IN THE
SUPREME COURT OF MISSOURI

No. SC97418

STATE ex rel. THE CURATORS OF THE UNIVERSITY OF MISSOURI,

Relator,

v.

THE HONORABLE JOSEPH L. GREEN,
Circuit Court of St. Louis County,

Respondent.

BRIEF OF RELATOR, THE CURATORS OF THE UNIVERSITY OF MISSOURI

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JURISDICTIONAL STATEMENT

This petition arises from a timely filed motion for change of venue, which was denied by the circuit court.

> This Court has the authority to "issue and determine original remedial writs." Mo. Const. art. V, § 4.1. "It is well-established that this Court accepts the use of an extraordinary writ to correct improper venue decisions of the circuit court before trial and judgment."

State ex rel. Heartland Title Servs., Inc. v. Harrell, 500 S.W.3d 239, 241 (Mo., 2016), quoting *State ex rel. Kan. City S. Ry. Co. v. Nixon*, 282 S.W.3d 363, 365 (Mo. 2009). Relator sought and was denied relief in the Missouri Court of Appeals, Eastern District. No. ED107047. Adequate relief is thus not available by application to a lower court. *See* Rule 84.22.

STATEMENT OF FACTS

A. The bequest to The Curators "as trustees, in trust."

To its Second Amended Petition (as to its original and First Amended Petitions), Hillsdale includes and incorporates the will of Mr. Sherlock Hibbs—the *sole* instrument through which Mr. Hibbs bequeathed the funds at issue. His estate paid funds to The Curators and The Curators received funds from the estate.

Hillsdale first alleged:

> 8. In his Last Will and Testament dated April 3, 2002, Mr. Sherlock Hibbs, a graduate of MU, made a bequest of $5,000,000 to the University to be held and administered upon certain terms and conditions.

Exhibits to Writ Petition ("Exh."), p. 4. Hillsdale then attached and incorporated "as Exhibit 1 … a true and correct copy of the Last Will and Testament of Mr. Sherlock Hibbs." *Id.*

Mr. Hibbs began Article Seven of his will with:

> ARTICLE SEVEN
>
> Miscellaneous Devises. I devise to the following persons the sums of money or other property as specified. Except as otherwise provided, individual, non-charitable devisees shall of the option of having their pecuniary devises satisfied wholly or partially in the form of marketable securities included in my estate subject to administration. …

Exh. p. 32. He then listed 82 separate bequests[1]—most to "individual, non-charitable" recipients.

Mr. Hibbs chose to direct just three of those to or through trusts—the Natalie Black Bowman Trust, in bequests (1) and (2); a special needs trust for Philip Chase, in bequest (84); and the bequest to the Curators, at issue here:

> (83) Five Million ($5,000,000.00) Dollars to the Curators of the UNIVERSITY OF MISSOURI, ***as trustees, in trust,*** to be held and administered upon the following terms and conditions:
>
> (a) The ***trustees*** shall divide this devise into six (6) separate amounts, to wit: One Million One Hundred Thousand ($1,100,000.00) Dollars, One Million One Hundred Thousand ($1,100,000.00) Dollars, Five Hundred Sixty Seven Thousand ($567,000.00) Dollars, Five Hundred Sixty Seven Thousand ($567,000.00) Dollars and Five Hundred Sixty Six Thousand ($566,000.00) Dollars. Each said amount shall be held in a separate ***trust*** fund as follows, to be known respectively as:
>
> THE JAMES HARVEY ROGERS CHAIR OF MONEY, CREDIT AND BANKING ($1,100,000.00),
>
> THE EMMA S. HIBBS/LARRY GUNNISON BROWN CHAIR OF BUSINESS AND ECONOMICS ($1,100,000.00),
>
> THE EMMA S. HIBBS/FREDERICK A. MIDDLEBUSH CHAIR OF ENTREPRENEURSHIP ($1,100,000.00), and three (3) distinguished professorships, two of them to be named solely THE EMMA S. HIBBS DISTINGUISHED

[1] Article Seven has 84 numbered paragraphs, but the first two relate to the bequest in trust for one person, and the third declares the intentional omission of another.

PROFESSORSHIP (each at $567,000.00) and one of them to be named THE MYRON WATKINS DISTINGUISHED PROFESSORSHIP ($566,000.00).

(b) The said separate and named ***trust*** funds are established for the benefit of and shall be used at the UNIVERSITY OF MISSOURI-COLUMBIA COLLEGE OF BUSINESS AND PUBLIC ADMINISTRATION.

