SC96188

IN THE SUPREME COURT OF MISSOURI

SUSAN GALL, et al.,
Plaintiffs – Respondents

v.

RUSSELL E. STEELE, et al.,
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

SUBSTITUTE BRIEF OF RESPONDENTS LINDA DECKER AND SUSAN GALL

SCHWARTZ, HERMAN & DAVIDSON

Robert Herman, Bar No. 32376MO
Edward Wells, Bar No. 68471MO
8820 Ladue Road, Suite 201
St. Louis, Missouri 63124
Ph: (314) 862-0200
Fx: (314) 862-3050
bherman@laduelaw.com
ewells@laduelaw.com
Attorneys for Respondents

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Statement of Facts

I. The 1979 revision to the Judicial Article of the Missouri Constitution confirms Legislative authority over how court personnel should be selected.

Since at least 1939, the Legislature has provided for the election of circuit clerks, allowing them authority to appoint their own deputies. §483.015 R.S.Mo. (1939) (election), §483.080 (appointment). The 1945 Missouri Constitution did not provide how court personnel subordinate to circuit clerks should be selected.

In 1970, this Court held that the courts do not have any inherent power to select deputy circuit clerks in contravention to the statutory scheme. *State ex rel. Geers v. Lasky*, 449 S.W.2d 598, 600-01 (Mo. 1970). Thereafter, effective 1979, the judicial article of the Missouri Constitution was amended to include section 15.4, which provides that "[p]ersonnel to aid in the business of the circuit court shall be selected as provided by law." The judicial article does not expressly authorize this Court to make any rule or order with the force and effect of law regarding how court personnel shall be selected, and the court has no general power to make law, leaving only the Legislature to enact such laws within their plenary power. Mo. Const. art. III § 1.

II. On May 2, 2013, Steele arrogates to himself appointing authority over deputy circuit clerks.

On March 20, 2008, the Second Judicial Circuit adopted a Consolidation Agreement consolidating division and deputy circuit clerks, providing that elected circuit clerk Decker was the "appointing authority for all Deputy Circuit Clerks in Adair

County." LF 0053. More than one year later, on October 8, 2009, this Court issued its Order In Re: Consolidation of clerk personnel, providing that ". . . 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." LF 0110.

On May 2, 2013, Judge Steele e-mailed or phoned other judges of the Second Judicial Circuit seeking their approval to revise the 2008 Consolidation Order, transferring to himself as presiding judge the appointing authority already vested in Decker.[1] The same day, Steele entered a new consolidation order appointing himself the appointing authority for deputy circuit clerks. Steele's 2013 Consolidation Order was signed only by him. LF 0055.

III. The Second Judicial Circuit fails to meet *en banc* to approve the 2013 revised Consolidation Order.

The Second Circuit Judicial Circuit did not meet *en banc* to discuss or vote on the proposed 2013 revision of the Consolidation Order. Steele individually polled members of the circuit court for approval by "notational voting;" a procedure held void by this court in *State ex rel. Philipp Transit Lines, Inc. v. Pub. Serv. Commn.*, 552 S.W.2d 696, 703 (Mo. banc 1977). *See also State ex rel. Churchill Truck Lines, Inc. v. Pub. Serv. Commn*, 555 S.W.2d 328, 336 (Mo. Ct. App. Kansas City District 1977). As the trial court found, Steele failed to consult all judges of the circuit and the 2013 order was

[1] LF 0228 (group e-mail to judges of the Second Circuit), LF 0056-60 (letter from Judge Westhoff relating Steele's phone call, among other things).

signed by only Steele. In view of this procedural defect, the Second Judicial Circuit met *en banc* on April 1, 2014, voided the appointment of Steele as appointing authority, but transferred the appointing authority to Judge Swaim. LF 0118-0120 (amendment to 2008 Consolidation Agreement), LF 0056-60 (letter from Judge Westhoff expressing concern about the procedural failings of Steele's 2013 self-appointment).

IV. Steele terminates deputy circuit clerk Gall's employment on April 1, 2013.

On April 1, 2013, Steele notified deputy circuit clerk Gall of his intent to terminate her employment as deputy circuit clerk. LF0025. Pursuant to Court Operating Rule 7, Gall appealed to her statutory appointing authority, circuit clerk Decker, requesting a pre-termination hearing. LF0025-26, Respondents' Appendix at A19.[2] At that hearing, Decker reversed Gall's termination. LF0025-0026, Respondents' Appendix at A20. However, on September 5, 2013, Steele countermanded Decker's reinstatement of Gall and ordered the Office of the State Court Administrator not to comply with Decker's order. LF0026.

V. Gall files Federal claim for violation of her procedural due process rights.

On December 9, 2013, Gall filed her federal suit pursuant to 42 U.S.C. § 1983 alleging that Steele violated her procedural due process rights by his *ultra vires* interference with her reinstatement after she successfully appealed her termination. LF

[2] These records are official communications of officers of the court and court records. Judicial notice is therefore proper. *Moore v. Missouri Dental Bd.*, 311 S.W.3d 298, 305 (Mo. App. W. Dist. 2010)

0011-0062 (Gall and Decker's Missouri petition (LF 0011-23; federal suit described at LF 0014) and attachments thereto (LF 0024-62).

The District Court held that the dispositive issue of the federal suit turned on the question of Missouri law as to which official lawfully held the appointing power over the deputy circuit clerks, and stayed the action "to give the parties the opportunity to seek a determination of the controlling Missouri issue by the Missouri courts." LF 0025 (order of the Eastern District of Missouri, attached to Gall's petition as Exhibit 1).

Consequently, Gall and Decker filed this declaratory judgment action in the Adair County Circuit Court on March 9, 2015, as a "subsidiary action" to Gall's federal civil rights case. LF 0012 (Gall and Decker's petition).[3] Gall alleged that she "filed *Gall v. Steele*, cause no. 2:13-cv-00111, in the Federal District Court for the Eastern District of Missouri, on December 9, 2013. This subsequent action is ancillary to the original complaint . . . ." Gall also alleged that "[t]he issues presented herein are dispositive issues in the federal case *Gall v. Steele* . . . which has been stayed pending resolution of this issue of Missouri law." LF 0014 (page 4 of Gall and Decker's petition).

