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' REPLY BRIEF

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INTRODUCTION

Nothing in Mr. Rebman's brief can cure the defect in the circuit court's judgment: it orders the department to take money from the state treasury to pay for an office for which the legislature refused to appropriate funds.

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). Under this power, the legislature may decline to fund any administrative law judge positions it pleases, and it may abolish offices by declining to fund them. It was error to displace this power.

Even worse, the court ordered the department to pay Mr. Rebman from the funds that the legislature had appropriated to pay *other* administrative law judge offices. App. 31-32. D14 p.3; App. 3. But it is black-letter constitutional law that no court can order an executive department to draw money from the treasury for any purpose other than the legislature's purpose.

Nor would it be at all unreasonable for the legislature to decline to fund Mr. Rebman's office and thus abolish it. Mr. Rebman's past tenure led to serious sex and age discrimination complaints—which the State had to settle for $3.1 million. App. 48, 51, 61. Mr. Rebman testified that he is unemployable in the private sector in part because these prior cases. Tr. 29-33. In his brief, Mr. Rebman asks this court to ignore this evidence of the public perception of

scandal and his potential future legal risk to the State, and to presume him innocent, but the legislature and the department need not engage in courtroom fact-finding to make and implement public policy. The people's representatives need not blind their eyes to massive settlements paid to address troubling discrimination allegations against a quasi-judicial officer within the same department as the human rights commission. The state thus may reasonably promote its important interest in avoiding the appearance of corruption in high office by abolishing his office and ending the perceived public scandal and future financial risk of retaining his office.

ARGUMENT

I. The legislature has plenary authority to defund administrative law judge offices as a democratic check on executive decisions, and no court may order funds drawn from the treasury without an appropriation.

The legislature has plenary appropriations authority by which it may influence executive policy. 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 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 v. Cty. of Marion*, 69 Mo. 571, 576-77 (Mo. 1879); Appellants' Br. 54.

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). This appropriations requirement is "strictly construed." *State ex rel. Thompson v. Bd. of Regents for Ne. Missouri State Teachers' Coll.*, 305 Mo. 57, 65, 264 S.W. 698, 700 (1924).

In his response brief, Mr. Rebman does not contest this broad authority, or the strict adherence and construction required. Instead, he seeks to find exceptions to this authority elsewhere in law. Response Br. 19-21.

In particular, he does not deny his own deposition statements admitting these points, which he made under oath in *Herschel*. Response Br. 21 n.3. 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. 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.

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 decline funds and thus "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, 325-26 (1870).

The Western District Court of Appeals' opinion in *Herschel* explains why there is no separation of powers problem with defunding a public office, including by selectively defunding administrative law judge positions. *Herschel*, 332 S.W.3d at 137. 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 (quotation omitted); *Tolerton*, 139 S.W. at 407). The removal statute for

administrative law judge positions, Section 287.610, thus respects "the constitutional principle that prohibits one legislature from binding the appropriations authority of subsequent legislatures." *Id*. at 139.

In response, Mr. Rebman agrees with the state's position: that "the Legislature may control some operations of the Executive by withholding funding or FTEs from particular departments for particular programs, projects, or positions," just not specific employees. Response Br. 19 (citing *Tolerton*, 139 S.W. at 410).

Mr. Rebman also quibbles that *Herschel*'s language is dicta unrelated to the statutory issues in the case. Response Br. 21 n.3. But because *Herschel*'s reasoning is correct, and he agrees with the bottom line, that question does not matter. In any event, *Herschel*'s ruling arose under the state constitution because interpreting the constitution was necessary to resolve the statutory claim in the case. 332 S.W.3d at 139. The state constitution illuminates the meaning and context of Section 287.610, and the court interpreted the statute to be in harmony with this constitutional provision.

C. Nor does the legislature's plenary appropriations power encroach on the Executive Branch'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).