(c) Each said separate and named ***trust*** fund shall be administered and distributed as follows:

(i) The principal sum, and any other funds contributed after the death of Sherlock Hibbs from any source, shall be added to the corpus provided, however, that a donor may request that a particular gift be added to the distribution account in order to provide increased stipends.

(ii) Investment and reinvestment of the fund shall be in accordance with the policy of the Curators of the UNIVERSITY OF MISSOURI. It is my earnest suggestion and request (but not direction) that the fund be invested conservatively and prudently in common stocks of high-quality companies, exclusively.

(iii) Distributions from the fund shall be credited to a distribution account established on the records of the UNIVERSITY OF MISSOURI-COLUMBIA, to augment and support the work of the Chair or Distinguished Professorship, as the case may be.

(iv) Uses of distributions from the fund to the occupant of the Chair or Distinguished Professor, as the case may be (hereinafter "the appointee"), may in his or her sole discretion, include but shall not be limited to, research support, professional development, teaching materials, travel, staff support and salary. The

trustees shall distribute to the appointee an annual amount equal to no less than five (5%) percent of the fair market value of the fund determined as of the last business day of each year.

(v) The length of time the appointee shall occupy his or her position, and the selection of the appointee shall be recommended to the Provost of the UNIVERSITY OF MISSOURI-COLUMBIA by the Dean of the College of Business and Public Administration. The appointee shall be designated under the regular procedures applying to the appointment of a member of the university faculty. The appointee shall become a member of the faculty of the College of Business and Public Administration, with duties and responsibilities comparable to other professors of the College of Business and Public Administration. The appointee's university salary payable from other sources shall be comparable to salaries paid to other professors of the College of Business and Public Administration.

(vi) The appointee shall have all the rights, privileges and obligations of a member of the faculty of the UNIVERSITY OF MISSOURI-COLUMBIA COLLEGE OF BUSINESS AND PUBLIC ADMINSITRATION. The appointee's qualifications will be considered in light of his or her experience, achievements and reputation within the finance community. The appointee must be a dedicated and articulate disciple of the free and open market economy (the Ludwig von Mises Austrian School of Economics). If the Chair or Distinguished Professorship, as the case may be, remains vacant for a period of five (5) consecutive years, the trustees shall forthwith distribute the then balance of the fund to HILLSDALE COLLEGE, Hillsdale, Michigan, and if HILLSDALE COLLEGE is not then an organization described in Sections 170(c) and 2055(a) of the Internal Revenue Code of 1986 at the time when any principal or income of the fund is to be distributed to it, then the ***trustees*** shall distribute the balance of the fund to such one or

more publicly supported charitable organizations described in Sections 170(c) and 2055(a) as the ***trustees*** in their sole discretion shall select. At the end of each four (4) year term commencing with the date of my death, the ***trustees*** shall promptly and in writing inform the competent authorities of HILLSDALE COLLEGE of the name and qualifications of each prior and present year's appointee and shall certify that the appointee is a dedicated and articulate disciple of the Ludwig von Mises (Austrian) School of Economics. Failure to promptly so inform and certify shall create a legal presumption that the balance of the fund should be distributed to HILLSDALE COLLEGE at the end of the consecutive five (5) year term that coincides with the four (4) year term.

(vii) Any amount from the fund credited to the distribution account in excess of the amount expended in any one fiscal year shall be retained for future use. Periodically, however, the Dean of the College of Business and Public Administration, after consultation with the Provost of the UNIVERSITY OF MISSOURI-COLUMBIA, may request that specific unused sums in the distribution account be transferred to, and become a permanent part of the fund.

(viii) Realizing that the human mind cannot predict the circumstances of the future, the ***trustees*** are authorized to change the terms and conditions applicable to the administration of this fund (but never in a manner that would jeopardize any state or federal tax exemptions available to the fund), if, in the judgment of the trustee, it becomes clearly necessary to do so in order to carry out my wishes for the use of the fund. Notwithstanding the foregoing provisions of this paragraph, the ***trustees*** do not have the authority to make changes vitiating the consecutive five (5) year requirement and the free and open market economy qualification requirement set out in the preceding subparagraph (vi).

> (ix) Announcement of the fund and pertinent details shall be made in the usual university publications provided for this purpose.

Exh. pp. 44-46 (emphasis added).

