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, Circuit Judge

RESPONDENT'S BRIEF

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STATEMENT OF FACTS[1]

Respondent was appointed as an ALJ in the Division of Workers' Compensation ("Division") of the Missouri Department of Labor and Industrial Relations ("DOLIR") on March 18, 2013. A001. He works in the Division's Kansas City Office, one of the busiest in the state, and had over 1,600 open cases at the time of trial, with dockets and trials scheduled months in advance. *Id.* In the five years he has served as an ALJ, Respondent has not received any votes of "no confidence" from the bipartisan ALJ Review Committee that evaluates ALJ performance under § 287.610 RSMo. A002.

At the start of 2018, the Division had a backlog of over 50,000 cases divided among 28 ALJs. *Id.* To reduce that backlog, DOLIR requested additional funding and FTEs from the Legislature for Fiscal Year 2019 to appoint eight more ALJs. *Id.* The General Assembly denied DOLIR's budget request for additional funding, reduced total appropriations for ALJ salaries by almost $100,000, and restricted the use of salary appropriations by ALJ appointment date:

> Section 7.840. To the Department of Labor and Industrial Relations
> For the Division of Workers' Compensation
> For the purpose of funding Administration, provided that no funds shall be used to pay the salaries of Administrative Law Judges, and further provided that not more than ten percent (10%) flexibility is allowed between personal service and expense and equipment
> Personal Service. $4,745,599
> Expense and Equipment. $1,371,111
> From Workers' Compensation Fund (0652). $6,116,710
> *For the purpose of funding Administrative Law Judges appointed on or prior to January 1, 2012*

[1] All citations in Respondent's Statement of Facts are to Appellants' Brief Appendix.

Personal Service. $2,480,240
For the purpose of funding Administrative Law Judges appointed on or after January 1, 2015
Personal Service. $859,334
From Workers Compensation Fund (0652). $3,339,574
Funds are to be transferred out of the State Treasury pursuant to Section 173.258, RSMo to the Kids' Chance Scholarship Fund
From Workers' Compensation Fund (0652). $50,000
Expense and Equipment
From Tort Victims' Compensation Fund (0622). $4,836
Total (Not to exceed 143.25 F.T.E.) $9,511,120

A002, A043 (quoting HB 2007 (2018))(emphasis added).

Of 28 ALJs in the Division at the time of trial, 20 were appointed before January 1, 2012 and six were appointed after January 1, 2015. *Id.* Respondent was the only Workers Comp ALJ appointed between January 1, 2012 and January 1, 2015 and thus the only ALJ for whom the Legislature failed to appropriate salary funding in FY 2019. *Id.* Division Director Colleen Vetter sent Respondent a certified letter on Monday, May 25, 2018, stating: "Based upon the reductions in the fiscal year 2019 budget by the Missouri Legislature, your position as an Administrative Law Judge with the Division of Worker's Compensation has been eliminated effective June 15, 2018, at the Close of business day." A002-A003.

The only explanation Appellants offered the circuit court for the General Assembly's apparent targeting of Respondent for removal from office is "the State's 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." A003. When Respondent served as the Director of DOLIR before his appointment as an ALJ, he was one of several named defendants in a discrimination lawsuit brought by two DOLIR employees. *Id.*

The Attorney General's Office agreed to settle those discrimination claims for more than $3,000,000 without admitting any liability or wrongdoing and without the consent of Respondent. *Id.* Appellants argued below that the Legislature chose to eliminate Respondent' position through the appropriations process due to a "public perception" about Respondent's "alleged age and sex discrimination misconduct." *Id.*

When the Legislature has reduced appropriations for Workers' Comp ALJs in the past, the Division chose to remove the most recently appointed ALJs first. *Id.* At the time of trial, seven ALJs had been appointed more recently than Respondent, two of whom were appointed during the 2018 legislative session even as the General Assembly was reducing appropriations for ALJ salaries. *Id.*

STANDARD OF REVIEW

"Challenges to a statute's constitutional validity are questions of law, which this Court reviews de novo." *City of Normandy v. Greitens*, 518 S.W.3d 183, 190 (Mo. 2017). "A judgment awarding equitable relief 'will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law.'" *Id.* (quoting *St. Louis Police Officers' Ass'n v. Bd. of Police Comm'rs of City of St. Louis*, 259 S.W.3d 526, 528 (Mo. 2008).

