SC96188

IN THE SUPREME COURT OF MISSOURI

SUSAN GALL, et al.,
Plaintiff – Respondents

v.

RUSSELL E. STEELE,
Defendant – Appellant

Appeal from the Thirteenth Judicial Circuit Court, County of Boone
Circuit Court No.: 15B CV02046
The Honorable Gary Oxenhandler, Division 2

Transferred after Opinion from the Western District Court of Appeals (WD79820) by Order of this Court

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SUBSTITUTE BRIEF OF APPELLANT RUSSELL E. STEELE

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JURISDICTIONAL STATEMENT

This is an appeal from a summary judgment entered in favor of Plaintiffs-Respondents Susan Gall ("Gall") and Linda Decker ("Decker") on January 13, 2016. LF 0379-0385. An appeal by Defendant-Appellant Judge Russell E. Steele[1] ("Judge Steele") was filed directly with this Court. This Court remanded to the Court of Appeals. On December 6, 2016, the Court of Appeals denied Gall and Decker's motion to dismiss the appeal and affirmed the trial court's summary judgment in their favor. Court of Appeals Opinion ("Appl. Ct. Op."), at 7 and 15 (Substitute Appendix ("Sub. Appx.") at 34 and 42). On January 24, 2017, the Court of Appeals overruled Judge Steele's motion for rehearing and denied his motion for transfer to this Court. On April 4, 2017, this Court sustained Judge Steele's motion to transfer and ordered the matter transferred here.

This matter involves matters of constitutional and statutory interpretation and the application of administrative orders and rules of this Court. Jurisdiction is proper pursuant to Rule 83.04 in that, following an Opinion by the Court of Appeals, this Court granted Judge Steele's application for transfer.

[1] Defendant Judge Kristie Swaim has not joined in this appeal.

STATEMENT OF FACTS

This case concerns Respondents' challenge to the validity of two consolidation orders of the Second Judicial Circuit issued in 2013 and 2014. These consolidation orders complied with this Court's 2009 order directing consolidation of deputy and division clerks under a single appointing authority in each judicial circuit, but they did not comply with a statutory provision requiring separate appointing authorities for deputy and division clerks. *See* RSMo. § 483.245.2. The trial court awarded summary judgment based on the parties' respective statements of uncontroverted facts.

I. 2009 Supreme Court en banc Order Regarding Court Clerk Consolidation

Article V, section 4 of the Missouri Constitution confers plenary authority on the Missouri Supreme Court to exercise supervision and control over the administration and internal affairs of the Missouri judiciary, including all inferior courts. "The supreme court shall have general superintending control over all courts and tribunals." Mo. Const. art. V, section 4.1 (emphasis added). "Supervisory authority over all courts is vested in the supreme court which may make appropriate delegations of this power." *Id.* The Supreme Court's authority thus includes "general superintending control" and "supervisory authority" over "all courts." *Id.*

In 1979, the General Assembly enacted section 483.245.2, RSMo., which became effective in 1981. Section 483.245.2 provides that the elected circuit clerk for each judicial circuit shall be the appointing authority for deputy circuit clerks in that judicial circuit, while division clerks shall be appointed by the judge of the division where they serve. RSMo. § 483.245.2. The statute provides that "[t]he circuit clerk, or person exercising the authority of the circuit clerk pursuant to county charter, shall appoint all deputy circuit clerks, including deputy circuit clerks serving in courtrooms, and shall prescribe and assign the duties of such deputy circuit clerks. The circuit clerk may remove from office any deputy circuit clerk whom he appoints." *Id.* By contrast, under the statute, "[a]ll division clerks . . . shall be appointed by the judge of the division such clerks serve, and such judge may remove from office any division clerk whom he appoints." *Id.*

On October 8, 2009, then-Chief Justice William Price issued an administrative order on behalf of the Supreme Court en banc. This Order required circuit courts to consolidate all deputy circuit clerks and division clerks under the supervision of one appointing authority. 2009 Order "In re: Consolidation of Clerk Personnel (the "2009 Order" or "Order"), LF 0110-0112. Chief Justice Price's 2009 Order stated that, "[i]n light of the current budget constraints facing the state, the Judiciary is taking steps to accommodate the Governor's request to find areas

of savings." LF 0110. The 2009 Order specified that the Order was promulgated "pursuant to article V, section 4 of the Missouri Constitution." *Id.*

The 2009 Order directed that "effective January 1, 2010 . . . all circuit courts that have not previously consolidated all deputy circuit clerks and division clerks under the supervision of one appointing authority shall be consolidated." *Id.* "The appointing authority shall be either the circuit clerk or court administrator if the county does not have a circuit clerk, an associate circuit judge of the county, or the presiding judge of the circuit." *Id.* Thus, the 2009 Order unambiguously contemplated that there should be a single appointing authority for both deputy circuit clerks and division clerks in each judicial circuit throughout the State. And the Order allowed each circuit court en banc to designate as the single appointing authority either (1) the elected circuit clerk, (2) an associate circuit judge of the county, or (3) the presiding judge of the circuit. *Id.*

The 2009 Order specified the responsibilities of the appointing authority. It directed that the appointing authority shall: "(a) Be the immediate supervisor over all deputy and division clerks, exercising control and determining which functions each deputy or division clerk shall perform;" "(b) Be named custodian for all personnel records of deputy and division court clerks;" "(c) Ensure that all cases . . . to be brought before any judge of the court shall be filed in the office of the circuit clerk;" and "(d) Ensure that when the associate circuit judge of the county,

or any other judge or commissioner presiding over a matter in the county, has need for immediate assistance, such assistance may be required of any deputy or division clerk." L.F. 0111.

The 2009 Order charged the Circuit Court Budget Committee ("CCBC") with oversight to assure that circuit courts' consolidation plans were in compliance with the Order. "The presiding judge, after consultation with the court en banc, the circuit clerk, and any other appointing authority, shall submit a plan to the circuit court budget committee designating the appointing authority for all deputy circuit clerks and division clerks by November 13, 2009, to assure that the plan complies with the above consolidation requirements." LF 0111.

On June 28, 2013, in an order of then-Chief Justice Richard B. Teitelman, this Court clarified and added to Chief Justice Price's 2009 Order by expressly providing a procedure for modifying consolidation plans. LF 0113. The 2013 order stated that "the circuit court en banc, after consultation with the circuit clerk and other appointing authority, may submit any proposed revisions to its consolidation plan to the circuit court budget committee for its approval." *Id.*

II. First Amended Administrative Order of Consolidation at Issue

Prior to 2013, pursuant to a Consolidation Agreement entered in 2008, the elected Circuit Clerk was the appointing authority for all deputy clerks in the Second Judicial Circuit. LF 0124 at ¶ 3. On or around May 2, 2013, Judge Steele,

presiding judge of the Second Judicial Circuit, consulted with the other three Second Circuit Judges and the Adair County Circuit Clerk, both verbally and via electronic mail, regarding a proposed amendment to the 2008 order. LF 0343-0348. Three of the four judges of the Second Circuit—Circuit Judge Steele, Associate Judge Fred Westhoff, and Associate Judge Bill Alberty—voted to adopt Judge Steele's proposed amendment, and the latter two judges confirmed their votes to Judge Steele both verbally and by email. LF 0344, ¶ 5; LF 0347-0348. Based on this consultation and the approval of the majority of judges of the Second Circuit en banc, Judge Steele entered the May 2013 Adair County Amended Consolidation Order. LF 0343-0344, at ¶¶ 4-5. The May 2013 Order named Judge Steele, the presiding judge, as the appointing authority over deputy circuit clerks. LF 0122-0123. Judge Steele then forwarded the consolidation order to the CCBC for review and approval, as required by the Supreme Court's 2009 Order. LF 0344 at ¶ 5. About a month later, the CCBC sent a letter to Judge Steele confirming the CCBC's approval of the May 2013 Adair County Consolidation Order, and instructed that it was to become effective immediately. LF 0121.