VI. State trial court judgment

On January 13, 2016, the Missouri trial court ruled on cross motions for summary judgment in favor of Respondents Gall and Decker. Judge Oxenhandler held that Decker is the lawful appointing authority for deputy circuit clerks, that Steele's 2013 self-

[3] The cause was later transferred by consent to Boone county, Honorable Judge Gary Oxenhandler presiding. LF 0063-64

appointment to such authority was procedurally defective (and ineffective in the first place because Decker is the lawful appointing authority), and that the 2014 amendment to the 2008 Consolidation Agreement was ineffective because Decker is the lawful statutory appointing authority for deputy circuit clerks.

The trial court held,

> It is this Court's opinion that in the first instance, pursuant to 483.245 RSMO, a duly elected circuit clerk is the appointing authority for her or his clerks, that is, vested with hire and fire power, for that circuit clerk's clerks. As an aside, it may be that such a circuit clerk can delegate their appointing authority power to someone else but such issue is not before this Court.

LF 0379. The Court further held,

> 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. Likewise, the Court en banc's attempt to appoint Judge Swaim as the appointing authority for the Clerk's clerks was ineffective: the Court en banc had no right to unilaterally take away the Clerk's statutorily granted appointing authority without her consent.

> It is the judgment of this Court that Linda Decker is the duly elected Circuit Clerk of Adair County, Missouri. As such, she is vested with sole appointing authority for her clerks.

LF 0384-85. Underlying the trial court's determination of the main issue—whether the elected circuit clerk is the lawful appointing authority for deputy circuit clerks—was that Article V, section 15.4 of the Missouri Constitution provides the General Assembly plenary power to provide for the manner of selection of personnel to aid in the business of the circuit courts. LF 0379-81. Underlying the trial court's determination of the subsidiary issue of the procedural defects inherent in Steele's self-appointment was that the Second Circuit *en banc* did not meet. LF 0384.

VII. Court of appeals opinion and this Court's transfer

On December 6, 2016, the Western District Court of Appeals affirmed the trial court's summary judgment in favor of Gall and Decker, holding that

> Judge Steele is absolutely correct that the Missouri Constitution provides the Supreme Court with "general superintending control over all courts and tribunals" and 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, § 4. Article V, section 15.4 of the Missouri Constitution, however, provides: "Personnel to aid in the business of the circuit court shall be selected as provided by law or in accordance with a governmental charter of a political subdivision of this state." The phrase "provided by

law" means "as prescribed or provided by statute" or by "other provisions of the constitution." *Wann v. Reorganized Sch. Dist. No. 6 of St. Francois Cty.*, 293 S.W.2d 408, 411 (Mo. 1956); *see also Eberle v. Plato Consol. Sch. Dist. No. C-5 of Texas Cty.*, 313 S.W.2d 1, 3-4 (Mo. 1958) (following *Wann*, the Court found that Mo. Const. Art. VI, § 26(g), providing that "[a]ll elections under this article may be contested as provided by law," means that "the method and manner for contesting particular elections was as provided or as was to be provided by the legislature"). To that end, the Missouri legislature enacted section 483.245.2, which provides:

> The 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.

The law, i.e. section 483.245.2, therefore, provides that the circuit clerk has the authority to appoint deputy circuit clerks and to discharge deputy circuit clerks.

Appl. Ct. Op. at 7-8, Steele's Substitute Appendix at 34-35.

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

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

Argument

Article V, section 15.4 of the Missouri Constitution provides, "Personnel to aid in the business of the circuit court shall be selected as provided by law . . . ."

Section 483.245.2 R.S.Mo. provides that ". . . [t]he circuit clerk … 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."

In direct conflict with Section 483.245.2, Steele and the Second Judicial Circuit divested elected circuit clerk Decker of her statutory appointing authority and transferred it to one of the circuit judges.

The judicial department is not authorized to prescribe law unless expressly directed or permitted by the Missouri constitution. Mo. Const. art. II § 1.[4] In absence of such express constitutional authority, no court has the power to provide by law how personnel to aid in the business of the court shall be selected. Any rule or order in conflict with statute is void. "The power of the legislature to make laws is plenary within its

[4] "The powers of government shall be divided into three distinct departments--the legislative, executive and judicial--each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted." (emphasis added).

sphere of responsibility." *State Auditor v. Jt. Comm. on Legis. Research*, 956 S.W.2d 228, 231 (Mo. 1997). "It is also basic that this Court is not to make new laws, particularly when the legislature has spoken on the subject within constitutional framework." *Bartley v. Spec. Sch. Dist. of St. Louis County*, 649 S.W.2d 864, 867 (Mo. 1983) (superseded on other grounds by statutory revision) ". . . [T]he doctrine [of separation of powers] may be violated when one branch assumes a [power] . . . that more properly is entrusted to another. [citations omitted]." *Id*. (quoting *I.N.S. v. Chadha*, 462 U.S. 919, 963 (1983) (Powell, J., concurring)) (bracketed alterations in original except initial capitalization).

The trial court's judgment that Decker is vested with the sole appointing authority for her clerks in accordance with §483.245 R.S.Mo is therefore correct and should be affirmed. *See* LF 0379, 0384-85.

I. Article V, Section 15.4 of the Missouri Constitution provides that "personnel to aid in the business of the circuit court shall be selected as provided by law." Section 483.245 R.S.Mo. provides that the elected circuit clerk of Adair County is the appointing authority for her deputy circuit clerks. The Second Judicial Circuit does not have constitutional authority to divest the elected circuit clerk of her appointing authority by transferring such power to a judge because it is barred by the separation of powers, Mo. Const. art. II § 1.

(Addresses Steele's Points I and II.)