ARGUMENT

I. The circuit court correctly held that the General Assembly's attempt to terminate Respondent's employment through the appropriations process violates the constitutional prohibition against special laws.

[*Responding to Appellants' Third Point Relied-On*]

The Missouri Constitution provides:

> The general assembly shall not pass any local or special law … where a general law can be made applicable, and whether a general law could have been made applicable is a judicial question to be judicially determined without regard to any legislative assertion on that subject.

Mo. Const. art. III, sec. 40(30). "The test employed to determine if a statute is a special law is whether the statute's applicability is based on open-ended or closed-ended characteristics." *Normandy*, 518 S.W.3d at 191. "A law based on closed-ended characteristics—e.g., historical facts, geography, or constitutional status—is facially special and presumed to be unconstitutional as others cannot come into the group nor can its members leave the group." *Id*. "A law based on open-ended characteristics—e.g., population—on the other hand, is presumed to be constitutional." *Id*. However, if a facially "open-ended" classification is so narrow in fact as to "contravene the purpose behind the constitutional prohibition against special legislation," the presumption of constitutionality is overcome. *Id*. In *Normandy*, for example, this Court invalidated portions of SB 5 notwithstanding its ostensibly open-ended population classification because, as a practical matter, St. Louis County was the only county in the state that currently has or is likely to have in the near future more than 950,000 residents. *Id*. at 195. Finally, "When … a

challenged statute is presumed a special law, the State must show substantial justification for the special treatment." *Id.*

A. The challenged appropriations bill is presumptively special because it is based on a closed-ended characteristic of ALJ appointment dates that have already passed.

HB 2007 § 7.840's appropriation for Workers' Compensation ALJs is facially special because it appropriates funds for all ALJs *except the one appointed between January 1, 2012 and January 1, 2015*. This classification is "closed-ended" because the members of the class will never change. When the law went into effect, only one of the 28 then-sitting ALJs was appointed between those two dates—Respondent Lawrence G. Rebman. And because those dates had already passed when the law went into effect, there will never be another ALJ appointed between those two dates. The funding restriction applies only to Respondent, now and forever. As a closed-ended classification, § 7.840 is facially special and presumptively unconstitutional.

This Court rejected similar legislative effort to fire specific employees in *Tolerton v. Gordon*, 139 S.W. 403 (1911), and *Harris v. Herrmann*, 75 Mo. 340 (1882). In *Tolerton*, this Court considered "whether the Legislature may be a proviso to an appropriation act single out one citizen of this state and deny to him a right and privilege accorded to all others, without clashing with constitutional guaranties." 139 S.W. 407. The legislation at issue appropriated funds to operate the office of the Fish and Game Commissioner but included the following restriction:

> none of the money herein appropriated in this section shall be available or paid so long as the present State Game and Fish Commissioner remains in this office or is in any wise connected with the office of State Game and Fish

> Commissioner, except the salaries and accounts due at the time of the approval of this act.

Id. at 405. Finding the restriction unconstitutional, this Court held that "[i]n singling out relator from the class of persons eligible to hold that office and in making the proviso apply to and exclude him only, by imposing on him a burden not imposed on any other person, the proviso became special legislation in the most pronounced form." *Id.* The ALJ appropriations bill at issue in this case suffers from the same constitutional infirmity. Here, the General Assembly has singled out Respondent from the class of persons serving as ALJs and imposed on him a burden not imposed on any other person in that class. Like the legislation in *Tolerton*, section 7.840 is "special legislation in the most pronounced form."

Similarly, in *Harris*, the General Assembly enacted legislation purporting to oust all notaries public "holding a commission bearing date prior to the passage of this act, and whose term of office as such notary public has not expired at the time this act becomes a law." 75 Mo. 340, 347 (1882). This Court invalidated the act as a special law because

> [i]t selects particular individuals, i.e., *notaries whose commissions bear certain dates*, from a general class, i. e. all notaries in said jurisdiction, and subjects them to peculiar rules, from which all others in the same class are exempt. Such a law cannot be otherwise than special, and can justly bear no other name or designation.

Id. at 353–54 (emphasis added). The General Assembly's attempted ouster of Respondent based on his appointment date is no different from the attempted ouster of notaries public by their appointment dates in *Harris*. HB 2007 selects a particular individual from the general class of all Workers Comp

ALJs and subjects him to "peculiar rules, from which all others in the same class are exempt."

