IN THE SUPREME COURT OF MISSOURI

Case No. SC89896

MISSOURI PROSECUTING ATTORNEYS AND CIRCUIT ATTORNEYS RETIREMENT SYSTEM,

Appellant,

v.

BARTON COUNTY, GERRY MILLER, JOHN STOCKDALE, DENNIS WILSON, AND BONDA RAWLINGS,

Respondents

On Appeal from the Circuit Court of Barton County

The Honorable Kevin L. Selby

BRIEF OF RESPONDENTS

Respectfully submitted,

BLITZ, BARDGETT & DEUTSCH, L.C.

Marc H. Ellinger, #40828
308 East High Street, Suite 301
Jefferson City, MO 65101
Telephone No.: (573) 634-2500
Facsimile No.: (573) 634-3358

Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT

Respondents adopt Appellant's Jurisdictional Statement.

STANDARD OF REVIEW

The Missouri Rules of Civil Procedure encourage the use of summary judgment to permit resolution of claims as early as they are properly raised in order "to avoid the expense and delay of meritless claims or defenses and to permit the efficient use of scarce judicial resources." *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). Summary judgment is appropriate where the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law. *Id*. at 380. This Court's review of the trial court's grant of summary judgment is *de novo. ITT Commercial Fin. Corp. v. Mid-America Marine Supply Co.*, 854 S.W.2d 371, 376 (Mo. banc 1993). This Court may affirm the trial court's judgment as long as the judgment can be sustained under any legal theory that is reasonably consistent with the pleadings. *Smith v. Square One Realty Co.*, 92 S.W.3d 315, 317 (Mo. App. 2002); *State ex rel. Conway v. Villa*, 847 S.W.2d 881, 886 (Mo. App. 1993).

"On appeal, a trial court judgment is presumed valid… and the burden is [A]ppellants' to demonstrate incorrectness of the judgment." *Delaney v. Gibson*, 639 S.W.2d 601, 604 (Mo. banc 1982). An appellate court is "concerned primarily with reaching a correct result, and thus… do[es] not need to agree with the reasoning of the trial court in order to affirm the result." *Beck v. Shrum*, 18 S.W.3d 8, 10 (Mo. App. E.D. 2000) (citing *McDermott v. Carnahan*, 934 S.W.2d 285, 287 (Mo. banc 1996)).

STATEMENT OF FACTS

Respondents adopt Appellant's Statement of Facts as if fully stated herein and additionally state as follows:

The Missouri Office of Prosecution Services ("MOPS") sent a letter to the Barton County Treasurer on September 12, 1989, regarding the Prosecuting Attorneys' and Circuit Attorneys' Retirement Fund. (L.F. 30). The MOPS was, and is, designated as the collection agent for payments to the Prosecuting Attorneys' and Circuit Attorneys' Retirement System ("PACARS"). Section 56.807, RSMo (previously in Section 56.790, RSMo 1989). The letter from MOPS states that "the Missouri State Department of Social Services will reimburse your county the amount that was deposited into the retirement fund." (L.F. 31).

The trial court found that the PACARS as originally established, with the funding stream, complied with Article X, Section 21 of the Missouri Constitution, which prohibits state-mandated activities upon local government without state funding for such activities. (L.F. 179.) The court found that the enactment of PACARS, along with the concurrent funding system, was a demonstration of legislative intent that such system was a mandate falling under the import of the Hancock Amendment and that funding was required. *Id.* Additionally, the court found the fact that the passage of PACARS was after the amendment to Article VI, Section 11 of the Missouri Constitution clearly shows legislative intent was to fund the Retirement System and comply with the Hancock Amendment. *Id.*

The court determined that the provisions of Sections 56.800-56.840, RSMo, mandate payment by Barton County for a new and expanded activity in violation of Article X, Section 21 of the Missouri Constitution and that Article VI, Section 11 offers no protection against

this violation. (L.F. 180.) The court additionally determined that the discontinuation of funding by the State for such the mandated payments is specifically a violation of Article X, Section 21 of the Missouri Constitution. *Id.* On that basis, the court concluded that PACARS cannot recover payments from Barton County for the period beginning January 2002 and forward. *Id.*

The court found not only denied Plaintiff's Petition for Writ of Mandamus, finding in favor of Barton County, but also awarded Barton County all costs in defending the suit, including attorneys fees. (L.F. 180-81.) Appellants have not appealed, challenged or raised in their brief the award of costs, including attorney fees, entered under Article X, Section 23, and thus have waived any challenge to this part of the trial court's judgment.