Steele's arrogation to himself of Decker's appointing authority over deputy circuit clerks[5] is in direct conflict with §483.245 R.S.Mo., which provides that the elected circuit clerk shall be the appointing authority for deputy circuit clerks, and the Missouri Constitution, article V, section 15.4, which provides that "personnel to aid in the business of the circuit court shall be selected as provided by law."

The Legislative Department has plenary power to make laws. Mo. Const. art. III § 1. "A careful reading of [that] article shows that the constitution assigns the General Assembly the single power and sole responsibility to make, amend and repeal laws for Missouri . . . ." *State Auditor v. Joint Comm. on Legislative Research*, 956 S.W.2d 228, 230 (Mo. 1997), *as modified on denial of reh'g* (Nov. 25, 1997). "The power of the legislature to make laws is plenary within its sphere of responsibility." *Id*. *See also*

[5] The Second Judicial Circuit en banc subsequently transferred the appointing authority to Judge Swaim. LF 0118-0120.

Comm. For Educ. Equal. v. State, 294 S.W.3d 477, 489 (Mo. 2009). The judicial department does not have that power—with one exception not applicable here. The Constitution does not expressly authorize the judicial department to select the appointing authority by law.

The Second Judicial Circuit's arrogation of the circuit clerk's statutory appointing authority exceeds the judicial department's constitutional authority and is barred by the Missouri Constitution, article II, section 1, Separation of Powers. Article II, section 1 prohibits any branch of government from " . . . exercis[ing] any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted." (emphasis added).

The Missouri Constitution does not expressly direct or permit the judicial department to legislate the manner of selection of personnel to aid in the business of the circuit courts. Mo. Const. art. V § 15.4. The only express direction or permission in the Missouri Constitution for the judicial department to make law is article V, section 5, which provides that "[t]he supreme court may establish rules relating to practice, procedure and pleading for all courts and tribunals which shall have the force and effect of law." (emphasis added).[6] This provision does not apply here.

[6] *See also Clark v. Kinsey*, 488 S.W.3d 750, 758-59 (Mo. App. 2016) (if a rule of procedure adopted by this Court under the authority of the constitution is inconsistent with a statue and has not been annulled or amended by the legislature, the rule supersedes the statute).

A. Article V, section 15.4 grants plenary power to the legislature to determine how personnel to aid in the business of the circuit court shall be selected.

Article V, section 15.4 reserves plenary power to the legislature to determine how personnel to aid in the business of the circuit court shall be selected. The legislature has enacted multiple statutory sections providing that Adair County shall elect a circuit clerk, and that the elected circuit clerk shall have the power of appointment over all her deputies.[7]

The General Assembly has the plenary power to provide by law the means by which the circuit clerk is selected and her duties and responsibilities. Mo Const. art. V § 15.4. The Missouri Constitution does not empower the judicial department to provide by law in any matter other than "practice, procedure and pleading." Mo. Const. art. 5 § 5. Thus, the longstanding legislative scheme establishing the manner of selection for the elected circuit clerk and her powers of appointment of her subordinates cannot be

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[7] §483.015 R.S.Mo, §483.245.2 R.S.Mo. It has done so since at least 1939. *See* §483.015 R.S.Mo. (1939) (election), §483.080 R.S.Mo. (1939) (appointment).

"The duties of the circuit clerk are specified probably in more detail than any other county officer. There are several hundred sections of the statutes and a number of the Supreme Court Rules that relate to his duties." *State ex rel. Geers v. Lasky*, 449 S.W.2d 598, 601 (Mo. 1970)

superseded by inferences emanating from the Court's general supervisory or superintending powers, or by its inherent powers, because those powers do not have the "force and effect of law." Mo. Const. art. 5 § 5. *Compare* art. 5 § 4.1 *with* § 5.[8] Steele's contention that "[t]his Court possesses express and inherent constitutional authority to administer the courts of this State, including the selection and appointment of deputy circuit clerks" relies entirely on purported implications from section 4.1, not "express[] direct[ion] or permi[ssion]," as required by article II, section 1.

[8] *See, e.g.*, *Comm. For Educ. Equal. v. State*, 294 S.W.3d 477, 489 (Mo. 2009) ("[U]nder the division of powers in our form of government, we have no right to trench upon the prerogatives of the other co-ordinate branches of our government.") (citing *State ex rel. Crow v. Bland*, 46 S.W. 440, 446 (1898)).

This Court's powers under Section 4.1 do not have "the force and effect of law."

Article V § 4.1	Article V § 5
The supreme court shall have general superintending control over all courts and tribunals. Each district of the court of appeals shall have general superintending control over all courts and tribunals in its jurisdiction. The supreme court and districts of the court of appeals may issue and determine original remedial writs. Supervisory authority over all courts is vested in the supreme court which may make appropriate delegations of this power	The supreme court may establish rules relating to practice, procedure and pleading for all courts and administrative tribunals, which shall have the force and effect of law. The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication. Any rule may be annulled or amended in whole or in part by a law limited to the purpose. (Emphasis added.)

Section 4.1 does not expressly authorize Steele or the Second Judicial Circuit to usurp Decker's appointing authority in violation of §483.245 R.S.Mo.

In his opening remarks, Steele applies the last in time rule of *Clark v. Kinsey*, 488 S.W.3d 750, 758-59 (Mo. App. 2016) to conclude that this Court's 2009 Order

supersedes §483.245 R.S.Mo. Steele's brief at 28-29 (applying the rule without citation). *Clark* held that this Court's rules of practice, pleading, and procedure supersede procedural statutes if they are promulgated after the statute is enacted. *Clark*, 488 S.W.3d at 758-59. Steele fails to appreciate that article V, section 5 provides such rules with the "force and effect of law," whereas article V, section 4.1 contains no similar provision. Steele has never claimed that the assignment of the circuit clerk's appointing authority is a matter of practice, procedure, or pleading, and such a contention would have no basis in law.

1. "As provided by law" in section 15.4 means as provided by statute.