In an effort to distinguish *Tolerton* and *Herrman*, Appellants argue that § 7.840 of HB 2007 eliminated Respondent's *office* rather than singling him out for removal. But HB 2007 did not get rid of the *office* of any administrative law judge. The bill placed no limit on the number of ALJs the Workers' Comp Division may employ[2]; nor did it reduce the number of FTEs assigned to the Division. Instead, the bill divided the universe of Workers' Comp ALJs into three classes: those appointed before 2012; those appointed during 2012, 2013, or 2014; and those appointed in 2015 or later. All ALJs in the first and third classes are treated the same and may be paid out of the funds appropriated to the Division, but the lone ALJ in the second class is treated differently.

Appellants' reliance on *Alderson v. State*, 273 S.W.3d 533 (Mo. 2009) and *Zimmerman v. State Tax Comm'n of Missouri*, 916 S.W.2d 208, 209 (Mo. 1996) is misplaced as both of those cases involved open-ended classifications. In *Alderman*, employees in the juvenile office of the Twenty-Third Judicial Circuit tried to enroll in a benefit program open to "any county elective or appointive officer or employee who is hired and fired by the county and whose work and responsibilities are directed and controlled by the county." 273 S.W.3d at 536. Deemed ineligible to participate in the program because their responsibilities were directed by the court rather than the county, the employees argued that the statute's definition of "employer" was a special law. *Id.* at 538. This Court disagreed, noting that "employees come and go

[2] Under § 287.610.1 RSMo, "the division may appoint additional administrative law judges for a maximum of forty authorized administrative law judges."

from the eligible class as they are hired and fired; this is an open class because eligibility turns on their relationship to their employer." *Id.* By contrast, ALJs cannot come and go from Respondent's class because no more ALJs will ever be appointed between January 1, 2012 and January 1, 2015. The challenged statute in *Zimmerman* was likewise open-ended because it applied to all "first class charter counties," a statutory classification based on the county's organizational structure and assessed evaluation. 916 S.W.2d at 209. Unlike that classification, which is open to any first class county that chooses to adopt a charter form of government, HB 2007 § 7.840 created a closed-ended class based on dates of appointment that have already passed and no one else may enter.

Even if § 7.840 were facially open-ended, the concomitant presumption of constitutionality should be overcome because the bill has the practical effect of singling out one state employee for different treatment. As this Court has repeatedly held, open-ended classifications are not entitled to a presumption of constitutionality "when the classification is so narrow that 'as a practical matter others could not fall into that classification.'" *Normandy*, 518 S.W.3d at 191 (quoting *Jefferson Cty. Fire Prot. Districts Ass'n v. Blunt*, 205 S.W.3d 866, 870 (Mo. 2006)). Although the Court has previously applied this practicality exception to population-based classifications, the principle holds for classifications based on a range of appointment dates so narrow as to implicate only a single state employee. In *Jefferson City,* this Court adopted a three-part test for overcoming the presumption that population classifications are open-ended: If "(1) a statute contains a population classification that includes only one political subdivision, (2) other political subdivisions are similar in size to the targeted political subdivision, yet are not included, and (3) the population range is so narrow that the only

apparent reason for the narrow range is to target a particular political subdivision and to exclude all others," then "the law is no longer presumed to be general, but is presumed to be a special law. 205 S.W.3d at 870–71. Applying the test to the statue challenged in *Jefferson City*, this Court concluded that "section 321.222.7 contains the narrowest population range of any reported case of this Court"; "[t]he population range in this statute (1200) is a tiny fraction (.6%) of the upper population limit in the statute of 199,200"; and "[t]he only apparent reason this statute has a population range that represents only .6% of the upper population limit is to exclude all counties other than Jefferson." *Id.* at 871. Given those facts, the Court held the law was presumptively special. *Id.*; *see also City of DeSoto v. Nixon*, 476 S.W.3d 282 (Mo. 2016) (holding six-prong classification presumptively special because no other city was remotely likely to satisfy all six criteria).

Appellants suggest that appropriations by appointment-date are open ended classifications because anyone—including Respondent if he were re-appointed—may enter the class of ALJs appointed after January 1, 2015. But that argument overlooks the other two appointment-date classifications, neither of which is open to new members. In *Normandy*, the state argued that a statute applying to counties with "more than nine hundred fifty thousand inhabitants" was open-ended, even though only one of the state's 114 counties has that many residents, because other counties could theoretically grow in population. 518 S.W.3d at 193-94. Finding the necessary population growth was not "likely" in the "foreseeable future," the Court held that this facially open-ended classification "clearly targeted St. Louis County and excluded all other political subdivisions." *Id.* at 195.

