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SC100352

In the Supreme Court of Missouri

State of Missouri ex rel. Governor Michael L. Parson,

Relator,

v.

The Honorable Cotton S. Walker,

Respondent.

Original Proceeding from a Petition for Writ of Prohibition or, in the Alternative, Mandamus

Relator's Brief

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Jurisdictional Statement

Michael Parson, the 57th Governor of Missouri ("Governor Parson"), requests a permanent writ of prohibition directed at the Honorable Cotton Walker ("Respondent"), in his official capacity, ordering him to take no further action except to grant Governor Parson's motion for judgment on the pleadings and deny Marcellus Williams's ("Williams") petition for declaratory judgment. On December 4, 2023, this Court issued a preliminary writ of prohibition against Respondent. This Court has jurisdiction to "issue and determine original remedial writs." Mo. Const. art. V, § 4, cl. 1. And, this Court has "general superintending control over all courts and tribunals[,]" which includes the Cole County Circuit Court. *Id.* Further, this Court has authority to issue remedial writs under Rule 84.22 and Rule 84.24.

Statement of Facts

More than twenty-five years ago, on August 11, 1998, Williams murdered Felica Gayle. *State v. Williams*, 97 S.W.3d 462, 466–67 (Mo. 2003) ("Williams I").

I. Williams's Underlying Criminal Trial[1]

"On August 11, 1998, Williams drove his grandfather's Buick LeSabre to a bus stop and caught a bus to University City. Once there, he began looking for a house to break into." *Id.* at 466. "Williams came across the home of Felicia Gayle. He knocked on the front door but no one answered. Williams then knocked out a window pane near the door, reached in, unlocked the door, and

[1] In his return on behalf of Respondent, Williams attempts to deny many of the facts from his underlying trial. *See* Return at 5–8, ¶¶ 6–30. In several of those denials, Williams states: "Respondent denies the allegations in this paragraph. Respondent further notes that this type of allegation is inconsistent with the standard of review for a motion for judgment on the pleadings." *Id.* at 5–8, ¶¶ 6–12, 14–17, 19–26. Governor Parson understands this denial as an attempt to assert that, because Williams pled he is innocent in his declaratory judgment petition, the circuit court could ignore the facts found by the jury at Williams's trial and affirmed by this Court on direct review. But Williams is not innocent, and he cannot collaterally attack his conviction or sentence in a declaratory judgment action. *Hicklin v. Schmitt*, 613 S.W.3d 780, 787 (Mo. 2020); *Charron v. State*, 257 S.W.3d 147, 153–54 (Mo. App. 2008); *Kennedy v. Missouri Attorney General*, 920 S.W.2d 619, 621 (Mo. App. 1996). Moreover, Respondent must follow the holdings of this Court. Mo. Const. art. V, § 2. Therefore, Governor Parson's statement of facts includes facts concerning Williams's convictions as previously found by the jury and this Court regardless of Williams's ineffectual denials. *See* Return at 5–8, ¶¶ 6–30.

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entered Gayle's home." *Id.* "He went to the second floor and heard water running in the shower. It was Gayle. Williams went back downstairs, rummaged through the kitchen, found a large butcher knife, and waited." *Id.*

"Gayle left the shower and called out, asking if anyone was there. She came down the stairs. Williams attacked, stabbing and cutting Gayle forty-three times, inflicting seven fatal wounds." *Id.* at 466–67. "Afterwards, Williams went to an upstairs bathroom and washed off. He took a jacket and put it on to conceal the blood on his shirt." *Id.* at 467. "Before leaving, Williams placed Gayle's purse and her husband's laptop computer and black carrying case in his backpack." *Id.* "The purse contained, among other things, a St. Louis Post–Dispatch ruler and a calculator." *Id.* "Williams left out the front door and caught a bus back to the Buick." *Id.*

"After returning to the car, Williams picked up his girlfriend, Laura Asaro. Asaro noticed that, despite the summer heat, Williams was wearing a jacket." *Id.* "When he removed the jacket, Asaro noticed that Williams' shirt was bloody and that he had scratches on his neck. Williams claimed he had been in a fight." *Id.* "Later in the day, Williams put his bloody clothes in his backpack and threw them into a sewer drain, claiming he no longer wanted them." *Id.*

"Asaro also saw a laptop computer in the car. A day or two after the

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murder, Williams sold the laptop to Glenn Roberts." *Id.*

"The next day, Asaro went to retrieve some clothes from the trunk of the car. Williams did not want her to look in the trunk and tried to push her away." *Id.* "Before he could, Asaro snatched a purse from the trunk. She looked inside and found Gayle's Missouri state identification card and a black coin purse. Asaro demanded that Williams explain why he had Gayle's purse." *Id.* "Williams then confessed that the purse belonged to a woman he had killed." *Id.* "He explained in detail how he went into the kitchen, found a butcher knife, and waited for the woman to get out of the shower." *Id.* Williams "further explained that when the woman came downstairs from the shower, he stabbed her in the arm and then put his hand over her mouth and stabbed her in the neck, twisting the knife as he went." *Id.* "After relaying the details of the murder, Williams grabbed Asaro by the throat and threatened to kill her, her children and her mother if she told anyone." *Id.*

"On August 31, 1998, Williams was arrested on unrelated charges and incarcerated at the St. Louis City workhouse. From April until June 1999, Williams shared a room with Henry Cole." *Id.* "One evening in May, Cole and Williams were watching television and saw a news report about Gayle's murder. Shortly after the news report, Williams told Cole that he had committed the crime." *Id.* "Over the next few weeks, Cole and Williams had

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several conversations about the murder. As he had done with Laura Asaro, Williams went into considerable detail about how he broke into the house and killed Gayle." *Id.*

"After Cole was released from jail in June 1999, he went to the University City police and told them about Williams' involvement in Gayle's murder. He reported details of the crime that had never been publicly reported." *Id.*

"In November of 1999, University City police approached Asaro to speak with her about the murder. Asaro told the police that Williams admitted to her that he had killed Gayle." *Id.* "The next day, the police searched the Buick LeSabre and found the Post–Dispatch ruler and calculator belonging to Gayle." *Id.* "The police also recovered the laptop computer from Glenn Roberts. The laptop was identified as the one stolen from Gayle's residence." *Id.*

After a fair and error-free trial, a jury convicted Williams of first-degree murder, first-degree burglary, first-degree robbery, and two counts of armed criminal action. *Id.* at 466. The circuit court sentenced Williams to death for the first-degree murder. *Id.*

II. Direct Appeal and Post-Conviction Review

Williams filed a direct appeal with this Court. *See id.* at 466; Return at 9, ¶ 31. After a full and fair briefing opportunity, this Court issued a unanimous opinion denying Williams's appeal and affirming the circuit court's

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judgment of conviction. *Williams I*, 97 S.W.3d at 466, 475; Return at 9, ¶ 32. Williams then petitioned the United States Supreme Court for a writ of certiorari to review the decision of this Court affirming the circuit court's judgment of conviction. *Williams v. Missouri*, 539 U.S. 944, 944 (2003) (mem.); Return at 9, ¶ 33. The petition was denied. *Id.*; Return at 9, ¶ 33.

Williams then filed a motion for post-conviction relief under Rule 29.15. *See Williams v. State*, 168 S.W.3d 433, 438 (Mo. 2005) ("*Williams II*"); Return at 9, ¶ 34. In his amended motion, Williams asserted at least twenty-two claims for post-conviction relief. *See Williams II*, 168 S.W.3d at 438–47; Return at 9, ¶ 34. After Williams received a full and fair opportunity to litigate his post-conviction motion, the motion court denied his motion for post-conviction relief. *See Williams II*, 168 S.W.3d at 439; Return at 9, ¶ 35.[2] Williams then appealed the motion court's denial of his post-conviction motion. *Williams II*, 168 S.W.3d at 439; Return at 9, ¶ 36. After a full and fair briefing opportunity, this Court

[2] Williams denies that he "received a full and fair opportunity to litigate his post-conviction motion," but he does not explain his basis for that denial. Return at 9, ¶ 35. Any objection to the fairness of the motion court's adjudication of his post-conviction motion should have been raised, *if anywhere*, in his appeal from the motion court's denial of his post-conviction motion. Williams does not identify the deficiency in his post-conviction proceeding, but the governor notes that this Court affirmed the judgment of the motion court denying William's post-conviction motion.

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issued a unanimous opinion affirming the circuit court's denial of Williams's post-conviction motion. *Williams II*, 168 S.W.3d at 447; Return at 9, ¶ 37.[3]

Williams then filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Missouri under 28 U.S.C. § 2254. *Williams v. Roper*, 2010 WL 11813203 (E.D. Mo 2010) ("*Williams III*"); Return at 9, ¶ 38. After the federal district court initially granted Williams habeas relief, the United States Court of Appeals for the Eighth Circuit reversed the district court's judgment and denied Williams federal habeas relief. *Williams v. Roper*, 695 F.3d 825, 839 (8th Cir. 2012) ("*Williams IV*"); Return at 9, ¶ 39. Williams petitioned the United States Supreme Court for a writ of certiorari to review the decision of the Eighth Circuit denying his petition for writ of habeas corpus. *Williams v. Steele*, 571 U.S. 839, 839 (2013) (mem.); Return at 9, ¶ 40. The United States Supreme Court denied his petition. *Id.*; Return at 9, ¶ 40.

On December 17, 2014, this Court issued an execution warrant scheduling Williams to be executed on January 28, 2015. E179; Return at 9, ¶ 41.

[3] Williams denies that he received "a full and fair briefing opportunity," but he does not explain his basis for that denial nor does he explain how this Court allegedly denied him a full or fair opportunity to brief his post-conviction claims. Return at 9, ¶ 37.

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On January 12, 2015, Williams filed a civil rights suit against then St. Louis County Prosecuting Attorney, Robert P. McCulloch, seeking a release of DNA evidence for testing. *Williams v. McCulloch*, 2015 WL 222170, 4:15-CV-00070-RWS, Doc. 7 (E.D. Mo. January 14, 2015) ("*Williams V*"); E148–E154; Return at 9, ¶ 42. On January 14, 2015, the district court denied Williams's 42 U.S.C. § 1983 complaint *sua sponte*, finding that "the complaint [was] frivolous and fail[ed] to state a claim upon which relief can be granted." E149; Return at 9, ¶ 43.[4]

On January 9, 2015, Williams filed a petition for a writ of habeas corpus in this Court. *See Williams v. Steele,* SC94720 (Mo. January 31, 2017) ("*Williams VI*"); Return at 9, ¶ 44. In that petition, Williams alleged that further DNA testing could demonstrate he was innocent of the murder of Gayle. *See Williams VI*, SC94720; *see also* Return at 10, ¶ 45. This Court stayed its previously issued execution warrant for further habeas corpus

[4] Williams denies "that 'the complaint [was] frivolous and fail[ed] to state a claim upon which relief can be granted.'" Return at 9, ¶ 43. Williams does not explain how he can deny the finding of the federal district court that, "After careful review, I find that the complaint is frivolous and fails to state a claim upon which relief can be granted. As a result, I will dismiss this action without further proceedings." E149. As with many of Williams's denials, Governor Parson understands this denial to merely be an attempt by Williams to avoid the reality that his claims have been repeatedly denied by both federal and state courts.

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proceedings. E155–E156, E179; Return at 10, ¶ 46. This Court appointed a special master and ordered the special master to "ensure DNA testing of appropriate items at issue in this cause and to report to this Court the results of such testing." E158; Return at 10, ¶ 47. On January 31, 2017, after receiving the special master's report, this Court denied Williams's petition for a writ of habeas corpus. E160–E162; Return at 10, ¶ 48. On April 26, 2017, this Court issued an execution warrant scheduling Williams to be executed on August 22, 2017. E178; Return at 10, ¶ 49. Williams sought review of this Court's habeas denial by filing a petition for writ of certiorari with the United States Supreme Court. *Williams v. Steele,* 16-8963 (2017); E163–E165; Return at 10, ¶ 50. On June 26, 2017, the petition was denied. E163–E165; Return at 10, ¶ 50.

On August 14, 2017, Williams filed another petition for a writ of habeas corpus in this Court. *Williams v. Larkin,* SC96625 (Mo. August 15, 2017) ("*Williams VII*"); E166–E168; Return at 10, ¶ 51. On the next day, August 15, 2017, this Court denied Williams's petition for a writ of habeas corpus. E166–E168; Return at 10, ¶ 52. Williams sought review of this Court's denial by filing a petition for writ of certiorari with the United States Supreme Court.

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Williams v. Larkins, 17-5641 (2017); E169–E170; Return at 10, ¶ 53. On October 2, 2017, the petition was denied. E169–E170; Return at 10, ¶ 53.[5]

On August 22, 2017, former Governor Eric Greitens issued Executive Order 17-20, which included an executive stay of Williams's execution. E171–E173; Return at 10–11, ¶ 54. As part of Executive Order 17-20, former Governor Greitens ordered, in pertinent part:

> WHEREAS, Article IV, Section 7 of the Missouri Constitution provides that "The Governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may deem proper..."; and
>
> WHEREAS, the General Assembly, in furtherance of these constitutional powers, has given the Governor the discretion to appoint a Board of Inquiry, "whose duty it shall be to gather information, whether or not admissible in a court of law, bearing upon whether or not a person condemned to death should be executed or ... whether the person's sentence should be commuted," § 552.070 RSMo.; and
>
> WHEREAS, Williams has submitted an application for clemency and requested the appointment of a Board of Inquiry pursuant to Section 552.070, RSMo., to review evidence and provide the Governor with a recommendation on Williams' claim of innocence and application for clemency.

E172; Return at 11, ¶ 55.

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[5] The governor's petition mistakenly stated the United States Supreme Court denied this petition on June 26, 2017. Pet. at 13, ¶ 53. The return admitted that allegation. Return at 10, ¶ 53. To avoid confusion, the governor notes that the correct date—October 2, 2017—is included in the cited exhibit. E169–E170.

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Nearly six years later, on June 29, 2023, Governor Parson issued Executive Order 23-06, Return at 11, ¶ 56, which dissolved the board and lifted the executive stay of Williams's execution:

EXECUTIVE ORDER
23-06

WHEREAS, Executive Order 17-20 was issued on August 22, 2017, establishing a Board of Inquiry (Board) to assist the Governor in determining if Marcellus Williams should receive clemency from his sentence of death; and

WHEREAS, under Section 552.070, RSMo, the Board shall make a report and recommendation to the Governor; and

WHEREAS, under Section 552.070, RSMo, all information gathered by the Board, and any report or recommendation to the Governor, shall be held by the Governor in strict confidence.