Steele argues that article V, section 4.1 provides the law contemplated by article V, section 15.4. It does not. Contrary to Steele's contention, the phrase "as provided by law" in section 15.4 does not refer back to Article V, section 4.1 or any other constitutional provision. *Contra* Steele's brief at 33-35. Therefore, "as provided by law" in section 15.4 means as provided by statute.

Missouri courts have uniformly interpreted the phrase "as provided by law" to mean "as prescribed or provided by statute." *Wann v. Reorganized Sch. Dist. No. 6 of St. Francois County*, 293 S.W.2d 408, 411 (Mo. 1956).

> The first part of § 26(g), providing that 'All elections under this article may be contested,' is modified by the words 'as provided by law.' This latter phrase, when used in constitutions, has been held to mean as prescribed or provided by statute . . . .

Id. *Wann* states in dicta that "as provided by law" could also refer to other provisions of the Constitution, but held that the statute governed because there were no applicable constitutional provisions. *Id*. Here, as in *Wann*, there are no other applicable provisions of the Constitution. Therefore, "as provided by law" means as provided by statute.

Every Missouri case interpreting the phrase "as provided by law" has held that the phrase refers to statutes. *See, e.g.*, the following:

- *Eberle v. Plato Consol. Sch. Dist. No. C-5 of Texas County*, 313 S.W.2d 1, 4 (Mo. 1958) (holding that the language of Article VI, Section 26 (g) which provides that certain elections may be contested "as provided by law" means that the "method and manner for contesting particular elections was as provided or as was to be provided by the legislature.")
- *State ex inf. Nixon v. Moriarty*, 893 S.W.2d 806, 808 (Mo. 1995) (interpreting Missouri Constitution Article VII, Section 4, providing that "all officers not subject to impeachment shall be subject to removal from office in the manner and for the causes provided by law" means in the manner provided by the legislature)
- *Gerken v. Sherman*, 276 S.W.3d 844, 847 (Mo. App. W. Dist. 2009) (holding that Missouri Constitution article III, section 38 (b) providing that a special fund shall be created for the blind to be appropriated and used "as provided by law" creates a special constitutional mandate for action of the legislature, not the court)
- *State ex rel. Rolla Sch. Dist. No. 31 v. Northern*, 549 S.W.2d 596, 596–97 (Mo. App. 1977) (holding that the Missouri Constitution Article VI, Section 26(g), providing that particular elections may be "contested as provided by law" is not

self- executing and provides no authority to act in the absence of legislative enactment.).[9]

[9] "As provided by law" is a term of art used in many state constitutions, and has uniformly been interpreted as delegating power to the legislature: *Lawson v. Kanawha County Ct.*, 92 S.E. 786, 789 (W. Va. 1917) (cited with approval by the Missouri Supreme Court in *Wann*, 293 S.W.2d 408, 411 (Mo. 1956)), *Exline v. Smith*, 5 Cal. 112, 113 (1855) (holding that "as provided by law" means as provided by statute because the power to prescribe by law is inherently legislative, and that it would violate the separation of powers to vest such power in the judiciary), *Winters v. Hughes*, 24 P. 759, 761 (Utah 1861) ("The term "prescribed by law" means by law passed by the territorial legislature."), *Brinckerhoff v. Bostwick*, 1 N.E. 663 (N.Y. 1885) ("Such expressions as 'required by law,' 'regulated by law,' 'allowed by law,' 'made by law,' 'limited by law,' 'as prescribed by law,' 'a law of the state,' are of frequent occurrence in the codes and other legislative enactments; and they are always used as referring to statutory provisions only."), *In re Campbell*, 101 N.W. 826, 828 (Mich. 1904) (holding that the language "as provided by law" in a criminal sentencing statute "means 'provided by statute.'") (citing for the same proposition *People v. Cummings*, 50 N.W. 310, 315 (Mich. 1891)). *Fountain v. State*, 101 S.E. 294, 295-96 (Ga. 1919) ("We assume that no one will question that the term "provided by law" means provided by statute law."), *Shute v. Frohmiller*, 90 P.2d 998, 1001 (Ariz. 1939) ("The expressions, 'as provided by law,' and 'as prescribed by

As this Court concluded in *Wann*, when the Constitution specifies that some particular thing be as provided by law, "subsequent action by the legislature is contemplated to put the provision into operation." *Wann*, 293 S.W.2d at 411.

2. This Court's administrative powers do not supersede legislation adopted by the General Assembly, passed in accordance with its express constitutional mandate.

The General Assembly has the plenary power to make law. Mo. Const. art. III § 1, *State Auditor v. Jt. Comm. on Legis. Research*, 956 S.W.2d 228, 230–31 (Mo. 1997), *as modified on denial of reh'g* (Nov. 25, 1997), *Bd. of Educ. of City of St. Louis v. City of St. Louis*, 879 S.W.2d 530, 533 (Mo. 1994). "Any constitutional limitation, therefore, must be strictly construed in favor of the power of the General Assembly." *Id*. "[D]eference due the General Assembly requires that doubt be resolved against nullifying its action if it is possible to do so by any reasonable construction of that action or by any reasonable construction of the Constitution." *Id*. (internal citations omitted). "Legislative acts are entitled to deference, and this Court must give these acts any reasonable construction to avoid nullifying them." *Comm. for Educ. Equal. v. State*, 294 S.W.3d 477, 488 (Mo. 2009).

Steele asks this Court to nullify section 483.245 R.S.Mo, ignoring the express grant of power to legislate the manner of selection of personnel to aid in the business of

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law,' are, as we see it, susceptible of no other construction. The word 'law' in both expressions means statute.").

the circuit courts in article V, section 15.4, on the basis of a constitutional limitation he finds implied in article V, section 4.1. Steele's brief at 29-35. The General Assembly is not subject to the limitation Steele suggests, because it is expressly empowered to provide for the manner of selection of personnel to aid in the business of the circuit courts, art. V. section 15.4, and because there is a reasonable construction of the Constitution that avoids nullifying section 483.245 R.S.Mo: specifically, that the General Assembly has been granted power to provide for the manner of selection of personnel to aid in the business of the circuit courts by article V, section 15.4, and section 4.1 does not "expressly direct[] or permit[]" this Court to do so. Mo. Const. art. II § 1.

