IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

DARRELL COPE, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 18AC-CC00230
	)	
MICHAEL L. PARSON, et al.,	)	
	)	
Defendants.	)	

ORDER AND JUDGMENT

Pending before the Court is the Motion to Dismiss of the Defendants, Governor Parson and Lieutenant Governor Kehoe (collectively, "the State"). For the reasons stated below, the Motion to Dismiss is GRANTED, the case is DISMISSED WITH PREJUDICE, and final judgment is entered on behalf of the Defendants.

The Petition in this case challenges the validity of Governor Parson's appointment of Michael Kehoe to the office of Lieutenant Governor of Missouri. Plaintiffs—the Missouri Democratic Party and Mr. Darrell Cope—contend that Governor Parson lacked authority to fill the vacancy that arose when Governor Parson succeeded to the office of Governor. The Petition requests declaratory and injunctive relief that would eject Lieutenant Governor Kehoe from office and enjoin Governor Parson from appointing anyone else to that office.

The Court finds that Plaintiffs, as private parties, lack authority to seek the removal of a state official from office by litigation.

Plaintiffs Lack Authority to Seek to Remove the Lieutenant Governor by Litigation.

First, Plaintiffs here are private parties, not government officials. Under Missouri law, a private plaintiff lacks authority to seek the removal of a public official through litigation. Rather, a private party seeking to oust a public official from office must proceed under the *quo warranto* statute, § 531.010, RSMo. The *quo warranto* statute provides the exclusive procedure under

Missouri law to remove a state officer by litigation. *See Benne v. ABB Power T&D Co.*, 106 S.W.3d 595, 597-98 (Mo. App. W.D. 2003). When seeking the removal of state officers, "all private relators must" proceed under the *quo warranto* statute. *State ex inf. Graham v. Hurley*, 540 S.W.2d 20, 23 (Mo. banc 1976).

In *Benne v. ABB Power T&D Co.*, the Court of Appeals held that a private litigant lacks authority to challenge the legality of a public officer's service through litigation. 106 S.W.3d at 597-98. The Court of Appeals stated, "this court is not in the position to rule via this case on the issue of whether [the appointee] was properly on the LIRC. Rather, the proper method for challenging the constitutional validity of an officer's service is through a *quo warranto* action." *Id.*

Plaintiffs do not dispute that Lieutenant Governor Kehoe is the *de facto* holder of the office of Lieutenant Governor. He was appointed by Governor Parson and sworn into office by Cole County Circuit Judge Patricia Joyce, and at least two former Governors have made similar appointments to fill vacancies in the office of Lieutenant Governor. "An officer '*de facto*' holds office by some color of right and title." *Benne*, 106 S.W.3d at 599. Lieutenant Governor Kehoe plainly "holds office by some color of right and title," and thus he constitutes the *de facto* officeholder under this standard. As a *de facto* officeholder, "the acts of that officer are not invalid as to third persons and the public." *Id.* [1]

[1] The Defendants further assert a constitutional barrier to removal, Article VII, §§ 1-3. This Court disagrees. The Court acknowledges that the opinion of the Missouri Supreme Court stated that "The single method provided in the Constitution for removal from office of statewide elective executive officials . . . is impeachment." *State ex inf. Nixon v. Moriarty*, 893 S.W.2d 806, 808 (Mo. banc 1995) (citing Mo. Const. art VII, §§ 1-3) and that "Elective executive officials may be removed from office solely and exclusively by impeachment pursuant to article VII, sections 1-3 of our Constitution." In *Moriarty*, there was no challenge that Moriarty was not the duly elected Secretary of State. In the instant cause, Lieutenant Governor Kehoe is the *de facto* holder of his office. He was not duly elected and is better described as a statewide appointed executive official. Unlike an elected official, there is other no way to challenge the propriety of his appointment. He would be impeachable, but that is not the exclusive manner of removal for certain claims.

Under black-letter Missouri law, a private plaintiff lacks authority to initiate a *quo warranto* action—the participation of a government attorney, such as the Attorney General or an elected prosecutor, is required. Under the statute, "[t]he discretion of the government attorney is complete," and without the participation of such a government attorney, "the private relator can proceed no farther." *State ex inf. Graham v. Hurley*, 540 S.W.2d 20, 23 (Mo. banc 1976).