Among the bequests that Mr. Hibbs chose *not* to make to or "in trust" were those to three other institutions of higher education:

- (80), "to HILLSDALE COLLEGE for the purpose of the endowment of a permanent chair for an economics professor."
- (81), "to ROBERT COLLEGE, Istanbul, Turkey" for "a permanent chair for an economics professor."
- (82) "to the UNIVERSITY OF KANSAS, for the purpose of endowing a permanent chair for an economics professor."

Exh. pp. 42-43.

B. Administration by The Curators.

The Curators' usual place of business—and the place where the records regarding the funds received "in trust" from the Hibbs bequest are kept—is Columbia, Boone County. Exh. p. 79.[2]

Though Hillsdale's Second Amended Petition, like the original and First Amended Petitions, says nothing about where The Curators keep their records or perform their duty as trustees, it does incorporate some of The

[2] Though The Curators attached the Caldwell affidavit (Exh. p. 79, cited above) to the motion below, the burden was on Hillsdale, as plaintiff, to show that venue is proper in St. Louis County. *See, e.g.*, *M.R. v. S.R.*, 238 S.W.3d at 207 (Mo.App. W.D.2007), quoted with approval in *Kanatzar*, 413 S.W.3d at 26.

Curator's records of administration: internal University documents that Hillsdale attached as Exhibits 2-6 to the Second Amended Petition. Exh. pp. 61-78. Each of those documents is a "recommend[ation] that a fund be established in the records of the University of Missouri-Columbia" for one of the five professorships or chairs listed in the Hibbs bequest. *Id.* The recommendations were made over the signatures of the Provost and the Dean of the College of Business, and were approved by The Curators as shown by the signature of the Treasurer. *Id.*

C. The lawsuit.

Hillsdale filed suit in St. Louis County attacking how The Curators administer the funds given to them "as trustees, in trust," by Mr. Hibbs, through his will. In its Count I, Hillsdale alleges that "the University of Missouri" (presumably meaning The Curators as the legal entity named as the defendant) failed to make appointments that met the terms of the bequest. In Count II, Hillsdale alleges that The Curators failed to comply with the specific terms and conditions of alleged "contracts" between the estate and The Curators (actually, the fund management recommendation memos described above). In Count III, Hillsdale again alleges that The Curators failed to comply with the terms of the bequest. In each instance, Hillsdale describes the relationships among itself, the Estate, and The Curators as "contracts" and seeks relief for breach of those "contracts" instead of seeking relief under the terms of the bequest.

As to venue, Hillsdale admits that it is a nonresident—a "college located in Hillsdale, Michigan." Exh. p. 1, ¶ 2. As to the location of The Curators, Hillsdale alleges just that the University has a campus in St. Louis County. Exh. p. 3-4, ¶¶ 3, 6(e). Hillsdale alleges nothing regarding where the

trust established by the bequest could be or is registered, nor where the trust is administered or records kept. Nor does Hillsdale allege in its Petitions where any action pertinent to the trust occurred—though by incorporating the Hibbs will that requires appointments in the "UNIVERSITY OF MISSOURI-***COLUMBIA*** COLLEGE OF BUSINESS" (Exh. p. 45, emphasis added), it implicitly confirms that any actions had to be performed in Boone County.

The Curators were served with the original Petition on February 26, 2018, through the University's General Counsel in Columbia, Boone County, Missouri. On April 17, 2018, The Curators filed an answer in which they admitted the sole fact alleged by Hillsdale as a basis for venue in St. Louis County, *i.e.*, that the University of Missouri-St. Louis is part of the University of Missouri system and is in St. Louis County. Answer, ¶ 6 (Appendix to Respondent's Opposition, at 131).

On March 28, 2018, The Curators filed their motion for change of venue, invoking § 456.2-204.1. The Curators attached, as noted above, an affidavit establishing that the trust records and administration are in Boone County, where The Curators maintains its office and staff. (Exh. p. 79.)

In opposition, Hillsdale made just two points, shown in its subheadings: "A. The Missouri Uniform Trust Code Does Not Determine Venue Because This Is Not a Judicial Proceeding Regarding the Administration of a Trust."; and "B. Venue Is Proper in St. Louis County Under the General Venue Statute." Hillsdale did not claim that venue could be proper in St. Louis County under § 456.2-204.1. Hillsdale did not provide any evidence to question the validity of the affidavit submitted by The Curators, nor any evidence otherwise relating to the administration of the trust. Hillsdale did

not ask the court to "allow discovery on the issue of venue." Rule 51.045(b). Instead, Hillsdale relied solely on the single fact pled and admitted with regard to the venue theory asserted in the petition: the presence of UMSL in St. Louis County.