3. Article V, section 15.4 does not incorporate section 4.1 by reference.

Steele asserts that section 4.1's inherent administrative powers authorizes the Court to make law, and therefore section 15.4 "incorporates Section 4.1 by reference." Steele's brief at 33. This argument ignores the mandate of art. II § 1 that the judicial department is only allowed to make law if the Constitution expressly directs or permits it.

There is simply no reference back to section 4.1 in section 15.4. The text is silent precisely where Steele says it speaks.

B. Article V, section 15.4 is a specific delegation of power to the legislature and is an exception to the general supervisory powers of section 4.1.

"In general, constitutional provisions are subject to the same rules of construction as other laws . . . ." *StopAquila.org v. City of Peculiar*, 208 S.W.3d 895, 899 (Mo. banc 2006). Steele's argument that section 15.4's exception is swallowed by the general rule of section 4.1 violates numerous, longstanding rules of statutory and constitutional construction. *See* Steele's brief at 33-35.

First, section 15.4's specific delegation of power cannot be modified by section 4.1's general grant of power because specific constitutional provisions supersede more general ones concerning the same subject matter. "Where one provision of a statute contains general language and another provision in the same statute contains more specific language, the general language should give way to the specific." *Younger v. Missouri Pub. Entity Risk Mgmt. Fund*, 957 S.W.2d 332, 336 (Mo. Ct. App. 1997), *as modified* (Nov. 25, 1997).

Section 4.1 confers general powers. Section 15.4 provides a specific exception. It is of a limited scope and concerns a particular subject matter. When a general provision is in conflict with a more specific provision, the specific provision operates as an exception to the general one. *Younger*, 957 S.W.2d 332, 336 (Mo. Ct. App. 1997), *as modified* (Nov. 25, 1997).

Second, Steele's interpretation of "as provided by law" as secondary to the general superintending or supervisory power of the courts, exercised at the will of the court, interprets that clause in such a way as to make it superfluous and meaningless, thus

violating the well-accepted rule of statutory construction that requires every word and phrase be interpreted as meaningful. "[E]very word, clause, sentence, and provision of a statute" must have effect. "Conversely, it will be presumed that the legislature did not insert idle verbiage or superfluous language in a statute."" *Civ. Serv. Commn. of City of St. Louis v. Members of Bd. of Aldermen of City of St. Louis*, 92 S.W.3d 785, 788 (Mo. 2003) (quoting *Hyde Park Housing Partnership v. Director of Revenue*, 850 S.W.2d 82, 84 (Mo. banc 1993)).

Steele's interpretation of section 15.4 reduces it to a vestigial appendage without practical effect. If section 15.4 is read to allow the legislature to provide the manner of selection of personnel to aid in the business of the circuit court, but subject to a veto by the courts at the court's sole discretion (precisely the one rejected in *Geers*, 449 S.W.2d 598 (Mo. 1970)), then any legislature power delegated by the express text of Section 15.4 is illusory. Steele's contention that section 15.4 and 4.1 mean the same thing raises and leaves unanswered the question why section 15.4 appears in the 1979 revision of the judicial article at all. *See* Steele's brief at 33-35,

Third, Steele's interpretation that section 4.1 gives this Court unlimited power over all matters the constitution directs are to be "as provided by law" produces an absurd result. "As provided by law" is used more than 40 times in the Constitution as a whole, and twelve times in the judicial article alone. Because the rules of statutory construction require that words and phrases must be attributed the same meaning within a document, such interpretation would provide the judiciary with unlimited powers every time the Constitution delegates power "as provided by law" in matters ranging from the number of

judges who sit on the Missouri courts of appeals (article V § 13) to the subject matter jurisdiction of the associate civil courts (article V § 17).[10] *See* R.S.Mo. §§477.160, 477.170, 477.180 (number of judges on the courts of appeals), R.S.Mo. §517.011.1(1) (jurisdiction of associate civil courts).

Steele claims that ". . . 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." Steele's brief at 34. This contention depends entirely on his assertion that this Court has unlimited power to make law "over the judiciary, including its personnel." Steele's brief at 34. As argued above, in light of section 15.4's specific direction, the judicial department has no power to make law with respect to the manner of selection of personnel to aid in the business of the circuit courts. Any conflict between the judicial department's rules and statutes concerning the appointing authority of deputy circuit clerks must be resolved in favor of the statutes, because the judicial department has no power to make law with respect to personnel to aid in the business of the circuit courts. Mo. Const. art. II § 1.

[10] The phrase "as provided by law" occurs 12 times in the judicial article. Other cognate phrases occur more often. In each case, there is an accompanying statutory enactment. See Respondents' Appendix A3-A18 for an exhaustive list of each occurrence of the phrase "by law" in the judicial article and its accompanying statutory enactment.

C. The inherent power of this Court does not extend to the appointing authority of the elected circuit clerk of Adair County.

Contrary to Steele's argument, Steele's brief at 28-50, the inherent power of this Court does not supersede the specific, express and exclusive constitutional delegation to the legislature of the power to determine how personnel to aid in the business of the court shall be selected. Mo. Const. art. V § 15.4.

This Court has already rejected the contention that the inherent power of courts is sufficient to strip or limit the elected circuit clerk's appointing authority. *State ex rel. Geers v. Lasky*, 449 S.W.2d 598, 600-01 (Mo. 1970).