POINTS RELIED ON

I.

THE TRIAL COURT DID NOT ERR OR ABUSE ITS DISCRETION IN ENTERING JUDGMENT IN FAVOR OF THE DEFENDANTS BECAUSE THE FACTS SHOW THAT PACARS IS NOT ENTITLED TO RECEIVE THE REQUESTED PAYMENTS FROM BARTON COUNTY IN THAT SECTION 56.807, RSMO, IS IN DIRECT CONFLICT OF ARTICLE X, SECTION 21 WHICH BARS STATE MANDATES ON LOCAL GOVERNMENTS WITHOUT APPROPRIATIONS TO PAY FOR SUCH MANDATES AND ARTICLE VI, SECTION 11 PROVIDES NO EXCEPTION TO THE MANDATE IMPOSED BY SECTION 56.807, RSMO.

Mo. Const., Article X, Section 21

City of Jefferson v. Missouri Department of Natural Resources, 863 S.W.2d 844 (Mo. banc 1993)

Laclede County v. Douglass, 43 S.W.3d 826 (Mo. banc 2001)

II.

THE TRIAL COURT DID NOT ERR IN ITS JUDGMENT IN FAVOR OF DEFENDANTS BECAUSE THE PARTICIPATION OF BARTON COUNTY IN APPELLANT'S SYSTEM IS VOLUNTARY AND CAN BE TERMINATED AT WILL IN THAT IN ORDER FOR SECTION 56.807, RSMO, NOT TO BE IN CONFLICT WITH ARTICLE X, SECTION 21 AND ARTICLE VI, SECTION 25, PARTICIPATION MUST BE VOLUNTARY AND TERMINABLE AT WILL IF FUNDING IS NOT PROVIDED BY THE GENERAL ASSEMBLY AND SINCE THE GENERAL ASSEMBLY HAS TERMINATED FULL FUNDING, BARTON COUNTY MAY TERMINATE ITS PARTICIPATION.

Mo. Const., Article VI, Section 25

Fraternal Order of Police Lodge #2 v. City of St. Joseph, 8 S.W.3d 257 (Mo. App. 1999)

ARGUMENT

This case arose from a mandamus action brought by Appellant PACARS against Respondent Barton County. Mandamus is an extraordinary remedy and a party seeking mandamus must show "a clear, unequivocal, specific right to the thing claimed." *State ex rel. Public Counsel v. Public Service Commission*, 236 S.W.3d 632, 635 (Mo. banc 2007). In the current matter, the plain language of the Missouri Constitution demonstrates that there is no "clear, unequivocal, specific right" vested in Appellant to payments from Barton County.

The trial court, after reviewing the evidence submitted by stipulation and affidavit, entered its Judgment holding that the provisions of Section 56.807, RSMo, were in conflict with and violated Article X, Section 21 of the Missouri Constitution as an unfunded mandate upon counties. The trial court was correct in its determination for the reasons stated in this Brief. Thus the trial court's judgment should be affirmed by this Court.

I.

THE TRIAL COURT DID NOT ERR OR ABUSE ITS DISCRETION IN ENTERING JUDGMENT IN FAVOR OF THE DEFENDANTS BECAUSE THE FACTS SHOW THAT PACARS IS NOT ENTITLED TO RECEIVE THE REQUESTED PAYMENTS FROM BARTON COUNTY IN THAT SECTION 56.807, RSMO, IS IN DIRECT CONFLICT OF ARTICLE X, SECTION 21 WHICH BARS STATE MANDATES ON LOCAL GOVERNMENTS WITHOUT APPROPRIATIONS TO PAY FOR SUCH MANDATES AND ARTICLE VI, SECTION 11 PROVIDES NO EXCEPTION TO THE MANDATE IMPOSED BY SECTION 56.807, RSMO.

