an [administrative law judge] is for cause, is eliminated from the statute." *Id.* at 135.

In the past, this statute "expressly stated that the removal or discharge of an [administrative law judge] could *only* be based upon a review of the judge's conduct, performance, and productivity." *Id.* at 134. But in 1998 the legislature revised the statute to refer to the appropriations authority, and in 2005, the legislature retained the language about appropriations while "*delet[ing]* the language which had previously provided *that the only way to remove or discharge an [administrative law judge]* was based upon a review of the judge's conduct, performance, or productivity." *Id.* at 134–35.

Now, after legislative modifications, Section 287.610 "in no way states or suggests that the only way to discharge an [administrative law judge] is for

cause." *Id*. at 135. Instead, after the 2005 amendment, the second sentence of section 287.610.1 "provides the General Assembly with the authority to adjust appropriations for [administrative law judges] upwards or downwards based upon necessity, measured by the requirements and needs of the Division." *Id*. at 136. And the courts "are not permitted to write back into section 287.610 a prohibition on removal of [administrative law judges] except for cause when that concept has been purposefully eliminated by the legislature." *Id*. at 135.

The Court of Appeals thus reversed the circuit court's holding in *Herschel* that "'[o]nce appointed and assuming they remain otherwise qualified to serve, an administrative law judge appointed pursuant to section 287.610 may be removed only by the Governor after for [sic] two or more votes of no confidence by the Committee or by a vote of non-retention taken at the end of their term.'" *Id*. at 135. The "plain language of section 287.610 provides a dual mechanism for removal of [administrative law judges], with the first based on the individual performance of an [administrative law judge] (section 287.610.2 through .5) and the second based on the legislature's appropriations to the Division (section 287.610.1)." *Id*.

The Court of Appeals also stressed the need to interpret Section 287.610 to be in harmony with other constitutional provisions. The Missouri Constitution only permits the General Assembly to "make appropriations for one or two fiscal years." Mo. Const. art. IV, § 23. This rule ensures that "one

general assembly cannot tie the hands of its successor." *State ex rel. Fath v. Henderson*, 160 Mo. 190, 60 S.W. 1093, 1097 (1901). In *Herschel*, the trial court interpreted section 287.610 to "insulate[ ] and protect[ ] administrative law judges from budgetary pressures." *Id.* at 139. But, as the Court of Appeals, explained, this "well meaning" interpretation of section 287.610 "would fly in the face of the constitutional principle that prohibits one legislature from binding the appropriations authority of subsequent legislatures and" so that "interpretation must yield" to the state constitution's "appropriations principle." *Id.* at 139.

The legislative power to abolish administrative law judge positions through the appropriations power is thus "consistent with long-standing and fundamental principles of Missouri law." *Id.* at 137. "Although the legislature's participation typically ends once legislation is enacted, the Missouri Supreme Court has recognized that the legislature 'may, of course, attempt to control the executive branch ... *by the power of appropriation*.'" *Id.* (citing *Mo. Coal. for Env't v. Joint Comm. on Admin. Rules*, 948 S.W.2d 125, 134 (Mo. 1997)). "[A]bsent constitutional inhibition, there is 'no doubt of the power of the legislature to refuse to make an appropriation for the payment of the salary and expenses of any public officer,'" *id.* (quoting *Tolerton*, 139 S.W. at 407), or of "'the power of the legislature which creates an office to abolish it or to change it,'" *id.* (quoting *State ex rel. Voss v. Davis*, 418 S.W.2d 163, 168 (Mo.1967)).

The circuit court held that the appropriation "does not reduce the number of allowed F.T.E.s from FY2018." D14 p.8; App. 8. It claimed that this appropriation "is in contrast to the reduction of 5 F.T.E.s expressly made in *Herschel*. 332 S.W.3d at 138. In this sense, only the funding was eliminated, not the position." *Id*.