III. Second Amended Administrative Order of Consolidation at Issue

On April 1, 2014, the Second Judicial Circuit met en banc. At that meeting, the circuit approved and issued an administrative order amending the 2013 consolidation order and naming Associate Circuit Judge Kristie Swaim as the

appointing authority for deputy circuit clerks in the Adair County Circuit Court. LF 0118-0120 and 0344 at ¶ 7. Circuit Clerk Linda Decker was present at the en banc meeting and received a copy of the April 2014 Adair County Consolidation Order. LF 0344 at ¶ 8. The CCBC, on a recommendation from this Court, approved the April 2014 Adair County Consolidation Order on April 18, 2014. LF 0116. Respondent Decker lodged no appeal challenging the 2014 Consolidation Order with either the Circuit Court Budget Committee or this Court.

IV. Declaratory Judgment Action by Gall and Decker

On December 9, 2013, Gall filed a federal civil-rights action against Judge Steele, alleging that Judge Steele had removed her from the office of deputy circuit clerk for Adair County on August 20, 2013 without lawful authority. LF 0129-0137. In particular, Gall alleged that Linda Decker, the elected Circuit Clerk, was the sole appointing authority over deputy circuit clerks pursuant to RSMo. § 483.245, and thus that Judge Steele had no authority to remove her from office. LF 0132. On January 6, 2015, the federal district court ruled that the doctrine of *Pullman* abstention applied, and the court stayed Gall's federal lawsuit "so the parties may seek resolution of the state-law issues by a Missouri state court." LF 0024-0039.

On March 9, 2015, Gall and Decker filed the instant declaratory judgment action in Adair County Circuit Court. LF 0011-0023. The petition alleged that the

complaint was a "subsidiary action" to Gall's now-stayed federal civil rights action. LF 0012. Plaintiffs' two-count petition claimed that because Decker was the elected Circuit Clerk of Adair County for the Second Judicial Circuit, she was the sole valid appointing authority for deputy circuit clerks under RSMo § 483.245. LF 0016. Plaintiffs alleged that the Circuit Court's exercise of authority over the circuit clerk's office was therefore inconsistent with the Missouri Constitution. LF 0014. Gall and Decker alleged that the Circuit Clerk was the proper appointing authority pursuant to statute. LF 0015 at ¶ 15.

In their first count, Gall and Decker relied on a separation of powers argument, contending that the Missouri Constitution precluded the appointment of anyone other than the elected Circuit Clerk to the position of appointing authority over Adair County deputy circuit clerks. LF 0017-0018. Count I challenged both the May 2013 Adair County Consolidation Order and the April 2014 Adair County Consolidation Order.

Plaintiffs' second count alleged procedural violations of the Missouri Sunshine law in Judge Steele's appointment as appointing authority in 2013. LF 0018-0023. Count II challenged only the May 2013 Adair County Consolidation Order. LF 0018-0023. On July 10, 2015, Gall and Decker voluntarily dismissed the second count of their petition. LF 0188.

Judge Gary Oxenhandler was assigned by this Court as a special judge of the Second Circuit to hear the case. LF 0063-0065.

V. Trial Court Judgment

On January 13, 2016, the trial court issued a seven-page Consolidated Findings of Fact, Conclusions of Law and Judgment. LF 0379-0385. The Judgment followed cross-motions for summary judgment filed by Plaintiffs and Judge Steele. LF 0379. The trial court ruled, based on constitutional and statutory grounds, that the two consolidation orders entered by Second Judicial Circuit for Adair County in 2013 and 2014 were invalid, and that Ms. Decker, as the elected Circuit Clerk, was and is the sole appointing authority for deputy circuit clerks. LF 0379-0385.

The basis of judgment as to the May 2013 Adair County Consolidation Order was two-fold. The trial court stated that:

> Judge Steele's May 2, 2013 attempt at declaring himself as the appointing authority for the Clerk's clerks was ineffective for two reasons: first, the attempt was procedurally defective; and second, even if it had been procedurally proper, Judge Steele had no right to unilaterally take away the Clerk's statutorily granted appointing authority without her consent.

LF 0384. The trial court also ruled the April 2014 Adair County Consolidation Order ineffective based on his reasoning that "the Court en banc had no right to

unilaterally take away the Clerk's statutorily granted appointing authority without her consent." LF 0385.

Underlying the trial court's determination on both issues—the 2013 consolidation order and the 2014 consolidation order—was the trial court's conclusion that the Missouri courts have no authority to override the statutory delegation of authority to the elected Circuit Clerk in RSMo § 483.245. In the final paragraph of its decision, the trial court stated twice that both consolidation orders were invalid because, under that statute, "the courts cannot usurp the appointing authority of an elected Circuit Clerk." LF 0385.

VI. Court of Appeals Opinion and this Court's Transfer

On December 6, 2016, the Court of Appeals affirmed the trial court's summary judgment, holding that "[t]he designation of any judge to exercise the statutory appointing authority of the Adair County Circuit Clerk was unlawful and in violation section 483.425.2."[2] Appl. Ct. Op. at p. 15 (Sub. Appx. at 42).

On January 24, 2017, the Court of Appeals overruled Judge Steele's motion for rehearing and denied his motion for transfer to this Court. On April 4, 2017,

[2] The relevant statute section is 483.245. The Court of Appeals cited the correct statute number in multiple instances but apparently made a typo in the quoted section.

this Court sustained Judge Steele's motion to transfer and ordered the matter transferred to this Court.

POINTS RELIED ON

I. The trial court erroneously declared and applied the law in entering judgment finding that § 483.245, RSMo, controls who is the proper appointing authority over deputy circuit clerks because the Supreme Court possesses both express and inherent constitutional authority over the administration of its courts and personnel in that this Court validly ordered the consolidation of deputy circuit clerks with the option of the Circuit Court Committee naming the appointing authority with the approval of the Supreme Court exercised through the Circuit Court Budget Committee.

- Missouri Constitution, article V, sections 4 and 15.4
- Missouri Revised Statutes, section 483.245
- *State ex rel. Weinstein v. St. Louis County*, 451 S.W.2d 99 (Mo. banc 1970)
- *Twentieth Judicial Circuit of State of Mo. v. Bd. of Com'rs of County of Franklin*, 911 S.W.2d 626 (Mo. 1995)

II. The trial court erroneously applied the law in entering judgment that the elected Circuit Clerk exclusively had appointing authority and that Chief Justice Price's 2009 Order on consolidation did not apply to Adair County and the Second Judicial Circuit, in that the order's application and scope is constitutionally in the exclusive purview of this Court, in that this Court provided for assurance of compliance of Chief Justice Price's 2009 Order by its Circuit Court Budget Committee.

- Missouri Constitution, article V, sections 3 and 4
- *Gregory v. Corrigan*, 685 S.W.2d 840 (Mo. 1985)
- *Ownbey v. Circuit Court Budget Committee*, 813 S.W.2d 4 (Mo. App. W.D. 1991)
- Chief Justice Price's 2009 Order regarding consolidation of court clerk personnel

III. The trial court erroneously applied the law in ruling that the appointment of Judge Steele as appointing authority Adair County Circuit Court en banc was procedurally defective because the trial court lacked jurisdiction in that plaintiffs voluntarily dismissed Count II of their claim as to the procedural inadequacy of the consolidation order prior to summary judgment and declaratory relief was unavailable as a matter of law in any event.

- *Malone v. Schapun*, Inc., 965 S.W.2d 177 (Mo. App. E.D. 1997)
- *Van Dyke v. LVS Bldg. Corp.*, 174 S.W.3d 689 (Mo. App. W.D. 2005)
- *Huff v. Dewey & LeBoeuf*, LLP, 340 S.W.3d 623 (Mo. App. W.D. 2011)

IV. The trial court's judgment that Judge Steele unilaterally and ineffectively modified the 2008 Consolidation Agreement is not supported by substantial evidence because Judge Steele consulted with all members of the Second Judicial Circuit, obtained Circuit Court Budget Committee approval, and therefore substantively complied with Chief Justice Price's 2009 Order.