One of the stated purposes of the Hancock Amendment, Mo. Const., Article X, Sections 16-24 is to avoid the transfer of state responsibilities to local governments (commonly known as unfunded mandates.) The PACARS statute as currently interpreted by Appellant creates a direct conflict with Article X, Section 21 of the Hancock Amendment and violates the spirit of the Hancock Amendment. The trial court was correct in finding that the General Assembly recognized this conflict and initially provided funding for the county payments to the PACARS. However, when that funding was removed, Section 56.807, RSMo, then came in direct conflict with Article X, Section 21 and cannot be enforced against Barton County.

A. Participation in PACARS is an unlawful unfunded mandate

Unfunded mandates, i.e., directives of the State to local governments requiring new or expanded activities that are not accompanied by full funding for those activities, may not be enforced. *City of Jefferson v. Missouri Department of Natural Resources*, 916 S.W.2d 794, 796 (Mo. banc 1996)(*City of Jefferson II*); *Rolla 31 School District v. State*, 837 S.W.2d 1, 7 (Mo. banc 1992). In 1989 when PACARS was created and began operation, it was a new activity for purposes of Article X, Sections 16 and 21 of the Missouri Constitution, and subject to the requirements of those two sections that full state funding for the activity be provided. From 1989 through the end of 2001, the State did, in fact, comply with the obligations imposed on it by the Hancock Amendment. (L.F. 18.) In accordance with the letter from the Missouri Office of Prosecution Services, the County received a specific source of State funds during that period which was specifically provided by the State to reimburse the counties for expenses associated with making contributions to PACARS. (L.F. 18, 134 and 145.) In 2002, however, the State discontinued this State funding for this activity, did not provide a substitute and sought to transfer the financial burden of this activity onto the counties. (L.F. 49.) The State's action is inconsistent with the Hancock Amendment and the County was justified in discontinuing payments to PACARS for the unfunded mandated activity.

Article X, Section 21 states:

> The state is hereby prohibited from reducing the state financed proportion of the costs of any existing activity or service required of counties and other political subdivisions. A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the general assembly or any state agency of counties or other political subdivisions, unless a state appropriation is made and disbursed to pay the county or other political subdivision for any increased costs.

Mo. Const. Art. X, §21. In addition, and of similar effect, Article X, Section 16, states in pertinent part, "The state is prohibited from requiring any new or expanded activities by counties and other political subdivisions without full state financing, or from shifting the tax burden to counties or other political subdivisions." Mo. Const. Art. X, §16.

These sections are explicit in prohibiting the State from mandating increased activities of counties "without an attendant state appropriation to cover the increased cost." *State ex rel. Sayad v. Zych*, 642 S.W.2d 907, 911 (Mo. banc 1982). *See, also, Boone County Court v. State*, 631 S.W.2d 321, 325-26 (Mo. banc 1982) (purpose of unfunded mandate provisions is "to eliminate the state's power to mandate new or increased levels of service or activity performed by local government without state funding"). Accordingly, a statute violates Article X, Section 21 when three conditions are met: (1) the State requires a new or increased

activity of a political subdivision; (2) the political subdivision experiences increased costs from the activity; and (3) the State does not provide funding specifically earmarked for and covering the increased costs experienced by the political subdivision. *City of Jefferson v. Missouri Department of Natural Resources*, 863 S.W.2d 844, 847, 849 (Mo. banc 1993) (*City of Jefferson I*). In terms of remedy, when the unfunded mandate provision of the Hancock Amendment is violated, the county or other political subdivision is relieved from compliance with the State's mandate of a new or increased activity. *Fort Zumwalt School District v. State*, 896 S.W.2d 918, 923 (Mo. banc 1995).