Mr. Rebman asserts that defunding a single office encroaches on this authority. Response Br. 19-20. But the appropriations statute meets the standard that he agrees applies. The statute does not dictate *which* employee must be hired; it abolishes an office entirely, by abolishing the salary, so that no one may hold the defunded position.

The statute eliminated funding and thus eliminated the position. Mr. Rebman claims that the two are different but *Herschel* held that this is a distinction without a difference. Both when the legislature expressly abolishes administrative law judge positions, and 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. Even if the department may 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 case's appropriations statute is just like the statute at issue in *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.

Mr. Rebman also claims that Section 19 impliedly limits or repeals the legislature's plenary appropriations power, so executive officials may (or must) ignore a lack of funding and keep him on. Response Br. 19-21. But this Court construes the constitutional provision "in favor of the power of the Legislature" and requires limits on the legislature's 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). And here Section 19 did not repeal the legislature's plenary authority over appropriations because Section 19 makes clear that executive personnel power is subject to other constitutional limits, such as appropriations. Mo. Const. art. IV, § 19 (App. 28).

Anyway, the legislative and executive branches have no conflict here. The department decided to terminate him when his position was abolished through lack of funding. It did not decline to enforce the law nor did it assert any authority contrary to the legislature's statute.

II. The appropriations statute comports with the equal rights clause because it is rational to end an office held by a person whose conduct led to large sex and age discrimination settlements.

Article I, Section 2 of the Missouri Constitution guarantees "equal rights and opportunity under the law." Mo. Const. art. I, § 2 (App. 22). But, for two reasons, there is no equal protection violation here.

First, as the circuit court held and Mr. Rebman concedes, the law implicates no fundamental right or suspect class, and so, at most, rational-basis review applies. D14 p.5; App. 5; Response Br. 22.

That said, "a class-of-one claim cannot be used to challenge discretionary governmental action," and so he may not bring an equal-rights claim at all. *Katz-Crank v. Haskett*, 843 F.3d 641, 649 (7th Cir. 2016). Mr. Rebman has no response on this point.

Second, assuming rational-basis review applies, it is easily met here. Although the legislature gave no reason for its decision not to fund positions appointed between January 1, 2012 and January 1, 2015, abolishing Mr. Rebman's office furthers the protection of the public fisc and the promotion of propriety in quasi-judicial offices.

A. Under rational-basis review, the classification in the state appropriations statute is reasonably related to furthering the state interest in protecting the public fisc and removing an unnecessary public office. This interest applies even if, contrary to evidence, Mr. Rebman had always been a model employee.

Mr. Rebman argues that this fiscal interest is not narrowly tailored enough because the legislature lacks specific reasons to end his office just to save money, Response Br. 22, but that misstates the level of scrutiny. Under exceedingly deferential rational basis review, 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). Courts uphold a 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). Saving money is a plausible reason to abolish a position that costs money to fund.

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). "Assessing 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).

B. And, considering the actual information available to the legislature about the public perception of scandal, this law furthers state interests directly by promoting public integrity and protecting against the risk of paying future discrimination settlements. App. 48; D14 p.3; App. 3.

Mr. Rebman claims that the people lack any interest in avoiding the appearance of impropriety in public officials unless they also have evidence of actual impropriety that would prove liability in court. Response Br. 23.

But, by law, the State has an important interest in averting the fact or appearance of impropriety in quasi-judicial officers under the Code of Judicial Conduct for administrative law judges. D11 p.11-13; Tr. 98-102; Tr. 50-52, 98-106; D13 p. 1-23; D12 p.1-51. 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). 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).

Mr. Rebman also admitted below the importance of these state interests in avoiding the appearance of impropriety. On the stand, he testified

> Q. Do you agree that it is important for ALJ's to be impartial?
>
> A. Yes.
>
> Q. To be perceived to have integrity?

A. Correct.

Q. And do you agree that our state is entitled to judges who avoid the appearance of impropriety?

A. I would say that is true, yes.

Tr. 36-37.

C. Although the legislature gave no reason for its policy choices, the legislature had sufficient information to decide that its law would serve this interest in avoiding the appearance of impropriety.