The circuit court nonetheless denied the motion.

The Curators sought a writ in the Court of Appeals, No. ED106773. The Court of Appeals denied that petition without opinion. Hillsdale then filed its First Amended Petition, replacing the Petition on which the writ petition was based. When Relator sought a writ in this Court (No. SC97249), Hillsdale's attorneys, filing for Respondent, asked the Court to deny the writ petition as moot because it was based on the superseded petition—which this Court then did.

The Curators filed a second motion for change of venue, directed to the First Amended Petition. But Hillsdale then filed a Second Amended Petition. The Curators responded with an amended motion for change of venue, directed to the new petition, again attaching the affidavit. Hillsdale responded with the same two arguments. The circuit court denied that motion. Exhibit C hereto; Exh. p. 80.

The Curators again sought a writ in the Court of Appeals (No. ED107047); that Court denied the petition on September 11, 2018. This Court granted a preliminary writ on October 30, 2018.

POINTS RELIED ON

I. Relator is entitled to an order prohibiting Respondent from proceeding other than to transfer venue to Boone County pursuant to § 456.2-204(1), or in mandamus requiring the circuit court to transfer venue to Boone County, because this is a judicial proceeding involving trust administration subject to § 456.2-204(1), in that

- This judicial proceeding attacks the actions of trustees with regard to duties imposed by the trust document and seeks to eliminate the trust;
- A specific venue statute, § 456.2-204, applies because the proceeding addresses trust administration; and
- The proper venue under § 456.2-204 is Boone County, the usual place of business of the trustees, The Curators.

Bank of Am. N.A. v. Kanatzar, 413 S.W.3d 22 (Mo. App. W.D., 2013)

Rothermich v. Gallagher, 816 S.W.2d 194 (Mo. 1991)

Section 456.2-204, RSMo.

II. In the alternative, Relator is entitled to an order prohibiting Respondent from proceeding other than to transfer venue to Boone County or in mandamus requiring the circuit court to transfer venue to Boone County, because Boone County is the appropriate venue pursuant to § 508.010.1(2), in that plaintiff Hillsdale is not a resident of the State of Missouri and The

Curators is a resident of Boone County and may be found there.

Ormerod v. Hamilton, 130 S.W.3d 571 (Mo. 2004)

Rothermich v. Gallagher, 816 S.W.2d 194 (Mo. 1991)

Section 508.010.2, RSMo.

III. In the alternative, Relator is entitled to an order prohibiting Respondent from proceeding other than to transfer venue to Boone County or in mandamus requiring the circuit court to transfer venue to Boone County, because Boone County is the appropriate venue if there is no available statutory venue in that it is the place where any actions at issue took place (or where actions alleged to have been omitted should have taken place), the location of records and witnesses, and the residence of the only Missouri-resident party.

Rothermich v. Gallagher, 816 S.W.2d 194 (Mo. 1991)

Anglim v. Missouri Pacific R. Co., 832 S.W.2d 298 (Mo. 1992)

PRESERVATION AND STANDARD OF REVIEW

The question of proper venue was timely raised by The Curators: they sought a change of venue on April 17, 2018, which was within 60 days of being served on February 26, 2018, as required by Rule 51.045.

The more challenging preservation issue will be the one faced by Hillsdale. Rule 51.045 bars courts from considering "any basis [for venue] not stated in the reply" that must be filed "[w]ithin 30 days after the filing of a motion to transfer for improper venue." Hillsdale filed its reply on April 27, 2018. Hillsdale chose not to seek discovery, and provided to the circuit court no evidence, in its reply or later, to support its venue choice. When on August 8 The Curators renewed their motion specific to the Second Amended Petition filed that same day, Hillsdale took the same approach. So Hillsdale's basis for venue was and is limited to:

- *Factually*, the allegation that the University has a campus in St. Louis County and to the instructions in the Hibbs Will regarding the use of the trust funds solely on the separate Columbia campus.[3]
- *Legally*, to the claim that venue was proper in St. Louis County under the general venue statute—identified by Hillsdale in the original petition as "R.S. Mo. § 508.010(1) and R.S. Mo. § 508.010(4) …." Petition at 2 (Appendix to Opposition, p. 2), but modified in the Second

[3] In the Answer that they filed for Respondent, Hillsdale's counsel says, "Hillsdale sought discovery from the University with respect to the issue of whether the 'trust records,' if any, were located in Boone County or, rather, where the investments were held." Answer at 4, n.2. But Hillsdale did not seek that discovery until October 1, 2018, too late to add a basis for venue in St. Louis County—or even to use any information derived to support the basis asserted in the original reply, given that motions to change venue are "deemed granted" if not denied within 90 days. § 508.010.10, RSMo.