The law on the application of the Hancock Amendment to unfunded mandates is as clear as are the facts here establishing non-compliance with that provision by the withdrawal of State funding for the County's payments to PACARS. The Hancock Amendment was adopted by the voters on November 4, 1980 and became effective December 4, 1980. *State ex rel. Sayad*, 642 S.W.2d at 909. The extent of existing activities of counties and other local governments is measured from this date. Mo. Const. Art. X, §21 (what State may do and not do is related to whether activity is existing or new one). The Missouri Prosecuting Attorneys and Circuit Attorneys Retirement System ("PACARS") did not exist on December 4, 1980. (L.F. 48.) Involuntary participation in this retirement system by counties was not an existing activity at the time the Hancock Amendment was adopted. *Id.* In 1989, the Legislature passed the PACARS legislation and PACARS began its operation on August 28, 1989, the date the legislation became effective. *Id.* Clearly, then, under Hancock Amendment analysis, the requirement imposed in 1989 on the counties to participate in PACARS and its Fund was a

new activity. The first element for establishing application of the Hancock Amendment was met, i.e., the State required a new activity of a political subdivision. *City of Jefferson I*, 863 S.W.2d at 847.

The second element for establishing the amendment's application has also been met. From its inception, the PACARS legislation has mandated counties to pay a set amount specified in Section 56.807 into the PACARS Fund. Section 56.807, RSMo. That obligation existed at the time the PACARS legislation became effective. It continues to this day. In particular, from the time of its inception to the present, PACARS has imposed an increased cost on the County in the amount of $375.00 through August 2003 and $187.00 subsequent to that date. (L.F. 130 and 133-134.) And as the claim made here by PACARS shows, it is a monetary obligation which PACARS is actively enforcing. It cannot be denied that the PACARS legislation from inception to the present imposes increased costs on local governments as a result of the mandate to participate in PACARS. *City of Jefferson I*, 863 S.W.2d at 847.

With the first two elements of a Hancock Amendment established in the enactment of the PACARS legislation, the only means available to the State to avoid running afoul of the amendment was to provide full funding to the counties to cover the increased costs associated with participation in PACARS. From 1989 through the end of 2001, the State's actions comported with the Hancock Amendment. The State funded the counties' participation in PACARS. (L.F. 48.) In 2002, the State discontinued such funding and in doing so has taken itself out of compliance with the Hancock Amendment. (L.F. 49.) When

the State stopped funding participation in PACARS, the final element required to show a Hancock Amendment violation came into being and the violation of that amendment was established. *City of Jefferson I*, 863 S.W.2d at 849.

The plain language of Article X, §21 and Article X, §16 does not allow for the requirement for full state funding to wither away with time or to abruptly terminate on the passage of a specified or unspecified number of years. Mo. Const. Art. X, §§ 16 & 21. So long as the mandate of an activity which came into existence after December 4, 1980, is imposed, the State's obligation to provide full funding for the activity continues. Once funding stops, the mandate goes away and it is no longer enforceable against those political subdivisions which had been previously subject to it. *Fort Zumwalt School District*, 896 S.W.2d at 923. This is what happened here. As a result, Barton County is relieved of any requirement to make payments to PACARS.

B. PACARS <u>does</u> violate the Hancock Amendment as participation in PACARS is an unlawful unfunded mandate

Appellant alleges that *Boone County Court v. State*, 631 S.W.2d 321 (Mo. banc 1982) has been overruled by Article VI, Section 11 of the Constitution.[1] While Respondents do not

[1] Appellant cites dicta contained in a footnote in the opinion of the Western District Court of Appeals in *Associated General Contractors of Missouri v. Department of Labor and Industrial Relations*, 898 S.W.2d 587, 594 (Mo. App. W.D. 1995). *Associated General Contractors* was a prevailing wage case, in which no local government was a

contest that Article VI, Section 11 of the Missouri Constitution was amended on August 5, 1986, this amendment is irrelevant to Respondents' argument and to this case.