> The duties of the circuit clerk are specified probably in more detail than any other county officer. There are several hundred sections of the statutes and a number of the Supreme Court Rules that relate to his duties. As we have said, the circuit court is given certain supervisory powers. However, as an elected county official, required by law to give a bond conditioned upon the faithful performance of his duties and upon which he is responsible for his deputies, certainly relator [the circuit clerk] has the authority to control the details of the operation of his office, including the assignment of duties to his deputies. The duties of a courtroom deputy are very important. They are not, however, any more important than many other functions performed by relator's deputies. If the circuit court has the lawful authority, by rule, to require its approval before relator can assign a deputy clerk to each division, in principle the court can also extend the rule to require its

> approval for the assignment of duties to relator's other deputies. **We find no authority, inherent or otherwise, for a circuit court to assume that type of control over the conduct of the office of the circuit clerk.**

Id. (emphasis added). Yet Steele argues that an implied grant of power in section 4.1 empowers this Court do to precisely what *Geers* denied. Contrary to his attempt to distinguish the case, *Geers* was a wholesale rejection of judicial power, inherent or otherwise, to strip or limit the statutory duties provided by the legislature to the elected circuit clerk, and the decision was not limited to a mere resolution of a parochial intra-circuit dispute. Steele attempts to distinguish *Geers*, writing that "*Geers* is clearly distinguishable, because it addressed only the scope of the inherent common-law authority of an inferior court . . . ." Steele's brief at 43. But earlier in his brief, he cites several inferior court common-law authority cases, concluding from them that "[t]his Court's *plenary* supervisory authority over the lower courts . . . must be at least as robust as the inherent common-law authority of the inferior courts." Steele's brief at 31. Steele's implied powers legal theory is incoherent. His view of the common law authority of the inferior courts varies on an as-convenient basis.

Geers was decided in 1970, when there was no express constitutional limitation on the power to decide how personnel to aid in the business of the circuit courts shall be selected. But the 1979 revision to the judicial article confirmed the holding in *Geers*, expressly providing that the power to do so is confined to the legislature.

D. The superintending and supervisory powers of courts provided for in Art. V, Section 4.1 do not justify stripping elected circuit clerk Decker of her statutory duties.

Missouri cases have never held that a court's superintending control or supervisory power allows a court to strip the elected circuit clerk of her statutory duties. Instead, such powers run from superior courts to inferior courts, not elected circuit clerks, and can compel inferior courts to carry out ministerial duties. They have no broader scope than this.

In *State ex rel. St. Louis Boiler & Equip. Co. v. Gabbert*, 241 S.W.2d 79 (Mo. App. 1951), the Missouri Court of Appeals explained that the superintending control of superior courts is the power to issue extraordinary writs and compel the performance of ministerial duties and nothing more. The court wrote,

> However, in the exercise of the power of superintending control by the superior courts of this state, as in most states, when it is to be resorted to for an authority over and above that comprehended by the ordinary common-law writs, it would seem that it **extends only to the matter of compelling the proper performance of purely ministerial duties, and not to matters involving discretion or the exercise of a judicial power.**

Id. at 82 (quoting *State ex rel. Auto Fin. Co. v. Landwehr*, 71 S.W.2d 144, 145-46 (Mo. App. 1934) (emphasis added). In the *Landwehr* case, the Court of Appeals explained that writs issued under a superior court's supervisory power or superintending control over inferior the courts "runs to the inferior court or judge in his official capacity," and not, for

instance, litigants. *Landwehr*, 71 S.W.2d at 145-146.

Thus the superintending and supervisory control over inferior courts and tribunals contemplated by article 5, section 4.1 of the Missouri Constitution is the power to compel inferior courts to carry out ministerial duties, and does not reach a court's exercise of discretion or exercise of judicial power. It is not the power to ratify or veto an elected circuit clerk's exercise of her sound discretion in deciding which deputy circuit clerks to hire and which deputy circuit clerks to fire or discipline, because, as the Supreme Court stated in *Geers*, "[w]e find no authority, inherent or otherwise, for a circuit court to assume that type of control over the conduct of the office of the circuit clerk." 449 S.W.2d 598, 600-01 (Mo. 1970).

Though the circuit clerk may be "an arm of the court" in the contexts of the court's ministerial duties not involving discretion to accept motions and file papers, *Canon v. Nikles*, S.W.2d 472, 475 (Mo. App. 1941), and delivering a budget to the Franklin County budget officer, *Twentieth Judicial Circuit of State of Missouri v. Board of Commissioners of County of Franklin*, 911 S.W.2d 626, 628 (Mo. 1995), she is also an "elected county official, required by law to give a bond conditioned upon the faithful performance of [her] duties and upon which [she] is responsible for [her] deputies," *Geers*, 449 S.W.2d at 600-01 (Mo. 1970). No Missouri court has the power to divest the elected circuit clerk of her statutory power of appointment, because the General Assembly has vested it in her and it has plenary power to so provide. Mo. Const. art. II § 1, art. V § 15.4, R.S.Mo. §483.245.

II. Steele cannot rely upon the authority of the 2009 Supreme Court Consolidation Order because he failed to "consult with the Court en banc," as required before he appointed himself the appointing authority for deputy circuit clerks in Adair County, and the trial court's holding that Steele failed to comply with the Consolidation Order is supported by substantial evidence.

(Addresses Steele's Points II and IV.)

As the underlying judgment of the circuit court in this matter noted, a finding that the Second Circuit lacked authority to usurp the powers of the elected circuit clerk of Adair County is dispositive. *See* LF0379-385 (underlying judgment of the circuit court). While it is unnecessary to reach the remaining issues, Respondents Gall and Decker address several procedural issues Steele raises.

A. The 2009 Consolidation Order did not apply to the Second Judicial Circuit, which had already consolidated in 2008.

(Addresses Steele's Point II.)

The trial court correctly observed that this Court's 2009 Consolidation Order provides that ". . . it is therefore ordered that effective January 1, 2010, and until the further order of this Court, 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." LF 0382 (trial court's judgment), LF 0110 (2009 Consolidation Order). The Second Judicial Circuit had already consolidated deputy and division clerks in 2008. LF 0052, ¶ 1. Therefore, the 2009 Order did not apply to the Second Judicial Circuit and Steele may not rely on it.