NOW, THEREFORE, I, MICHAEL L. PARSON, GOVERNOR OF THE STATE OF MISSOURI, by virtue of the authority vested in me by the Constitution and the laws of the State of Missouri, specifically Article IV, Section 7 of the Constitution of the State of Missouri and Section 552.070, RSMo, do hereby rescind Executive Order 17-20, thereby dissolving the Board of Inquiry established therein. With this Executive Order, I remove any legal impediments to the lawful execution of Marcellus Williams created by Executive Order 17-20, including the order staying the execution.

IN WITNESS WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of the State of Missouri, in the City of Jefferson, on this 29th day of June, 2023.

MICHAEL L. PARSON
GOVERNOR

ATTEST:

JOHN R. ASHCROFT
SECRETARY OF STATE

E174–E175; Return at 11, ¶ 57.

On June 30, 2023, Attorney General Andrew Bailey filed a renewed motion to set Williams's execution date in this Court. E178; Return at 11, ¶ 58. As of the time of this filing, the renewed motion remains pending before this Court. *See* E177–E178; *see also* Return at 11, ¶ 59.

III. 2023 Declaratory Judgment Petition

On August 23, 2023, Williams filed a petition for declaratory judgment, naming Governor Parson and Attorney General Bailey as defendants. E18, E19–E49; Return at 11, ¶ 60. In that petition, Williams raised four counts: (1) that the board of inquiry process violated Williams's due process rights under the state and federal constitutions; (2) that Executive Order 23-06 violates Williams's federal due process rights under color of state law; (3) that Executive Order 23-06 is "null and void" because Governor Parson lacked the authority to "unilaterally dissolve" the board of inquiry before the board "satisfied its statutory obligation"; and (4) that Executive Order 23-06 violates the separation of powers embedded in Missouri's constitution. E37, E40, E41, E45; Return at 11, ¶ 61.

On August 29, 2023, Williams served a copy of his petition and discovery requests on Governor Parson and Attorney General Bailey. E17; Return at 11, ¶ 62. On September 19, 2023, Governor Parson and Attorney General Bailey filed separate answers, a joint motion for judgment on pleadings, and a joint

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motion to stay discovery. Attorney General Bailey also filed a separate motion to dismiss Attorney General Bailey as a named party. E16–E17, E50–E99, E117–E122, E128–E139; Return at 11, ¶ 63.

After the first judge assigned to the case recused, the case was reassigned to Circuit Judge Daniel R. Green. E16; Return at 11, ¶ 64. On September 28, 2023, Governor Parson and Attorney General Bailey filed a notice of their intent to call their motions for a hearing. E16; Return at 11, ¶ 65. Six days later, Williams filed for a motion for change of judge. E15–E16; Return at 11, ¶ 66. The circuit court granted the motion, and the case was then reassigned to Respondent. E15–E16; Return at 11, ¶ 66. After the reassignment was complete, Governor Parson and Attorney General Bailey filed another notice of their intent to call their motions for a hearing on October 23, 2023. E15; Return at 11, ¶ 67. After Williams requested and received a continuance, Respondent set a hearing on the motions for November 7, 2023. E15, E146–E147; Return at 11, ¶ 68. Respondent stayed discovery through that date. E15, E146–E147; Return at 11, ¶ 68.

On November 1, 2023, Williams filed responses to Governor Parson and Attorney General Bailey's motions. E14, E100–E116, E123–E127, E140–E145; Return at 11, ¶ 69. On November 7, 2023, a hearing was held, in which Respondent received argument on the motions. E14, E146–E147; Return at 12,

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¶ 70. At that hearing, Williams conceded Attorney General Bailey's motion to dismiss, and Attorney General Bailey was dismissed as a named defendant in the underlying action. E14, E146–E147; Return at 12, ¶ 71. After the hearing, Respondent took Governor Parson's motion for judgment on the pleadings under advisement and asked for proposed orders. E14, E146–E147; Return at 12, ¶ 72. Respondent extended the stay of discovery "pending the outcome of today's hearing including the ruling, if any, on the Motion to Stay Discovery." E14, E147; Return at 12, ¶ 73.

On November 16, 2023, Respondent denied, in part, Governor Parson's motion for judgment on the pleadings. E2–E12; Return at 12, ¶ 74. Respondent granted judgment on the pleadings as to Count IV, stating the parties "consent[ed] to judgment on the pleadings" on that count. E2 n.1; Return at 12, ¶ 74.[6] In his November 16, 2023 order, Respondent temporarily stayed discovery until December 1, 2023, stating, in pertinent part:

> Absent superseding authority by that date, the parties shall submit a proposed Protective Order regarding the discovery requests related to the Board of Inquiry and especially any information gathered by that Board which is required by the

[6] As stated in Governor Parson's petition for writ of prohibition or, in the alternative, mandamus, Governor Parson did not understand Williams to have consented to judgment on that count. *See* E112–114. While Governor Parson asserts that judgment on the pleadings was proper in relation to the count, Williams has since confirmed that he did not intend to consent to the entry of judgment on the pleadings on that count. Return at 12, ¶ 74.

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> statute to be held by it and the Governor in strict confidence, but such pending discovery requests served shall be answered subject to said Protective Order once signed by this Court.

E12; *see* Return at 12, ¶ 75.

IV. Writ Proceedings in the Court of Appeals

Governor Parson sought a writ of prohibition or, in the alternative, a writ of mandamus from the Missouri Court of Appeals. E183–E184; Return at 12, ¶ 76. On November 30, 2023, the Missouri Court of Appeals summarily denied Governor Parson's petition for writ of prohibition or, in the alternative, mandamus. E183–E184; Return at 12, ¶ 76. This Court issued its preliminary writ on December 4, 2023. On January 10, 2024, Respondent, through Williams, filed a return and a response to this Court's order to show cause.

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Points Relied On

I. Relator is entitled to an order prohibiting Respondent from taking any action on Williams's petition for declaratory judgment except to grant judgment on the pleadings for Relator, because Respondent exceeded his authority by authorizing any judicial review of Relator's exclusive constitutional authority to consider and decide clemency petitions, in that Missouri's constitutional separation of powers leaves the exercise of clemency powers to Relator alone.

Mo. Const. art. II, § 1

Mo. Const. art. IV, § 7

State ex rel. Lute v. Mo. Bd. of Prob. & Parole, 218 S.W.3d 431 (Mo. 2007)

Rebman v. Parson, 576 S.W.3d 605 (Mo. 2019)

II. Relator is entitled to an order prohibiting Respondent from taking any action on Counts I and II of Williams's petition for declaratory judgment except to grant judgment on the pleadings for Relator on those counts, because Counts I and II fail as a matter of law, in that Williams has no liberty interest in any clemency process, as the exercise of clemency authority during the clemency process is within the nearly unlimited discretion of Relator.

Mo. Const. art. II, § 1

Mo. Const. art. IV, § 7

Olim v. Wakinekona, 461 U.S. 238 (1983)

State ex rel. Lute v. Mo. Bd. of Prob. & Parole, 218 S.W.3d 431 (Mo. 2007)

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III. Relator is entitled to an order prohibiting Respondent from taking any action on Count III of Williams's petition for declaratory judgment except to grant judgment on the pleadings for Relator on that count, because Count III fails as a matter of law, in that Relator did not violate any Missouri statute in issuing an executive order dissolving the board of clemency impaneled to consider clemency action for Williams, as § 552.070 does not, and could not, limit the Governor's constitutional authority to consider and decide clemency applications.

Mo. Const. art. II, § 1

Mo. Const. art. IV, § 7

§ 552.070, RSMo 2016

State ex rel. Lute v. Mo. Bd. of Prob. & Parole, 218 S.W.3d 431 (Mo. 2007)

IV. Relator is entitled to an order prohibiting Respondent from taking any action on Count IV of Williams's petition for declaratory judgment except to grant judgment on the pleadings for Relator on that count, because Count IV fails as a matter of law, in that Relator did not violate Missouri's constitutional separation of powers clause in issuing an executive order dissolving the board of clemency impaneled to consider clemency action for Williams, as § 552.070 does not, and could not, limit the Governor's constitutional authority to consider and decide clemency applications.

Mo. Const. art. II, § 1

Mo. Const. art. IV, § 7

§ 552.070, RSMo 2016

State ex rel. Lute v. Mo. Bd. of Prob. & Parole, 218 S.W.3d 431 (Mo. 2007)

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V. Relator is entitled to an order prohibiting Respondent from taking any action on Williams's petition for declaratory judgment except to grant judgment on the pleadings for Relator, because Respondent exceeded his authority by authorizing Williams to mount an unauthorized collateral attack on a final criminal judgment, in that collateral attacks on a final judgment in a criminal case are permitted only as provided by statute or rule and no statute or rule provides for Respondent's newly-recognized form of collateral attack.

State ex rel. Bailey v. Fulton, 659 S.W.3d 909 (Mo. 2023)

Hicklin v. Schmitt, 613 S.W.3d 780 (Mo. 2020)

State ex rel. Zahnd v. Van Amburg, 533 S.W.3d 227 (Mo. 2017)

Kennedy v. Missouri Attorney General, 920 S.W.2d 619 (Mo. App. 1996)

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Summary of the Argument

This Court should make its preliminary writ of prohibition permanent to prevent Respondent's unconstitutional judicial inquiry into Governor Parson's discretionary exercise of clemency authority. It is well settled that Missouri's constitution grants Governor Parson the power to issue pardons, reprieves, and commutations as a "mere matter of grace[,]" which he may exercise "upon such conditions and with such restrictions and limitations as he may think proper." *State ex rel. Lute v. Mo. Bd. of Prob. & Parole*, 218 S.W.3d 431, 435 (Mo. 2007) (quoting *Ex Parte Reno*, 66 Mo. 266, 269, 273 (1877)). As a result, Missouri's courts cannot review Governor Parson's clemency decisions or the process by which he reaches them. *Cooper v. Holden,* 189 S.W.3d 614, 620 (Mo. App. 2006) (holding that court had no jurisdiction to review the Governor's commutation decision). Despite that precedent, Respondent has decided that a circuit court can authorize discovery and allow Williams to proceed in a suit to determine the reasons for Governor Parson's discretionary decision to lift the executive stay of Williams's execution, force Governor Parson to exercise the governor's clemency authority how Williams sees fit, and order the Governor to vacate an executive order and issue another executive order regarding the same discretionary clemency authority. This intrusive encroachment on

Missouri's constitutional separation of powers delegating clemency authority to Missouri's governor cannot be allowed to stand.

In support of this Court's issuance of a permanent writ of prohibition, Governor Parson asserts five points. While each point presents separate reasons for reversal, Respondent's misreading of § 552.070 is a common issue because that statutory-interpretation error permeates Respondent's order below. Section 552.070 provides that:

> In the exercise of his powers under Article IV, Section 7 of the Constitution of Missouri to grant reprieves, commutations and pardons after conviction, the governor may, in his discretion, appoint a board of inquiry whose duty it shall be to gather information, whether or not admissible in a court of law, bearing upon whether or not a person condemned to death should be executed or reprieved or pardoned, or whether the person's sentence should be commuted. It is the duty of all persons and institutions to give information and assistance to the board, members of which shall serve without remuneration. Such board shall make its report and recommendations to the governor. All information gathered by the board shall be received and held by it and the governor in strict confidence.

The plain language § 552.070 provides no limitation on Governor Parson's constitutional clemency authority. § 552.070. Undeterred by the lack of textual support, Respondent's order construed § 552.070 to include a prohibition preventing Governor Parson from lifting the stay of Williams's execution or otherwise granting or denying clemency unless the board of inquiry submits a report and recommendation to the governor. The entirety of Respondent's

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order is dependent on this reading, but this reading cannot be correct as it implicitly adds language to the statute.

Respondent reading of § 552.070 would prohibit the governor from lifting a stay of execution or making a clemency decision until a board of inquiry issues a formal, written, public report. But the statute simply does not say that, and Respondent cannot make that the law by judicial command. *State ex rel. Young v. Wood*, 254 S.W.3d 871, 873 (Mo. 2008). Further, Respondent's construction of § 552.070 disregards many of this Court's canons of statutory interpretation, resulting in a construction of § 552.070 that leads to an absurd result, that creates a conflict with Missouri's constitution, and that removes the statute from its proper context in the greater statutory and constitutional clemency framework.

As is discussed in greater detail throughout Governor Parson's points, the harm that results from Respondent's statutory construction error was compounded by Respondent's error in finding that Williams is innocent of first-degree murder simply because Williams pled that he is innocent of first-degree murder. Williams received a fair trial and has now pressed claims of innocence and constitutional error in numerous state and federal courts, some more than once. They have all been denied. Despite Respondent's order to the contrary, Williams cannot assert, and Respondent cannot find, that Williams is innocent

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in the underlying declaratory judgment action because relitigation of Williams's guilt is barred by the doctrine of res judicata. *See Kennedy*, 920 S.W.2d at 621. Moreover, Williams is barred from challenging his conviction and sentence in a declaratory judgment action. *Hicklin*, 613 S.W.3d at 787 ("To the extent [the petitioner] asks this Court to vacate her sentence, however, this Court agrees with the State that habeas corpus—not a declaratory judgment—is the appropriate action."). In assuming Williams is innocent, Respondent created a new right—one that attempts to allow Williams, and not the governor, to exercise the governor's clemency authority.

At bottom, Williams has received numerous rounds of review of his meritless claims of innocence. And Williams is not entitled to press more meritless complaints about the governor's clemency decisions in the court below. Williams does not have a due process right to expropriate the Governor's clemency authority because, "[i]n terms of the Due Process Clause, a [Missouri] felon's expectation that a lawfully imposed sentence will be commuted or that he will be pardoned is no more substantial than an inmate's expectation, for example, that he will not be transferred to another prison; it is simply a unilateral hope." *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981); *accord Lute,* 218 S.W.3d at 435. "When a person has been fairly convicted and sentenced, his liberty interest, in being free from such confinement, has been

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extinguished." *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 289 (1998) (O'Connor J., concurring). Similarly, when an inmate is sentenced to death, the inmate has no legal expectation that the sentence will not be carried out. *Id.* at 281 (Rehnquist, J., concurring). When a death-row inmate petitions for clemency, the inmate may hope to avoid the death sentence but has no legally protectable interest in clemency or even in any specific clemency process. *Id.* Governor Parson will fully and fairly consider any clemency petition filed by Williams, but Williams cannot use the courts of this State to force the Governor to exercise his discretionary clemency authority how Williams would deem fit. This Court should make its preliminary writ of prohibition permanent.