But *Herschel* held that this is a distinction without a difference. Both when the legislature expressly abolishes administrative law judge positions, and also when the legislature declines to fund administrative law judge positions and the department relies on the loss of funds to end the positions, "'in either case the incumbent of the office has no legal ground of complaint.'" *Herschel*. 332 S.W.3d at 137 (citing 139 S.W. at 407). Even if the department might have discretion to try to find other funds, by reducing personnel expenditures to stay within the appropriations language, "the legislature's action was sufficient to authorize, even if it did not require, the termination of the [administrative law judges] under the second sentence of section 287.610.1." *Id*. at 139. And this year's appropriations bill is just like *Herschel* because the reduction in salary amounted to one full-time position. The legislature appropriated enough money for precisely one less administrative law judge salary than the year before, essentially abolishing the position. D14 p.2; App. 2; Tr. 14, 68.

Nor does defunding an administrative law judge position conflict with the statutes that allow for-cause removal of administrative law judges through executive action. Under *Herschel*, the appropriations power is a separate way to end administrative law judge offices apart from the statutes providing for the removal of administrative law judges only for cause.

The law is thus clear that it does not pose an obstacle to legislative funding decisions. But, even if there were doubt on this point, so that it was ambiguous whether the legislature could abolish administrative law judge positions through the appropriations process, the canon of constitutional avoidance would compel this Court to interpret the law to comport with the state constitution. And, even if it did apply in an unconstitutional way, which it does not, the Court would still have to sever any invalid application from the valid scope of the statute.

Federal courts have long adhered to the principle that, if a law is subject to "competing plausible interpretations," *McFadden v. United States*, 135 S. Ct. 2298, 2307 (2015), the statute must be construed "so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score," *Almendarez-Torres v. United States*, 523 U.S. 224, 237-328 (1998) (citing *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916)). This canon "is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts." *FCC v. Fox Television*

Stations, Inc., 556 U.S. 502, 516 (2009). This canon "not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988). "The courts will therefore not lightly assume that [a legislature] intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Id.*

Likewise, under Missouri law, "if one interpretation of a statute results in the statute being constitutional while another interpretation would cause it to be unconstitutional, the constitutional interpretation is presumed to have been intended." *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 838-39 (Mo. banc 1991). For this reason, "ambiguous statutes that are susceptible to more than one construction should be construed in a manner consistent with the constitution." *M & P Enter.'s, Inc. v. Transamerica Fin. Servs.*, 944 S.W.2d 154, 159 (Mo. 1997), as modified on denial of reh'g (May 27, 1997). State statutes thus "cannot be held unconstitutional if they are susceptible to any reasonable construction supporting their constitutionality." *State v. Burnau*, 642 S.W.2d 621, 623 (Mo. 1982) (emphasis added). In short, if there is any doubt about the statute's meaning, this Court must accept the interpretation that avoids

constitutional concerns. *Martin v. Schmalz*, 713 S.W.2d 22, 25 (Mo. Ct. App. 1986) (quoting *Lincoln Credit Co. v. Peach*, 636 S.W.2d 31, 35 (Mo. 1982)).

Here, applying the statute to preclude abolishing administrative law judge positions through the appropriations power would unlawfully bind future legislatures to the funding decisions of prior legislatures. And so, if the statute were ambiguous, the proper course under precedent would be to interpret the law to avoid a potential constitutional problem, rather than reach to decide a dispute that the Court could avoid. Under the canon of constitutional avoidance, if there is any possible reading of the statute that would avoid inhibiting the appropriations power, this Court must adopt that reading, just as the Court of Appeals did in *Herschel*.

When, as here, a plaintiff contends that a portion of an appropriations statute or other statute is unconstitutional, section 1.140, RSMo, provides the applicable standard and creates a strong presumption in favor of severability. Section 1.140 provides that "the provisions of every statute are severable." Section 1.140, RSMo. "If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid unless the court finds the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed that the legislature would have enacted the valid provisions without the void one; or unless the court finds that the

valid provisions, standing alone, are incomplete or incapable of being executed in accordance with legislative intent." *Id*.