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*, 473 U.S. at 441–42. Rational basis review is "not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Beach Commc'ns, Inc.*, 508 U.S. at 313.

Mr. Rebman asserts that the claims were never proven against him, because the State (in his view, unaccountably) settled the cases for $3.1 million rather than, as he suggests, exonerate him at a trial. Response Br. 22-25. Without a courtroom judgment against him, he asserts that any allegations are just speculation: no one admitted liability. *Id*. 23-24.

But a $3.1 million settlement—from the department charged with enforcing the Missouri Human Rights Act—speaks for itself. App. 48-61; D14

p.3; App. 3. So do the widely publicized public filings from the *Guthrie* and *Backer* suits. App. 48 (Defendant's Exhibit 26); Tr. 87-90. The legislature may use its own common sense to decide what these settlements between sophisticated parties look like to the public and what they mean to the state's bottom line.

What is more, Mr. Rebman himself *volunteered* that he could not get another legal job and that *no* person in the private sector would employ him, in part because of these prior cases. Tr. 33. He thus concedes the problem of public perception. Response Br. 25 n.4. And, even though he now puts all the blame on the Governor for firing Ms. Backer, Mr. Rebman *admitted* that her claim of retaliatory termination 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. That admission would hardly help his case if it went to trial. Nor did any other administrative law judges cause similar litigation or scandal.

Plus, exercising the appropriations power does not require fact-finding or proof comparable to statutory removal procedures or to courtroom adjudication. 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. *Beach Communications*, 508 U.S. at 314. A "legislative choice is not subject to courtroom fact-finding and may be based on

rational speculation unsupported by evidence or empirical data." *Id.* at 315 (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.* The legislature thus may draw its own view of the facts from the known public information.

Mr. Rebman also asserts that his past conduct is irrelevant if the state may remove him only for cause, but the lack of any recent misconduct is irrelevant if there is no statutory for-cause protection from abolishing an administrative law judge position through lack of funding. *Herschel*, 332 S.W.3d at 137.

III. The appropriations law 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.

This appropriations statute comports with Mo. Const. art. III, §40. App. 25. Article III, Section 40(30), which prohibits the General Assembly from passing any "special law" where a general law could apply.

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

To determine whether a statute is a special law or a general law, the Court looks to whether the statute applies 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). Laws based on open-ended characteristics are subject only to rational basis review. *City of Normandy v. Greitens*, 518 S.W.3d 183, 191 (Mo. 2017).

Laws that abolish an office by appropriations are not special laws. *Tolerton*, 139 S.W. at 407. Appropriations bills by nature make hard-and-fast specific distinctions, or else the legislature could never fund or defund a program or office. *State ex rel. Zoological Bd. of Control v. City of St. Louis*, 1 S.W.2d 1021, 1025 (Mo. 1928). 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.

As Mr. Rebman agrees, because the legislature has plenary power to defund public offices, 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. *Tolerton*, 139 S.W. at 407. He concedes: "the Legislature may control some operations of the Executive by withholding funding or FTEs from particular departments for particular programs, projects, or positions," just not specific employees. Response Br. 19 (citing *Tolerton*, 139 S.W. at 410).

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 v. Missouri Dep't. of Transp.*, 411 S.W.3d 796, 808 (Mo. 2013) (citation omitted). 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.

To decide whether a statute is open or closed, courts look at the statute's text. Here, the text shows that this statute funds administrative law judge

offices held before 2012 and 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 and after 2015 is an open-ended class because its members may leave. *Id.* In the same way, a person could leave the class of judges between that time. The statute thus is not facially special.

Mr. Rebman asks this court to disregard the statute's text and instead invert the statute to have it state what it does not state. Response Br. 11-14. To reshape the statute to be a closed class, he would have this court read the statute to speak only of a class of persons appointed between 2012 and 2015 that the legislature disqualified from employment. *Id.* 11.