Like the statutes in *Normandy* and *De Soto*, the classification of ALJs by the particular appointment dates chosen has the effect of, and was

obviously intended to, single out one member of a larger class for special treatment. Holding HB 2007 § 7.840 to be presumptively special "is a logical extension of the reasoning in *Jefferson County*." *Normandy*, 518 S.W.3d at 196.

B. Appellants have not shown any substantial justification for the enactment of a special law.

Presumptively special legislation may still be constitutional if the state is able to show "substantial justification" for its enactment. *Normandy*, 518 S.W.3d at 196; *see, e.g., City of Sullivan v. Sites*, 329 S.W.3d 691, 694 (Mo. 2010) (holding that the city had presented evidence of substantial justification for a sewer fee based on a particular location because certain areas had benefited from previous sewer improvements). In this case, the General Assembly did not identify *any* justification for singling out Respondent for termination, much less a *substantial* one. Appellants nonetheless speculate that the Legislature may have targeted Respondent because he was one of the named defendants in a pair of discrimination lawsuits settled by the Attorney General's Office several years ago:

> 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.

Appellants' Br. at 82-83.

This argument is remarkable for several reasons. First, it essentially concedes the underlying premise of Respondents' special law claim, namely that he was specifically target by the Legislature. Second, this argument is being advanced by the Attorney General's Office, which represented

Respondent in the very discrimination lawsuits on which the AGO now relies to impugn his character. Third, it was the Attorney General's decision to settle the two discrimination lawsuits, not Respondent's, and the AGO did so over Respondent's objection. Fourth, the Attorney General's Office did not admit to any form of discrimination or retaliation by Respondent when it settled those cases. On the contrary, the settlement agreements expressly denied any liability on Respondent's part. Notwithstanding its ethical duty to a former client, its own role in negotiating the settlements at issue, or its express denial of Respondent's liability, the Attorney General's Office is now throwing Respondent under the bus. It is all the more astonishing that the AGO would turn on a former client not for the sake of the Appellants it actually represents in this case—Executive Branch officials who neither asked for nor wanted Respondent to be removed from office—but rather to defend legislation that unabashedly encroaches on these Appellants' own constitutional authority to make employment decisions within the Executive Branch.

In any event, Appellants' substantial justification argument is unavailing because they offered absolutely no *evidence* to support it. Appellants rely solely on *allegations* from the pleadings in two discrimination lawsuits, allegations both Respondent and the Attorney General's Office itself have expressly denied. Acknowledging the dearth of evidence offered in the circuit court, Appellants contend that "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." Appellants' Br. at 83 (emphasis added). Essentially, Appellants are arguing that the Legislature

has substantial justification to terminate through the appropriations process any quasi-judicial officer who has been accused of wrongdoing if the public *might* question that officer's integrity. Why stop there? Carried to its logical conclusion, the Legislature could simply accuse a disfavored state official of wrongdoing and then use news reports of Legislature's own accusations to justify that official's removal due to "public perception."

Because the challenged portion of HB 2007 § 7.840 applies to only one person in all of state government and Appellants have not provided substantial justification for treating Respondent differently from all other ALJs, the circuit court did not err in holding that portion of the statute an unconstitutional special law.

II. The General Assembly violated the Missouri Constitution's separation of powers by using the appropriations process to fire a specific Executive branch employee.

[*Responding in part to Appellants' First Point Relied-On*]

The Missouri Constitution provides:

> 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 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, sec. 1. The constitution further 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, sec. 19. Respondent is aware of only one reported appellate decision citing Mo. Const. art. IV, sec. 19, *see Anderson v. Pers. Advisory Bd.*, 586 S.W.2d 738, 740 (Mo. App. 1979), but that case is not instructive here. The scope and meaning of article IV, section 19 appears to be a matter of first impression.

In this case, there is little question that the General Assembly is attempting to usurp Executive authority over personnel decisions within the state's various administrative agencies through the power of appropriations. To be sure, the Legislature may control some operations of the Executive by withholding funding or FTEs from particular departments for particular programs, projects, or positions. *Tolerton*, 139 S.W. 403, 410 (1911), However, the Legislature may not dictate *which specific employees* the Executive must hire or fire. That's precisely what the Legislature has done with HB 2007. By

appropriating funds for all Workers' Compensation ALJs except Respondent—the only ALJ appointed between January 1, 2012 and January 1, 2015—the Legislature has attempted to force the Division of Workers' Compensation to fire a specific ALJ whom the Legislature disfavors. The circuit court correctly found the Legislature's action to be an encroachment on Executive power prohibited by Mo. Const. art. II, sec. 1 and art IV, sec. 19.