- Chief Justice Price's 2009 Order regarding consolidation of court clerk personnel
- Sup. Ct. Op. Rule 7.04.2

V. The Trial Court erroneously applied the law by entering judgment for the Circuit Clerk because the Circuit Clerk's sole remedy was by appeal to the Circuit Court Budget Committee in that one circuit judge does not have the subject matter jurisdiction or authority to invalidate either the administrative orders of a Circuit or the administrative orders of the Supreme Court or the exercise of delegated powers to the Circuit Court Budget Committee.

- Missouri Constitution, article V, sections 4
- Chief Justice Price's 2009 Order regarding consolidation of court clerk personnel
- *Gregory v. Corrigan*, 685 S.W.2d 840 (Mo. 1985)
- Sup. Ct. Op. Rule 7.04.2-3

VI. The trial court erroneously applied the law in entering judgment for Respondent Gall because she had no standing to bring this action in that she failed to allege in her petition that she had any legally protectable interest in the subject matter of the suit or any other basis for standing.

- *Airport Tech Partners, LLP v. State*, 462 S.W.3d 740 (Mo. 2015).
- *Lebeau v. Commissioners of Franklin County, Missouri*, 422 S.W.3d 284 (Mo. 2014).

STANDARD OF REVIEW

Because the facts are largely uncontested in the present case, and the decision turns on a matter of law, this Court's review is de novo. *Kidde America, Inc. v. Director of Revenue*, 242 S.W.3d 709, 711 (Mo. 2008). In addition, because the trial court decided the case on summary judgment, the standard of review is de novo. *See also Mickels v. Danrad*, 486 S.W.3d 327, 328 (Mo. 2016) ("The trial court's summary judgment ruling is reviewed de novo.").

ARGUMENT

I. The trial court erroneously declared and applied the law in entering judgment finding that § 483.245, RSMo, controls who is the proper appointing authority over deputy circuit clerks because the Supreme Court possesses both express and inherent constitutional authority over the administration of its courts and personnel in that this Court validly ordered the consolidation of deputy circuit clerks with the option of the Circuit Court Committee naming the appointing authority with the approval of the Supreme Court exercised through the Circuit Court Budget Committee.

This case presents the question whether a statutory provision can displace this Court's authority, explicitly granted in the Missouri Constitution, to exercise "general superintending control over all courts and tribunals" and "supervisory authority over all courts" of the State of Missouri. Mo. Const. art. V, 4.1. The answer to this question is no. Though a statute may direct the internal administration of the inferior courts in areas in which this Court has been silent, under the plain terms of the Missouri Constitution and longstanding constitutional traditions, this Court has final constitutional authority to administer the internal affairs of the lower courts. Accordingly, both the trial court and the court of appeals erred when they concluded that section 483.245.2 provides the final word on who will exercise appointing authority over deputy circuit clerks. Under Article

V, section 4.1 of the Constitution, Chief Justice Price's 2009 Order takes precedence over RSMo § 483.245.2 when the two provisions come into conflict, as they do here. Thus, the trial court's summary judgment order and the Court of Appeals' opinion have needlessly called into question the lawfulness of the consolidation agreements of most circuit courts in the State.

To reach their erroneous conclusion without explicitly declaring the 2009 Order invalid, both the trial court and the Court of Appeals purported to artificially restrict the application of the Order to a limited number of circuit courts. But the 2009 Order was clear and its application was general to all circuit courts, as the 2013 amendment by Chief Justice Teitelman confirmed. Moreover, both the trial court and the court of appeals held that *no* court has any authority to supersede section 483.245.2. If that were true, most consolidation plans in this State would be illegal. This Court should reverse the lower court's judgment.

A. This Court possesses both express and inherent constitutional authority to administer the courts of this State, including the selection and appointment of deputy circuit clerks.

As noted, the Missouri Constitution explicitly confers on the Missouri Supreme Court the power to exercise "general superintending control over all courts and tribunals." Mo. Const. art. V, § 4.1. "Supervisory authority over all

courts is vested in the supreme court which may make appropriate delegations of this power." *Id.*

It is unquestionable that the "general superintending control" and "supervisory authority," *id.*, that this Court possesses over all inferior courts in the State of Missouri includes the authority to set forth the terms on which critical auxiliary court officers, such as deputy circuit clerks, shall be appointed. Even without an explicit grant of constitutional authority, Missouri courts possess the "inherent power . . . to *select and appoint* employees reasonably necessary to carry out [their] functions . . . and to fix their compensation." *State ex rel. Weinstein v. St. Louis County*, 451 S.W.2d 99, 103 (Mo. banc 1970) (emphasis added). "This right cannot be made amenable to and/or denied by a county council *or the legislature itself*." *Id.* at 102 (emphasis added) (quoting *Noble County Council v. Indiana ex rel. Fifer*, 125 N.E.2d 709, 713 (Ind. 1955)). Not only is it critical for courts to have certain employees to assist them, but it is also essential that those employees be faithful agents of the courts. "In order that the Court may administer justice . . . it is essential that it control the employees who assist it." *Id.*

In other words, this Court's constitutional power of "general superintending control" and "supervisory authority" over Missouri's inferior courts includes, at very least, the power to direct how "to select and appoint employees reasonably

necessary to carry out [the lower courts'] functions," and "this right cannot be . . . denied by . . . the legislature itself." *Id.* at 102-03.

In fact, this Court has recognized that even an inferior "court cannot properly function without certain attachés and attendants, such as clerks, bailiffs, reporters and janitors," and when necessary, such an inferior court "may, as long as the necessity exists, appoint such attachés and attendants as are necessary to enable the court to properly function as a court." *State ex rel. Gentry v. Becker*, 174 S.W.2d 181, 183 (Mo. 1943); *see also Pogue v. Swink*, 284 S.W.2d 868, 872 (Mo. 1955) (noting that the inherent powers of inferior courts include "the power to appoint necessary attendants, including clerks and janitors"). This Court's *plenary* supervisory authority over the lower courts, provided in an explicit constitutional grant of power, must be at least as robust as the inherent common-law authority of the inferior courts.

For these reasons, authority over the appointment of deputy circuit clerks necessarily falls within the scope of this Court's express grant of constitutional authority to "superintend" and "supervise" the administration of the lower courts. In Missouri, as elsewhere, "[t]he circuit clerk is an arm of the circuit court. The circuit clerk does not act independently of the circuit court, but acts 'under the supervision of the judge.' Thus, the circuit clerk is *an agent of the circuit judge* and possess the statutory authority to perform certain tasks." *Twentieth Judicial*

Circuit of State of Mo. v. Bd. of Com'rs of County of Franklin, 911 S.W.2d 626, 628 (Mo. 1995) (emphasis added) (quoting *Cannon v. Nikles*, 151 S.W.2d 472, 475 (Mo. App. 1941)). The "general superintending control" and "supervisory authority" of this Court over the inferior courts includes, of necessity, the appointment of the deputy circuit clerks who serve critical functions as "agent[s] of the circuit judge[s]." *Id.* As noted above, "it is essential that [the courts] control the employees who assist [them]." *Weinstein*, 451 S.W.2d at 103.

Further, according to Black's Law Dictionary, the plain and ordinary meanings of both "superintending control" and "supervisory authority" encompass control over the selection of deputy circuit clerks. Mo. Const. art. V, § 4.1. "Superintending control" is defined as "the general supervisory control that a higher court in a jurisdiction has over the *administrative affairs* of a lower court within that jurisdiction," and the powers of a "supervisor" typically include "authority to *hire*, transfer, suspend, lay off, recall, promote, discharge, discipline and handle grievances of employees." BLACK'S LAW DICTIONARY 353, 1479 (8th ed. 2004) (Bryan A. Garner, ed.) (emphases added). Selection and appointment of deputy clerks is a quintessential concern of the "administrative affairs" of any court. *Id.* at 353. Thus, under the plain and ordinary meaning of Article V, section 4.1 of the Missouri Constitution, this Court has constitutional authority to direct the manner in which deputy circuit clerks are appointed in the circuit courts.