But his position ignores the statute's text. This law creates 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, and others may leave the classes. 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). 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.

New employees may join the funded class, as in *Alderson v. State*, and so the law "created an open-ended class, entitling the classification to a presumption of constitutionality." 273 S.W.3d 533, 538 (Mo. 2009). Given that "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.* at 536-37. The court in *Alderson* did not rewrite the law to focus on a class of excluded employees, who it then theorized would never be eligible to join the included class. Likewise, in *Zimmerman v. State Tax Comm'n of Missouri*, this Court held that the legislature may distinguish among employees by the employees' method of appointment. 916 S.W.2d 208, 209 (Mo. 1996). As in that case, more people may exit or enter the funded classes.

Mr. Rebman also tries to expand this Court's precedents on special laws to situations in which the legislature abolished an office by defunding it. Response. Br. 12-13. He claims that *State ex rel. Harris v. Herrmann*, 75 Mo. 340 (1882), forbids ousting employees appointed by a certain date, and that under *Tolerton* the legislature can never single out a particular employee's office to defund. *Id.* But in *Harris* 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. And the appropriation in *Tolerton*, which refused to fund a Missouri agency in charge of game and fish so long as the present director remained in office, fell "directly within the definition of special laws" because it targeted a particular individual and pressured him to vacate the office by prohibiting any funding unless he left—rather than abolishing the office. *Tolerton*, 139 S.W. at 405, 408.

But 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 and disqualify him from it: the law ends it. The legislature left Mr. Rebman free to seek and hold any other administrative law judge or state position. And he concedes that if it abolished his office, rather than disqualifying him personally from any of the funded positions, it is lawful under the legislature's plenary appropriations authority and the presumption of constitutionality of state laws. Response Br. 19

C. The appropriations statute satisfies any level of scrutiny.

Because the appropriations statute is not facially special, its open-ended provisions are subject to rational-basis review. *Glossip*, 411 S.W.3d at 808. Under the rational-basis 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) (quotation omitted).

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). A special law is only a problem if a general law could have been made applicable. *Id.*

Mr. Rebman argues that hypothesizing that the legislature could have had a strong substantial justification to end his office means that the state conceded that the law is special and thus unconstitutional. Response Br. 16. But that gets the constitutional framework backwards. Identifying a substantial justification for the law is just another way to say that the law does "embrace all of the class to which they are naturally related," showing that the Act is general because it could not be made broader. *City of Sullivan*, 329 S.W.3d at 694.

The legislature gave no reason for its decision to not fund positions appointed between January 1, 2012 and January 1, 2015. But, as above, given reports of Mr. Rebman's past actions, "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).

The legislature 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. *Supra* Pt. II. 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. *Id*. Addressing discrimination, especially protecting state employees from discrimination, is a "substantial justification" for a special law. Appellants Br. 82.

When Mr. Rebman served as the director of the department, two older, female employees accused him of sex and age discrimination. 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 pay $3.1 million to compensate the female employees. App. 48-61; D14 p.3; App. 3.

Mr. Rebman asserts that the state lacked evidence of actual wrongdoing on his part, and he again disputes that the state has an interest in avoiding the appearance of impropriety unless the legislature has proof that would satisfy a court of legal liability. Response Br. 16-18.

But the public has an interest in avoiding more than the *fact* of impropriety; it has an interest in avoiding any *appearance* of impropriety under the relevant canons of conduct for his position, as he conceded at trial below. *See supra* Pt. II. And the media coverage documenting the public

perception of Mr. Rebman's alleged misconduct continues to this day. Appellants' Br 24-25, 88-89.