Appellants fail to address the circuit court's separation of powers ruling directly in their appeal, citing Article I, section 19 of the Missouri Constitution only once in the Argument section of their brief. *See* Appellants' Br. at 54. Appellants' suggest Article I, section 19 is inapplicable to the present cases because "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." *Id.* As explained above, however, HB 2007 § 7.840 does not "abolish" the office of any ALJ. Nor does it reduce the number of FTEs available to the Division. Nor does it reduce the total number of ALJs the Division is authorized to hire under § 287.610.1 RSMo. The only thing HB 2007 § 7.840 "abolishes" is the Division's authority to spend its ALJ salary appropriations on one *particular* employee of the Executive Branch.

In support of their first Point Relied-On, Appellants repeatedly invoke the Legislature's "plenary authority" over appropriations and the disposition of tax revenues. Appellants' Br. 52 (citing *School Dist. of Kansas City v. State*, 317 S.W.3d 599, 606 (Mo. 2010); *St. Louis Cty. v. University City*, 491 S.W.2d 497, 499 (Mo. banc 1973); *Billings Special Rd. Dist. v. Christian Cty.*, 5 S.W.2d 378, 382 (Mo. 1928)). They note, correctly, that the "power of the Legislature over these matters, *subject to constitutional limitations*, is supreme," *id.* (quoting *Davis v. Smith*, 75 S.W.2d 828, 830 (Mo. 1934))

(emphasis added), but they never address what those constitutional limitations are or how they apply to HB 2007 § 7.840. Appellants rely on *Tolerton* for the Legislature's power to "refuse to make an appropriation for the payment of the salary and expenses of any public officer holding office," and to "abolish any office not provided for by the Constitution." 139 S.W. 402 (1911). Citing *Wilcox v. Rodman*, 46 Mo. 322 (1870), they argue "[t]his power includes the power to abolish the office of a single person." Yet, both *Tolerton* and *Wilcox* were decided long before the people of Missouri adopted Article IV, section 19 of the Constitution *in 1971*.

Appellants note correctly that the "offices of administrative law judges were created by statute, not Art. VII, § 1 (Appellants' Br. at 30), and are therefore subject to legislative abolishment, Mo. Rev. Stat. § 287.610 (*Id. at* 31-32). Perhaps, then, the Legislature could eliminate *all* administrative law judges in the Workers' Comp Division. Under *Herschel v. Nixon*, 332 S.W.3d 129, 137 (Mo. App. 2010), the Legislature may also reduce *total funding and FTEs* for Workers' Comp ALJs.[3] What the Legislature cannot do is to tell the Division *which* ALJs to fire. That power is reserved exclusively to the Executive Branch under Mo. Const. Art. IV, sec. 19.

[3] Appellants' cite Respondents' testimony in *Herschel* for various propositions throughout their brief, *e.g.,* "The legislature can do what it wants." Appellants' Br. at 58. It goes without saying that Respondent's prior statements about the Legislature's constitutional authority are not binding on this Court. Moreover, *Herschel* was a *statutory* challenge to the way the *Executive Branch* selected which ALJs to remove due to a lack of appropriation. To the extent that case has any bearing on the present case, it supports Respondent's argument that the power to select which ALJs should be removed due to a lack of appropriations lies with the Executive Branch.

III. The General Assembly violated the Missouri Constitution's guarantee of equal rights by treating Respondent differently from the other 27 Workers' Compensation ALJs without any rational basis.

[*Responding to Appellants' Second Point Relied-On*]

The Equal Rights Clause of the Missouri Constitution provides "that all persons are created equal and are entitled to equal rights and opportunity under the law." Mo. Const. art. I, sec. 2. Unless a law "operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution," the Equal Rights Clause is satisfied "as long as [the challenged legislation] bears a reasonable relationship to a legitimate state purpose." *Glossip v. Missouri Dep't of Transp. & Highway Patrol Employees' Ret. Sys.*, 411 S.W.3d 796, 801 (Mo. 2013).