As the trial court observed, LF 0380-0381, the Constitution further provides that "[p]ersonnel to aid in the business of the circuit court shall be selected *as provided by law*." Mo. Const. art. V, § 15.4 (emphasis added. But this Court has already held that the phrase "as provided by law" in the Missouri Constitution does not refer solely to statutory law, but also refers to any other provisions of the Constitution that may be relevant. *Wann v. Reorganized Sch. Dist. No. 6 of St. Francois Cnty.*, 293 S.W.2d 408, 411 (Mo. 1956) (holding that the phrase "as provided by law" in Article VI, section 26 (g) of the 1945 Constitution means "as prescribed or provided by statute, but it could also refer to other provisions of the constitution") (citation omitted). For this reason, the phrase "as provided by law" in section 15.4 of Article V should not be interpreted to derogate or detract from the plenary grant of supervisory authority set forth in section 4.1 of the same Article.

Rather, the two provisions should be read in harmony, with the former provision incorporating that latter by reference, so that this Court's exercise of the power granted under section 4.1 constitutes the primary method by which the selection of clerks is "provided by law" under section 15.4. Constitutional provisions must be interpreted in conformity with one another whenever possible. *Gregory v. Corrigan*, 685 S.W.2d 840, 842-43 (Mo. 1985) ("It is manifest that words used in constitutional provisions must be viewed in context… [W]e are to

attempt to harmonize all provisions of the constitution."). Furthermore, "each section of the judicial article must be construed as consistent with the concept of a unified court system." *Id*. at 842. A unified court system "contemplates a judiciary integrated from top to bottom for the purpose of efficient and economical use of judicial personnel and resources. … General supervision and control over the entire judiciary is placed in the Supreme Court." *Gregory*, 685 S.W.2d at 844 (Welliver, J., concurring in part and dissenting in part) (citing Mo. Const. art. V, § 4). Here, the 2009 Order unquestionably advances "the purpose of efficient and economical use of judicial personnel and resources" under section 4.1. *Id.*

In short, the Constitution is the supreme law vesting authority over the judiciary, including its personnel, in the Missouri Supreme Court. To be sure, when this Court is *silent* on a particular issue of inferior-court administration, the legislature may legislate in such an area. But when this Court speaks in this area of core judicial competence, the Court's directives are "provided by law" within the meaning of Article V, section 15.4, and the legislature lacks power to displace this Court's constitutionally granted authority.

Thus, there is no conflict of meaning between section 15.4 and section 4.1 that would require recourse to a canon of construction to mediate between the two provisions—such as the "specific governs the general" canon cited by the Court of Appeals. Rather, the reference to "provided by law" in section 15.4, by its plain

and ordinary meaning, *includes* the constitutional grant of authority over the lower courts' administration set forth in section 4.1. Under section 4.1, when this Court dictates the terms on which agents of the circuit courts shall be selected and appointed, this Court's direction has the full force of law.

While the legislature may assist the judiciary through statutory law, it may not interfere with or override the Court's inherent powers, let alone those granted by an explicit constitutional provision. *See In re Thompson*, 574 S.W.2d 365, 367 (Mo. 1978) (holding that while "the legislature may assist the court by providing penalties for the unauthorized practice of law…the legislature may in no way hinder, interfere, or frustrate the court's inherent power to regulate the practice of law"). *See also In re Richards*, 63 S.W.2d 672, 675 (Mo. banc 1933). Powers inherent to the judiciary can be complemented or assisted but never overridden by statutes. Therefore, though the legislature is not foreclosed from acting in this area, its statutory directives cannot displace the constitutional authority of this Court.

B. Chief Justice Price's 2009 Order was a proper exercise of this Court's constitutional authority to administer the lower courts, including its delegation of authority to the lower courts to designate appointing authorities for deputy and division clerks.

Chief Justice Price's 2009 Order was a valid exercise of this Court's constitutional authority over the administration of the circuit courts. The Order has several clear provisions:

1) This Court told judicial circuits why its order was reasonably necessary: "In light of the current budget constraints facing the state, the Judiciary is taking steps to accommodate the Governor's request to find areas of savings." 2009 Order at 1 (LF 0110).
2) This Court told judicial circuits its authority for issuing its order: "[P]ursuant to article V, section 4 of the Missouri Constitution, it is therefore ordered …" 2009 Order at 1 (LF 0110).
3) This Court told judicial circuits that had not already consolidated to do so: "All circuit courts that have not previously consolidated all deputy circuit clerks and division clerks under the supervision of one appointing authority shall be consolidated." 2009 Order at 1 (LF 0110).
4) This Court told judicial circuits who the appointing authority shall be: "The appointing authority shall be either the circuit clerk or court

administrator if the county does not have a circuit clerk, an associate circuit judge of the county, or the presiding judge of the circuit." 2009 Order at 1 (LF 0110).

5) This Court charged the CCBC with oversight to assure circuits' orders were in compliance with the Supreme Court's order: "The presiding judge, after consultation with the court en banc, the circuit clerk, and any other appointing authority, shall submit a plan to the circuit court budget committee designating the appointing authority for all deputy circuit clerks and division clerks by November 13, 2009, to assure that the plan complies with the above consolidation requirements." 2009 Order at 2-3 (LF 0111-0112).

Thus, the 2009 Order is clear in its intent, authority, and operation.

Furthermore, the fact that the 2009 Order *delegated* authority to the circuit courts en banc to designate each circuit's appointing authority in the first instance, subject to the CCBC's approval, was also a valid exercise of this Court's authority under Article V, section 4.1 of the Constitution. Notably, that section expressly states that "[s]upervisory authority over all courts is vested in the supreme court *which may make appropriate delegations of this power*." Mo. Const. art. V, section 4.1 (emphasis added). Chief Justice's Price's 2009 Order was an "appropriate delegation" of this Court's authority to the en banc circuit courts in

the first instance, subject to the supervision of the CCBC, and there is no plausible argument that this delegation was inappropriate.

C. The 2009 Order governs the affairs of *all* circuit courts, not just the subset of circuits that had not already adopted a voluntary consolidation plan.

The trial court held that Chief Justice Price's 2009 Order applied only to judicial circuits that had not previously entered into a consolidation agreement before 2009, and thus the 2009 Order had no application to the Second Judicial Circuit, which had adopted a voluntary consolidation plan in 2008. LF 0383. The trial court's interpretation of the 2009 Order is incorrect. The 2009 Order regarding consolidation applies to "all circuit courts." LF 0110. The Order then immediately provides that "[t]he appointing authority shall be either the circuit clerk or court administrator if the county does not have a circuit clerk, an associate circuit judge of the county, or the presiding judge of the circuit." LF 0110.

Admittedly, the 2009 Order required *immediate* action only from the circuit courts "that have not previously consolidated all deputy circuit clerks and division clerks under the supervision of one appointing authority," *id.*, because those were the only circuit courts from whom immediate action was needed. But the plain import of the order was to permit *any* circuit court to designate "either the circuit clerk or court administrator if the county does not have a circuit clerk, an associate

circuit judge of the county, or the presiding judge of the circuit" to serve as the "appointing authority" for "deputy circuit clerks and division clerks." *Id.* Otherwise, the 2009 Order would have created an unreasonable and absurd situation where certain circuits were authorized to use persons other than the elected circuit clerk as the appointing authority, but other circuits were not.

Moreover, Chief Justice Teitelman's 2013 Order amending the 2009 Order removed any possible doubt on this point. As noted above, the 2013 amendment provided that "the circuit court en banc, after consultation with the circuit clerk and other appointing authority, may submit any proposed *revisions* to its consolidation plan to the circuit court budget committee for its approval." LF 0113 (emphasis added). And the 2013 amendment lacks any language indicating that its scope is restricted to only those circuits that had not entered into a voluntary consolidation agreement prior to 2009. Thus, the 2013 amendment expressly contemplated that there could be "revisions" to preexisting consolidation plans in accordance with the 2009 Order, and that a circuit court that had previously consolidated its clerks under the authority of the elected circuit clerk could thus "revise" its plan to provide for a different appointing authority from the options listed in the 2009 Order. *Id.* This is exactly what the Second Judicial Circuit did in both the 2013 and the 2014 Amended Consolidation Agreements. The trial court's interpretation of the 2009 Order as authorizing only a subset of circuits to designate a different

appointing authority cannot be squared with this 2013 amendment, which expressly contemplates ongoing "revisions" to such preexisting consolidation plans in *all* circuit courts.