Steele suggests that the scope of the order is ambiguous. Steele's brief at 52. It is not. The phrase "all circuit courts that have not previously consolidated all deputy circuit clerks and division clerks under the supervision of one appointing authority" admits of precise, univocal interpretation. It means all circuit courts that have not previously consolidated all deputy circuit clerks and division clerks under the supervision of one appointing authority. Because Adair County had done so already, the Order did not apply to the Second Circuit.

B. The trial court's judgment that Steele failed to comply with the 2009 Consolidation Order is supported by substantial evidence.

(Addresses Steele's Point IV.)

Steele claims to have relied on the 2009 Missouri Supreme Court Consolidation Order as justification for his self-appointment as appointing authority over the Adair County deputy circuit clerks. Regardless of whether Steele could take such action consistent with the Missouri Constitution, it is clear that he did not comply with the requirement of the consolidation order that he "consult[] with the court en banc" before making such designation. LF0111 (2009 Consolidation Order).

Steele admits that he emailed all judges in the circuit to poll their votes before he appointed himself appointing authority in May 2013. Steele's brief at 58-59. But Steele misses the point Gall and Decker raised in the trial court, that individually polling members of the court is not a substitute for consulting with the court *en banc* because the court *en banc* is a government body which cannot act unless it meets. Individual polling of members of a commission is otherwise known as notational voting and has been held

insufficient in a number of Missouri cases to substitute for a meeting of the government body as a whole. *State ex rel. Philipp Transit Lines, Inc. v. Pub. Serv. Commn.*, 552 S.W.2d 696, 703 (Mo. banc 1977) (holding that where a collegial governmental body can act, such body must convene and may not act through notational voting), *State ex rel. Churchill Truck Lines, Inc. v. Pub. Serv. Commn*, 555 S.W.2d 328, 336 (Mo. Ct. App. Kansas City District 1977) (holding that the procedural defect of notational voting "call[s] for reversal" under *Philipp Transit Lines*).

Because Steele admits that he merely polled the members of the Second Circuit en banc via e-mail, Steele's brief at 58-59, the trial court's judgment of January 13, 2016 is supported by substantial evidence.

Steele additionally argues that he nonetheless "substantively complied" with the 2009 Consolidation Order. Steele's brief at 58. The same substantial compliance argument was rejected by *Philipp Transit Lines*, 552 S.W.2d at 702.

Steele's Points II and IV should therefore be denied.

III. The trial court had subject matter jurisdiction over Gall and Decker's declaratory judgment action, and properly issued judgment on it.

(Addresses Steele's Points III, V, and VI.)

Steele contends that Gall and Decker are not entitled to a declaratory judgment, despite his assurances to the federal court that a Missouri declaratory judgment action was appropriate to resolve the present issues of Missouri state law. LF0036.[11] Steele further claims that the Thirteenth Circuit had no subject matter jurisdiction, on a variety of disparate theories. These claims misunderstand the subject matter jurisdiction of the trial courts and the law of standing.

A. Gall has standing because her petition alleges a legally protected interest.

(Addresses Steele's Point VI.)

Respondent Gall alleged in her petition that she

> filed *Gall v. Steele*, cause no. 2:13-cv-00111, in the Federal District Court for the Eastern District of Missouri, on December 9, 2013. This subsequent action is ancillary to the original complaint . . . .

[11] In her Order invoking *Pullman* abstention in the federal component of this litigation, Judge Perry of the Federal District Court for the Eastern District of Missouri states that in oral argument in the pending federal component of this litigation, defense counsel admitted that a declaratory judgment action was an appropriate state court remedy. LF0036.

LF0014 ¶ 12. Gall further alleged that

> [t]he issues presented herein are dispositive issues in the federal case *Gall v. Steele*, cause no. 2:13-cv-00111, which has been stayed pending resolution of this issue of Missouri law. See, Order of Judge Perry, attached hereto as Exhibit 1.

Id., ¶ 13. In his Answer, Steele admitted both factual allegations. LF201-202, ¶¶ 12, 13.

"Allegations in a petition which are admitted in an answer constitute a judicial admission, and a judicial admission waives or dispenses with the production of evidence and concedes for the purpose of the litigation that a certain proposition is true." *Holdredge v. Missouri Dental Bd.*, 261 S.W.3d 690, 693 (Mo. App. W. Dist. 2008) (internal citation, alterations, and quotation marks omitted).

Steele further acknowledges that "[o]n 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)." Steele's brief at 64.

Nonetheless, Steele maintains that Respondent Gall "has no standing to sue," because "[s]he failed to allege that she has any legally protected interest in this litigation." Steele's brief at 64. He insists that "Gall and Decker never went on to allege any specific affected rights of Gall." *Id*. at 65.

"When considering standing, there is no litmus test for determining whether a legally protectable interest exists. The issue is whether plaintiff has a pecuniary or personal interest directly at issue and subject to immediate or prospective consequential

relief. A party establishes standing, therefore, by showing that it has some legally protectable interest in the litigation so as to be directly and adversely affected by its outcome." *Schweich v. Nixon*, 408 S.W.3d 769, 775 (Mo. banc 2013) (internal citations and quotation marks omitted).

Because Gall alleged that the issues presented in this case are dispositive of issues in a federal case to which she is a party, and that this case is ancillary to her federal case, Gall has therefore shown that she has a "legally protectable interest in the litigation so as to be directly and adversely affected by its outcome." *Schweich*, 408 S.W.3d at 775 (Mo. banc 2013). In short, Gall wins or loses her federal suit depending on the outcome of her state declaratory judgment action, and she said so in her petition. LF 0014 ¶ 13.

Steele's Point VI should therefore be denied.

B. Decker is expressly exempted from Rule 7. Therefore, Rule 7 provides her with no remedy at law and she is entitled to declaratory judgment.

(Addresses Steele's Point V(B)).