In their written response to the State's Motion to Dismiss, Plaintiffs did not even address this fatal deficiency in their Petition. At oral argument on the Motion to Dismiss, in an attempt to evade this fatal problem, Plaintiffs' counsel argued for the first time that Plaintiffs would abandon their claims for injunctive relief and seek only a declaratory judgment regarding the validity of Lieutenant Governor Kehoe's service, which (they proposed) would have no binding effect on Lieutenant Governor Kehoe. In this way, Plaintiffs seek to avoid the prohibition against private actions seeking to oust state officials, but still obtain a court order attacking the validity of Governor Parson's appointment.

Plaintiffs' last-minute proposal is plainly inappropriate, because it asks this Court to offer an advisory opinion on the authority of the Governor to fill a vacancy in the office of Lieutenant Governor. An opinion about the law with no binding effect on any party is a quintessential advisory opinion. The prohibition against advisory opinions is one of the most deeply rooted principles of American jurisprudence. "[I]t is quite clear that the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (quotation omitted). For this reason, Missouri courts have repeatedly declined to allow private plaintiffs to seek advisory opinions under the guise of

Furthermore, impeachment may not even be an available remedy. Serving under a challenged appointment does not easily fit into "crimes, misconduct, habitual drunkenness, willful neglect of duty, corruption in office, incompetency or any offense involving moral turpitude or oppression in office", the constitutional grounds for impeachment. Mo. Const. Art. VII § 1.

declaratory-judgment actions. *See, e.g., Witty v. State Farm Mut. Auto. Ins. Co.*, 854 S.W.2d 836, 838 (Mo. App. S.D. 1993) ("The Declaratory Judgment Act does not authorize the issuance of advisory opinions."); *Missouri Soybean Ass'n v. Missouri Clean Water Comm'n*, 102 S.W.3d 10, 25 (Mo. banc 2003) ("A declaratory judgment must 'declare a fixed right and accomplish a useful purpose.'") (quoting *Local Union 1287 v. Kansas City Area Transp. Auth*., 848 S.W.2d 462 (Mo. banc 1993)); *id.* ("A declaratory judgment is not a general panacea for all real and imaginary legal ills.").

For these reasons, Plaintiffs lack authority to seek the removal of Lieutenant Governor Kehoe by litigation, and their Petition must be dismissed with prejudice.

Governor Parson Had Authority to Appoint Lieutenant Governor Kehoe Under Article IV, § 4 of the Missouri Constitution.

Notwithstanding the fact that these private plaintiffs lack authority to bring a lawsuit to seek the ejectment of Lieutenant Governor Kehoe from office, this Court nevertheless has discretion to address the merits "when the court believes there is a specific reason for . . . *deciding in favor of the validity of the officer's authority*." *Benne*, 106 S.W.3d at 600 (emphasis added). Should this Court be found to have erred in its determination that Plaintiffs lack standing, the Court resolves the issue of the propriety of the appointment. This would avoid a need for remand in that scenario. Given the important role of the Lieutenant Governor with the General Assembly, the Court finds this should be addressed sooner than later. Accordingly, the Court exercises this discretion to hold in the alternative that Plaintiffs' Petition lacks merit as a matter of law, because Governor Parson had authority to appoint Lieutenant Governor Kehoe under Article IV, § 4 of the Missouri Constitution.

Article IV, § 4 of the Missouri Constitution provides: "The governor shall fill all vacancies in public offices unless otherwise provided by law, and his appointees shall serve until their

successors are duly elected or appointed and qualified." MO. CONST. art. IV, § 4. A vacancy in the office of Lieutenant Governor constitutes a "vacanc[y]" in a "public office" that the Governor may "fill" under Article IV, § 4, unless "otherwise provided by law." *Id.*

When interpreting provisions of the Missouri Constitution, courts "give effect to their plain, ordinary, and natural meaning." *Gray v. Taylor*, 368 S.W.3d 154, 156 (Mo. banc 2012). Courts look to the dictionary to determine the plain and ordinary meaning of a word used in the Constitution. *In re Finnegan*, 327 S.W.3d 524, 526 (Mo. banc 2010).