Respondent has not alleged that he is a member of a protected class or that HB 2007 involves a fundamental right. Thus, the relevant question on appeal is whether the Legislature's elimination of funding for Respondent's salary is reasonably related to a "legitimate state purpose." The only legislative purposes Appellants offered at trial were (1) "protecting the public fisc and removing an unnecessary public office," and (2) "promoting public integrity and protecting against the risk of paying future discrimination settlements." A006. As the circuit court noted, the first of these rationales "may support a reduction in the *total number* of ALJs for which funds are appropriated collectively, but it does not provide a rational basis for eliminating funding for a specific ALJ." *Id.*

The second rationale relies on the decision by the Attorney General's Office to settle MHRA claims brought against Respondent *several years ago*. As noted above, however, "the only evidence presented at the preliminary

injunction hearing was that [Respondent] 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 Plaintiff's approval." *Id.* As the circuit court correctly held, "speculation that the legislature believed Plaintiff posed 'a risk of future discrimination settlements' is not a rational basis for treating him differently from all other similarly situated workers' comp ALJs." *Id.*

Disputing the circuit court's finding that no evidence was presented at trial other than Respondent's denial of the discrimination allegations against him, Appellants assert that "[t]he public findings from the *Garcia* [sic] and *Backer* suits were widely publicized, introduced into evidence, and taken under judicial notice." Appellants' Br. at 65. Yet, the only evidence they direct this Court to in their Appendix is the *Guthrie* and *Backer* Settlement Agreements (A048-61), both of which expressly provided, "Nor shall anything herein be an acknowledgment by anyone of any liability for any claimed act or acts by or against another, *as all liability is expressly denied*." (A050, A060) (emphasis added).

Appellants grossly misrepresent Respondent's testimony at trial, claiming in their Opening Brief that he

> *admitted* that the claim of discriminatory termination by Ms. Backer was "essentially indefensible since they fired Gracia Backer seven days after setting a letter saying … saying I was mistreating people based on age." Tr. 29-31.

Appellants' Br. at 66 (emphasis and ellipsis in Appellants' Brief). In stark contrast to Appellants' characterization of his testimony, Respondent's actually testified as follows:

> Q. [*by Appellants' counsel*] And the State has suggested that one of the reasons why the legislature did this is because those cases were resolved for a multi million dollar judgment. Is that correct?
>
> A. [*by Respondent*] That is what the Attorney General's office is saying, yes.
>
> Q. What is your recollection of how those cases were resolved?
>
> A. Well, they were settled without a hearing, and I didn't approve of any of the settlements, that was run by the Attorney General's office. You know, I had the attorney -- assistant attorney generals representing me; the department had assistant attorney generals representing them, and the governor's office, and those changed over various periods of time, but when I was dealing with the preparation for the Backer case, *Assistant Attorney General Chuck Henson said to me*, at that period of time, *we believe you have a good case for making legitimate non-discriminatory decisions to take action against people in the department*, *and he said that the governor's case was essentially indefensible* since they fired Gracia Backer seven days after getting a letter saying -- *and I disagreed with everything in that letter* -- saying I was mistreating people based on age.

Tr. 28-29 (emphasis added). Appellants omit a material statement by Respondent's then-counsel at the Attorney General's Office that the AGO "believe[s] *you* have a good case for making legitimate non-discriminatory decisions to take action against people in the department." Appellants further omit the phrase "the governor's case" before the phrase "was 'essentially indefensible.'" Eliding these partial statements, Appellants create a false impression that the Attorney General's Office believed *Respondent's case was essential indefensible*, when Respondent's testimony was exactly the opposite.

Appellants' further omit Respondent's statement, "I disagreed with everything in that letter," giving the false impression that Respondent "admitted" to discriminatory conduct.[4]

Even assuming the Legislature did want to remove Respondent from office because it believed his behavior posed a risk of future discrimination lawsuits, § 287.610 RSMo provides the *exclusive* statutory mechanism to remove an ALJ *for cause*. The Legislature cannot amend § 287.610 RSMo—or any substantive law, for that matter—through the appropriations process. *See Davis v. Smith*, 75 S.W.2d 828, 830 (1934) ("legislation of a general character cannot be included in an appropriation bill. If this appropriation bill had attempted to amend section 13525, it would have been void in that it would have violated section 28 of article 4 of the Constitution which provides

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[4] Appellants' further representation that "Mr. Rebman himself *volunteered* that *no* person in the private sector would employ him because of these scandalous allegations" is equally misleading. (Appellants' Br. at 66) (emphasis in original). Respondent actually testified:

> 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).

that no bill shall contain more than one subject which shall be clearly expressed in its title.").