In the end, he cannot dispute this public perception or the legislature's reasonable means of promoting integrity, protecting state employees from discrimination, and protecting state resources from future legal risks. And so he resorts to suggesting that the Office of the Missouri Attorney General has not followed the applicable rules of professional conduct when it chose to defend the constitutionality of the state appropriations statute and to represent itself and other state officials in this case. Response Br. 16-17. He suggests that an "ethical duty to a former client, its own role in negotiating the settlements at issue, or its express denial of Respondent's liability" requires the Attorney General's Office not "to defend legislation that unabashedly encroaches on these [its] own constitutional authority to make employment decisions within the Executive Branch." *Id.*

But Mr. Rebman does not identify any breached ethical rule. Nor does he dispute that, as the Office made clear in open court at the outset at the TRO hearing, that the attorneys on this matter have been screened from any attorneys or files involving defending the Missouri Human Rights Act litigation against him. And it *is* the duty of the office to defend the validity of state law when state officials seek to enforce a constitutional state law. In any event, the settlement in his prior cases before a determination of liability does

not mean that there is no public perception of impropriety or no future risk of wrongdoing that the legislature may address going forward.

IV. Section 287.610 provides no private cause of action, Mr. Rebman failed to satisfy the writ requirements under Section 536.150, and Section 287.610 recognizes the legislature's ability to remove administrative law judge positions through lack of appropriations.

A. The lower court lacked statutory authority because Mr. Rebman lacks a cause of action and failed to satisfy the writ requirements.

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 under Section 536.150. App. 31-32.

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). And even though the lower court ordered 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. Rule 94.01 *et seq*. Because he did not follow these procedures, this Court should decline to provide relief. *Bartlett v. Missouri Department of Insurance*, 528 S.W.3d 911 (Mo. 2017).

Plus, even if this court were to grant relief, it would have to do so under the mandamus standards. He seeks to adjudicate and establish a new right,

but mandamus only allows him to enforce a preexisting right. "[M]andamus is clearly inappropriate" where "the question [at issue] has not previously been decided by a Missouri court." *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 576-77 (Mo. 1994). 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).

Mr. Rebman fails to offer any substantive defense on either point. Response Br. 27. Instead, he argues that he need not respond because these issues were not aired below. *Id.*

But if the judiciary lacks statutory authority to grant him relief, it is a jurisdictional defect: no party may consent to this court's power where it does not exist, and a lack of power to enter relief may be raised at any time, "even on appeal." *McCracken v. Wal-Mart Stores E., LP*, 298 S.W.3d 473, 476 (Mo. 2009). Here, "the failure to state a cause of action is a jurisdictional defect," and so "it may be raised at any time during the proceedings." *Dobson v. Mortg. Elec. Registration Sys./GMAC Mortg. Corp.*, 259 S.W.3d 19, 22 (Mo. Ct. App. 2008). Mr. Rebman's failure to respond on the merits thus admits this point.

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

Nor does the for-cause removal statute provide administrative law judges guaranteed salaries and positions, or provide that the exclusive way to

end an administrative law judge position is for cause. The State may abolish administrative law judge offices "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.

Under the statute, "the division may appoint additional administrative law judges for a maximum of forty authorized administrative law judges" but the law also acknowledges the legislature's power of appropriations, contemplating that not all positions may exist. § 287.610(1), RSMo (App. 31-32).[1] Section 287.610 states that "Appropriations shall be based upon necessity, measured by the requirements and needs of each division office." *Id*. 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

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[1] 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.

§ 287.610(1), RSMo.

Assembly's appropriation of funds." *Herschel*, 332 S.W.3d at 134-37. 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.

In this law, the legislature repealed old language that purported to exempt the statute from appropriations, and it added the appropriations language. *Id.* 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. Section 287.610 thus "in no way states or suggests that the only way to discharge an [administrative law judge] is for cause." *Id.* at 135.

Nor could the statute lawfully purport to provide administrative law judges a funding guarantee. Under the canon of constitutional avoidance, the statute should not be read to infringe on the legislature's constitutional authority over appropriations. "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*. (citation omitted).