Legal Standard

The same standard of review applies to all of Governor Parson's points relied on contained in this brief.

I. Legal Standard Governing the Issuance of a Writ of Prohibition

This Court has the discretion to issue and determine original remedial writs. Mo. Const. art. V, § 4. "A writ of prohibition is appropriate: (1) to prevent the usurpation of judicial power when a lower court lacks authority or jurisdiction; (2) to remedy an excess of authority, jurisdiction or abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not granted." *State ex rel.*

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Hawley v. Midkiff, 543 S.W.3d 604, 606–07 (Mo. 2018) (quoting *State ex rel. Strauser v. Martinez*, 416 S.W.3d 798, 801 (Mo. 2014)). "The essential function of prohibition is to correct or prevent inferior courts and agencies from acting without or in excess of their jurisdiction." *State ex rel. Douglas Toyota III, Inc. v. Keeter*, 804 S.W.2d 750, 752 (Mo. 1991). Prohibition will also lie to decide "an important legal question" that is being decided wrongly "which might otherwise escape this Court's attention for some time[,]" *State ex rel. Noranda Aluminum, Inc. v. Rains*, 706 S.W.2d 861, 862 (Mo. 1986), or to preserve "the orderly and economical administration of justice." *Id.* at 863*; accord State ex rel. Delmar Gardens N. Operating, LLC v. Gaertner*, 239 S.W.3d 608, 610 (Mo. 2007) (discussing the orderly and economical administration of justice).

II. Legal Standard Governing the Issuance of a Writ of Mandamus

In the alternative, Governor Parson requests a writ of mandamus. This Court has discretion to treat a relator's petition for a writ of prohibition as one for a writ of mandamus. *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 577 (Mo. 1994). Though the Court issued a preliminary writ of prohibition, Governor Parson does not waive the alternative request for mandamus relief. If, after briefing and argument, this Court determines that relief is proper under mandamus and not prohibition, Governor Parson would ask this Court to enter a permanent writ of mandamus. *See St. Louis Little Rock Hosp., Inc.*

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v. Gaertner, 682 S.W.2d 146, 148 (Mo. App. 1984) ("The distinction between mandamus and prohibition is at best blurred, at worst nonexistent, and the subject matter to which the two writs apply overlap to a great extent.").

"Mandamus is a discretionary writ that is appropriate when a court has exceeded its jurisdiction or authority, and where no remedy exists through appeal." *State ex rel. Lovelace v. Mennemeyer*, 421 S.W.3d 555, 556 (Mo. App. 2014). "Ordinarily, mandamus is the proper remedy to compel the discharge of ministerial functions, but not to control the exercise of discretionary powers." *State ex rel. Valentine v. Orr*, 366 S.W.3d 534, 538 (Mo. 2012) (quoting *State ex rel. Mertens v. Brown*, 198 S.W.3d 616, 618 (Mo. 2006)). "However, if the respondent's actions are wrong as a matter of law, then he or she has abused any discretion he or she may have had, and mandamus is appropriate." *Id.*

III. Legal Standard Governing Review of a Motion for Judgment on the Pleadings

In the appellate context, "this Court reviews a circuit court's ruling on a motion for judgment on the pleadings *de novo*." *Woods v. Mo. Dep't of Corr.*, 595 S.W.3d 504, 505 (Mo. 2020). A motion for judgment on the pleadings is appropriate when "the question before the court is strictly one of law." *In re Marriage of Busch*, 310 S.W.3d 253, 259 (Mo. App. 2010). "The party moving for judgment on the pleadings admits, for purposes of the motion, the truth of

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all well pleaded facts in the opposing party's pleadings." *Kraus v. Hy-Vee, Inc.*, 147 S.W.3d 907, 920 (Mo. App. 2004) (quoting *State ex rel. Nixon v. Am. Tobacco Co.*, 34 S.W.3d 122, 134 (Mo. 2000)). But "[c]onclusory allegations of fact and legal conclusions are not considered in determining whether a petition states a claim on which relief can be granted." *Bray v. Mo. Dep't of Corr.*, 498 S.W.3d 514, 518 (Mo. App. 2016) (alteration in original) (quoting *Hope Acad. Corp. v. Mo. State Bd. of Educ.*, 462 S.W.3d 870, 874 (Mo. App. 2015)).

"The position of a party moving for judgment on the pleadings is similar to that of a movant on a motion to dismiss; i.e., assuming the facts pleaded by the opposite party to be true, these facts are, nevertheless, insufficient as a matter of law." *Am. Tobacco Co.*, 34 S.W.3d at 134 (citation omitted). "The 'motion for judgment on the pleadings should be sustained if, from the face of the pleadings, the moving party is entitled to judgment as a matter of law.'" *Hicklin*, 613 S.W.3d at 786 (quoting *Madison Block Pharmacy, Inc., v. U.S. Fid. & Guar. Co.*, 620 S.W.2d 343, 345 (Mo. 1981)).

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Argument

I. Relator is entitled to an order prohibiting Respondent from taking any action on Williams's petition for declaratory judgment except to grant judgment on the pleadings for Relator, because Respondent exceeded his authority by authorizing any judicial review of Relator's exclusive constitutional authority to consider and decide clemency petitions, in that Missouri's constitutional separation of powers leaves the exercise of clemency powers to Relator alone.

Below, Williams asked the circuit court to force Governor Parson to reverse Executive Order 23-06, to stay Williams's execution, to reassemble the board of inquiry, and to disclose any report issued by the board. E47–48. The circuit court has no authority to issue that relief due to Missouri's separation of powers, so the circuit court should have denied Williams's claims as meritless. In allowing Williams's meritless claims to proceed by judicial inquiry into Governor Parson's clemency consideration, the circuit court exceeded its judicial authority and invaded Governor Parson's constitutional clemency powers. This Court should prohibit the circuit court from taking action other than granting Governor Parson's motion for judgment on the pleadings.

A. Preservation Statement

Under Rule 84.04(e), "For each claim of error, the argument shall also include a concise statement describing whether the error was preserved *for appellate review*; if so, how it was preserved; and the applicable standard of

review." (emphasis added). To the extent this Rule is applicable to writ proceedings, Governor Parson pressed the same, or substantially similar, arguments before the circuit court prior to instituting writ proceedings in this Court. E90–E91. Accordingly, Respondent had a full and fair opportunity to pass upon this argument below. Governor Parson then sought a writ of prohibition on the same grounds in the Missouri Court of Appeals, which the court denied by summary written order. *See* E183–E184; *see also* Return at 12, ¶ 76. This argument is, therefore, preserved.

B. Respondent's order violates the separation of powers embedded in Missouri's constitution.

The drafters of the Missouri constitution, before enumerating the power of any executive, judicial, or legislative officer, sought to enshrine the separation of powers:

> 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, § 1. The separation of powers embedded in Missouri's constitution "is 'fundamentally vital to our form of government.'" *Rebman v. Parson*, 576 S.W.3d 605, 609 (Mo. 2019) (quoting *State on inf. Danforth v.*

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Banks, 454 S.W.2d 498, 500 (Mo. 1970)); *accord Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J, dissenting) ("In No. 47 of The Federalist, Madison wrote that '[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty.'") (alteration in original) (quoting Federalist No. 47, p. 301 (C. Rossiter ed. 1961)).

Article IV, § 1 of Missouri's constitution vests the "supreme executive power" in Governor Parson, the elected Governor of Missouri. By virtue of that office and delegation of executive power, Governor Parson is constitutionally directed to "take care that the laws are distributed and faithfully executed, and shall be a conservator of the peace throughout the state." Mo. Const. art. IV, § 2. Amongst the powers granted to Governor Parson by Missouri's constitution is the exclusive authority to grant pardons, reprieves, and commutations. That exclusive authority is granted to Governor Parson by Article IV, § 7 of Missouri's constitution, which states:

> The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may deem proper, subject to provisions of law as to the manner of applying for pardons. The power to pardon shall not include the power to parole.

This Court has made clear that Governor Parson's power to grant clemency "is 'a mere matter of grace' that [he] can exercise 'upon such

conditions and with such restrictions and limitations as he may think proper.'" *Lute*, 218 S.W.3d at 435 (quoting *Reno*, 66 Mo. at 269, 273). To protect that delegation of exclusive clemency authority, Missouri's constitution provides Missouri's judiciary no role in Governor Parson's consideration of clemency petitions. Mo. Const. art. IV, § 7; Mo. Const. art. II, § 1; *Cooper,* 189 S.W.3d at 620 ("[The petitioner's] claim for a reprieve, commutation, or pardon is meritless, and one over which we have no jurisdiction.").[7] Despite those constitutional commands, Respondent denied Governor Parson's motion for judgment on the pleadings and sanctioned an unconstitutional judicial inquiry into the clemency decisions of Missouri's chief executive.

C. Section 552.070 does not limit or control Governor Parson's exclusive clemency authority, and it could not under the Missouri constitution's separation of powers.

In 1963, the General Assembly enacted § 552.070, RSMo, which states:

> *In the exercise of his powers under Article IV, Section 7 of the Constitution of Missouri to grant reprieves, commutations and pardons after conviction*, the governor may, in his discretion, appoint a board of inquiry whose duty it shall be to gather information, whether or not admissible in a court of law, bearing upon whether or not a person condemned to death should be executed or reprieved or pardoned, or whether the person's

[7] After this Court's decision in *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 251–54 (Mo. 2009), Governor Parson understands the Missouri Court of Appeals' use of jurisdiction in *Cooper* to properly be characterized as indicating a lack of authority but, in either circumstance, the issuance of a writ of prohibition would be proper. *Midkiff*, 543 S.W.3d at 606–07.

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> sentence should be commuted. It is the duty of all persons and institutions to give information and assistance to the board, members of which shall serve without remuneration. Such board shall make its report and recommendations to the governor. All information gathered by the board shall be received and held by it and the governor in strict confidence.

(Emphasis added).

Section 552.070 gives Governor Parson additional tools to exercise his clemency power by recognizing his authority to convene a board of inquiry to aid him "[i]n the exercise of his powers under Article IV, Section 7 of the Constitution of Missouri to grant reprieves, commutations, and pardons, after conviction[.]" § 552.070. Governor Parson may create a board "in his discretion" and appoint members of the board of inquiry who serve at Governor Parson's pleasure and report only to him. *See id.* The information gathered by a board of inquiry is kept in "strict confidence" between the board and Governor Parson. *Id.* Section 552.070, by its plain terms does not limit the Governor's constitutionally delegated clemency authority. *See* § 552.070. Nor could it—a statutory provision cannot limit the Governor's constitutional clemency powers. *See* Mo. Const. art. IV, § 7; *see also* Mo. Const. art. II, § 1.

The text of § 552.070 plainly states that the governor "may, in his discretion" create a board of inquiry to assist him "[i]n the exercise of *his* powers." § 552.070 (emphasis added). And it is well-settled that the "[t]he

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power of commutation rests purely within the discretion of the governor." *Cooper,* 189 S.W.3d at 620 (citing *Whitaker v. State,* 451 S.W.2d 11, 15 (Mo. 1970)). Thus, § 552.070 provides the governor with discretionary authority to use a board of inquiry as part of his discretionary clemency powers. The statute further empowers the board of inquiry to gather information, and it explicitly states that the information gathered will remain between the board of inquiry and the governor in "strict confidence." § 552.070. The board answers to the governor, *and the governor alone*, and there is no provision that gives Williams or any other person any expectation or right during the process. *Id.*

Even if Missouri's constitution and § 552.070 were not clear that Governor Parson has discretionary control over the board-of-inquiry process, this Court's case law emphasizes that any board of inquiry would be required to follow the governor's orders. *Lute,* 218 S.W.3d at 435. After all, any board "must follow the governor's orders as he is granted the sole authority to commute sentences at his discretion." *Id.* So, although the statute does not explicitly say that Governor Parson can choose the members of a board of inquiry, direct their investigation, or dissolve the board, that much is plain because the only purpose of the board is to assist Governor Parson in exercising his purely discretionary clemency powers. *Id.*; *accord State ex rel. Schmitt v. Harrell*, 633 S.W.3d 463, 466 (Mo. App. 2021) (stating that the purpose of

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statutory construction "is to determine the intent of the legislature" by considering the objectives and reasonably and logically construing the statute) (quoting *State ex rel. Rhodes v. Crouch*, 621 S.W.2d 47, 49 (Mo. 1981)).

Section 552.070, by its plain terms, says nothing that would allow the circuit court to proceed on Williams's challenge to the governor's clemency decisions. § 552.070. But even if it did, the General Assembly has no power to require the governor to appoint a board of inquiry, no ability to restrict how the governor considers clemency petitions, and no power to review or delay his clemency decisions. *See* Mo. Const. art IV, § 7; *see also Cooper,* 189 S.W.3d at 620. Put simply, a statute passed by the General Assembly could not require Governor Parson to enter an executive order concerning clemency or prevent him from withdrawing one because those clemency powers were never the General Assembly's powers to confer or constrain. *See* Mo. Const. art IV, § 7; *see also Cooper,* 189 S.W.3d at 620.

Williams has been found guilty of first-degree murder and may receive clemency, if at all, "upon such conditions and with such restrictions and limitations as [the governor] may think proper." *Lute*, 218 S.W.3d at 435 (quoting *Reno*, 66 Mo. at 269, 273). By authorizing any judicial review of the process by which Governor Parson exercises his clemency power, Respondent's order exceeds the constitutional limits on judicial authority and violates the

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separation of powers embedded in Missouri's constitution. *See* Mo. Const. art. II, § 1; *see also* Mo. Const. art IV, § 7; *Lute*, 218 S.W.3d at 435; *Cooper,* 189 S.W.3d at 620.