Boone County Court stands as authority for the underlying purpose of Section 21 of the Hancock Amendment (Article X, Sections 16-24). The amendment to Article VI, Section 11 did not affect the underlying purpose of the Hancock Amendment; cases after such amendment was adopted have articulated the same purpose as was articulated in *Boone County Court*.

> The Hancock Amendment is aimed at limiting taxes by controlling and limiting governmental revenue and expenditure increases…The amendment's official ballot title stated that it prohibited 'state expansion of local responsibility without state funding.'

See *Neske v. City of St. Louis*, 218 S.W.3d 417, 422 (citing *Boone County Ct.*)

Appellant appears to argue that the purpose behind the 1986 amendment to Article VI, Section 11 of the Missouri Constitution is to supplant the Hancock Amendment restrictions and permit the general assembly's enactment of laws increasing the compensation level for

---

party. Even the Western District found that the decision in *Boone County Ct.* "concerned a statute which mandated" a salary increase. *Id.* (emphasis added). In its footnote, the Western District further recognized that Article VI, Section 11 related to "a statute authorizing an increase in compensation..." *Id.* (emphasis added). Thus *Associated General Contractors*, and the dicta therein, is of no support to Appellant's position.

county officers. However, this Court shed light on the purpose of the amendment in Art. VI, Section 11, in *Laclede County v. Douglass*, 43 S.W.3d 826 (Mo. banc 2001). In *Laclede County*, the county filed a declaratory judgment action challenging the constitutionality of a statute that allegedly permitted a midterm increase in compensation. *Id.* at 827. On appeal, after the trial court ruled in favor of the county commissioners, this Court noted that the prohibition against midterm increases in compensation is not absolute, but rather, is subject to several exceptions. *Id.* at 827-28. This Court held that the challenged statute was unconstitutional, finding that none of the exceptions urged by Respondents (county commissioners) applied. *Id.* at 828-29. This Court stated:

> The provisions of article VI, section 11, of the Missouri Constitution are likewise inapplicable. That section states, in pertinent part:
>
> > 1…A law which would authorize an increase in the compensation of county officers shall not be construed as requiring a new activity or service or an increase in the leave of any activity or service within the meaning of this constitution.
> >
> > 2. Upon approval of this amendment by the voters of Missouri the compensation of county officials, or their duly appointed successor, elected at the general election in 1984 or 1986 may be increased during that term in

> accordance with any law adopted by the general assembly or, in counties which have adopted a charter for their own government, in accordance with such charter, notwithstanding the provisions of section 13 of article VII of the Constitution of Missouri.
>
> When the subsections are read together, as intended, their application is limited to county officers elected in 1984 or 1986, and to any increase in compensation provided by law to those officers during their terms.

Id. at 828 (emphasis added). The purpose behind the amendment was not to supplant the Hancock Amendment. Instead, the application of the amendment is limited to county officers elected in 1984 or 1986. *Id.* Article VI, section 11, of the Missouri Constitution is therefore inapplicable in this case as PACARS did not even commence operation until 1989. (L.F. 48.)

Even if this Court were to find Article VI, Section 11 applicable, Appellant's argument still fails. Appellant, citing *Sihnhold v. State Employees' Ret. Sys.*, 248 S.W.3d 596 (Mo. banc 2008), suggests that "compensation" includes benefits under a retirement system. *See* Appellant's Brief at 15. This Court, in *Sihnhold*, held that Article III, §39(3) barred the retroactive application of a statutory amendment creating a new retirement plan to a former administrative law judge. However, the language in §39(3) is fundamentally different than the language in Article VI, section 11. Article III, section 39(3) prohibits the general assembly from "grant[ing]…any extra compensation, fee or allowance to an officer, agent,

servant or contract after service has been rendered." In finding that the retirement benefits were barred by this provision, this Court, in effect, found retirement benefits to be either "compensation, [a] fee or [an] allowance." Section 39(3) is broader than Article VI, Section 11, which only speaks in terms of "compensation of county officers." There is no direct authority that "compensation" in Article VI, Section 11 includes retirement benefits, so even if this Court finds Article VI, Section 11 applicable Plaintiff's argument that the 1986 amendment supplants the Hancock Amendment fails.