Here, no plausible argument exists that the other provisions of the for-cause removal statute are "so essentially and inseparably connected with, and so dependent upon" the supposed prohibition on elimination of administrative law judge offices by appropriation, or that the statute is "incomplete and . . . incapable of being executed" without that supposed prohibition. *Id*. Rather, the overwhelming evidence from the statute is that the legislature never intended to have the for-cause removal procedure interfere with the appropriations power at all. So even if the Court holds that (1) the statute prohibits removing administrative law judges through the appropriations power, and (2) that this prohibition is unconstitutional, the Court should sever that invalid prohibition from the rest of the statute and leave the remainder of the statute intact. *See Missouri Roundtable for Life*, 396 S.W.3d at 353-54.

Below, the circuit court held that removing any particular administrative law judge requires observing the procedures for for-cause removal in Section 287.610 RSMo. D14 p.6; App. 6. "Even assuming arguendo that the General Assembly's dissatisfaction with the Attorney General's settlement of prior discrimination claims against [Mr. Rebman] is the real reason behind the Legislature's attempt to remove [Mr. Rebman] from office, removal of an [administrative law judge] for cause is governed by § 287.610

RSMo and requires successive votes of 'no confidence by the bipartisan [administrative law judge] review committee." *Id*.

But this holding is inconsistent with *Herschel*. And, even if "*Herschel* did not decide any issue involving special laws, separation of powers, or equal rights," it did directly reject Mr. Rebman's current statutory claim. D14 p.6; App. 6.

This state appropriations statute is a valid exercise of the people's plenary oversight powers and their representatives' duty to ensure the prudent expenditure of public funds. *Herschel*, 332 S.W.3d at 134. As the Court of Appeals held and as Mr. Rebman conceded in *Herschel*, when the legislature reduces the number of positions, the department may remove or discharge administrative law judges to enforce the statute. *Id*.; *see also* 29 Mo. Prac., Workers' Compensation Law & Practice § 7.3 (2d ed.).

Below, Mr. Rebman also argued that terminating him is arbitrary and capricious, but the circuit court did not agree with him, and, in any event, the legislature made a constitutionally protected decision to defund his public office. This decision did not come from the whim of an executive official—and indeed it came against the Executive Branch's budgetary recommendation. Just as the legislature may abolish offices, so too may the Executive Branch implement the legislature's directions without acting in an arbitrary or capricious way.

V. The trial court erred in enjoining Mr. Rebman's termination and ordering payment of his salary because the balancing of harms and the public interest do not support injunctive relief in that Mr. Rebman's job loss is not irreparable injury, the State suffered irreparable injury from retaining Mr. Rebman, his interests do not outweigh the interests of other administrative law judges, and the public interest supports enforcing democratically adopted statutes as written.

The remaining *Gabbert* factors include "(2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *State ex rel. Dir. of Revenue v. Gabbert*, 925 S.W.2d 838, 839-40 (Mo. 1996). Apart from the merits, all three of these factors weigh against granting a temporary restraining order here, as the state officials argued below. D11 p.19-23; Tr. 50-52, 98-106; D13 p. 1-23; D12 p.1-51.

First, Mr. Rebman has not alleged an irreparable injury. D11 p.19-23. The only prejudice that Mr. Rebman claims will result from the enforcement of the state appropriations statute is a potential loss of pay. "This is not a showing of irreparable injury because [he] could adequately be compensated with an allowance of back pay should it be established that removal from the [position] as contemplated was improper or unlawful." *Eberle v. State*, 779 S.W.2d 302, 304 (Mo. Ct. App. 1989). A damages award could include lost benefits, including lost health insurance or the costs of COBRA, if liability existed. This absence of any prospect of irreparable harm because of the

availability of a damages award is a sufficient ground on which a trial court should refuse to grant injunctive relief. *Id.*; *see also City of Greenwood v. Martin Marietta Materials, Inc.*, 311 S.W.3d 258, 266 (Mo. Ct. App. 2010).

Mr. Rebman also asserts that the foregone medical expenses, on which he might economize if he had to pay for his own medical insurance under COBRA, constitute irreparable harm.

But these costs are just the results of lost salary, and courts often restore a lost salary with back pay. He is no differently situated from any other employee terminated in an employment dispute.