D. A permanent writ should issue to prevent Respondent from exceeding his authority.

As stated above, "A writ of prohibition is appropriate: (1) to prevent the usurpation of judicial power when a lower court lacks authority or jurisdiction; (2) to remedy an excess of authority, jurisdiction or abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not granted." *Midkiff*, 543 S.W.3d at 606–07 (quoting *Strauser*, 416 S.W.3d at 801). Here, Missouri's constitution provides no role for the judiciary in reviewing claims concerning the governor's clemency authority. Mo. Const. art. IV, § 7; Mo. Const. art. II, § 1; *Cooper,* 189 S.W.3d at 620. Despite that constitutional directive, Respondent intruded on grounds left solely to Governor Parson. "The essential function of prohibition is to correct or prevent inferior courts and agencies from acting without or in excess of their jurisdiction." *Keeter*, 804 S.W.2d at 752. Missouri's constitution gives the Cole County Circuit Court no role in the governor's clemency review process. This Court should issue a permanent writ of prohibition to protect Missouri's constitutional separation of powers, which "is 'fundamentally vital to our form

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of government.'" *Rebman*, 576 S.W.3d at 609 (quoting *Banks*, 454 S.W.2d at 500).

E. Conclusion

The people of Missouri have entrusted the clemency power to the governor; Missouri's constitution provides no role for Missouri's judiciary in Governor Parson's consideration of clemency petitions. Mo. Const. art. IV, § 7; Mo. Const. art. II, § 1; *Cooper,* 189 S.W.3d at 620. By intruding on that delegation of exclusive clemency authority, Respondent exceeded his constitutional authority. This Court should make its preliminary writ permanent.

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II. Relator is entitled to an order prohibiting Respondent from taking any action on Counts I and II of Williams's petition for declaratory judgment except to grant judgment on the pleadings for Relator on those counts, because Counts I and II fail as a matter of law, in that Williams has no liberty interest in any clemency process, as the exercise of clemency authority during the clemency process is within the nearly unlimited discretion of Relator.

Because the circuit court had no constitutional authority to grant the relief Williams sought in his petition below, it did not need to reach Williams's specific claims. But even if Respondent could have considered William's claims, Respondent erred in failing to grant Governor Parson's motion for judgment on the pleadings.[8] In his Counts I and II below, Williams argued that Governor Parson's decision to rescind Executive Order 17-20 concerning a board of inquiry to assist in the consideration of William's clemency petition violated Williams's rights to due process under the state and federal constitutions.[9] While Williams's petition framed his claims as concerning the Governor's

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[8] If this Court grants Governor Parson's first or fifth points relied on, it need not consider Governor Parson's second, third, or fourth points relied on, which assume, for the sake of argument, that the court below may have been able to grant some relief that required it to consider Williams's specific claims.

[9] The circuit court analyzed Counts I and II as a single claim as Count I alleged violation of the federal and Missouri due process clauses and Count II alleged violation of the federal due process clause to be enforced through 42 U.S.C. § 1983. The due process clauses of the Missouri and federal constitutions are co-extensive. *State ex rel. Houska v. Dickhaner*, 323 S.W.3d 29, 33 n.4 (Mo. 2010).

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clemency authority as related to the board of inquiry, in response to Governor Parson's motion for judgment on the pleadings he disclaimed that framing and stated that he had a liberty interest "in demonstrating his innocence that flows from an expectation created by state law, namely, section 552.070, RSMo., and Executive Order 17-20." E106.

Respondent, taking Williams allegations as true for the purposes of the motion for judgment on the pleadings, found that Williams had a liberty interest in proving his innocence in the clemency process. E10–E11. But clemency does not provide a judicial forum for Williams to relitigate the jury's verdict finding him guilty—it is a "mere matter of grace" exercised at the Governor's discretion. *Lute,* 218 S.W.3d at 435. As a matter of law, Respondent's ruling on this issue is clearly erroneous because under controlling precedent, Williams has no protectable interest in the clemency process.

A. Preservation Statement

Under Rule 84.04(e), "For each claim of error, the argument shall also include a concise statement describing whether the error was preserved *for appellate review*; if so, how it was preserved; and the applicable standard of review." (emphasis added). To the extent this rule is applicable to writ proceedings, Governor Parson pressed the same, or substantially similar,

arguments before the circuit court prior to instituting writ proceedings in this Court. E75–E91. Accordingly, Respondent had a full and fair opportunity to pass upon this argument below. Governor Parson then sought a writ of prohibition on the same grounds in the Missouri Court of Appeals, which the court denied by summary written order. *See* E183–E184; *see also* Return at 12, ¶76. This argument is, therefore, preserved.

B. Williams has no protected interest in the clemency process.

Clemency gives a governor the power to extend mercy to prisoners, but it is not another round of judicial review. *Woodard,* 523 U.S. at 284 (Rehnquist, J, concurring). Clemency proceedings "do not determine the guilt or innocence of the defendant, and they are not intended primarily to enhance the reliability of the trial process." *Id.* And no individual has a protectable interest in receiving clemency. *Dumschat,* 452 U.S. at 466–47. Not even capital inmates, because "the reasoning of *Dumschat* did not depend on the fact that it was not a capital case." *Woodard,* 523 U.S. at 281 (Rehnquist, J., concurring).

"When a person has been fairly convicted and sentenced, his liberty interest, in being free from such confinement, has been extinguished." *Id.* at 289 (O'Connor J., concurring). Similarly, when an inmate is sentenced to death, the inmate has no legal expectation that the sentence will not be carried out. *Id.* at 281 (Rehnquist, J., concurring). When a death-row inmate petitions for

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clemency, the inmate may hope to avoid the death sentence but has no legally protectable interest in clemency or even in any specific clemency process. *Id.*

In *Woodard,* eight justices of the Supreme Court of the United States concurred in the result. *Id.* at 275 (Rehnquist, J., concurring); *Id.* at 288 (O'Connor J., concurring). The Court was unanimous as to Part III of the opinion, concerning an inmate's rights to self-incrimination during voluntary clemency interviews. *Id.* at 275. But as to Part II, there were two four-justice concurrences and one dissenting opinion. *Id.* at 275 (Rehnquist, J., concurring); *Id.* at 288 (O'Connor J., concurring); *Id.* at 290–91 (Stevens, J., concurring in part, dissenting in part).

Justice O'Connor, joined by Justices Souter, Ginsburg, and Breyer, wrote that capital inmates should receive "some minimal procedural safeguards" in the clemency process. *Id.* at 289 (O'Connor J., concurring). While "pardon and commutation decisions have not traditionally been the business of the courts", Justice O'Connor's concurrence found that "judicial intervention *might*, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process." *Id.* (emphasis added).

On the other hand, Chief Justice Rehnquist, joined by Justices Scalia,

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Kennedy, and Thomas, found that capital inmates have no protectable interest in clemency because clemency is awarded by the executive as a matter of grace. *Id.* at 282 (Rehnquist, J., concurring). As a result, Chief Justice Rehnquist's opinion held procedural due process requirements do not apply in state clemency consideration. *Id.* at 276.

When the United States Supreme Court decides a case and "no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest ground.'" *Marks v. United States,* 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia,* 428 U.S. 153, 169 n.15 (1976)). Under *Marks,* Justice Rehnquist's concurrence is the controlling rule because it finds no liberty interest in clemency proceedings, in line with the Supreme Court's prior decisions in *Dumschat* and *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex,* 442 U.S. 1, 7 (1979). By contrast, Justice O'Connor's concurrence argued for a "more expansive reading" of the due process clause and "her approach would find more state actions unconstitutional . . . than would [Justice Rehnquist's] analysis." *Spencer v. State,* 334 S.W.3d 559, 568 (Mo. App. 2010) (applying the *Marks* rule in a similar case). Justice Rehnquist's narrower due process analysis thus controls this Court's analysis.

Some federal circuit courts have read Justice O'Connor's concurrence to control under *Marks,* but this Court should not follow those decisions. *See, e.g., Wellons v. Comm'r, Ga. Dept. of Corr.,* 754 F.3d 1268, 1269 (11th Cir. 2014). While the *Wellons* Court believed "Justice O'Connor was the fifth and decisive vote for the plurality opinion," *id.* n.2, that conclusion is simply wrong. The *Woodard* Court's holding that Ohio's clemency procedures do not violate due process was supported by eight justices in two four-justice concurrences. *Woodard,* 523 U.S. at 275 (Rehnquist, J., concurring), 288 (O'Connor J., concurring).

And, even to the extent other intermediate federal appellate courts have followed Justice O'Connor's concurrence,[10] those decisions are not binding on state courts. *Doe v. Roman Cath. Diocese of St. Louis*, 311 S.W.3d 818, 823 (Mo. 2010); *Spencer,* 334 S.W.3d at 567–68. In *Spencer,* the Missouri Court of Appeals disagreed with a similar group of federal court decisions and found that *Marks* requires courts to apply a narrower constitutional reading over a competing opinion that takes a more expansive view of constitutional

[10] *See, e.g., Duvall v. Keating,* 162 F.3d 1058, 1061 (10th Cir. 1998), *Faulder v. Tex. Bd. of Pardons & Paroles,* 178 F.3d 343, 344–45 (5th Cir. 1999), *Young v. Hayes,* 218 F.3d 850, 852–53 (8th Cir. 2000), *Anderson v. Davis,* 279 F.3d 674, 676–77 (9th Cir. 2002).

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requirements. *Id. Spencer* is directly on point and this Court should apply Justice Rehnquist's concurring opinion.[11]

Under Justice Rehnquist's controlling opinion in *Woodard,* Williams's due process claims fail as a matter of law because clemency is a matter of grace and does not impact Williams's legal rights. *Woodard,* 523 U.S. at 285 (Rehnquist, J. concurring). When Williams applied for clemency he was "already under a sentence of death, determined to have been lawfully imposed." *Id.* No matter what process the governor uses to decide clemency—whether it involves a board of inquiry or not—"if [clemency] is denied, [Williams] is no worse off than he was before." *Id.*[12]

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[11] Some federal courts have added Justice Stevens's dissenting opinion to Justice O'Connor's concurring opinion and concluded that a "majority" of the Supreme Court endorsed at least minimal due process safeguards in clemency review. *See e.g., Young*, 218 F.3d at 852. But *Marks* requires courts to examine only the opinions of the Justice's "who concurred in the judgments." *Marks,* 430 U.S. at 193. Justice Stevens did not concur in the result of *Woodard,* and would have affirmed in part the judgment of the court of appeals rather than reversing as the majority did. *Woodard,* 523 U.S. at 295 (Stevens, J., dissenting in part). Because Justice Stevens did not concur in judgment, his opinion does not count in determining the controlling rule of *Woodard.*

[12] As to not to be misunderstood (and as discussed in subpart II.E below), even if this Court were to apply Justice O'Connor's concurrence, Williams's claims fail as a matter of law and Respondent was required to grant Governor Parson's motion for judgment on the pleadings.

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At bottom, Williams was found guilty of a heinous murder and sentenced to death. His sentence has been repeatedly upheld by reviewing courts. He should expect that his sentence will be executed. Williams may apply for clemency, and Governor Parson will consider his petition as he would any other inmate to decide whether to extend clemency as a matter of grace. Unless and until clemency is granted, Williams has no legal interest in delaying or avoiding the execution of his sentence.

C. Missouri statute § 552.070 does not grant Williams any protected interest in the clemency process.

Section 552.070 gives Governor Parson the authority to convene a board of inquiry to aid the governor "[i]n the exercise of his powers under Article IV, Section 7 of the Constitution of Missouri to grant reprieves, commutations, and pardons." Governor Parson may create a board "in his discretion" and appoint members of his choice. *Id.* The information gathered by a board of inquiry is kept in "strict confidence" between the board and Governor Parson. *Id.*

By its plain terms, § 552.070 provides Governor Parson with additional resources to help him exercise his clemency powers, but it does not provide any rights or expectations to convicted inmates. *Roll v. Carnahan,* 225 F.3d 1016, 1018 (8th Cir. 2000). The appointment of a board of inquiry is "left to the governor's sole discretion, so [inmates] [have] no due process right to the

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appointment." *Id.* Likewise, Governor Parson exercises the clemency power as a matter of grace, with the conditions and requirements "as he may deem proper." Mo. Const. art IV, § 7; *accord Lute,* 218 S.W.3d at 435.

Despite the plain language of § 552.070, Respondent found that § 552.070 created a mechanism for Williams to prove his innocence:

> Plaintiff has a liberty and a life interest in demonstrating his innocence that flows from an expectation created by state law, namely, section 552.070, RSMo., and Executive Order 17-20. When the Missouri Legislature enacted section 552.070, RSMo., it created a mechanism by which a prisoner may "demonstrat[e] his innocence." *Id.* The only difference between the Alaska law at issue in [*District Attorney's Office for Third Judicial District v. Osborne*, 557 U.S. 52 (2009)] and the Missouri law at issue here is that section 552.070 RSMo., does not trigger due process on its own terms. Instead, under 552.070 RSMo., a condemned person obtains a liberty interest once a governor empanels a Board of Inquiry. Accordingly, when Governor Greitens appointed the Board of Inquiry to investigate Plaintiffs innocence, that executive order triggered Plaintiffs due process rights. Those due process rights must not be deprived.

E10–E11.

But this finding was wrong as a matter of law because § 552.070 gives Williams no right or expectation that he will be granted clemency, and he has no interest in the process used by the board of inquiry. *Olim v. Wakinekona,* 461 U.S. 238, 250–51 (1983). "Process is not an end in itself." *Id.* at 250. The purpose of the Due Process Clause is to "protect a substantive interest to which an individual has a legitimate claim of entitlement." *Id.* But where the

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governor can grant or deny clemency "for whatever reason or for no reason at all," Williams has no interest for any process to protect. *Id.* Williams has no right to clemency and no "right to demand needless formality" in processes that do not implicate his rights. *Id.*

Wakinekona controls this case. There, the United States Supreme Court examined a prison transfer process in Hawaii. *Id.* at 241–42. Under Hawaii's prison regulations, before an inmate could be transferred from a Hawaiian prison to a prison on the mainland, a program committee would give notice to the inmate, hold a hearing, and apprise the inmate of the committee's findings. *Id at* 242. After the hearing process, a prison administrator acted as the final decision maker and decided whether to transfer the inmate with "no standards governing the administrator's exercise of discretion." *Id.* at 243. Even though the prison regulations required the process before the program committee, the Supreme Court held that inmates had no enforceable rights in that process because they had no right to remain in a Hawaiian prison rather than being transferred to a prison on the mainland. Instead, prison administrators could transfer a prisoner "for whatever reason or no reason at all." *Id.* at 250 (quoting *Meachum v. Fano,* 427 U.S. 215, 228 (1976)).