Amended Petition to say, "R.S. Mo. § 508.010.2(1)" (Exh. p. 2.), because the petitions said nothing about trust claims but alleged solely breach of contract.

Hillsdale thus waived any claim that venue could be proper in St. Louis County under § 456.2-204.

ARGUMENT

Where a specific venue statute applies to a particular suit, the general venue provisions in § 508.010 do not apply. As discussed in Point I, a specific venue statute applies here: § 456.2-2-4(1), part of the Missouri Uniform Trust Code.[4] That special venue statute applies because the Hibbs bequest to The Curators "as trustees, in trust" created a trust and this suit, addressing in detail how the trust has been administered by The Curators as trustees, is necessarily a "judicial proceeding[] involving trust administration."

Were there no special venue statute applicable, this matter would still be heard only in Boone County, for one of two reasons.

First, as discussed in Point II, the sole provision of the general venue statute that Hillsdale invokes, the first arm of § 508.010.2(1), puts venue in Boone County—the county where The Board of Curators resides. That conclusion requires, however, that the Court correct its error in stating in *State ex rel. Ormerod v. Hamilton*, 130 S.W.3d 571, 572 (Mo. 2004), that The Board of Curators has no residence.

Second, if the Court declines to apply § 456.2-2-4 and declines to modify its conclusion in *Ormerod*–necessarily concluding that *no* statute addresses venue in this case—the Court should distinguish its precedents declaring the there is no intrastate *forum non conveniens* doctrine in Missouri. The Court should say, consistent with its oft-repeated declarations regarding the legislature's role in setting venue, that for the rare case where the legislature

[4] Hillsdale has said that the Hibbs will is governed by Florida law. But the question of venue is one of Missouri procedure. "A forum state will always apply forum procedure." *Moore ex rel. Moore v. Bi-State Dev. Agency*, 87 S.W.3d 279 (Mo. App. E.D., 2002).

has not spoken regarding a proper venue of a case within the jurisdiction of Missouri courts, the legislature has left the question for the courts to answer. And that when the courts do answer that question, they are to do so using *forum non conveniens principles*. Applied here, those principles mean that a case brought against The Curators with regard to a bequest to The Curators that The Curators must administer for use solely on the Columbia campus must be heard in Boone County.

POINT RELIED ON I:

Relator is entitled to an order prohibiting Respondent from proceeding other than to transfer venue to Boone County pursuant to § 456.2-204(1), or in mandamus requiring the circuit court to transfer venue to Boone County, because this is a judicial proceeding involving trust administration subject to § 456.2-204(1), in that

- *This judicial proceeding attacks the actions of trustees with regard to duties imposed by the trust document and seeks to eliminate the trust;*
- *A specific venue statute, § 456.2-204, applies because the proceeding addresses trust administration; and*
- *The proper venue under § 456.2-204 is Boone County, the usual place of business of the trustees, The Curators.*

I. Venue is proper in Boone County pursuant to § 456.2-204.1.

a. Section 456.2-204, a specific venue statute, applies to proceedings involving trust administration.

"Venue in Missouri is determined by statute." *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 200 (Mo. 1991).

Plaintiff Hillsdale College invokes one subsection of the general venue statute: "R. S. Mo. § 508.010.2(1)." Second Amended Petition ¶ 6; Exh. p. 2. "Chapter 508 of the Revised Statutes normally governs venue." *M.R. v. S.R.*, 238 S.W.3d 205, 207 (Mo.App. W.D. 2007), quoted with approval, *State ex rel. Bank of Am. N.A. v. Kanatzar*, 413 S.W.3d 22 (Mo. App. W.D. 2013). But as discussed in Point II below, no part of § 508.010 applies to this case.