Nor can he raise the interests of third-parties. The general rule is that third-party standing is not permitted. *Missouri State Med. Ass'n v. State*, 256 S.W.3d 85, 89 (Mo. 2008). He thus lacks standing to raise the claims of other litigants, including workers' compensation litigants, and his termination will not harm them, because other administrative law judges can cover his position as he admitted. Other administrative law judges can assume Mr. Rebman's former docket. He claims that there will be delays but other administrative law judges can and often do cover for each other. The department can also reassign administrative law judges or dockets to meet demand. The only harm is thus his loss of compensation.

Plus, Mr. Rebman has experienced no greater harm than the State will suffer if this Court grants Mr. Rebman relief, and the public has a strong

interest in having their elected representatives and state officials exercise their constitutional power to remove public officers without interference.

Second, an order that prevents the State from enforcing its duly enacted laws inflicts per se irreparable injury on the State. *See, e.g., Otto*, 744 F.3d at 1053-54 (holding that, "because Plaintiffs seek to enjoin enforcement of a validly enacted statute," they must meet "a more rigorous threshold showing than th[e] ordinary preliminary injunction test"). Money damages cannot compensate the State when it cannot enforce its duly enacted laws. As a result, "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). Thus, "it is clear that a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined." *Coalition for Economic Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997).

Here, enjoining the state appropriations statute—and requiring the State to fund a public office that the legislature has defunded—imposes *even more irreparable injury on the State* in the form of unrecoverable financial harm. Although when a private citizen is wrongly discharged a court may order him reinstated and given back pay, when the State wrongly must employ and

pay a private citizen, the State likely has no recourse to recover the lost salary if the person performed the duties during the forced employment. In fact, Mr. Rebman testified that the department did not get the money back that it had to pay the administrative law judges during *Herschel* before the appeals court overturned the injunction. Tr. 41. For this reason, when any employer must hire and pay employers, the "later recovery of excess wages becomes highly speculative" and thus the injunction causes irreparable injury. *Jacksonville Mar. Ass'n v. Int'l Longshoremen's Ass'n*, 571 F.2d 319, 325 (5th Cir. 1978).

The State also will have to fire or not hire other people, threatening other services, while other administrative law judges could assume Mr. Rebman's former docket. According to Mr. Rebman, the department would have had to lay off other employees (whose salaries the appropriation bill funded) if the court in *Herschel* had prohibited the department from ending the unfunded administrative law judge positions. Tr. 44. If Mr. Rebman was correct, then allowing him to keep his position could result in some other employee or employees losing their positions—positions provided for in the democratically enacted appropriations bill. This year's pool of appropriated funds is not in fact enough money to pay all 28 administrative law judges all year at current salaries. But the interests of the other administrative law judges are at least equal to Mr. Rebman's; his interests do not outweigh theirs.

Third, Mr. Rebman cannot establish that any irreparable harm he has experienced "decidedly" outweighs the harm to other parties or the public. At a minimum, Mr. Rebman has experienced no greater harm than the State will suffer if Mr. Rebman receives relief, and the public has a strong interest in having their elected representatives and state officials exercise their constitutional power to remove public officers without interference. The State also will have to fire or not hire other people, threatening other services.

Fourth and finally, in assessing the public interest, the actions of Missouri's duly enacted legislature and governor provide decisive evidence of what is in the public interest. When the party opposing equitable relief is the government, consideration of the public interest "merge[s]" with consideration of harm to the government. *Nken v. Holder*, 556 U.S. 418, 435 (2009); *see also, e.g., Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). A legislative enactment "is in itself a declaration of public interest and policy." *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937). The courts should not "ignore the judgment" of the Missouri General Assembly "deliberately expressed in legislation," and "override [the legislature's] policy choice, articulated in a statute" about which public offices should exist. *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497 (2001).

The public interest is in preserving the proper balance of the three branches of government, in enforcing the duly enacted laws like the

appropriations statute, and in promoting public confidence in the integrity of quasi-judicial officers. It also is in ensuring that, as the constitution directs, no money leaves the public treasury unless the legislature appropriated it. It is also in ensuring that the money appropriated for other public services does not get wrongly re-directed to activities that the legislature declined to fund, such as administrative law judge offices for appointees not before 2012 or after 2015.