The same is true here. Section 552.070 gives Governor Parson discretion to create a board of inquiry and gives such boards the duty to gather

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information bearing on the clemency decision and the duty to make a report and recommendation to the governor. But it does not place any restrictions or standards on the governor's discretionary decision to grant or deny clemency. Because § 552.070 does not give Williams any protectable rights in the board-of-inquiry process, his statutory due process claims fail. *Wakinekona,* 461 U.S. at 250–251.

Respondent relied on *District Attorney's Office for Third Judicial District v. Osborne,* 557 U.S. 52 (2009), to find otherwise, but that case counsels *against* Williams's claims. In that case, the Supreme Court specifically rejected the idea that a protectable due process interest arose from the state's clemency process. *Osborne,* 557 U.S. at 67–68. Instead, the Court found that the offender's due process claim stemmed from an Alaskan statute that specifically provided a right for inmates to obtain review of their conviction or sentence *in an Alaskan court* based on claims of innocence. *Id.* at 68 (citing Alaska Stat. §§ 12.72.020(b)(2), 12.72.010(4)). Williams has no similar statutory interest under § 552.070.

At bottom, *Osborne* stands for the proposition that states can create post-conviction procedures that may "beget yet other rights to procedures essential to the realization of the parent right." *Osborne,* 557 U.S. at 68 (quoting *Dumschat,* 452 U.S. at 463). "Plainly, however, the underlying right must have

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come into existence before it can trigger due process protection." *Dumschat,* 452 U.S. at 463. Here, Williams does not have a due process right to appropriate the Governor's clemency authority because, "[i]n terms of the Due Process Clause, a [Missouri] felon's expectation that a lawfully imposed sentence will be commuted or that he will be pardoned is no more substantial than an inmate's expectation, for example, that he will not be transferred to another prison; it is simply a unilateral hope." *Dumschat,* 452 U.S. at 465; *accord Lute,* 218 S.W.3d at 435.

Section 552.070 does not create a judicial forum for claims of actual innocence or contemplate any role for a convicted inmate in the board-of-inquiry process. A board of inquiry may be created at Governor Parson's discretion, and it exists only to assist him in making clemency decisions. It is worth noting that Missouri law *does* provide a forum for capital offenders to raise claims of actual innocence. Inmates under a sentence of death, like Williams, may file a petition for a writ of habeas corpus in this Court alleging that new evidence shows they are actually innocent. *State ex rel. Johnson v. Blair,* 628 S.W.3d 375, 387–88 (Mo. 2021). Williams has already done so twice, and his claims have been rejected twice. E160–E162; E166–E168. He cannot now attempt to appropriate Governor Parson's exclusive clemency authority to ask a circuit court to grant, in declaratory judgment, relief for which he has

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proved no entitlement and which has been repeatedly denied by this Court.

Put another way, § 552.070 does not provide Williams a liberty interest that would not otherwise exist. Section 552.070 says nothing about eliminating Governor Parson's power to grant or lift a stay of execution until a board of inquiry issues a report, if it ever does so. § 552.070. However, Respondent effectively added that language into the statute. E5–E7. But, "[a] court may not add words by implication to a statute that is clear and unambiguous." *State ex rel. Young v. Wood*, 254 S.W.3d 871, 873 (Mo. 2008) (quoting *Asbury v. Lombardi*, 846 S.W.2d 196, 202 n.9 (Mo. 1993)). Under Respondent's interpretation, § 552.070 reads (words implicitly added by Respondent are set forth in bold):

> In the exercise of his powers under Article IV, Section 7 of the Constitution of Missouri to grant reprieves, commutations and pardons after conviction, the governor may, in his discretion, appoint a board of inquiry whose duty it shall be to gather information, whether or not admissible in a court of law, bearing upon whether or not a person condemned to death should be executed or reprieved or pardoned, or whether the person's sentence should be commuted. It is the duty of all persons and institutions to give information and assistance to the board, members of which shall serve without remuneration. Such board shall make its report and recommendations to the governor. **The governor shall not lift any stay of execution or make any decision concerning whether a person condemned to death should be executed or reprieved or pardoned, or whether the person's sentence should be commuted until the Board returns its report and recommendations to the governor.**

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> All information gathered by the board shall be received and held by it and the governor in strict confidence.

But those words in bold do not appear in the statute and Respondent cannot add them by judicial fiat. *Young*, 254 S.W.3d at 873.

Moreover, Respondent's order adding words into § 552.070 would lead to an absurd or unreasonable result. By Respondent's telling, § 552.070 effectively gives a board of inquiry—a board appointed at the discretion of Governor Parson solely to assist Governor Parson in his exercise of discretionary clemency authority—veto power over the Governor's discretion to ever lift a stay of execution or to grant or deny clemency. *See* E5–E7. For example, a board of inquiry could simply fail to ever provide a report, effectively holding the governor's clemency power hostage. That is an absurd result and this Court has made plain that a statute should not be read to require an absurd or unreasonable result. *State ex rel. Hillman v. Beger*, 566 S.W.3d 600, 608 (Mo. 2019).

Additionally, Respondent's construction of § 552.070 causes § 552.070 to conflict with Missouri's constitutional command of separation of powers. *See* Mo. Const. art. II, § 1; *see also* Mo. Const. art. IV, § 7; § 552.070. Under Respondent's reading of § 552.070, the General Assembly has altered or affected the governor's ability to grant or deny clemency. But, a statute passed

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by the General Assembly could not require Governor Parson to enter an executive order concerning clemency or prevent him from withdrawing one because those clemency powers were never the General Assembly's powers to confer or constrain. *See* Mo. Const. art IV, § 7; *see also Cooper,* 189 S.W.3d at 620. And any statute purporting to do so would be unconstitutional under Missouri's constitutional separation of powers. *See* Mo. Const. art. II, § 1; *see also* Mo. Const. art. IV, § 7; § 552.070.

The plain text of § 552.070 does not limit the governor's power to consider clemency and stays of execution, so this Court should reject the circuit court's attempt to read the statute in a way that creates a constitutional conflict. *Bennett v. Owens-Corning Fiberglass Corp.*, 896 S.W.2d 464, 467 (Mo. 1995) ("Where possible, courts are to interpret statutes so that they are in harmony with the constitution."). If § 552.070 were really an attempt to limit the Governor's authority to consider clemency and to make decisions on clemency petitions, which it is not, the statute would be unconstitutional. This Court should not follow Respondent's lead to create a conflict between Missouri's constitution and § 552.070 where none exists.

This is especially true here because Respondent's understanding of § 552.070 removes the statute from its proper context in the greater statutory and constitutional clemency framework, the provisions of which should be read

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harmony with one another. *Id.*; *see Elliot v. Carnahan*, 916 S.W.2d 239 (Mo. App. 1995) (cited with approval by *Mo. Inmates v. Mo. Dep't of Corr.*, 47 S.W.3d 366, 366 (Mo. 2001) (mem.)) (finding the conditional release statute should not be read in isolation to create a liberty interest in conditional release because the statutory subsection "is merely a part of the larger statutory scheme," which must be read in context of other statutory provisions). Clemency exists to allow the Governor to exercise discretionary mercy, outside the bounds of the adversarial legal system. Mo. Const. art. II, § 1; Mo. Const. art. IV, § 7. In reading § 552.070 to constrain the governor's ability to grant or deny clemency, Respondent's order divorces the statute from the greater constitutional delegation of authority. As this Court recognized in *Lute*, a prisoner may receive clemency, if at all, "upon such conditions and with such restrictions and limitations as [the governor] may think proper." *Lute*, 218 S.W.3d at 435 (quoting *Reno*, 66 Mo. at 269, 273). Respondent's order ignores *Lute*, and this Court's intervention is necessary to correct the error.

Finally, no other state law gives Williams a protectable interest in clemency. As discussed in greater detail above, under Missouri's constitution and well-settled precedent, "[t]he power of commutation rests purely within the discretion of the governor." *Cooper,* 189 S.W.3d 614, 620 (citing *Whitaker,* 451 S.W.2d at 15); *accord* Mo. Const. art. IV, § 7. "[A] pardon or commutation

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is a mere matter of grace, and until this act of clemency is fully performed, neither benefit nor rights can be claimed under it." *Lute,* 218 S.W.3d at 435 (quoting *Reno,* 66 Mo. at 269). Missouri's courts have no power to review claims related to Governor Parson's clemency decisions. *Id.*

Because Williams has no constitutional or state-law interest in the clemency process or in crafting a post-conviction remedy within the clemency process, his due process claims failed as a matter of law. Respondent exceeded his authority by finding otherwise and by allowing any judicial review into the Governor's clemency process.

D. Respondent's order rests on a faulty premise—that Williams can assert that he is innocent in a declaratory judgment action as a factual matter.

Williams was found guilty of the murder of Felicia Gayle. *Williams I*, 97 S.W.3d at 466. No state court has ever vacated Williams's conviction or found that Williams is innocent. In fact, this Court has, at least, twice denied Williams's assertion of innocence. E160–E162; E166–E168. Nevertheless, in denying Governor Parson's motion for judgment on the pleadings, Respondent simply assumed that Williams is, for the purposes of the motion for judgment on the pleadings, factually innocent of first-degree murder. E3, E9. Respondent's order concerning Williams's due process claims rests nearly exclusively on that unfounded assumption. *See* E9. But Respondent cannot

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ignore the jury's verdict in adjudicating the declaratory judgment action. Nor can Respondent decline to follow this Court's prior holdings. Mo. Const. art V, § 2.

Williams cannot assert, and Respondent cannot find, that Williams is innocent in the underlying declaratory judgment action because relitigation of Williams's guilt is barred by the doctrine of res judicata. *See Kennedy*, 920 S.W.2d at 621. And Williams is barred from challenging his conviction and sentence in a declaratory judgment action. *Hicklin*, 613 S.W.3d at 787 ("To the extent [the petitioner] asks this Court to vacate her sentence, however, this Court agrees with the State that habeas corpus—not a declaratory judgment—is the appropriate action."); *Charron v. State*, 257 S.W.3d 147, 153–54 (Mo. App. 2008) (finding circuit court lacked subject-matter jurisdiction to hear declaratory judgment action concerning validity of conviction or sentence).[13]

Williams is not innocent. Williams was found guilty after a fair trial, and this Court has rejected his claims of innocence. Those holdings are binding on Respondent. Mo. Const. art V, § 2. Williams's conviction was supported by

[13] After this Court's decision in *Webb*, 275 S.W.3d at 251–54, Governor Parson understands the Missouri Court of Appeals' use of subject-matter jurisdiction in *Charron* to properly be characterized as indicating a lack of authority but, in either circumstance, the issuance of a writ of prohibition would be proper. *Midkiff*, 543 S.W.3d at 606–07.

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substantial evidence: he confessed his crimes to his cellmate in the St. Louis City Workhouse and to his former girlfriend. *Williams I*, 97 S.W.3d at 467. On the day of the victim's murder, Williams's girlfriend saw that Williams's shirt was bloody and that he had scratches on his neck. *Id.* Later that same day, Williams "put his bloody clothes in his backpack and threw them into a sewer drain, claiming he no longer wanted them." *Id.* The victim's ID was found in Williams's car, along with a ruler used at the victim's workplace to measure print size. *Id.* Williams also sold the victim's husband's laptop shortly after the murder and admitted to doing so. *Id.*

The American justice system carries a presumption of innocence *before trial*. *Herrera v. Collins,* 506 U.S. 390, 399 (1993) (citing *In re Winship,* 397 U.S. 358 (1970)). In addition, the federal Constitution includes several other provisions to ensure against the risk of convicting an innocent person. *Id.* These include, among others, the right to confront adverse witnesses, the right to compulsory process, the right to an attorney, the right to effective assistance of counsel, the right to jury trial, the right to discover exculpatory evidence from the prosecution, and the right to a neutral judge. *Id.* Missouri has introduced additional procedural safeguards including the right to an appeal and the right to post-conviction review with appointed counsel.

Our legal system strongly presumes that a trial by jury, with all of the

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procedural safeguards the constitution requires, is the most accurate way to determine the truth of criminal charges. *Id.,* at 403–404; *Neder v. United States,* 527 U.S. 1, 30 (1999) (Scalia, J., concurring in part, dissenting in part) (stating trial by jury is the "spinal column of democracy."). As the Supreme Court of the United States recognized nearly fifty years ago, the trial occupies a special role in our constitutional tradition:

> A defendant has been accused of a serious crime, and this is the time and place set for him to be tried by a jury of his peers and found either guilty or not guilty by that jury. To the greatest extent possible all issues which bear on this charge should be determined in this proceeding: the accused is in the court-room, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens.

Wainwright v. Sykes, 433 U.S. 72, 90 (1977); *accord Singer v. United States*, 380 U.S. 24, 36 (1965) (recognizing that the Constitution regards a jury trial as "most likely to produce a fair result."). Williams has presented no reason to doubt that his trial was fair. And every claim of error he has asserted on direct appeal, post-conviction review, and habeas review has been rejected by Missouri's courts. *See Williams I*, 97 S.W.3d at 467; *see also Williams II*, 168 S.W.3d at 447; *Williams VI*, SC94720; *Williams VII*, SC96625.

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Put simply, there is no basis for a court to find that Williams is innocent, and no court has made such a finding. Respondent cannot now assume that Williams is innocent in a declaratory judgment action simply because Williams pleads he is innocent. *See Hicklin*, 613 S.W.3d at 787; *see also Kennedy*, 920 S.W.2d at 621; *Charron*, 257 S.W.3d at 153–54. Therefore, as a matter of law, the entirety of Respondent's order finding the existence Williams's due process right to prove his innocence rests on a faulty premise. As an irrefutable factual matter in the underlying proceeding, Williams is guilty of first-degree murder, and he has been sentenced to death.

E. Williams failed to plead facts that could show a due process violation.

Williams has explicitly renounced the idea that he is seeking to enforce any specific clemency process. E107 ("In this case, Mr. Williams has not challenged the Governor's discretion to grant or deny clemency or to convene a Board of Inquiry, nor has he challenged the sufficiency of the process provided for by state law.")