Finally, the trial court observed that in the 2009 Order "there is no mention whatsoever of the hiring and firing power of an appointing authority – only the supervision of clerks, custody of records and related matters are mentioned." LF 0383. But in multiple instances, the trial court acknowledged that "appointing authority" *does* include the ability to hire and fire. *See e.g.*, LF 0382 ("a duly elected circuit clerk is the appointing authority, that is, vested with hire and fire power…"), LF 0379, LF 0381. Indeed, the power to select and discharge is necessarily included in the plain and ordinary meaning of "*appointing* authority." *See* Black's Law Dictionary 109 (8th ed. 2004) (defining "appointment" as "the designation of a person, such as a nonelected public official, for a job or duty"). There is no basis to conclude that the 2009 Order intended to vest only a portion of the appointing power in the "appointing authority" that the Order referred to, while leaving the most critical portion of that authority—the ability to hire and fire—in the preexisting authority. Such an interpretation would entail that the 2009 Order intended to complicate, not simplify, the process of appointing clerks by dividing certain responsibilities among multiple "appointing authorities."

D. Legislative functions cannot override powers conferred by an explicit grant of constitutional authority to this Court.

The fact that statutes may assist the courts does not override inherent authority. By way of example, the Constitution expressly empowers the legislature to annul or amend rules of practice and procedure in the courts, pursuant to article V, section 5. However, even with that express power, the Supreme Court has stated that it "does not include the power to interfere with this Court's 'superintending control of all courts and tribunals' as is provided in Mo. Const. art. V, § 4.1 and our rules made pursuant thereto." *In re Rules of Circuit Court for Twenty-First Judicial Circuit*, 702 S.W.2d 457, 459 (Mo. 1985). Simply because the legislature *can* do something does not mean it possesses exclusive and plenary power to do so, in derogation of this Court's constitutional authority.

In *State v. Kinder*, 89 S.W.3d 454 (Mo. 2002), a statute that provided circuit courts with authority over other circuit courts was deemed unconstitutional. "[T]his grant of power clearly violates article V, section 4(1) of the Missouri Constitution, which provides: *Supervisory authority over all courts is vested in the supreme court which may make appropriate delegations to this power.*" *Id.* at 458 (emphasis added by Court).

Section 483.245.2, RSMo, cannot grant the circuit clerk exclusive control over the appointment of deputy circuit clerks, to the exclusion of this Court's

supervisory power over the lower courts. It is not within the legislature's power to delegate such authority. *See State ex rel. Weinstein v. St. Louis County*, 451 S.W.2d 99, 102 (Mo. banc 1970). Inasmuch as the circuit clerk has statutory authority to perform an act, so does the judiciary whose power is both constitutionally granted and inherent. In *Twentieth Judicial Circuit*, 911 S.W.2d 626, this Court considered a statute directing that a circuit court's budget estimate "shall be transmitted to the [county] budget officer by the circuit clerk." *Id.* at 627. This Court disagreed with a county's argument that the circuit court's budget estimate was void because it had been delivered by a circuit judge:

> The county, in arguing that the statute establishes an exclusive method for transmitting the circuit court's budget estimate, minor deviations from which render the actual delivery by the circuit judge a nullity, misunderstands the role of the circuit clerk. The circuit clerk is an arm of the circuit court. The circuit clerk does not act independently of the circuit court, but acts "under the supervision of the judge." *Cannon v. Nikles*, 235 Mo. App. 1094, 151 S.W.2d 472, 475 (1941). Thus, *the clerk is an agent of the circuit judge* and possesses the statutory authority to perform certain tasks. The judge, as the principal, possesses the inherent power to perform the tasks.

Twentieth Judicial Circuit of State of Mo. v. Board of Com'rs of County of Franklin, 911 S.W.2d 626, 628 (Mo. 1995) (emphasis added).

In analyzing separation of powers between branches of government this Court has distinguished between powers and functions. *Asbury v. Lombardi*, 846 S.W.2d 196, 200 (Mo. 1993) (noting that Mo. Const. art. II, section 1, dealing with separation of powers, "primarily separates 'powers,' not 'functions.'"). The legislature, in enacting RSMo § 483.245, exercised a function in providing that the Circuit Clerk is the appointing authority over a deputy circuit clerk. Functions never override powers. *State Auditor v. Joint Committee on Legislative Research*, 956 S.W.2d 228, 231 (Mo. 1997) ("[T]he constitution does not permit one department to exercise the *powers* reserved for the other." (emphasis in original)).

The inherent power of "[s]upervisory authority over all courts is vested in the supreme court which may make appropriate delegations of this power." Mo. Const. article V, section 4.

E. *Geers v. Lasky* is inapplicable because it addresses only the inherent common-law authority of an inferior court, not the power explicitly vested in the Supreme Court by Article V, section 4.1 of the Missouri Constitution.

The trial court relied heavily on *State ex rel. Geers v. Lasky*, 449 S.W.2d 598 (Mo. 1970), in reasoning that this Court lacks authority to override section 483.245.2. But *Geers* is clearly distinguishable, because it addressed only the scope of the inherent common-law authority of an inferior court to override the

authority of the legislature. *Geers* did not purport to address or decide the scope of *this Court's* explicit, plenary constitutional authority over the administrative affairs of the lower courts, because no such question was presented in the case.

In *Geers*, the circuit court implemented local rules dictating the assignment of deputy clerks without a delegation of authority from the Supreme Court. The circuit court was attempting to act unilaterally within its own inherent common-law authority, which is limited to that which is "reasonably necessary to preserve the courts' existence and protect it in the orderly administration of its business." *Id*. at 601. This Court correctly concluded that the inherent *common law* powers of the circuit court do not supersede a statutory grant of authority to the elected circuit clerk, but it did not hold—or even purport to address—whether a statute may supersede the explicit *constitutional* authority of this Court.

Thus, the holding of *Geers* does not limit this Court's ability to administer its courts and do so by way of delegation. Critically, *Geers* did not consider or address the scope of the *explicit* grant of power to *this Court* under Article V, section 4.1 of the Constitution. Rather, *Geers* opined only on the scope of the inherent common-law powers of the circuit court, an inferior court, in the absence of constitutional or statutory authority. *Geers* explicitly stated that it was addressing only "the inherent rule-making power of the Judges of the Twenty-First Judicial Circuit," not the constitutional power of this Court. *Id.* at 599.

Moreover, even if *Geers* were applicable here, it would not be fatal to the 2009 Order. In *Geers*, this Court specifically reiterated that "a court has the power 'to do all things that are reasonably necessary for the administration of justice' and in order that it may preserve its existence and function as a court and which powers exist and inhere merely because it is a court and irrespective of legislative or constitutional grant." 449 S.W.2d at 601. Furthermore, "[t]he limitation on the courts' inherent power is that the expense incurred or the thing done must be reasonably necessary to preserve the courts' existence and protect it in the orderly administration of its business." *Id*. Given the budget crisis addressed by the 2009 Order, this Court can reasonably conclude that the 2009 Order was "reasonably necessary for the administration of justice" and was a reasonable step for the courts to "preserve their existence and function as courts." *Id.* Notably, moreover, *Geers* was decided only one month before *Weinstein*, which provides strong support for this Court's authority "to select and appoint employees reasonably necessary to carry out [the courts'] functions," and states that "it is essential that [the court] control the employees who assist it." *Weinstein*, 451 S.W.2d at 102. Thus, *Geers* should not be interpreted as undermining the principles set forth in *Weinstein*.

In this case, the Supreme Court possesses the requisite inherent authority pursuant to an explicit grant of constitutional power—a "power," not a "function—to select and appoint court personnel, and this Court stated in the 2009 Order why

its action was reasonably necessary and who the appointing authority for deputy clerks for each circuit shall be. LF 0110.