Here, the plain and ordinary meaning of the constitutional phrase "unless otherwise provided by law" is "unless the law provides a different manner in which the vacancy is to be filled." The plain and ordinary meaning of the word "otherwise" is "in a different manner; in another way, or in other ways." WEBSTER'S SECOND NEW INTERNATIONAL DICTIONARY ("WEBSTER'S SECOND") 1729 (1950); *see also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY ("WEBSTER'S THIRD") 1958 (1986) (defining "otherwise" as "in a different manner"). The plain and ordinary meaning of the word "provide" is "[t]o furnish; supply." WEBSTER'S SECOND, at 1994. Taking these definitions together, the plain and ordinary meaning of "otherwise provided by law" in Article IV, § 4 is "unless the law furnishes or supplies a different manner of filling the vacancy." *See id.* at 1729, 1994.

Here, it is undisputed that Missouri law does not "furnish" or "supply" a method of filling the vacancy in the office of Lieutenant Governor "in different manner" or "in another way." Plaintiffs expressly pled in their Petition that "Missouri law . . . provides *no way* to fill a vacancy in the office of Lieutenant Governor." Pet. ¶ 16 (emphasis added). Because the plain language of Article IV, § 4 authorizes the Governor to fill the vacancy unless Missouri law furnishes or supplies another way to fill it, this concession is fatal to Plaintiffs' case.

Plaintiffs argue alternatively that Article VII, § 7 of the Missouri Constitution and § 105.030, RSMo, displace the Governor's authority to make this appointment, but their arguments are unconvincing. Article VII, § 7 of the Missouri Constitution provides: "*Except as provided in this constitution*, the appointment of all officers shall be made as prescribed by law." Mo. Const. art. VII, § 7 (emphasis added). Because Article IV, § 4 permits the Governor to make appointments in the specific context of when vacancies arise, the Governor's power to fill this vacancy is "provided in this constitution" within the meaning of Article VII, § 7.

Section 105.030, RSMo, authorizes the Governor to fill vacancies in certain offices, while explicitly excluding the office of Lieutenant Governor from that authorization. But Article IV, § 4 of the Constitution separately authorizes this appointment, and nothing in § 105.030 purports to displace the Governor's constitutional authority to fill the vacancy. On the contrary, if the legislature wished to displace the Governor's constitutionally vested authority to fill vacancies in public offices, it would have to speak far more clearly than it did in § 105.030. *See, e.g., Overcast v. Billings Mut. Ins. Co.*, 11 S.W.3d 62, 69 (Mo. 2000) ("Where the legislature intends to preempt a common law claim, it must do so clearly.")

Plaintiffs contend that the State's interpretation of Article IV, § 4 would render Article VII, § 7 and § 105.030 meaningless, but in fact the opposite is true. Plaintiffs interpret Article VII, § 7 to mean that the Governor cannot make any appointment without express statutory authorization by the legislature. Thus, Plaintiffs' interpretation would strip away all significance from the clear and unambiguous phrase "[t]he governor shall fill all vacancies in public offices" in Article VI, § 4 of the Constitution.

Notably, Plaintiffs contend that *no one* has authority to fill a vacancy in the office of Lieutenant Governor, and that the office must remain vacant until after the next general election

in 2020. Given the importance of the office of Lieutenant Governor, this Court is reluctant to adopt an interpretation of Missouri law that would generate such an unreasonable and anomalous result. *See, e.g., Aquila Foreign Qualifications Corporation v. Director of Revenue*, 362 S.W.3d 1, 4 (Mo. banc 2012).

For these reasons, the Court concludes that Governor Parson had authority to appoint Michael Kehoe as Lieutenant Governor under the Missouri Constitution. Plaintiffs' Petition lacks merit as a matter of law and must be dismissed with prejudice.

No Plaintiff Has Alleged a Non-Speculative Personal or Pecuniary Interest Sufficient to Support Standing.