But even if Williams had not specifically renounced that claim and even if he had some minimal due process interest in the clemency process, as discussed in Justice O'Connor's *Woodard* concurrence, he failed to plead facts that could establish a due process violation here. Justice O'Connor's

concurrence suggested that "some *minimal* procedural safeguards apply to clemency proceedings," *Woodard,* 523 U.S. at 289 (O'Connor, J, concurring) (emphasis added), and it hypothesized that "[j]udicial intervention *might,* for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether or not to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process." *Id.* (emphasis added).

Federal courts have held that judicial intervention in clemency considerations would be warranted only in the narrow category of "extreme situations" contemplated by the concurring opinion. *Faulder,* 178 F.3d at 344–45; *accord Duvall,* 162 F.3d at 1061; *Anderson,* 279 F.3d at 676–77.

> Because clemency proceedings involve acts of mercy that are not constitutionally required, the minimal application of the Due Process Clause only ensures a death row prisoner that he or she will receive procedures explicitly set forth by state law, and that the procedure followed in rendering the clemency decision will not be wholly arbitrary, capricious or based upon whim, for example, flipping a coin.

Duvall, 162 F.3d at 1061. This Court should likewise decline to expand judicial review of clemency beyond the extreme circumstances hypothesized in Justice O'Connor's concurrence. *See Willbanks v. Mo. Dep't of Corr.*, 522 S.W.3d 238, 246 (Mo. 2017) ("Extending the Supreme Court's holdings beyond the four corners of its opinions is clearly disfavored.")

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In his petition, Williams alleges that Governor Greitens stayed Williams's execution and appointed a board of inquiry that gathered evidence bearing on his application for clemency for more than six years. E34–E35, ¶¶ 37–44. According to Williams, he was able to present "significant information" to members of the board of inquiry. E35, ¶ 42. Williams asserts that Governor Parson then dissolved the board of inquiry and that Williams is unaware whether the board issued a recommendation to the governor. Williams does not allege that he has petitioned Governor Parson for clemency or that there is any impediment to filing a new clemency petition. E35–E36, ¶¶ 45–47.

Williams's factual allegations fall far short of the "extreme situations" that would justify judicial intervention in the state clemency process. *Faulder,* 178 F.3d at 344–45. While Williams complains that the board of inquiry may have been dissolved before it issued a report and recommendation, he has no standing to make that claim. Section 552.070 only requires the board to "make its report and recommendations *to the governor*" and does not require its findings to be made available to Williams or any other person. § 552.070, RSMo (emphasis added). Indeed, the statute underscores that the information gathered by the board "shall be received and held by it and the governor in strict confidence." § 552.070. The board of inquiry's statutory duties are owed only to the governor and only to assist him "[i]n the exercise of his powers" to

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grant clemency. *Id.* Even if, for the purposes of argument, a board of inquiry failed in its duty to make its report and recommendations to the governor, the only person who would have recourse under the statute is Governor Parson himself. *Id.*

Beyond that, Williams does not allege that he has been denied access to the clemency process. At the time of this filing, Williams is not scheduled for execution and has not alleged that he will be unable to petition Governor Parson for executive clemency. *See Winfield v. Steele*, 755 F.3d 629, 630–32 (8th Cir. 2014) (en banc) (indicating that when the governor received inmates claim and information concerning request for clemency, whatever due process right that may exist is satisfied.)

Williams does not allege that Governor Parson denied him clemency by flipping a coin or through some other extreme, arbitrary conduct. Indeed, Williams does not allege that Governor Parson denied him clemency *at all.* While Governor Parson has dissolved the board of inquiry and withdrawn the stay of execution, Williams does not allege that Governor Parson issued any final decision or statement about whether to pardon Williams or commute his sentence.

To the extent that Williams may complain that he was not provided with a report issued by the board or a statement of reasons explaining why the board

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was dissolved, that does not state a due-process claim. *Faulder,* 178 F.3d at 344. In *Faulder,* the inmate complained that Texas's Board of Pardons and Paroles "acts in secrecy, refuses to hold hearings, gives no reasons for its decisions, and keeps no records of its actions." *Id.* The Fifth Circuit found that the inmate's contentions were "meritless" and that they did not plead facts that could warrant judicial review of a discretionary clemency decision. *Id.*

Williams's due-process claims are not based in law. Instead, they are an admitted ploy designed to place "political pressure on [Governor] Parson to commute his sentence." E39, ¶ 56. But neither this Court nor the circuit court below are political forums. The Governor's clemency power is a matter of grace entrusted to him by Missouri's constitution. Mo. Const. art IV, § 7; *Lute,* 218 S.W.3d at 435. If Williams chooses to apply to Governor Parson for clemency, Governor Parson will consider his application as he does for any prisoner who applies. Missouri's constitution provides Missouri's judiciary no role in that clemency process.

F. A permanent writ should issue to prevent Respondent from exceeding his authority.

This Court should issue a writ of prohibition because where a petition "is insufficient to justify court action, it is 'fundamentally unjust to force another to suffer the considerable expense and inconvenience of litigation' in addition

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to being 'a waste of judicial resources and taxpayer money.'" *State ex rel. Church v. Collins*, 543 S.W.3d 22, 26 (Mo. 2018) (quoting *State ex rel. Henley v. Bickel*, 285 S.W.3d 327, 330 (Mo. 2009)).

Here, Respondent's order allows Counts I and II to proceed, which, for the reasons discussed above, do not state viable theories for relief. While a court's erroneous interpretation of a statute or precedent can usually be remedied by an appeal, this case presents special considerations that would make continued judicial review particularly pernicious. First, like the litigants in *Church* and *Henley*, requiring additional litigation of Williams's constitutionally moribund claims would force Missouri's chief executive official to suffer the "inconvenience of litigation" and result in "a waste of judicial resources and taxpayer money." *Church*, 543 S.W.3d at 26 (quoting *Henley*, 285 S.W.3d at 330).

What is more, unlike in *Church* and *Henley*, Respondent's order here threatens an unwarranted violation of Missouri's constitutional separation of powers and the people's will in delegating exclusive constitutional authority for clemency decisions to Governor Parson. That harm is compounded because it allows a capital inmate, who has received multiple rounds of review from state and federal courts, to attempt to unilaterally delay the execution of Missouri's lawful criminal judgment.

Williams's long procedural history demonstrates that this unwarranted delay is not merely academic and instead exacts real, long-lasting harm on the victims of Williams's offenses. "Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out." *Shinn v. Ramirez*, 142 S. Ct. 1718, 1730 (2022) (quoting *Calderon v. Thompson*, 523 U.S. 538, 556 (1998)). "To unsettle these expectations is to inflict a profound injury to the powerful and legitimate interest in punishing the guilty, an interest shared by the State and the victims of crime alike." *Id.* (quoting *Calderon*, 523 U.S. at 556).

Finally, even setting aside the real and present harms, Respondent's order allowing continuing judicial review requires this Court's immediate intervention because without the issuance of a writ, Respondent will likely attempt to command Governor Parson or one of his agents to appear and explain the reasoning for Governor Parson's clemency decisions. *See* E12. Nothing in Missouri's constitution or laws allow such an unprecedented judicial intrusion into a domain explicitly delegated solely to Missouri's chief executive. And while Respondent has indicated that he will consider a protective order, the mere fact that Respondent will hale Governor Parson to court to answer claims barred by Missouri's constitution is a harm that an appeal cannot cure. Put another way, once Governor Parson is ordered to

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comply with discovery—even discovery limited by order—irreparable harm will occur in pursuit of claims Respondent has no authority *to even consider*, let alone grant.

G. Conclusion

In failing to grant the motion for judgment on the pleadings in relation to Counts I and II, Respondent has, in the excess of his authority, allowed continued judicial review of Governor Parson's clemency powers. Mo. Const. art. II, § 1; Mo. Const. art. IV, § 7; *Cooper,* 189 S.W.3d at 620. As Respondent has exceeded his authority and a failure to prohibit further proceedings will result in irreparable harm to Missouri's constitutional structure, this Court should make its preliminary writ permanent. *Midkiff*, 543 S.W.3d at 606–07.

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III. Relator is entitled to an order prohibiting Respondent from taking any action on Count III of Williams's petition for declaratory judgment except to grant judgment on the pleadings for Relator on that count, because Count III fails as a matter of law, in that Relator did not violate any Missouri statute in issuing an executive order dissolving the board of clemency impaneled to consider clemency action for Williams, as § 552.070 does not, and could not, limit the Governor's constitutional authority to consider and decide clemency applications.

In Count III below, Williams argued that Governor Parson violated Missouri law when he dissolved the board of inquiry that was appointed by Governor Greitens. No law supports Williams's claim, and Missouri's constitution and statutes foreclose his arguments.

A. Preservation Statement

Under Rule 84.04(e), "For each claim of error, the argument shall also include a concise statement describing whether the error was preserved *for appellate review*; if so, how it was preserved; and the applicable standard of review." (emphasis added). To the extent this rule is applicable to writ proceedings, Governor Parson pressed the same, or substantially similar, arguments before the circuit court prior to instituting writ proceedings in this Court. E91–E95. Accordingly, Respondent had a full and fair opportunity to pass upon this argument below. Governor Parson then sought a writ of prohibition on the same grounds in the Missouri Court of Appeals, which the

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court denied by summary written order. *See* E183–E184; *see also* Return at ¶ 76. This argument is, therefore, preserved.

B. No statute limits the Governor's constitutional authority to consider and decide clemency applications.

As explained in subpart I.C in relation to Governor Parson's first point relied on, § 552.070 does not, and could not, limit the Governor's constitutional authority to consider and decide clemency applications. Governor Parson is the head of the executive branch, and Missouri's constitution grants him the power to commute and pardon criminal convictions. Mo. Const. art. IV, §§ 1, 7; *Lute,* 218 S.W.3d at 435. Specifically, Article IV of Missouri's constitution states:

> The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may deem proper, subject to provisions of law as to the manner of applying for pardons. The power to pardon shall not include the power to parole.

Mo. Const. art. IV, § 7.

The General Assembly may create laws governing the process for *applying* for pardons, but it has no power to place restrictions on the governor's ability to consider, grant, or deny clemency as he sees fit. *Id.* Indeed, the General Assembly has directed the Missouri Parole Board to assist the governor in investigating clemency petitions, but Governor Parson retains the power to direct the Board on clemency issues and the "Board must follow the

governor's orders as he is granted the sole authority to commute sentences at his discretion." *Lute,* 218 S.W.3d at 435.

Even if the General Assembly passed a statute attempting to limit the governor's discretion or to provide inmates with statutory interests in the clemency consideration process, such a statute would be unconstitutional and would not be able to restrict Governor Parson's clemency discretion. Mo. Const. art. IV, § 7. Whether Williams cites to § 552.070 or any other statute, no statute could limit the governor's discretion to consider clemency, so Williams's statutory authority claims fail at the outset.

C. Respondent's order reads restrictions on the Governor's constitutionally conferred clemency authority into § 552.070 that do not appear in the plain text of § 552.070.

In explaining the ruling denying Governor Parson's motion for judgment on the pleadings as to Count III, Respondent posed two questions, stating, "first, is a Board of Inquiry, once appointed, required to produce a report and make a recommendation to the Governor; and second, what are the consequences if a Board fails to produce a report and make a recommendation to the Governor?" E5–E6. In purporting to answer the first of his two questions, Respondent stated the "answer to the first question is dictated by the statute's language. Giving the word 'shall' in the statute its plain and ordinary meaning, the Board, once appointed, had an affirmative obligation to produce a report

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and make recommendations to the Governor." E6. Respondent then found that because a board of inquiry has an affirmative statutory obligation to produce a report for a governor, that once a governor discretionarily appoints a board he or she has no discretion or authority to dissolve the same board of inquiry until the board creates a report. *Id.*

As support for that finding, Respondent compared a portion of § 552.070's text with a portion of the statute creating a board of regents for Harris-Stowe College, § 174.300. E6.[14] But, Respondent's reliance on § 174.300 demonstrates just how far Respondent's order has strayed from Missouri's constitution and principles of sound statutory interpretation. Indeed, the plain text of § 552.070 states that the appointment of a board of inquiry is a matter of gubernatorial discretion. § 552.070. Section 174.300.1 takes the opposite approach. At least prior to October 17, 1978, § 174.300.1 gave the governor authority, "*with the advice and consent of the senate*, to appoint a six-member board of regents to assume the general control and management of Harris-Stowe College." § 174.300.1 (emphasis added). Respondent does not explain how a statute requiring advice and consent to appoint a board of regents answers any question about § 552.070 or how it supports Respondent's finding

[14] As of August 28, 2005, Harris-Stowe College is now known as Harris-Stowe University. § 174.300.2

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that, "[t]here is a fundamental difference between the Governor's authority to appoint a Board in his discretion and the Board's ongoing existence." E6.

And the portion of § 174.300.1 not quoted by Respondent further cuts against the soundness of Respondent's order. Indeed, § 174.300.1 explicitly provides a term of years for members of the Harris-Stowe College Board of Regents, stating, "[t]he members of the board shall serve for terms of six years each, except for the members first appointed, two of whom shall serve two-year terms, two of whom shall serve four-year terms, and two of whom shall serve six-year terms." § 174.300.1. It then further restricts the Governor's appointment power by stating, "Not more than three of the regents shall be affiliated with any one political party." None of these terms of service or restrictions on individual appointment authority is present in § 552.070. *See* § 552.070.

Without explaining the basis for the "fundamental difference" in appointment and dissolution powers, E6, Respondent then pivoted to his second question—what are the "consequences" where a board of inquiry fails to produce a report and recommendation[15]—and ruled that he could not find

[15] To be clear, Governor Parson will not disclose whether the board of inquiry made a report. In his petition for declaratory judgment, Williams pled that the board failed to make a report and the standard governing review of a

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that the General Assembly had, by implication, intended to grant the Governor the power to dissolve the board before a report was issued. E7. In support of that proposition, Respondent stated the General Assembly knows how to give the Governor the authority to remove individuals appointed to various boards and entities when that is the goal of the General Assembly, relying on various statues. *Id.* But, as with Respondent's reliance on § 174.300.1, Respondent's reliance on these statutes undercuts Respondent's own order. *See* E7.