The Missouri Constitution vests authority with the Supreme Court to control and administer the state's courts. The Supreme Court issued a clear order, charging the CCBC with oversight of its implementation. Second Judicial Circuit officials followed that order. The CCBC expressly approved both the 2013 and 2014 Adair County Circuit Court consolidation orders. "The CCBC's interpretation of the Rule it administers is to be given great deference." *Ownbey v. Circuit Court Budget Committee*, 813 S.W.2d 4, 5 (Mo. App. W.D. 1991). Because Chief Justice Price's 2009 Order applies to Adair County and all circuit courts for that matter, Judge Steele did not act unilaterally and without authority, and both the 2013 and 2014 Adair County Consolidation Plans were valid exercises of this Court's delegated authority.

F. Both the 2010 changes to the Court Operating Rule 7.01.A definitions, and the practical implications of consolidation, demonstrate this Court's intent that the appointing authority can only be one person, not multiple persons as provided by statute.

Both the trial court and the Court of Appeals' opinion erroneously understated the impact of their finding that section 483.245.2, RSMo, prohibited

circuit courts of Missouri from consolidating, notwithstanding the express permission to do so in this Court's 2009 Consolidation Order.

For example, the Court of Appeals found that "[t]he designation of any judge to exercise the statutory appointing authority of the Adair County Circuit Clerk was unlawful and in violation section 483.245.2." Appl. Ct. Op. at p. 15 (Sub. Appx. at p. 42). Similarly, the trial court held unequivocally that, under section 483.245.2, "a duly elected circuit clerk is the appointing authority, that is, vested with hire and fire power, for that circuit clerk's clerks," and that "the courts cannot usurp the appointing authority of an elected Circuit Clerk." LF 0384-0385.

Under the reasoning that section 483.245.2 supersedes the 2009 Order, virtually every consolidation plan across the State must be illegal and void. Section 483.245.2 also mandates that "[a]ll division clerks, as defined in section 483.241, shall be appointed by the judge of the division such clerks serve, and such judge may remove from office any division clerk whom he appoints." In other words, the statute mandates that there must be at least *two* appointing authorities—the elected clerk for deputy clerks, and the judge(s) for division clerks. But the whole point of the 2009 Order is to establish a *single* appointing authority for each circuit. Taken to its logical conclusion, the Court of Appeals' reasoning would mean that nearly all of the state's circuit courts consolidation agreements are in violation of section 483.245.2, because either those plans consolidated the circuit's

deputy clerks under a judge, or they consolidated the circuit's *division* clerks under the elected circuit clerk. Either way, these plans would be illegal and void under the statute. This holding is potentially disruptive to the orderly administration of courts across the State, and it is unwarranted as a matter of law.

Further, in March 2010, the CCBC approved new definitions for the Court Operating Rule 7.01.A. These definitions demonstrate the Supreme Court's intent—or at least the CCBC's interpretation of the Supreme Court's intent, which is entitled to great deference—to remove the vesting authorities found in section 483.245 as a basis for appointing authorities. The following shows the applicable definitions change, with removed sections in brackets and additions underlined.

> Appointing Authority - The official who is [statutorily] vested with the authority to make the appointment of employees [to positions pursuant to Sections 483.245 and 485.010, RSMo and] within the provisions of this rule[.] , pursuant to a signed consolidation agreement or plan, as approved by the Circuit Court Budget Committee. The presiding judge shall be the appointing authority for presiding judges' secretaries and the juvenile division, except that Family Court Administrators may be vested with the authority to make the appointment of employees to positions pursuant to Sections 487.060 and 211.331 RSMo, if specifically designated as an

appointing authority by local court rule, and within the provisions of this rule.

Revisions to COR 7.01.A definitions,[3] Sub. Appx. at p. 27.

These additions and deletions demonstrate that the CCBC no longer viewed the statute as controlling who the appointing authority may be. The consolidation agreements—under the authority of this Court's 2009 Order—now control. As OSCA records confirm, all counties have consolidated. Other than arguably the roughly half dozen counties in Missouri where clerks are not elected or that have administrators in lieu of circuit clerks, all consolidation plans would violate the statute even if the clerk were appointed, since the division judges are themselves statutorily vested with appointing authority.

A record of consolidation agreements from OSCA shows that in seven counties, in addition to Adair, the associate circuit judge is the appointing

[3] A copy of the COR 7.01.A definitions and handbook revisions, approved by the CCBC in March 2010, and the spreadsheet of consolidation agreements in Missouri cited below, were provided to Steele's counsel upon request by the Office of State Courts Administrator. While not in the original Record on Appeal, this Court can take judicial notice of its own records. Judge Steele included these documents in his Substitute Appendix to this brief.

authority.[4] Several others do it by a panel, and in one case by en banc court.[5] *See* OSCA Spreadsheet of Missouri Appointing Authorities, Sub. Appx. at pp. 24-26. All 114 Missouri counties and the independent City of St Louis have consolidated their appointing authorities over deputy and division clerks. The vast majority of those consolidation plans would be invalid under the trial court's and Court of Appeals' reasoning.

In sum, consolidation is lawful and reasonably necessary, and Chief Justice Price's 2009 Order was a valid exercise of this Court's explicit and inherent constitutional authority to supervise the administration of Missouri's inferior courts. The trial court's conclusion to the contrary should be reversed.

[4] The Associate Circuit judge is the consolidated appointing authority in Bollinger, Carroll, Grundy, Linn, Moniteau, Sullivan, and Washington counties.

[5] A panel is the consolidated appointing authority in Franklin, Gasconade, and Greene counties. The en banc court is the consolidated appointing authority in Harrison County.

II. The trial court erroneously applied the law in entering judgment that the elected Circuit Clerk exclusively had appointing authority and that Chief Justice Price's 2009 Order on consolidation did not apply to Adair County and the Second Judicial Circuit, in that the order's application and scope is constitutionally in the exclusive purview of this Court, in that this Court provided for assurance of compliance of Chief Justice Price's 2009 Order by its Circuit Court Budget Committee.

The trial court noted in its judgment that Chief Justice Price's 2009 Order "was only applicable to the circuit courts that had 'not previously consolidated.'" LF 0382. The trial court then went on to explain that Chief Justice Price's 2009 Order may only be applied to clerks "[i]f they were appointed and had not previously entered into a consolidation agreement." LF 0383. But, as discussed in more detail above, there is no such limitation in Chief Justice Price's 2009 Order.

Chief Justice Price's 2009 Order instructs all circuits that have not previously consolidated to do so. LF 0110. The order independently does several other things. It describes who the appointing authority shall be. LF 0110. It provides the method of adopting a consolidation order. LF 0111. The Order provides that the Circuit Court Budget Committee is the reviewing body for consolidation orders compliance. *Id.*

If Chief Justice Price's 2009 Order were ambiguous as to whom it applied, the Circuit Court Budget Committee was the appropriate entity to decide its application and scope. The CCBC knew the May 2013 Adair County Consolidation Order was an amendment to an existing plan. Judge Steven Ohmer, chairman of the CCBC, stated in a June 19, 2013, letter to Judge Steele that:

> "The *amended* consolidation agreement for Adair County which *changes* the designation of the appointing authority from the Circuit Clerk of Adair County to the Presiding Judge of the 2nd Judicial Circuit was approved by the Circuit Court Budget Committee to become effective immediately."

LF 0121 (emphasis added).

On June 28, 2013, this Court added to Chief Justice Price's 2009 Order a means of amending existing consolidation orders. LF 0113. Nowhere in the addendum to the order does it say that amendments done previous to it were ineffective. The addendum simply clarifies that insofar as circuit courts wish to amend their consolidation orders, they may do so by the means similarly outlined in the original order. *Id.* The CCBC had approved the amendment to Adair County order nine days earlier on June 19, 2013. LF 0121.

III. The trial court erroneously applied the law in ruling that the appointment of Judge Steele as appointing authority Adair County Circuit Court en banc was procedurally defective because the trial court lacked jurisdiction in that plaintiffs voluntarily dismissed Count II of their claim as to the procedural inadequacy of the consolidation order prior to summary judgment and declaratory relief was unavailable as a matter of law in any event.

The first portion of the trial court's judgment as to the May 2013 Adair County Consolidation Order was based on purported procedural defects in its adoption. The trial court stated that: "Judge Steele's May 2, 2013 attempt at declaring himself as the appointing authority for the Clerk's clerks … was procedurally defective." LF 0384.