Any lack of negative performance votes for Mr. Rebman thus is irrelevant, as is his claim that the legislature could not amend this statute by appropriations. Response Br. 25-26. As the Court of Appeals held and as Mr. Rebman conceded in *Herschel*, when the legislature reduces the number of positions by appropriations, the department may remove or discharge administrative law judges to enforce the statute. *Herschel*, 332 S.W.3d at 134-35. Nor did the Court suggest that the methods chosen to remove positions in that case "represent the only scenarios wherein the Division has the authority to discharge ALJs within the permissible bounds of section 287.610.1." *Id*. at 137 n.10.

In response, Mr. Rebman claims that under this statute the legislature cannot direct which administrative law judge positions to abolish, and it must leave that discretion to the department. Response Br. 27. The statute says no such thing. Section 287.610 places no limit on how the legislature could decide which positions to defund or on how the department would select which positions to end. The statute provides no protection against abolishment of offices for lack of appropriations.

V. An injunction is improper because 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.

Mr. Rebman also identifies an incorrect standard for a permanent injunction. The full *Gabbert* factors, which apply to any stay of agency action, 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).

Courts across the nation routinely apply all four factors for permanent stays of agency action because they reflect the equitable concerns present *anytime* a party asks for equitable relief. If a permanent injunction requires only no remedy at law and the existence of irreparable harm to the plaintiff, then the merits would be irrelevant, as would be the balance of the equities and the public interest. This is plainly incorrect.

In any event, he did not meet these factors. Appellants' Br. 115-20. Mr. Rebman has not alleged an irreparable injury that cannot be cured at law with an award of back pay, rather than an injunction for reinstatement. D11 p.19-23. Nor does he attempt on appeal to raise the interests of third-parties to justify relief. He does not succeed on the merits, and he lacks any per se harm

from the violation of any personal constitutional right. The only harm is thus his loss of compensation.

Nor does he acknowledge that enjoining the state appropriations statute imposes irreparable injury on the State in the form of the inability to enforce its laws and unrecoverable financial harm. Because the legislature did not appropriate funds at all, this is far from an ordinary employment dispute where a private employer can easily reinstate an employee to a salary. He thus ignores the possible effect of this lack of funding on other administrative law judges. But the interests of the other administrative law judges are at least equal to Mr. Rebman's; his interests do not outweigh theirs or the public's.

The public interest is also behind the law: that no money leaves the public treasury unless the legislature appropriated it. The taxpayers and voters have an interest in making sure that the money appropriated for other public services does not get wrongly re-directed to activities that the legislature declined to fund.

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 remedy transgressed the separation of powers in that the court ordered money to be drawn from the treasury without any fund that the legislature appropriated for this purpose.

Finally, the circuit court had no power to order any payment of funds that the legislature did not appropriate. *Herschel*, 332 S.W.3d 129. It lacked any power to rewrite the appropriations statute to order the department to spend or redirect funds in ways that the legislature refused.

Mr. Rebman claims that the court did not order payment of his salary without an appropriation, Response Br. 32-33, but no semantics about severance can cover up the basic dispute that precludes his remedy: the legislature did not appropriate his salary. The circuit court did not order the department to pay more than the amount put in the worker's compensation fund for administrative law judges: the circuit court took money the legislature refused to appropriate for his office and that it appropriated for other purposes, and ordered the department to spend it on Mr. Rebman.

The circuit court lacked appropriations authority to order the department to withdraw money from the state treasury, especially when it was for a purpose not authorized by the legislature. Under the state constitution, "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). This appropriations

requirement is "strictly construed." *State ex rel. Thompson v. Bd. of Regents for Ne. Missouri State Teachers' Coll.*, 305 Mo. 57, 65, 264 S.W. 698, 700 (1924). No court can order money from the treasury, even if the money is necessary to ensure the state complies with the constitution. *State ex rel. Gibson v. Grimm*, 540 S.W.2d 17, 18 (Mo. 1976). Courts have no power of a line-item veto over spending restrictions.

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.

CONCLUSION

This Court should reverse the judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I certify that a copy of the above Appellants' Reply Brief was served electronically by Missouri CaseNet e-filing system on January 8, 2019, 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 7,742 words.

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Deputy Solicitor General