While Respondent cited to several statutes—§ 105.955.5, (restricting the Governor's ability to remove members of the Missouri Ethics Commission); § 172.300 (granting the state university board of curators the power to remove university officials and employees); § 374.080, (authorizing the Director of the Department of Commerce and Insurance to appoint a deputy who serves at the pleasure of the director); § 620.586.2, (granting the governor to appoint nonvoting, ex officio to the Missouri Community Service Commission who serve at the pleasure of the governor)—these statutes are not helpful in determining the scope of § 552.070. None of those statutes have any bearing on the question before this Court because, unlike powers granted to curators or directors of various departments or in relation to statutorily created entities,

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motion for judgment on the pleadings required Respondent to take that factual allegation as true for the purposes of the motion.

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Governor Parson's powers to consider, grant, and deny clemency or to stay executions were never the General Assembly's powers to confer or constrain.

Instead, Governor Parson's longstanding clemency powers are granted expressly and exclusively by Missouri's constitution, Mo. Const. art IV, § 7, and rest "purely within [his] discretion." *Cooper,* 189 S.W.3d at 620. Thus, the clemency power is not like the authority of university curators, department directors, or others operating under a legislative enactment. Governor Parson's clemency power was directly granted by the people of Missouri, not created by the General Assembly, and the General Assembly cannot regulate it. Mo. Const. art. I, § 1 ("That all political power is vested in and derived from the people; that all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.); Mo. Const. art IV, § 7.

Respondent's order, by analogizing § 552.070 to textually different statutes, reads restrictions on the Governor's constitutionally conferred clemency authority into § 552.070 that do not appear in the plain text of § 552.070. But, "[a] court may not add words by implication to a statute that is clear and unambiguous." *Young*, 254 S.W.3d at 873 (quoting *Asbury*, 846 S.W.2d at 202 n.9).

Put another way, § 552.070 does not provide Williams a liberty interest

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that would not otherwise exist. Section 552.070 says nothing about eliminating Governor Parson's power to lift a stay of execution or to grant or deny clemency until a board of inquiry issues a report, if it ever does so. § 552.070. By reading that language into the statute, Respondent has erred. E5–E7. *See Young*, 254 S.W.3d at 873 (quoting *Asbury*, 846 S.W.2d at 202 n.9). Under Respondent's interpretation of § 552.070, the statute effectively includes an additional provision, namely, "The governor shall not lift any stay of execution or make any decision concerning whether a person condemned to death should be executed or reprieved or pardoned, or whether the person's sentence should be commuted until the Board returns its report and recommendations to the governor." But there is no such wording or provision in the statute, and Respondent cannot add the wording or provision by judicial fiat. *Young*, 254 S.W.3d at 873.

Moreover, Respondent's order adding words into § 552.070 would lead to an absurd or unreasonable result. By Respondent's telling, § 552.070 the effectively gives a board of inquiry—a board appointed at the discretion of Governor Parson solely to assist Governor Parson in his exercise of clemency authority—veto power over the Governor's discretion to ever lift a stay of execution or to grant or deny clemency. *See* E5–E7. That is an absurd result, and this Court has made plain that a statute should not be read to require an

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absurd or unreasonable result. *Hillman*, 566 S.W.3d at 608.

Additionally, Respondent's construction of § 552.070 causes § 552.070 to conflict with Missouri's constitutional command of separation of powers. *See* Mo. Const. art. II, § 1; *see also* Mo. Const. art. IV, § 7; § 552.070. Under Respondent's reading of § 552.070, the General Assembly has altered or affected the governor's ability to grant or deny clemency. But, a statute passed by the General Assembly could not require Governor Parson to enter an executive order concerning clemency or prevent him from withdrawing one because those clemency powers were never the General Assembly's powers to confer or constrain. *See* Mo. Const. art IV, § 7; *see also Cooper,* 189 S.W.3d at 620. And any statute purporting to do so would be unconstitutional under Missouri's constitutional separation of powers. *See* Mo. Const. art. II, § 1; *see also* Mo. Const. art. IV, § 7; § 552.070.

The plain text of § 552.070 does not limit the governor's power to consider clemency and stays of execution, so this Court should reject the circuit court's attempt to read the statute in a way that creates a constitutional conflict. *Bennett*, 896 S.W.2d at 467 ("Where possible, courts are to interpret statutes so that they are in harmony with the constitution."). If § 552.070 were really an attempt to limit the Governor's authority to consider clemency and to make decisions on clemency petitions, which it is not, the statute would be

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unconstitutional. This Court should not follow Respondent's lead to create a conflict between Missouri's constitution and § 552.070 where none exists.

This is especially true here because Respondent's understanding of § 552.070 removes the statute from its proper context in the greater statutory and constitutional clemency framework, the provisions of which should be read harmony with one another. *Id.*; *see Elliot*, 916 S.W.2d at 241–42 (cited with approval by *Mo. Inmates*, 47 S.W.3d at 366) (finding the conditional release statute should not be read in isolation to create a liberty interest in conditional release because the statutory subsection "is merely a part of the larger statutory scheme," which must be read in context of other statutory provisions). Clemency exists to allow the Governor to exercise discretionary mercy, outside the bounds of the adversarial legal system. Mo. Const. art. II, § 1; Mo. Const. art. IV. In reading § 552.070 to constrain the governor's ability to grant or deny clemency, Respondent's order divorces the statute from the greater constitutional delegation of authority. As this Court recognized in *Lute*, a prisoner may receive clemency, if at all, "upon such conditions and with such restrictions and limitations as [the governor] may think proper." *Lute*, 218 S.W.3d at 435 (quoting *Reno*, 66 Mo. at 269, 273). Respondent's order ignores *Lute*, and this Court's intervention is necessary to correct the error.

Finally, no other state law gives Williams a protectable interest in

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clemency. As discussed in greater detail above, under Missouri's constitution and well-settled precedent, "[t]he power of commutation rests purely within the discretion of the governor." *Cooper,* 189 S.W.3d 614, 620 (citing *Whitaker,* 451 S.W.2d at 15); *accord* Mo. Const. art. IV, § 7. "[A] pardon or commutation is a mere matter of grace, and until this act of clemency is fully performed, neither benefit nor rights can be claimed under it." *Lute,* 218 S.W.3d at 435 (quoting *Reno,* 66 Mo. at 269). Section 552.070 does not limit Governor Parson's clemency authority and does not give Missouri's courts power to review claims related to Governor Parson's clemency decisions. *Id.*

D. A permanent writ should issue to prevent Respondent from exceeding his authority.

This Court should issue a writ of prohibition because where a petition "is insufficient to justify court action, it is 'fundamentally unjust to force another to suffer the considerable expense and inconvenience of litigation' in addition to being 'a waste of judicial resources and taxpayer money.'" *Church*, 543 S.W.3d at 26 (quoting *Henley*, 285 S.W.3d at 330).

Here, Respondent's order allows Count III to proceed, which, for the reasons discussed above, does not state a viable theory for relief. While a court's erroneous interpretation of a statute or precedent can usually be remedied by an appeal, this case presents special considerations that would

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make continued judicial review particularly pernicious. First, like the litigants in *Church* and *Henley*, requiring additional litigation of Williams's constitutionally moribund claim would force Missouri's chief executive official to suffer the "inconvenience of litigation" and result in "a waste of judicial resources and taxpayer money." *Church*, 543 S.W.3d at 26 (quoting *Henley*, 285 S.W.3d at 330).

What is more, unlike in *Church* and *Henley*, Respondent's order here threatens an unwarranted violation of Missouri's constitutional separation of powers and the people's will in delegating exclusive constitutional authority for clemency decisions to Governor Parson. That harm is compounded because it allows a capital inmate, who has received multiple rounds of review from state and federal courts, to attempt to unilaterally delay the execution of Missouri's lawful criminal judgment.

Williams's long procedural history demonstrates that this unwarranted delay is not merely academic and instead exacts real, long-lasting harm on the victims of Williams's offenses. "Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out." *Shinn*, 142 S. Ct. at 1730 (quoting *Calderon*, 523 U.S. at 556). "To unsettle these expectations is to inflict a profound injury to the powerful and legitimate interest in

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punishing the guilty, an interest shared by the State and the victims of crime alike." *Id.* (quoting *Calderon*, 523 U.S. at 556).

Finally, even setting aside the real and present harms, Respondent's order allowing continuing judicial review requires this Court's immediate intervention because without the issuance of writ, Respondent will likely attempt to command Governor Parson or one of his agents to appear and explain the reasoning for Governor Parson's clemency decisions. *See* E12. Nothing in Missouri's constitution or laws allow such an unprecedented judicial intrusion into a domain explicitly delegated solely to Missouri's chief executive. And while Respondent has indicated that he will consider a protective order, the mere fact that Respondent will hale Governor Parson to court to answer claims barred by Missouri's constitution is a harm that an appeal cannot cure. Put another way, once Governor Parson is ordered to comply with discovery—even discovery limited by order—irreparable harm will occur in pursuit of claims Respondent has no authority *to even consider*, let alone grant.

E. Conclusion

In failing to grant the Governor's motion for judgment on the pleadings in relation to Count III, Respondent has, in the excess of his authority, allowed continued judicial review of Governor Parson's clemency powers, Mo. Const.

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art. II, § 1; Mo. Const. art. IV, § 7; *Cooper,* 189 S.W.3d at 620, and impermissibly read restrictions on the Governor's constitutionally conferred clemency authority into § 552.070 that do not appear in the plain text of § 552.070. As Respondent has exceeded his authority and a failure to prohibit further proceedings will result in irreparable harm to Missouri's constitutional structure, this Court should make its preliminary writ permanent. *Midkiff*, 543 S.W.3d at 606–07.

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IV. Relator is entitled to an order prohibiting Respondent from taking any action on Count IV of Williams's petition for declaratory judgment except to grant judgment on the pleadings for Relator on that count, because Count IV fails as a matter of law, in that Relator did not violate Missouri's constitutional separation of powers clause in issuing an executive order dissolving the board of clemency impaneled to consider clemency action for Williams, as § 552.070 does not, and could not, limit the Governor's constitutional authority to consider and decide clemency applications.

In his fourth claim in the circuit court below, Williams argued that Governor Parson's decision to dissolve the board of inquiry and withdraw the stay of execution violated the separation of powers. Williams's argument has no basis in fact or law.

A. Preservation Statement

Under Rule 84.04(e), "For each claim of error, the argument shall also include a concise statement describing whether the error was preserved *for appellate review*; if so, how it was preserved; and the applicable standard of review." (emphasis added). To the extent this rule is applicable to writ proceedings, Governor Parson pressed the same, or substantially similar, arguments before the circuit court prior to instituting writ proceedings in this Court. E95–E97. Accordingly, Respondent had a full and fair opportunity to pass upon this argument below.

Governor Parson then sought a writ of prohibition in the Missouri Court of Appeals but did not raise this point because Respondent granted judgment on the pleadings for Governor Parson as to Count IV, stating the parties "consent[ed] to judgment on the pleadings" on that count. E2 n.1; Return at 12, ¶ 74. As stated in Governor Parson's petition for writ of prohibition or, in the alternative, mandamus, Governor Parson did not understand Williams to have consented to judgment on that count. *See* E112–E114. Because Williams has since confirmed that he did not intend to consent to the entry of judgment on the pleadings on that count, Return at 12, ¶ 74, Governor Parson now asserts Point IV before this Court. The argument is, therefore, preserved for this Court's review.

B. Governor Parson's exercise of his discretionary, constitutional powers does not violate the separation of powers.

The drafters of the Missouri constitution, before enumerating the power of any executive, judicial, or legislative officer, sought to enshrine the separation of powers:

> 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.

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Mo. Const. art. II, § 1. The separation of powers embedded in Missouri's constitution "is 'fundamentally vital to our form of government.'" *Rebman*, 576 S.W.3d t 609 (Mo. 2019) (quoting *Danforth*, 454 S.W.2d at 500).

Article IV, § 1 of Missouri's constitution vests the "supreme executive power" in Governor Parson, the elected Governor of Missouri. By virtue of that office and delegation of executive power, Governor Parson is constitutionally directed to "take care that the laws are distributed and faithfully executed, and shall be a conservator of the peace throughout the state." Mo. Const. art. IV, § 2. Amongst the powers granted to Governor Parson by Missouri's constitution is the exclusive authority to grant pardons, reprieves, and commutations. That exclusive authority is granted to the Governor by Article IV, § 7 of Missouri's constitution, which states:

> The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may deem proper, subject to provisions of law as to the manner of applying for pardons. The power to pardon shall not include the power to parole.

This Court has made clear that Governor Parson's power to grant clemency "is 'a mere matter of grace' that [he] can exercise 'upon such conditions and with such restrictions and limitations as he may think proper.'" *Lute*, 218 S.W.3d at 435 (quoting *Reno*, 66 Mo. at 269, 273). To protect that

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delegation of exclusive clemency authority, Missouri's constitution provides no role for Missouri's judiciary in Governor Parson's consideration of clemency petitions. Mo. Const. art. IV, § 7; Mo. Const. art. II, § 1; *Cooper,* 189 S.W.3d at 620 ("[The petitioner's] claim for a reprieve, commutation, or pardon is meritless, and one over which we have no jurisdiction.").[16]

To the extent that Williams argues that the General Assembly has imposed a "political burden" on the governor by forcing him to delay clemency decisions or publicize his decision-making process, E47 ¶ 91; *accord* E39, ¶ 56, neither § 552.070 nor Missouri's constitution supports his argument. The governor's clemency power is purely discretionary, and it is not subject to investigation or review by the General Assembly. Mo. Const. art. IV, § 7. Williams's separation of powers arguments fail as a matter of well-settled precedent. *Lute,* 218 S.W.3d at 435; *Cooper,* 189 S.W.3d at 620; *Whitaker,* 451 S.W.2d at 15; *Roll,* 225 F.3d at 1018.

But, as noted above, Williams's claims of innocence *have* been publically investigated and reviewed in Missouri's courts. A jury of his peers found him guilty after a fair trial and sentenced him to death. *Williams I*, 97 S.W.3d at

[16] After this Court's decision in *Webb*, 275 S.W.3d at 251–54, Governor Parson understands the Missouri Court of Appeals' use of jurisdiction in *Cooper* to properly be characterized as indicating a lack of authority.