The process was not procedurally defective (*See* Argument Section IV below) and even if it was, there is no basis in the pleadings or the law for declaratory relief on this basis.

A. There was no basis in the pleadings for declaratory relief based on purported procedural defects in adopting the 2013 order.

Respondents stripped the trial court of any jurisdiction over the procedural adequacy of how the May 2013 Adair County Consolidation Order came about through their voluntary dismissal of Count II, which was based on an alleged

Sunshine Law violation. "Once a plaintiff voluntarily dismisses a claim prior to the introduction of evidence, it is as if the suit were never brought. No action can be taken by the trial court, and any action attempted in the dismissed suit is a nullity." *Malone v. Schapun*, Inc., 965 S.W.2d 177, 182 (Mo. App. E.D. 1997) (internal citation omitted). The current operative petition challenged only the *substantive* lawfulness of the May 2013 and April 2014 Adair County Consolidation Orders, and not the procedure by which the May 2013 Adair County Consolidation Order came about. *See* Pltffs' Petition ¶¶ 1-30 (filed March 9, 2015) (LF 0011-0023) and Pltffs' Dismissal of Count II Without Prejudice (filed July 10, 2015) (dismissing all paragraphs after ¶ 30) (LF 0188).

The voluntary dismissal came after Judges Steele and Swaim argued in motions to dismiss that the declaratory relief sought under Count II was barred and improper. Gall and Decker then voluntarily dismissed that count. Gall and Decker later filed summary judgment as though the claim were still operative. While not mentioning the Sunshine Law by name, Gall and Decker argued procedural deficiencies in the adoption of the 2013 Adair County Order. Judge Steele preserved the issue, arguing in his summary judgment papers that the trial court lacked jurisdiction to rule on the procedural arguments. LF 0308-0309. This Court should hold that the trial court lacked jurisdiction over this claim.

B. Adequate remedies at law were available for the alleged procedural defects in the adoption of the Adair County 2013 consolidation order, barring declaratory relief.

In their original state court petition, Gall and Decker alleged that Judge Steele violated chapter 610, RSMo, Missouri's open meetings and records law or "Sunshine Law," by failing to provide notice to the public of an en banc meeting of the Second Judicial Circuit and closing that meeting to the public.

This was the sole basis upon which Respondents sought declaratory relief based on the procedural inadequacies of the May 2013 Adair County Consolidation Order. The first count dealt only with the substantive constitutional questions. *See* Count I, entitled "The Circuit Court's Attempt to Exercise Appointing Authority over the Adair County Circuit Clerk's Office is Unlawful because it is Inconsistent with the Missouri Constitution." (LF 0014).

The Sunshine Law claim was defective for many reasons. Judges Steele and Swaim argued in motions to dismiss that the procedural claim failed for three separate reasons: 1) declaratory relief was improper because there were adequate remedies at law; 2) the petition was filed after the applicable statute of limitation had expired; and 3) the declaratory relief improperly targeted two of the judges and not the Second Judicial Circuit as a whole. Gall and Decker elected to dismiss

their second count, leaving only the constitutional questions involving separation of powers between the judiciary and the legislature in play.

Gall and Decker's summary judgment motion stated two questions for judgment—first, the constitutional question; and second, whether "even if the Missouri constitution allows such a transfer of appointing authority, whether Defendant Steele's purported transfer of the appointing authority to himself without the approval of the Second Judicial Circuit en banc complied with the Supreme Court's consolidation order of October 8, 2009." LF 0244. But there was no basis in Count I of Mss. Gall and Decker's petition for the second question presented by them for summary judgment, on which the trial court ruled. *See* Pltffs' Petition ¶¶ 1-30 (LF 0011-0018).

"Missouri courts have long held that declaratory relief power does not abolish or provide an additional existing remedy but instead addresses a deficiency or bridges a superfluity in the law." *Van Dyke v. LVS Bldg. Corp.*, 174 S.W.3d 689, 692 (Mo. App. W.D. 2005). "The purpose of a declaratory judgment is to give parties relief from uncertainty and insecurity and to reduce multiple lawsuits." *Id.* When an adequate remedy at law already exists, declaratory judgment power cannot be invoked. *Huff v. Dewey & LeBoeuf*, LLP, 340 S.W.3d 623, 627 (Mo. App. W.D. 2011).

There was no ambiguity in the statutorily created remedies for violations of the Sunshine Law. Gall and Decker failed to seek those remedies in a timely fashion. Other procedural inadequacies, even if they existed, should have been raised before the CCBC or in the lawsuit's petition. They were not.

The trial court's judgment as to the procedural adequacy of the May 2013 Adair County Consolidation Order is a nullity.

IV. The trial court's judgment that Judge Steele unilaterally and ineffectively modified the 2008 Consolidation Agreement is not supported by substantial evidence because Judge Steele consulted with all members of the Second Judicial Circuit, obtained Circuit Court Budget Committee approval, and therefore substantively complied with Chief Justice Price's 2009 Order.

Even if the trial court had had jurisdiction to address the issue, the trial court's ruling that the 2013 amendment was procedurally defective was not supported by substantial evidence. The trial court held that "Judge Steele's first procedural attempt at modification was defective and, in turn, unsuccessful: he conducted an email meeting which did not include all of the members of the Court en banc." LF 0384. This was error.

The record is clear that Judge Steele's electronic mail *did* include all of the members of the Court en banc plus the circuit clerk. *See* Steele affidavit at ¶ 4 (LF 0343) and accompanying e-mails to all Second Judicial Circuit Judges and Circuit Clerk Decker (LF 0346-0348). The trial court simply got the facts wrong in its holding on this point.

The Second Judicial Circuit and Judge Steele substantively complied with Chief Justice Price's 2009 Order in May 2013. The 2009 Order states that the presiding judge, "after *consultation* with the court en banc, the circuit clerk, and any other appointing authority," shall submit a plan of consolidation to the CCBC.

LF 0111 (emphasis added). No particular method of "consultation" is mandated in the Order.

The presiding judge, Judge Steele, consulted with all of the Second Judicial Circuit judges and Adair County Circuit Clerk Linda Decker. *See* Steele affidavit at ¶ 4 (LF 0343) and accompanying e-mails to all Second Judicial Circuit Judges and Circuit Clerk Decker (LF 0346-0348). Judge Steele concedes that the Second Judicial Circuit en banc did not convene an in-person meeting regarding the May 2013 amendment, but electronic mail correspondence in which all judges and the circuit clerk were included meets the plain meaning of the term "consultation."[6] Judge Steele received three votes, including his own, out of the four Second Judicial Circuit judges, giving Judge Steele a majority approval for adoption of the May 2013 Adair County Consolidation Order. *See* Associate Circuit Judge Bill Alberty e-mail voting in favor of amendment (LF 0347), and Associate Circuit Judge Fred Westoff e-mail voting in favor amendment (LF 0348).

[6] While the applicable portion has since been dismissed, Plaintiffs admitted in their initial petition that "[o]n or about May 2, 2013, Steele *obtained approval to appoint himself as appointing authority from a majority of the Court en banc* by a series of closed meetings and communication with other members of the Circuit Court." (emphasis added) Pltffs' Petition at ¶38 (LF 0021).

"If a word used is not defined, the Court determines the plain and ordinary meaning of the word as found in the dictionary." *In re Finnegan*, 327 S.W.3d 524, 526 (Mo. 2010). Black's Law Dictionary defines "consultation" as "[t]he act of asking the advice or opinion of someone (such as a lawyer)." Black's Law Dictionary (8th ed. 2004). As an example of consultation in the legal context, in federal courts a judge shall issue a scheduling order after "consulting" with attorneys and unrepresented parties "at a scheduling conference or by telephone, mail, or other means." F.R.C.P. 16(b)(1). In the current day, email is probably the most common method of "consultation." Thus, Judge Steele complied with the plain meaning of the Chief Justice Price's 2009 Order through his verbal and email consultation with the entire Second Judicial Circuit and Circuit Clerk Decker.