But it would not matter if one did. "Over the years, the General Assembly has adopted numerous special venue provisions." *State ex rel. Public Service Comm'n v. Joyce*, 258 S.W.3d 58, 62 (Mo. 2008). When available, those specific venue provisions override provisions in the general venue statute. *See, e.g., Igoe v. Department of Labor*, 152 S.W.3d 284, 288 (Mo. 2005). Section 456.2-204, a special venue statute, applies here.

Section 456.2-204 specifies the venue for "judicial proceedings involving trust administration." So the questions raised by the motion for change of venue were whether the petition initiated a "judicial proceeding involving trust administration," and if so, where § 456.2-204.1 placed venue.

b. The bequest at issue established an express testamentary charitable trust.

As noted above, the funds bequeathed to The Curators by Mr. Hibbs were given expressly—and only—to The Curators "as trustees, in trust." Exh. p.44. That bequest (or devise) created one or more trusts, with the conditions that Hillsdale seeks to enforce in this suit.

The Uniform Trust Code, as adopted in both Florida and Missouri, lists criteria for the creation of a trust. The Hibbs bequest to The Curators for the School of Business fits those criteria.

First, the settlor must have "capacity to create a trust." § 456.4-402(a), RSMo.; Fla Stat. § 736.0402.1(a).[5] Hillsdale has never suggested that Mr. Hibbs lacked capacity to create a trust. Indeed, to do so would cast doubt

[5] The Florida statute is available at http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&URL=0700-0799/0736/0736.html

even on Hillsdale's contract theory, because that theory is based on the terms of the will, and lack of capacity to create a trust would indicate a lack of capacity to make the will.

Second, the settlor must "indicate[] an intent to create the trust." § 456.4-402(b), RSMo.; Fla Stat. § 736.0402.1(b). That seems beyond dispute from the grant of the funds "to the Curators of the UNIVERSITY OF MISSOURI, as trustees, in trust, to be held and administered upon the following terms and conditions." Exh. p. 44. But Mr. Hibbs' declaration that The Curators take the funds solely "as trustees, in trust," is only the first use of "trustee" or "trust" in the bequest. In addition, Mr. Hibbs said (emphasis added):

- "The *trustees*" were to "divide this devise into six (6) separate accounts." Exh. p. 44.
- Each account "shall be held in a separate *trust* fund." Exh. p. 44.
- Each "separate and named *trust* fund [is] established for the benefit and shall be used at" the University's College of Business. Exh. p. 44.
- "Each said separate and named *trust* fund" must be "administered and distributed" as specified—*i.e.*, to professors in the College of Business. Exh. p. 44.
- If a position remained vacant for five years, "the *trustees* shall forthwith distribute the then balance of the fund." Exh. p. 45.
- "[T]he *trustees* are authorized to change the terms and conditions applicable to the administration of this fund" under certain circumstances. Exh. p. 46.

Throughout the nearly three pages of his Will addressing the bequest to The Curators, Mr. Hibbs consistently and repeatedly referred to the funds as being in "trust" and The Curators as administering the "trust" as "trustees." His expression of intent is unequivocal.

And it is confirmed by the contrast between his language with regard to his bequest for the University of Missouri and his bequests to others. As noted above, Statement of Facts pp. 9-14, Mr. Hibbs chose to include trust language in only three of his 82 bequests. And he omitted such language from his bequests to three other institutions of higher education—including his bequest to Hillsdale College. Exh. p. 15-16.

Third, a trust must either have "a definite beneficiary or [be a] charitable trust." § 456.4-402(c), RSMo.; Fla Stat. § 736.0402.1(c). The trust created by Mr. Hibbs has definite beneficiaries: (1) Mr. Hibbs specified that the "trust funds are established for the benefit of … the UNIVERSITY OF MISSOURI-COLUMBIA COLLEGE OF BUSINESS AND PUBLIC ADMINISTRATION" (Exh. p. 44), to be used to pay selected professors. And because the purpose of the trust was "the advancement of education," it qualifies as a "charitable trust." *See* § 456.1-103(4), RSMo.; Fla Stat. § 736.0103(5) (a "Charitable trust" is a trust "created for a charitable purpose as described in" § 456.4-405.1, RSMo., or Fla. State. § 736.0405(1), which in turn define "charitable purposes" to include "the advancement education.").

Fourth, the trustee must have "duties to perform." § 456.4-402(d), RSMo.; Fla Stat. § 736.0402.1(d). Hillsdale's claims rest entirely upon the premise that The Curators did not properly perform the duties of administration that Mr. Hibbs assigned to them "as trustees."