As Appellants have not identified a legitimate state purpose behind the Legislature's specific targeting of Respondent for termination, the challenged portion of HB 2007 violates the constitutional guarantee of equal rights.

IV. Section 287.610 does not authorize the Legislature to remove specific ALJs through the appropriations process.

[*Responding to Appellants' Fourth Point Relied-On*]

In their fourth point relied-on, Appellants advance three separate arguments: (1) that § 287.610 RSMo does not create a private right of action, (2) that judicial review of Respondent's termination was improper because he did not file a petition in mandamus, and (3) that Respondent's termination did not violate § 287.610 RSMo because the Legislature may remove ALJs through the appropriations process. Appellants did not raise either of the first two arguments in the circuit court. "An issue that was never presented to or decided by the trial court is not preserved for appellate review." *Nixon v. Am. Tobacco Co.*, 34 S.W.3d 122, 129 (Mo. 2000).

Appellants' third argument in their fourth point relied-on—that § 287.610 RSMo permits the termination of a specific ALJ through the appropriations process—is premised on an overly broad reading of *Herschel v. Nixon*, 332 S.W.3d 129 (Mo. App. 2010). In that case, the court of appeals held:

> section 287.610 expressly recognizes two independent bases for discharging ALJs based either on the individual performance of a particular ALJ *or based on the General Assembly's appropriation of funds to the Division*. We also conclude that the Director was authorized in this case to remove the ALJs in response to the legislature's Fiscal Year 2010 appropriation to the Division.

332 S.W.3d 129, 134 (Mo. App. 2010) (emphasis added). Thus, when the Legislature reduced the total amount of FTEs and funding for ALJs, the Labor Department acted within *its discretion* to fire the shortest serving

ALJs without going through the for-cause removal process prescribed by § 287.610 RSMo.

The appropriations bill in *Herschel* did not specify which ALJs had to be fired due to a lack of appropriations. In this case, by contrast, the Legislature sought to control the Division director's discretion by appropriating funds for 27 *specific* ALJs and withholding money only from Respondent. As discussed above, two separate provisions of the Missouri Constitution prohibit the Legislature from doing so absent "substantial justification" for enacting special legislation, *see* Part I, *supra*; and a "legitimate state purpose, *see* Part III, *supra*; and a third constitutional provision prohibits such action outright, see *Part* II, *supra*.

V. Respondent was entitled to permanent injunctive relief.

[*Responding to Appellants' Fifth Point Relied-On*]

In the fifth section of their brief, Appellants argue Respondent was not entitled to injunctive relief under the four factors for *preliminary* injunctive relief as enumerated in *Dir. of Revenue v. Gabbert*, 925 S.W.2d 838, 839-40 (Mo. 1996) ("When considering a *motion for a preliminary injunction*, a court should weigh the movant's probability of success on the merits, the threat of irreparable harm to the movant absent the injunction, the balance between this harm and the injury that the injunction's issuance would inflict on other interested parties, and the public interest.") (emphasis added) (internal quotations omitted). However, the circuit court granted Respondent a *permanent* injunction, not a preliminary one, and the standards are different.

To obtain *permanent* injunctive relief, a party must demonstrate that "(1) he or she has no adequate remedy at law; and (2) irreparable harm will result if the injunction is not granted." *Beauchamp v. Monarch Fire Prot. Dist.*, 471 S.W.3d 805, 813 (Mo. App. 2015) (quoting *City of Greenwood v. Martin Marietta Materials, Inc.*, 311 S.W.3d 258, 265 (Mo. App. 2010). Respondent easily satisfied both requirements in this case.[5] First, there is no adequate remedy at law for an ongoing violation of the constitution. In fact, injunctive relief is the typical remedy for constitutional violations. *See, e.g., Ex parte Young*, 209 U.S. 123 (1908) (holding public officials may be sued for prospective injunctive relief to remedy a constitutional violation). Moreover, courts frequently order the reinstatement of wrongfully terminated employees as an equitable remedy. *See Brady v. Curators of Univ. of*

[5] As the "balance of equities" and "public interest" are not factors in the granting of *permanent* injunctive relief, Respondent need not respond to Appellants' arguments on these points.