Even if the Second Judicial Circuit en banc should have convened a formal in-person meeting on the issue, the remedy for Mss. Gall and Decker would have been to bring the matter to the CCBC as an appeal. The CCBC's rules contemplate appeals. Sup. Ct. Op. Rules 7.04.2 and 7.B.10. The matter then could have been resolved by the CCBC or remanded back to the Second Judicial Circuit for further action, if any. That was an available legal remedy that thereby precludes injunctive relief. A declaratory judgment action two years after the fact is not appropriate.

This Court should vacate or reverse the trial court and rule that the May 2013 Adair County Consolidation Order was both sound and procedurally proper.

V. The Trial Court erroneously applied the law by entering judgment for the Circuit Clerk because the Circuit Clerk's sole remedy was by appeal to the Circuit Court Budget Committee in that one circuit judge does not have the subject matter jurisdiction or authority to invalidate either the administrative orders of a Circuit or the administrative orders of the Supreme Court or the exercise of delegated powers to the Circuit Court Budget Committee.

The trial court improperly entertained a collateral attack upon and declared void the two consolidation orders from Adair County, even though the orders had been explicitly approved by the CCBC, the committee of circuit court judges charged by this Court with assuring the Adair County orders' legal compliance with Chief Justice Price's 2009 Order.

A. Jurisdiction over the compliance of this Court's orders resides with this Court and its appointed committees.

This Court possesses original jurisdiction over the constitutionality of court consolidation, including Chief Justice Price's 2009 Order, oversight of its committees, and the constitutionality of state statutes. Mo. Const. art. V, § 3; *see also Gregory v. Corrigan*, 685 S.W.2d 840, 841 (Mo. 1985) (noting that the Supreme Court accepted jurisdiction pursuant to its supervisory powers to review findings of a special trial judge appointed by Supreme Court order).

Judge Steele repeatedly made this argument to the trial court. *See* LF 0309-0311, 0351-0352. The jurisdictional defects were ignored. "[S]ubject matter jurisdiction may not be waived, may not be conferred by consent, and can be raised at any time by any party or court, even in a collateral or subsequent proceeding." *Hightower v. Myers*, 304 S.W.3d 727, 733 (Mo. 2010); Mo. Sup. Ct. R. 55.27 (g)(3).

B. The Circuit Court Budget Committee approved the Second Circuit orders; the committee's approvals were not "housekeeping events."

In acknowledging the Circuit Court Budget Committee's approval of the Second Circuit consolidation orders, the trial court stated that it "interprets said action as a housekeeping event and that the Budget Committee's action serves no precedential value." LF 0384.

The CCBC is a committee of thirteen judges appointed by this Court. Sup. Ct. Op. Rule 7.03.2. Among the powers and duties of the committee delineated by this Court, the Committee is to administer the Circuit Court Personnel System, to include: "allocat[ing] job classes to appointing authorities… and to review appeals resulting from actions of the Committee. … [and] to fulfill other duties as may, from time to time, be assigned by this Court." Sup. Ct. Op. Rule 7.04.2-3.

The CCBC approved both of the Adair County Circuit Court orders that the trial court declared void. LF 0116 and 0121. Court Operating Rule 7.B.10.1 provides that Decker had a right to appeal to the CCBC. The rule also provides that all decisions are final. No appeal was ever made to the CCBC of its approval of the contested Adair County Circuit Court consolidation orders. If Gall and Decker were unhappy with the outcome of or procedure by which the Adair County Circuit Court consolidation orders came about, their recourse was to appeal to the CCBC, as this Court's rules contemplate. *See* Sup. Ct. Op. Rule 7.04.2 (providing that the CCBC is to "to review appeals resulting from actions of the Committee"). And Decker did not seek any review directly from this Court through an administrative or judicial proceeding. It is too late to do so now, and declaratory judgment was improper when a legal remedy was available to respondents.

The trial court should have deferred to the Supreme Court's 2009 Order and the approvals of the CCBC. *See Ownbey v. Circuit Court Budget Committee*, 813 S.W.2d 4, 5 (Mo. App. W.D. 1991).

VI. The trial court erroneously applied the law in entering judgment for Respondent Gall because she had no standing to bring this action in that she failed to allege in her petition that she had any legally protectable interest in the subject matter of the suit or any other basis for standing.

Gall has no standing to sue. She failed to allege that she has any legally protected interest at stake in this litigation.[7] Judge Steele preserved this issue in his Answer to Plaintiff-Appellees' Petition.

> "Plaintiff Gall fails to state a claim for a declaratory judgment, and lacks standing to pursue the requested declaratory judgment, because Plaintiffs' Petition fails to allege that she has a legally protectable interest affected by Defendant's alleged actions or omission."

LF 205, ¶ 3.

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[7] Gall filed a federal lawsuit on December 9, 2013, alleging violations of her constitutional rights pursuant to 42 U.S.C. § 1983. LF 0129-0137. The complaint, which was amended multiple times, alleged violations of state constitutional and statutory law. LF 0129-162. Decker was not a party to this lawsuit. On January 6, 2015, the federal district court issued a stay in the federal matter "to give the parties the opportunity to seek a determination of the controlling Missouri issue by the Missouri courts." LF 0024-0039 (quote at LF 0025). That stay has since been lifted and the parties are currently in the discovery phase of the federal lawsuit.

Gall and Decker never amended their petition to resolve the standing issue. "When a question of standing exists, this Court has a duty to resolve that question before reaching substantive issues." *Airport Tech Partners, LLP v. State*, 462 S.W.3d 740, 744 (Mo. 2015). Among other requirements of standing in a declaratory judgment action, "[i]f a party is unable to meet [the] requirement [of] showing a legally protectable interest in the outcome of the litigation, then the party has no standing." *Id.* at 744-45 (citing *Lebeau v. Commissioners of Franklin County, Missouri*, 422 S.W.3d 284, 288 (Mo. 2014)).

Here Gall and Decker alleged that "[b]oth Plaintiffs have legal rights that are affected by [the trial] Court's administrative interpretation of various Missouri Statutes…" LF 0012. Gall and Decker never went on to allege any specific affected rights of Gall.

Gall and Decker next alleged that the trial court has the power to "render declaratory judgments 'respecting the validity of agency rules or of the threatened application thereof." *Id.* Again, no specific affected legal interest of Gall was alleged.

Finally, Gall and Decker alleged that the trial court may declare void actions taken in violation of the Missouri Sunshine Law—but the portion of Gall and Decker's petition invoking the Sunshine Law was dismissed. *See* Petition at LF 0013 and dismissal at LF 0188.

A taxpayer may have standing to sue to challenge the unlawful disbursement of state funds. *Lebeau,* 422 S.W.3d at 288. But such standing is not assumed. This Court noted that it "must determine whether [plaintiffs] sufficiently alleged taxpayer standing." *Id*. To sufficiently allege standing, this Court has stated that:

> "A taxpayer need not allege that it suffered a direct personal loss as a result of the challenged act. But neither will the mere filing of a lawsuit confer standing. The taxpayer must show: (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, 462 S.W.3d at 745 (internal citations and quotes omitted)

In the present case, there are no allegations approaching the required standards for taxpayer standing spelled out in *Airport Tech Partners*. Gall and Decker merely alleged that Gall was a citizen and resident of Adair County, State of Missouri. LF 0013. Under *Airport Tech Partners*, the pleading is insufficient to provide standing in this context. "In the absence of standing, this Court cannot grant relief, nor can it give an advisory opinion." *Airport Tech Partners,* 462 S.W.3d at 748. Gall should be dismissed from this action.

CONCLUSION

For the above stated reasons, Appellant Russell Steele respectfully asks this Court to reverse or vacate the judgment of the trial court in this case and declare that the May 2013 and April 2014 Adair County Consolidation Orders entered by the Second Judicial Circuit and Steele as the presiding judge were lawfully sound and in conformance with Chief Justice Price's 2009 Order.

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CERTIFICATE OF SERVICE AND COMPLIANCE

A copy of this document was served on counsel of record through the Court's electronic notice system on April 24, 2017.

This brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 13,150, excluding the cover, the signature block, and this certificate.

The electronic copies of this brief were scanned for viruses and found virus-free through the anti-virus program.

/s/ *D. John Sauer*
State Solicitor