In effect, Appellant is arguing the Hancock Amendment has been repealed by implication through the adoption of an amendment on August 5, 1986. Appellant is wrong. In *State ex rel. and to Use of George B. Peck Co. v. Brown*, 105 S.W.2d 909, 911 (Mo. banc 1937) (emphasis added) the Missouri Supreme Court stated:

> Repeals by implication are not favored – in order for a later statute to operate as a repeal by implication of an earlier one, there must be such manifest and total repugnance that the two cannot stand; where two acts are seemingly repugnant, they must, if possible, be so construed that the later may not operate as a repeal of the earlier one by implication; if they are not irreconcilably inconsistent, both must stand. These principles of construction are well settled.

See also Moore v. Brown, 165 S.W.2d 657, 663 (Mo. banc 1942) ("[While] existing constitutional provisions may be amended or repealed by implication thought [sic] an initiative amendment. But in any case such repeals are not favored, and there must be

irreconcilable repugnance between the two.") There is neither manifest and total repugnance between Article VI, section 11 and the Hancock Amendment nor are the two provisions "irreconcilably inconsistent." Rather, Article VI, section 11 and the Hancock amendment can be read in harmony. *See Thompson v. Hunter*, 119 S.W.2d 95, 100 (Mo. banc 2003) ("In construing the Missouri Constitution, the Court's task is to reconcile provisions that may seem to be in conflict").

Article VI, section 11 states that "a law which would authorize an increase in the compensation of county officers shall not be construed as requiring a new activity or service or an increase in the level of any activity or service within the meaning of this constitution" (emphasis added). The Hancock Amendment prohibits unfunded mandates. The first element of a Hancock Amendment claim is that the state requires a new or increased activity of a political subdivision. *See* City *of Jefferson v. Mo. Dept. of Natural Res.*, 863 S.W.2d 844, 846 (Mo. banc 1993). A law which would simply "authorize" and not require an increase in the compensation of county officers would fail to meet the first element required for a Hancock Amendment claim.[2] As these two provisions can be construed such that

[2] If this Court were to interpret the provisions of Section 56.807, RSMo, as being merely permissive and not mandatory, then there would be no conflict with the Hancock Amendment. Under such an interpretation, Barton County cannot be forced to participate in PACARS, in which case the trial court's judgment should still be affirmed under Point II, herein.

Article VI, Section 11 does not operate as a repeal of the Hancock Amendment by implication, both provisions must stand.

Therefore, the trial court's judgment follows and properly interprets the Missouri Constitution and should be affirmed.

II.

THE TRIAL COURT DID NOT ERR IN ITS JUDGMENT IN FAVOR OF DEFENDANTS BECAUSE THE PARTICIPATION OF BARTON COUNTY IN APPELLANT'S SYSTEM IS VOLUNTARY AND CAN BE TERMINATED AT WILL IN THAT IN ORDER FOR SECTION 56.807, RSMO, NOT TO BE IN CONFLICT WITH ARTICLE X, SECTION 21 AND ARTICLE VI, SECTION 25, PARTICIPATION MUST BE VOLUNTARY AND TERMINABLE AT WILL IF FUNDING IS NOT PROVIDED BY THE GENERAL ASSEMBLY AND SINCE THE GENERAL ASSEMBLY HAS TERMINATED FULL FUNDING, BARTON COUNTY MAY TERMINATE ITS PARTICIPATION UNDER SECTION 56.807, RSMO.

Alternatively, the County's refusal to continue to make payments to Appellant is justified because whatever requirement imposed on the County by Sections 56.800 to 56.840 is contrary to Article VI, Section 25 of the Missouri Constitution and, therefore, unenforceable. Because Article VI, Section 25 reposes sole discretion in local governments, including counties, as to whether they will provide retirement benefits to their officers and employees, Barton County may not be forced to participate in PACARS and is free to withdraw at any time it sees fit.