Steele contends that Decker should have sought administrative relief under Rule 7. Steele's brief at 62-63. But Decker is expressly exempted from Rule 7 by Rule 7B1.2.a, which provides, "The Circuit Court Personnel System shall not govern the following circuit court employees: (a) Circuit court employees whose salaries are fixed by statute, including . . . circuit clerks . . . ." LF 0041 (emphasis in original). Decker therefore has no rights or obligations under Rule 7. An appeal under Rule 7 is therefore not available to Decker, and as a consequence, Rule 7 provides Decker with no remedy at law. *See Moore*

v. Pelzer, 710 S.W.2d 416, 423 (1986 Mo. Ct. App.) (affirming reversal of administrative body's decision because personnel administrative body had no jurisdiction over employee where applicable rules exempted him).

Steele's Point V should be denied.

C. The procedural inadequacies of Steele's self-appointment were raised in count I of Respondents' Petition, and were not affected by their dismissal of their Sunshine Law claim in Count II.

(Addresses Steele's Points III(A) and III(B).)

Steele claims that "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." Steele's brief at 53-54. Steele later claims that the Sunshine Law count of Respondents' petition "was the sole basis upon which Respondents sought declaratory relief based on the procedural inadequacies" of Steele's May 2013 self-appointment. *Id*. at 55.

The Missouri Sunshine Law does not provide for the issue of notational voting.[12]

[12] The Missouri Sunshine Law provides for the remedy of voiding the acts of public governmental body for failure to hold open meetings when required by the statute (R.S.Mo. §§610.011.1, 610.022.1) and for failure to provide public notice of such open meetings (R.S.Mo. §610.022.2). It does not provide that public governmental bodies shall not use notational voting.

See, e.g., R.S.Mo. §610.015 (providing that "all votes shall be recorded," but failing to mandate any particular manner of voting). Instead, the prohibition against notational voting is provided for by *State ex rel. Philipp Transit Lines, Inc. v. Public Service Commission*, 552 S.W.2d 696, 703 (Mo. banc 1977) (declining to consider the Sunshine Law because "we see no useful purpose in extending this opinion to decide whether s 610.015 provides an additional mandate for that method of acting on reports and orders such as here involved."). Under *Philipp Transit Lines*, the remedy for notational voting is that a decision arrived at through notational voting is voidable and subject to attack on judicial review. 552 S.W.2d 696, 703 (Mo. banc 1977). The trial court reviewed Steele's use of notational voting and properly voided Steele's May 2013 self-appointment.

Therefore, Steele's Point III should be denied.

1. There is a basis in the pleadings for declaratory judgment on the matter of Steele's procedurally defective self-appointment to the elected circuit clerk's statutory power.

(Addresses Steele's Point III(A).)

Contrary to Steele's Point III(A), the allegations in the Petition, paragraphs 20-25 support the trial court's judgment, as do the attachments to the petition. *See* Exhibit 4 to the Petition at LF0052-0053 (2008 Consolidation Agreement signed by Steele, Swaim, and Decker), Exhibit 5 to the Petition, at LF0054-0055 (the May 23, 2012 order by which Steele appointed himself appointing authority for the Second Circuit's judicial clerks). None of the above averments are contained within Respondents' count II (beginning at ¶

31), which they dismissed voluntarily. LF0011-0018 (active portion of the petition), LF0188 (voluntary dismissal).

There is therefore a basis in Count I of respondents' petition for declaratory judgment on the matter of Steele's procedurally defective self-appointment to the elected circuit clerk's statutory power. As argued *supra* in section III(A), the prohibition on notational voting is not provided for by the Missouri Sunshine Law.

2. Declaratory relief is the appropriate remedy here.

(Addresses Steele's Point III(B).)

Steele claims in his Point III(B) that both Gall and Decker had remedies under the Missouri Sunshine law that they failed to pursue, and therefore, declaratory judgment on the matter of the procedural inadequacy of Steele's self-appointment to the appointing authority for Decker's deputy circuit clerks is not available. Steele's brief at 55-57.

Steele fails to understand that the Missouri Sunshine law does not provide a remedy for the procedural defect of notational voting. Because there is no remedy at law under the Sunshine Law for notational voting, Gall and Decker are not barred from seeking declaratory relief on that issue. The trial court's holding with respect to the procedural inadequacy of Steele's self-appointment was appropriate and correctly decided.

Therefore, Steele's Point III should be denied.

D. The trial court had subject matter jurisdiction.

(Addresses Steele's Point V(A).).

Trial courts in Missouri "have original jurisdiction over all cases and matters, civil and criminal." Mo. Const. art. V § 14(a). *Accord J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 253 (Mo. banc 2009), *M.S. v. D.S.*, 454 S.W.3d 900, 900 (Mo. banc 2015). Therefore, contrary to Steele's claims, the trial court had subject matter jurisdiction.

Steele's citation to *Gregory v. Corrigan*, 685 S.W.2d 840, 841 (Mo. banc 1985), an appeal from a specially appointed trial judge's adjudication of local circuit court rules, misses the point of that case. *Gregory* did not contravene the express provisions of the judicial article of the Missouri Constitution. Instead, it was "an appeal from a declaratory judgment by a special trial judge appointed by this Court to hear the case." *Id*. The procedure therein was irregular and tailored to the heavily-litigated crisis within the St. Louis County circuit courts in the mid 1980s. This Court clarified that the appointment of a special trial judge whose judgments are directly appealable to the Supreme Court ". . . is not intended to impinge upon or preclude the application of regular judicial processes in matters of this kind." *Id*. at 842 n. 3.

Steele's Point V should be denied.

Conclusion

The Judgment of January 13, 2016 should be affirmed for the reasons set forth above.

Respectfully submitted,

SCHWARTZ, HERMAN & DAVIDSON

By: /s/Robert Herman
Robert Herman, Bar No. 32376MO
/s/ Edward Wells
Edward Wells, Bar No. 68471MO
8820 Ladue Road, Suite 201
St. Louis, Missouri 63124
Ph: (314) 862-0200
Fx: (314) 862-3050
bherman@laduelaw.com
ewells@laduelaw.com
Attorneys for Respondents

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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 10,082 excluding the cover, the signature block, and this certificate.

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By: /s/Robert Herman