Because Mr. Rebman has not established that any irreparable harm exists, or outweighs any harm to others or the public, much less "decidedly" so, *Gabbert*, 925 S.W.2d at 839, he is not entitled to the extraordinary grant of equitable relief.

VI. The trial court erred in enjoining Mr. Rebman's termination and ordering payment of his salary because its remedy transgressed the separation of powers in that it ordered the expenditure of funds without identifying any fund that the legislature appropriated for this purpose.

Finally, the lower court failed to identify the proper remedy. As Point I explains, the circuit court had no power to order any payment of funds that the legislature did not appropriate. *Herschel v. Nixon*, 332 S.W.3d 129 (Mo. Ct. App. 2010). And, even if the court could revise the appropriations laws and order money appropriated that the legislature did not appropriate, it still erred in the provision of its precise remedy. The circuit court ordered the department to spend or redirect funds in ways that the legislature did not appropriate.

Lines 12 to 16. The appropriations statute in lines 12 to 16 declines to grant funds for administrative law judge positions not appointed before 2012 or after 2015. App. 22; Tr. 73-75. Even if one were to hold that this is a special law and that excluding Mr. Rebman is unconstitutional (which it is not), D14 p.3; App. 3, the most modest remedy is to remove the date restrictions. This is the proper form of narrow severing. But, even then, it does not provide enough money to pay 28 administrative law judges at the prior salary level of last years' appropriations. App. 22; Tr. 73-75. It is only enough money for 27 administrative law judges. This is the fundamental problem with trying to allocate money that the legislature did not appropriate, and it is why the public interest and harm to the State is irreparable.

Line 7. No other appropriated money exists that a court can use to pay administrative law judges. The appropriations statute states in line 7 that the department may not use the workers' compensation fund directed to the department administration to pay administrative law judges, and that line is not challenged here nor is it a special law because it applies to all administrative law judges as an open class. App. 22; Tr. 73-75. But the provision of $4 million in Line 7 pays for 116.25 other positions, including court reporters and docket clerks. Tr. 74. Drawing money from this fund would imperil these staff positions. So, too, would removing money for equipment and expenses for these functions. Tr. 84.

The workers' compensation fund is the sole fund available to pay administrative law judges. Any remedy ordered would require the department to spend money beyond its appropriations authority, and it did not have enough funds to pay his salary from the pool given for administrative law judges. Tr. 105, 108-09.

Even if this Court wanted to look past this fund, perhaps to the department's general administrative fund separate from the workers' compensation division, it could not lawfully appropriate these funds. Tr. 63-64, 71-72. Another state statute not challenged here, Section 287.640.1 provides that the workers compensation fund is the only fund to pay administrative law judge salaries. App. 34. The department also must safeguard funds under Section 287.710.5. App. 35-36. The money in the workers' compensation fund comes under Section 287.690-710 from a premium tax on workers' compensation policies in the state. By statute, only the workers' compensation fund pays division employees. RSMO Section 287.640.1 ("All salaries, expenses and costs under this chapter shall be paid monthly out of the state treasury from the fund for the support of the division of workers' compensation of the department of labor and industrial relations.") (App. 34). Under Section 287.800, this law is strictly construed. App. 37.

Otherwise, federal grants provide the bulk of the department's administrative funds, and there is not enough state money alone in the

administrative fund to pay an administrative law judge salary, and federal law prohibits using general administrative funds. 42 U.S.C. Section 503 (App. 10). The federal money is for the MCHR, mine safety, and unemployment insurance, not for workers' compensation judges. Tr. 66-67. This Court should not place the department or its officers in jeopardy for these funds. Tr. 66-68.

In the end, the basic problem is simple. This pool of appropriated funds is not enough money to pay all 28 administrative law judges all year at current salaries. The circuit court lacked appropriations authority to order the department to withdraw money from the state treasury to pay this salary.

CONCLUSION

This Court should reverse the judgment below.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I certify that a copy of the above Appellants' Opening Brief was served electronically by Missouri CaseNet e-filing system on October 5, 2018, to all parties of record.

I also certify that the foregoing brief complies with the limitations in Rule No. 84.06(b) and that the brief contains 25,254 words.

/s/ *Julie Marie Blake*
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