Article VI, Section 25 states:

> No county, city or other political corporation or subdivision of the state shall be authorized to lend its credit or grant public money or property to any private individual, association or corporation except as provided in Article VI, Section 23(a) and except that the general assembly may authorize any county, city or other political corporation or subdivision to provide for the retirement or pensioning of its officers and employees...

Mo. Const. Art. VI, §25 (emphasis added).

The key term in this provision is "may authorize." In adopting this provision, the people of the State did not use the terms, "may mandate" or "may require." The word "authorize" has many meanings, none of which are synonymous with mandating or requiring that something be done. *See, e.g.*, Webster's Third New International Dictionary (Merriam-Webster 2002) at 146-47. In the context used in Art. VI, § 25, the meaning is clear, "[t]o give legal authority; to empower." Black's Law Dictionary (8th ed. Thomson West 2004) at 143. Indeed, to construe the section to be synonymous with "require" or "mandate" is contrary to the plain and ordinary meaning of "authorize", which "indicates endowing formally with a power or right to act, usu. with discretionary privileges." Webster's Third New International Dictionary (Merriam-Webster 2002) at 147 (emphasis added). Missouri case law also recognizes the very discretionary nature of public pensions and the rights of the local government with respect to participation in a pension program, stating a public pension is considered a gratuitous allowance that is terminable in whole or part at the will

of the grantor. *Fraternal Order of Police Lodge #2 v. City of St. Joseph*, 8 S.W.3d 257, 264 (Mo. App. 1999).

The people of this State were very careful in the words they chose when they added Art. VI, §25, to overcome limitations against the grant of public pensions in Art. III, §39(3) of the Constitution as expressed in *State ex rel. Heaven v. Ziegenhein*, 144 Mo. 283, 45 S.W. 1099 (1898). They did not say that the State legislature could dictate to counties and other local governments that they had to create and participate in pension programs. Instead, they said the legislature could permit counties and other local governments to create and participate in pension programs but left the discretion to those local levels of government as to benefits to be provided local employees and officials and actual participation in pension programs. A statute in violation of a constitutional provision is invalid and cannot be enforced. *State ex rel. Miller v. O'Malley*, 117 S.W.2d 319, 324 (Mo. banc 1938). Article VI, Section 25, does not permit the State to dictate to counties or other political subdivisions whether those entities will participate in a pension system for some or all of its officers and employees. To the extent the PACARS legislation attempts to mandate participation by counties in the retirement system established under its provisions, it is unenforceable.

If the court can construe a statute in a manner to avoid a conflict with a constitutional provision, it should do so. *Murrell v. State*, 215 S.W.3d 96, 102 (Mo. banc 2007). There is no direct language in Section 56.807 or elsewhere in the PACARS legislation which specifically requires counties to participate in PACARS. §56.807; §§56.800-56.840, RSMo. Section 56.807, provides only that the County Treasurer shall make payments to PACARS

on a monthly basis but does not specify that the County is mandated to participate in the prosecutor retirement system. §56.807, RSMo. The only words of mandatory participation are found in Section 56.811, RSMo., which requires prosecutors to be members of the system. §56.811, RSMo. While Appellant would have the language of Section 56.807 read to imply that the County is mandated to participate in the system and bear the burden of funding the prosecutor's retirement, there is nothing in the language of the statute which inevitably leads to this construction. An equally possible conclusion is that Section 56.807 means that if the county has elected in its discretion to participate in PACARS then the County Treasurer is to make payments to the system from the general revenue funds of the county. Otherwise, Section 56.811 places the burden of funding the retirement on the prosecutor who benefits from the retirement and it is that person to whom Appellant should be looking for its payments.

This interpretation of § 56.807 is in accord with the basic rules of statutory construction.

> It is a cardinal rule of statutory construction that where a statute is fairly susceptible of a construction in harmony with the Constitution it must be given that construction by the courts and, unless the statute is clearly repugnant to the organic law, its constitutionality must be upheld.