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467. His convictions and sentences have been repeatedly affirmed. *Williams I*, 97 S.W.3d at 467; *Williams II*, 168 S.W.3d at 447; *Williams VI*, SC94720; *Williams VII*, SC96625. And this Court has denied the same claims of innocence that Williams makes in the underlying petition—on two separate occasions. *Williams VI*, SC94720; *Williams VII*, SC96625; Return at 9–10, ¶¶ 44–50, 51–53.

The General Assembly has passed laws that make murder in the first degree a capital crime. A jury determined that Williams was guilty of murder in the first degree, and a jury and court found that Williams should be sentenced to death. *See Williams I*, 97 S.W.3d at 467. As contemplated by Missouri's constitution, Governor Parson, and Governor Parson alone, will decide whether Williams should receive a reprieve, pardon, or commutation. Williams failed to plead facts below that could establish a separation of powers issue.

Quite the contrary, Respondent's order below—not Governor Parson's actions—violate Missouri's constitutional command of separation of powers. *See* Mo. Const. art. II, § 1; *see also* Mo. Const. art. IV, § 7; § 552.070. Governor Parson's power to grant clemency or reprieves staying execution are matters purely of his discretion. *Cooper,* 189 S.W.3d at 620; *Whitaker,* 451 S.W.2d at 15. Those powers are explicitly granted exclusively to the executive branch,

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and the governor exercises them as a matter of grace. *Lute,* 218 S.W.3d at 435. By contrast, Williams's argument (which is reflected in Respondent's order)—that the legislature has restricted the governor's clemency authority by statute and that this Court has the authority to force the Governor to exercise his clemency authority in a manner that Williams personally sees fit—would violate the separation of powers.

Under Respondent's reading of § 552.070, the General Assembly has altered or affected the governor's ability to grant or deny clemency. But, a statute passed by the General Assembly could not require Governor Parson to enter an executive order concerning clemency or prevent him from withdrawing one because those clemency powers were never the General Assembly's powers to confer or constrain. *See* Mo. Const. art IV, § 7; *see also Cooper,* 189 S.W.3d at 620. And any statute purporting to do so would be unconstitutional under Missouri's constitutional separation of powers. *See* Mo. Const. art. II, § 1; *see also* Mo. Const. art. IV, § 7; § 552.070.

C. Even if the General Assembly could constrain Governor Parson's clemency authority, it has not done so.

And even if the General Assembly could constrain the Governor's ability to grant or deny clemency as a matter of executive grace (which it cannot), the General Assembly has not done so. Indeed, Respondent's order read

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restrictions on the Governor's constitutionally conferred clemency authority into § 552.070 that do not appear in the plain text of § 552.070. But, "[a] court may not add words by implication to a statute that is clear and unambiguous." *Young*, 254 S.W.3d at 873 (quoting *Asbury*, 846 S.W.2d at 202 n.9).

Indeed, the General Assembly did not constrain Governor Parson's ability to lift execution stays or to dissolve the board of inquiry in the plain language of § 552.070. Section 552.070 says nothing about eliminating Governor Parson's power to grant or lift a stay of execution until a board of inquiry issues a report, if it ever does so. § 552.070. However, Respondent read that language into the statute in an attempt to create a separation of powers concern. E5–E7. Under Respondent's interpretation of § 552.070, the statute effectively includes an additional provision, namely, "The governor shall not lift any stay of execution or make any decision concerning whether a person condemned to death should be executed or reprieved or pardoned, or whether the person's sentence should be commuted until the Board returns its report and recommendations to the governor." But the General Assembly did not choose to add those words to § 552.070 (if they even could under Missouri's constitution) and Respondent cannot add them by judicial fiat. *Young*, 254 S.W.3d at 873.

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D. A permanent writ should issue to prevent Respondent from exceeding his authority.

This Court should issue a writ of prohibition because where a petition "is insufficient to justify court action, it is 'fundamentally unjust to force another to suffer the considerable expense and inconvenience of litigation' in addition to being 'a waste of judicial resources and taxpayer money.'" *Church*, 543 S.W.3d at 26 (quoting *Henley*, 285 S.W.3d at 330).

Here, Respondent's order allows Count III to proceed, which, for the reasons discussed above, does not state a viable theory for relief. While a court's erroneous interpretation of a statute or precedent can usually be remedied by an appeal, this case presents special considerations that would make continued judicial review particularly pernicious. First, like the litigants in *Church* and *Henley*, requiring additional litigation of Williams's constitutionally moribund claim would force Missouri's chief executive official to suffer the "inconvenience of litigation" and result in "a waste of judicial resources and taxpayer money." *Church*, 543 S.W.3d at 26 (quoting *Henley*, 285 S.W.3d at 330).

What is more, unlike in *Church* and *Henley*, Respondent's order here threatens an unwarranted violation of Missouri's constitutional separation of powers and the people's will in delegating exclusive constitutional authority

for clemency decisions to Governor Parson. That harm is compounded because it allows a capital inmate, who has received multiple rounds of review from state and federal courts, to attempt to unilaterally delay the execution of Missouri's lawful criminal judgment.

Williams's long procedural history demonstrates that this unwarranted delay is not merely academic and instead exacts real, long-lasting harm on the victims of Williams's offenses. "Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out." *Shinn*, 142 S. Ct. at 1730 (quoting *Calderon*, 523 U.S. at 556). "To unsettle these expectations is to inflict a profound injury to the powerful and legitimate interest in punishing the guilty, an interest shared by the State and the victims of crime alike." *Id.* (quoting *Calderon*, 523 U.S. at 556).

Finally, even setting aside the real and present harms, Respondent's order allowing continuing judicial review requires this Court's immediate intervention because without the issuance of writ, Respondent will likely attempt to command Governor Parson or one of his agents to appear and explain the reasoning for Governor Parson's clemency decisions. *See* E12. Nothing in Missouri's constitution or laws allow such an unprecedented judicial intrusion into a domain explicitly delegated solely to Missouri's chief executive. And while Respondent has indicated that he will consider a

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protective order, the mere fact that Respondent will hale Governor Parson to court to answer claims barred by Missouri's constitution is a harm that an appeal cannot cure. Put another way, once Governor Parson is ordered to comply with discovery—even discovery limited by order—irreparable harm will occur in pursuit of claims Respondent has no authority *to even consider*, let alone grant.

E. Conclusion

In failing to grant the Governor's motion for judgment on the pleadings in relation to Count IV, Respondent has, in the excess of his authority, allowed continued judicial review of Governor Parson's clemency powers, Mo. Const. art. II, § 1; Mo. Const. art. IV, § 7; *Cooper,* 189 S.W.3d at 620, and added words into § 552.070 to manufacture a separation of powers issue. Paradoxically, Respondent's order actually creates a separation of powers violation in the opposite direction, intruding on the people's delegation to the governor by creating a legislative check that does not exist in Missouri's constitution. As Respondent has exceeded his authority and a failure to prohibit further proceedings will result in irreparable harm to Missouri's constitutional structure, this Court should make its preliminary writ permanent. *Midkiff*, 543 S.W.3d at 606–07.

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V. Relator is entitled to an order prohibiting Respondent from taking any action on Williams's petition for declaratory judgment except to grant judgment on the pleadings for Relator, because Respondent exceeded his authority by authorizing Williams to mount an unauthorized collateral attack on a final criminal judgment, in that collateral attacks on a final judgment in a criminal case are permitted only as provided by statute or rule and no statute or rule provides for Respondent's newly-recognized form of collateral attack.

Respondent's decision to allow Williams's suit to proceed rested largely on the circuit court's erroneous assumption that Williams is factually innocent despite the fact that Williams *is convicted of murder and sentenced to death*. Respondent's decision to allow an unauthorized collateral attack on Williams's convictions warrants this Court's immediate intervention. *Fulton,* 659 S.W.3d at 914.

A. Preservation Statement

Under Rule 84.04(e), "For each claim of error, the argument shall also include a concise statement describing whether the error was preserved *for appellate review*; if so, how it was preserved; and the applicable standard of review." (emphasis added). To the extent this rule is applicable to writ proceedings, Governor Parson pressed the argument that Williams cannot assert, and Respondent cannot find, that Williams is innocent in the underlying declaratory judgment proceedings before the circuit court. E82–E87. Respondent's subsequent order created a post-conviction remedy and

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Governor Parson pressed the argument contained in Point V before the Missouri Court of Appeals, which denied the claim by summary written order. *See* E183–E184; *see also* Return at 12, ¶ 76. This argument is, therefore, preserved.

B. Respondent had no authority to allow Williams to challenge the jury's guilty verdict in a declaratory judgment proceeding.

In denying Governor Parson's motion for judgment on the pleadings, Respondent found that, as a factual matter, Williams is innocent of first-degree murder. E3. But, as Governor Parson argued below, Williams cannot assert, and Respondent cannot find, that Williams is innocent in a declaratory judgment action because relitigation of his guilt is barred by the doctrine of res judicata. *See Kennedy*, 920 S.W.2d at 621. And Williams is barred from challenging his conviction and sentence in a declaratory judgment action. *Hicklin*, 613 S.W.3d at 787 ("To the extent [the petitioner] asks this Court to vacate her sentence, however, this Court agrees with the State that habeas corpus—not a declaratory judgment—is the appropriate action."); *Charron*, 257 S.W.3d at 153–54 (finding circuit court lacked subject-matter jurisdiction to hear declaratory judgment action concerning validity of conviction or sentence). Therefore, Respondent's actions below were wrong as a matter of law.

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C. Respondent had no authority to recognize a new collateral attack on the jury's guilty verdict in Williams's case.

Further, Respondent had no authority to create a new form of collateral attack. "A criminal judgment becomes final when a sentence is entered." *State ex rel. Fite v. Johnson*, 530 S.W.3d 508, 510 (Mo. 2017). And, "[c]ollateral attacks on a final judgment in a criminal case are permitted only as provided by statute or rule, and courts must enforce the mandatory procedures of those proceedings to prevent duplicative and unending challenges to the finality of a judgment[.]" *Fulton*, 659 S.W.3d at 914 (citations and quotations omitted). Williams's convictions became final more than twenty years ago, *see Williams I*, 97 S.W.3d at 466, and now all of Missouri's judges and courts, including Respondent, are required to "enforce the mandatory procedures of [statutory or rule-based post-conviction] proceedings to prevent duplicative and unending challenges to the finality of a judgment." *Fulton*, 659 S.W.3d at 914.

In denying Governor Parson's motion for judgment on the pleadings, Respondent essentially recognized a new post-conviction remedy—the circuit court intends to review Williams's claims of innocence and to allow a judicial review of the governor's consideration of Williams's clemency request. E8–E12. But Williams's conviction is final and Williams "may not circumvent the applicable post-conviction rules by presenting a collateral attack upon his

conviction and sentence in an action for declaratory judgment." *Cooper v. State*, 818 S.W.2d 653, 654 (Mo. App. 1991); *see also Fite*, 530 S.W.3d at 510 (finding the circuit court lacked authority to grant a Rule 29.07(d) motion filed as an end-run around post-conviction proceedings).

Respondent made a mistake of law when he assumed, despite the jury's verdict, that Williams was innocent of murder. In doing so, Respondent allowed an unauthorized collateral attack on another circuit court's final criminal judgment simply because it was clothed as a declaratory judgment action. E8–E12. In Respondent's estimation, because a board of inquiry was appointed and because Williams has stated he is innocent, Governor Parson no longer has the ability to decide the manner in which he will consider clemency petitions, and a circuit court can force Governor Parson to instead litigate Williams's claim of innocence as a collateral attack in declaratory judgment. E8–E12. This determination is wrong and exceeds Respondent's authority.

D. A permanent writ should issue to prevent Respondent from exceeding his authority.

Unless the writ issues, Respondent's order will "result in a chaos of review unlimited in time, scope, and expense." *State ex rel. Zahnd v. Van Amburg*, 533 S.W.3d 227, 230 (Mo. 2017) (quoting *State ex rel. Simmons v. White*, 866 S.W.2d 443, 446 (Mo. 1993)). As recounted in the statement of facts

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above, Williams has received the review authorized by nearly every post-conviction process authorized under Missouri law. And every Missouri court to hear his meritless challenges has affirmed his convictions and sentences. Now, Williams seeks to circumvent Missouri's post-conviction rules and manufacture a new type of collateral challenge. Respondent had no authority to create such a post-conviction cause of action just because Williams titled his filing a petition for declaratory judgment. *See Fulton*, 659 S.W.3d at 914; *see also Cooper*, 818 S.W.2d at 654.

Importantly, the harm of allowing an unauthorized collateral attack is not merely academic. "Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1133 (2019) (quoting *Hill v. McDonough*, 547 U.S. 573, 584 (2006)). "Those interests have been frustrated in this case." *Id.* Williams committed his crimes more than two decades ago. *Williams I*, 97 S.W.3d at 466. He has exhausted nearly every state and federal avenue for review, some more than once. And each and every time, Williams's claims have been found to be meritless. Put simply, Williams "has managed to secure delay through lawsuit after lawsuit." *Bucklew*, 139 S. Ct. at 1133–34. "The people of Missouri, the surviving victims of [Williams's] crimes, and others like them deserve better." *Id.* at 1134. Governor Parson will fully and fairly consider any

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clemency request properly made by Williams, but unless Governor Parson grants such a request nothing allows Williams, by filing his meritless petition for declaratory judgment, to unilaterally delay the State of Missouri from enforcing its just sentence.

E. Conclusion

Respondent's order denying Governor Parson's motion for judgment on the pleadings recognizes a nonexistent collateral attack. Respondent had no authority to recognize such a collateral attack and this Court should make its preliminary writ permanent to prevent Respondent from exceeding his authority and to prevent the irreparable harm of an unauthorized collateral attack. *Midkiff*, 543 S.W.3d at 606–07.

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Conclusion

For these reasons, Governor Parson asks this Court to make its preliminary writ of prohibition directed at Respondent in his official capacity permanent. Governor Parson further requests this Court make any further adjudications and orders therein as right and just.

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Certificates of Service and Compliance

The attached brief complies with the limitations contained in Rule 84.06 as it contains 22,420 words, excluding the cover, signature block, certification, and appendix, as determined by Microsoft Word software.

I further certify that a copy of this document was filed using the Case.net system on February 9, 2024. Pursuant to Rule 103.08, counsel for Respondent will be served a copy of the document by operation of the Case.net system.

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