Missouri, 213 S.W.3d 101, 113 (Mo. App. 2006) ("Reinstatement is the preferred remedy for unlawful employment discrimination."). Indeed, Appellants argued below that a TRO was unnecessary because the court could always order Respondent's reinstatement later if he prevailed on the merits.

Second, the loss of a constitutional right, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Glass v. Trowbridge*, No. 14-CV-3059-S-DGK, 2014 WL 1878820, at *5 (W.D. Mo. May 12, 2014) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *and see Hicklin v. Precynthe*, No. 4:16-CV-01357-NCC, 2018 WL 806764, at *10 (E.D. Mo. Feb. 9, 2018) ("the deprivation of [plaintiff's] constitutional rights under the Eighth Amendment is alone sufficient to establish irreparable harm"); *see also Michigan State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 669 (6th Cir. 2016) ("When constitutional rights are threatened or impaired, irreparable injury is presumed."); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) ("The district court properly relied on the presumption of irreparable injury that flows from a violation of constitutional rights."); *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.").

Appellants' reliance on *Eberle v. State*, 779 S.W.2d 302, 304 (Mo. App. 1989), and *Greenwood*, 311 S.W.3d at 265, is misplaced. *Eberle* involved corrections officers whose sole injury was the loss of $42 per month in bonus pay if they could not pass a performance test. 779 S.W.2d at 304. Because they could recover all lost wages if successful in their administrative appeal, the plaintiffs had not shown irreparable injury. If anything, *Eberle* supports Respondent's claim of irreparable injury: Noting that "a loss of position could

arguably amount to irreparable injury," the court denied equitable relief because the plaintiffs were still employed. *Id.* *Greenwood* is even more inapposite. Not only had the plaintiff in that case "neither pleaded nor tried the issues of irreparable harm," but the circuit court had no jurisdiction to entertain an injunction because the plaintiff did not request it until more than 30 days after the original judgment became final. 311 S.W.3d at 266.

The circuit court did not err in permanently enjoining Appellants from removing Respondent from office in violation of the Missouri Constitution because he has no adequate remedy at law and the Legislature's violations of three separate constitutional provisions constituted irreparable harm *per se*.

VI. The circuit court did not order the expenditure of funds without an appropriation.

[*Responding to Appellants' Six Point Relied-On*]

Appellants argue that the circuit court violated the separation of powers by ordering the Labor Department "to spend or redirect funds in ways the legislature did not appropriate." Appellants' Br. at 120. This assertion is simply incorrect. 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 of Section 7.840 of HB 2007 (the "severed language") as it is this language which the Court finds to offend the Missouri Constitution. The remainder of the appropriations language remains in full force and effect.

A008. Once the severed language is removed, § 7.840 provides two separate appropriations for funding ALJ salaries:

> For the purpose of funding Administrative Law Judges ~~appointed on or prior to January 1, 2012~~
> Personal Service $2,480,240
> For the purpose of funding Administrative Law Judges ~~appointed on or after January 1, 2015~~
> Personal Service $859,334

HB 2007 (severed language struck through). Appellants are correct that the total funds appropriated in these two lines "do[] not provide enough money to pay 28 administrative law judges at the prior salary level of last years' appropriations." Appellants' Br. at 121. But the court's injunction does not require the Department to exceed the amount of appropriations provided. On the contrary, as the circuit court was careful to include in its grant of relief:

> Nothing in this permanent injunction shall prohibit the Division of Worker's Compensation from terminating any ALJ, including but not limited to Plaintiff, in order to not exceed its appropriation for administration, so long as the basis for the termination is otherwise constitutionally and legally permissible.

A008. Relying on *Herschel*, the circuit court noted that the Department remains free to choose which ALJ to remove in order to keep its personal services costs within the limits appropriated by the Legislature. *Id.* Nowhere in its Judgment and Permanent Injunction does the circuit court order the Department to pay the salaries of more than 27 ALJs. Appellants' claims to the contrary are meritless.

CONCLUSION

For the reasons stated above, this Court should affirm the Judgment and Permanent Injunction of the circuit court.

CERTIFICATION

Counsel for Respondent certifies that he signed and retains the original Respondent's Brief, which complies with the limitations contained in Rule 84.06(b).

This brief contains 7620 words as calculated by Microsoft Word.

Counsel for Respondent further certifies that he electronically filed this brief via the Court's electronic case filing system on December 10, 2018, which will serve a copy of the same upon all counsel of record.

/s/ J. Andrew Hirth
Counsel for Respondent