In addition to the foregoing problems, no Plaintiff has alleged "a pecuniary or personal interest directly in issue or jeopardy which is subject to some consequential relief, either immediate or prospective." *Vowell v. Kander*, 451 S.W.3d 267, 271 (Mo. App. W.D. 2014). "A legally protectable interest exists only if the plaintiff is affected directly and adversely by the challenged action or if the plaintiff's interest is conferred statutorily." *Id.*

Plaintiffs allege that the Missouri Democratic Party has direct standing to challenge the appointment because they allege that Lieutenant Governor Kehoe might run as an incumbent for the office of Lieutenant Governor in 2020, making it harder for them to elect a Democratic candidate to that office. This allegation is conjectural, hypothetical, and speculative. It is entirely unknown and unknowable whether Lieutenant Governor Kehoe will decide to run for the office of Lieutenant Governor in 2020; whether he will prevail in the Republican primary if he does run; which Democratic candidates, if any, might run against him; and whether his incumbency would provide any material advantage in the election if he does run and win the primary. This allegation piles speculation upon conjecture. It is too speculative and hypothetical to support standing. No injury in fact can arise simply from incumbency.

The Democratic Party also claims associational standing by alleging that its members include voters who will have difficulty electing the candidate of their choice in 2020. This argument suffers from three fatal problems. First, the Party has not identified any individual member who suffers from this alleged injury, and thus its pleading fails as a matter of law. *Summers v. Earth Island Institute*, 555 U.S. 488, 497-98 (2009). Second, courts have repeatedly rejected this exact theory of "voter" standing. *See, e.g., Gottlieb v. Fed. Election Comm'n*, 143 F.3d 618, 622 (D.C. Cir. 1998); *24th Senatorial Dist. Republican Comm. v. Alcorn*, 820 F.3d 624, 633 (4th Cir. 2016); *Hollander v. McCain*, 566 F. Supp. 2d 63, 68 (D.N.H. 2008); *Drake v. Obama*, 664 F.3d 774, 784 (9th Cir. 2011); *Berg v. Obama*, 586 F.3d 234, 239 (3d Cir. 2009). Third, this theory of voter standing suffers from the very same problems as the Party's theory of direct standing—it is based on hypothetical, speculative, and conjectural assumptions.

Plaintiff Darrell Cope asserts standing as a taxpayer and voter. His allegation of voter standing is invalid for the same reasons as the Party's claim of voter standing. His allegation of taxpayer standing fails because he does not seek the only relief that a taxpayer could pray for in this context. Taxpayer standing allows a plaintiff to challenge only "(1) a direct expenditure of funds generated through taxation; (2) an increased levy in taxes; or (3) a pecuniary loss attributable to the challenged transaction of a municipality." *Airport Tech Partners, LLP v. State*, 462 S.W.3d 740, 745 (Mo. banc 2015) (quotation omitted). Here, Mr. Cope purports to challenge the direct expenditure of funds generated through taxation that occurs from the funding of Lieutenant Governor Kehoe's office. But his Petition does not pray for an order blocking the expenditure of taxpayer funds for this purpose. Instead, it seeks much the broader relief of sweeping declarations and injunctions against Governor Parson and Lieutenant Governor Kehoe. Petition at 5. Because Mr. Cope has not requested the only relief that a taxpayer could seek in this context, he lacks

taxpayer standing to pursue this action. *See Airport Tech Partners, LLP v. State*, 462 S.W.3d 740, 745 (Mo. banc 2015) ("To establish taxpayer standing resulting from a direct expenditure of funds generated through taxation, the showing of an expenditure is mandatory"). Taxpayer standing does not provide *carte blanche* to explore the legality of every official action of the State. *Airport Tech*, 462 S.W.3d at 745.

For these reasons, no Plaintiff has alleged a personal or pecuniary interest in this action sufficient to support standing. Even if some form of taxpayer standing was to be recognized, Missouri courts have held that *quo warranto* is the exclusive remedy to determine, among other things, the legality of an appointment to public office. *See Boggess v. Pense*, 321 S.W. 667, 671 (Mo banc 1959.

CONCLUSION

The Defendants' Motion to Dismiss is GRANTED, the Petition is DISMISSED WITH PREJUDICE, and final judgment is hereby entered in favor of the Defendants

SO ORDERED

July 11, 2018

Jon E. Beetem, Circuit Judge – Divison I