Finally, the "same person is not the sole trustee and sole beneficiary." § 456.4-402(e), RSMo.; Fla Stat. § 736.0402.1(e). Mr. Hibbs did not make The Curators the beneficiary. No appointed Curator individually, nor the Curators collectively, can benefit from the trust. Rather, the beneficiaries are the College of Business through payments to individual, selected professors in the College of Business—and, ultimately, students and others who benefit from the work of those professors.

Pursuant to the Uniform Trust Code, as enacted in both Missouri and Florida, Mr. Hibbs created a trust. His intent was crystal-clear.[6]

c. This case involves the administration of the testamentary trust created by Mr. Hibbs.

The suit brought by Hillsdale attacking the actions or inaction of The Curators is necessarily a "judicial proceeding involving trust administration." § 456.2-2-4. Mr. Hibbs required that The Curators "as trustees" "administer[]" the "trust fund" "upon the following terms and conditions.". Exh. p. 44. Hillsdale's entire complaint consists of claims that The Curators

[6] In the Answer Hillsdale's counsel filed in this Court for Respondent, Hillsdale quoted cases from California, Minnesota, and Connecticut saying that use of the word "trust" in deeds and similar documents is not sufficient to create a trust. Answer at 3. But none of those cases dealt with a bequest remotely like the one executed by Mr. Hibbs. Hillsdale then claims that The Curators "failed to treat the bequest as a trust." *Id.* Hillsdale omitted any explanation or support for the implicit claim that the trustees' actions or inaction could somehow transform the trust created by Mr. Hibbs into something else. Hillsdale instead pointed to two irrelevant facts: that The Curators did not register the trust (registration is optional, not required); and that the funds were managed as part of the University's endowment (which Mr. Hibbs' will permitted—*see* Exh. p. 46 ("Investment and reinvestment of the fund shall be in accordance with the policy of the Curators of the UNIVERSITY OF MISSOURI.")).

violated the "terms and conditions" that Mr. Hibbs imposed on them as trustees.

That conclusion is supported by the non-exclusive list of matters that the Trust Code says fall within the scope of "proceedings involving trust administration." § 456.2-202.3, RSMo.; Fla. Stat. § 736.0201.4. Among them are proceedings to do what Hillsdale asks the court to do:

- Declare rights
    - Hillsdale seeks a declaratory judgment as to its rights in the funds given to The Curators "as trustees, in trust."
- Interpret or construe terms
    - Hillsdale asks the court to "interpret or construe" various terms under which The Curators received and must administer the trust funds, including what it means to be a "disciple" of a particular "school" of economics.
- Review actions of a trustee
    - Hillsdale asks the court to review the actions of The Curators, whose authority was established by the bequest to them solely "as trustees, in trust."
- Terminate a trust
    - The effect of granting Hillsdale the relief sought would be to "terminate the trust," *i.e.*, all funds would be removed from the trust and turned over to Hillsdale.

Compare Kanatzar, 413 S.W.3d at 27-28. Every basis for relief that Hillsdale asserts arises from administration of the trust. And every form of relief Hillsdale seeks would direct or preempt the administration of the trust by the trustees—The Curators.

This case, then, is not like cases in which the relationship between the claims and the trust is tangential. Unlike *In re J.P. Morgan Chase Bank, N.A.*, 361 S.W.3d 703 (Tex. App. 2011), on which Hillsdale relied below, this *is* an "action relating to the trust itself or the operation thereof." 361 S.W.3d at 706. The only basis on which The Curators took the bequest was "as trustees," bound to administer the bequest "in trust." Or to use the language of another Texas case that Hillsdale cited below, this suit *was* "brought … to determine the existence or non-existence of facts affecting the administration of the trust." *McCormick v. Hines*, 498 S.W.2d 58, 62 (Tex. App. 1973). It will not be possible to resolve Hillsdale's claims without determining the qualifications of those who The Curators appointed (or that the Provost, with The Curators' approval, appointed) to the chairs provided for in the bequest, *i.e.*, how The Curators administered the trust. And any relief for Hillsdale would require a judge to affect the administration of the trust.

In the absence of actual language, statutory or precedential, on which to rely when claiming that § 456.2-204 does not apply as broadly as its language demands, in the circuit court and the Court of Appeals Hillsdale opposed the application of § 456.2.204 by listing reported Missouri cases in which, Hillsdale claimed, a trust was involved, but the case was handled outside the probate division and thus, according to Hillsdale, outside § 456.2.204. In none of those did the court actually address the question of venue under § 456.2.204. And of course, courts cannot amend or repeal that venue statute by ignoring it.