Chamberlin v. Missouri Elections Commission, 540 S.W.2d 876, 879 (Mo. banc 1976). That Barton County does have the discretionary authority to discontinue participation in PACARS

is the only interpretation which reconciles Chapter 56, RSMo with Article VI, Section 25 and Article X, Section 22 of the Missouri Constitution.[3]

Statutes that have required county or local government participation have been held to violate Article VI, Section 25. *State ex rel. Bd. of Control of St. Louis Sch. and Museum of Fine Arts v. City of St. Louis*, 115 S.W. 534 (Mo. 1980) (statutes attempting to require the city of St. Louis and taxpayers to donate funds to support the existing museum held invalid); *State ex rel. Heaven v. Ziegenhein*, 45 S.W. 1099 (Mo. 1898) (statutes requiring the city of St. Louis to pension certain policemen was void). Because participation in pension programs is and must be discretionary, this court should find the Barton County's refusal to continue to make payments to PACARS justified.

Whichever alternative is chosen the result is the same. PACARS cannot look to the County for payments to the fund. This is so either because Article VI, § 25 makes the County's participation in the fund discretionary and the Legislature cannot impose a requirement that is contrary to that constitutional provision or because the PACARS legislation itself does not require the County to fund the prosecutor's retirement.

CONCLUSION

Based upon the plain language of Section 56.807, RSMo, and Article X, Section 21 of the Missouri Constitution, the mandatory payment provisions contained in Section

[3] In addition, it is the only interpretation which arguably complies with Article VI, Section 11 of the Missouri Constitution, which only grants the power to "authorize" changes in compensation.

56.807, RSMo, are in conflict with the Missouri Constitution. Article X, Section 21 bars the state from mandating additional services or funding from local governments without providing funding for such mandate. Section 56.807, RSMo, as interpreted by Appellant mandates payments to the PACARS retirement benefits for the county prosecuting attorney; however, there is no corresponding funding stream since the legislature reduced the funding in 2002. As a result, the trial court's judgment is proper that the provisions of Section 56.807, RSMo, are in conflict with Article X, Section 21 and cannot be enforced by Appellant.

The provisions of Article VI, Section 11, offer no solace to Appellant. This provision permits the General Assembly to "authorize" local governments to increase salaries; it does not give protection for mandates such as that imposed by Section 56.807, RSMo. Thus the trial court's judgment should be affirmed.

For this Court to find Section 56.807, RSMO, complies with Article X, Section 21 would require finding that Section 56.807 is discretionary and not mandatory. If participation in PACARS is discretionary, then Barton County can withdraw its participation at any time, particularly when the state ceases funding of the contribution. If participation in PACARS is voluntary, then Appellant cannot prevail on its mandamus action and in that the withdrawal from PACARS is appropriate under the provisions of Section 56.800, *et seq.*

For these reasons, more fully addressed in this brief, the trial court's judgment should be affirmed by this Court.

WHEREFORE, Respondents pray that this Court affirm the judgment of the trial court and for such other relief as this Court deems appropriate.

Respectfully submitted,

BLITZ, BARDGETT & DEUTSCH, L.C.

By: _____

Marc H. Ellinger, #40828
308 East High Street, Suite 301
Jefferson City, MO 65101
Telephone No.: (573) 634-2500
Facsimile No.: (573) 634-3358
E-mail: mellinger@blitzbardgett.com

CERTIFICATE OF ATTORNEY

I hereby certify that the foregoing Substitute Appellant's Brief of Respondents Barton County et al. complies with the provisions of Rule 55.03 and complies with the limitations contained in Rule 84.06(b) and that:

(A) It contains 5,849 words, as calculated by counsel's word processing program;

(B) A copy of this Brief is on the attached 3 ½" disk; and that

(C) The disk has been scanned for viruses by counsel's anti-virus program and is free of any virus.

_____
Marc H. Ellinger

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Brief of Respondents was sent via U.S. Mail, postage prepaid, to the following parties of record on this 27th day of May 2009:

J. Kent Lowry
Jeffrey T. McPherson
ARMSTRONG TEASDALE LLP
3405 West Truman Boulevard, Suite 210
Jefferson City, Missouri 65109-5713

_____
Marc H. Ellinger