But the varying lists that Hillsdale provided to the courts below do not even show that courts have knowingly but silently ignored, limited, or distinguished the trust venue statute. Some even show the contrary. For example, the second case on the list that Hillsdale provided to the Court of

Appeals in response to Relator's most recent writ petition was *Winston v. Winston*, 449 S.W.3d 1 (Mo. App. W.D. 2014). But that case was actually moved to the probate division on motion—and stayed there. *See* docket, No. 1016-CV203040. And two other cases on that list were classified as falling within the scope of the probate division: the Casenet records for both *Matter of Wilma G. James Trust*, 487 S.W.3d 37 (Mo. App. S.D. 2016), Cir. Ct. No. 13PH-PR00079, and *Barnett v. Rogers,* 400 S.W.3d 38 (Mo. App. S.D. 2013), Cir. Ct. No. 13PH-PR00079, show that the "case type" was "PR Miscellaneous Trust." And disposition in each instance is recorded as a disposition in probate: "Probate Ord Close File Misc."

We do not know, for the other cases that Hillsdale cited below, whether Hillsdale is right, *i.e.*, that each was assigned to and handled outside the "probate division." Hillsdale has neither explained how it concluded that the cases were assigned outside the probate division, nor provided a basis for inferring that the assignment received any judicial consideration. We do know that someone (presumably each plaintiff, upon filing) marked each of those cases with a non-probate "case type." But "case type" is not a legal determination of anything, including venue. And knowing the name of the judge who handled the case tells us nothing: even in circuits where there is a judge assigned exclusively to a probate division, individual probate cases may be assigned to judges who sit in other divisions for various reasons (including, but not limited to, a change of judge under Rule 51.05).

d. The proper venue under § 456.2-204 is the usual place of business of the trustees appointed by Mr. Hibbs: Boone County.

Again, § 456.2-204 provides the venue for all "judicial proceedings involving trust administration." Which clause within that section determines

venue depends on whether the trust has been or can be "registered in this state" and if so, where. § 456.2-204.1(1) and (2).

Section 456.027 tells us whether a trust can be registered and, if so, where:

> 1. The trustee of a trust having its principal place of administration in this state may register the trust in the probate division of the circuit court of the county wherein the principal place of administration is located.

If the trust's "principal place of administration" is in Missouri, then the trust may be registered in this state. "Principal place of administration of a trust" is statutorily defined as "the trustee's usual place of business where the records pertaining to the trust are kept." § 456.027.3. And if an eligible trust is registered (though there is no requirement that every trust be registered), it must be registered "in the probate division of the circuit court of the county wherein the principal place of administration is located." § 456.027.

As shown in the Affidavit of Ashley E. Caldwell, Exhibit p. 79, the "principal place of administration" of the trust created by the Hibbs bequest is in Boone County. So the trust can be (and now has been[7]) registered there.

Because the trust created by the Hibbs bequest could be registered in Missouri, the pertinent venue provision is § 456.2-204.1:

> 1. Venue for judicial proceedings involving trust administration shall be:

[7] The trust has recently been registered (separately for each of the chair or professorship) in Boone County. *See* Nos. 18BA-PR00418, 18BA-PR00419, 18BA-PR00420, 18BA-PR00421, 18BA-PR00422, and 18BA-PR00423 (Boone County).

> (1) For a trust then registered in this state, in the probate division of the circuit court where the trust is registered; or
>
> (2) For a trust not then registered in this state, in the probate division of the circuit court where the trust could properly be registered; …

See Kanatzar, 413 S.W.3d at 27-28. The trust could be (and now has been) registered in Boone County. That is the venue "determined by statute." *Rothermich*, 816 S.W.2d at 200.

POINT RELIED ON II

In the alternative, Relator is entitled to an order prohibiting Respondent from proceeding other than to transfer venue to Boone County or in mandamus requiring the circuit court to transfer venue to Boone County, because Boone County is the appropriate venue pursuant to § 508.010.1(2), in that plaintiff Hillsdale is not a resident of the State of Missouri and The Curators is a resident of Boone County and may be found there.

II. Absent a specific venue statute, Boone County would be the appropriate venue pursuant to the general venue statute.

To claim that venue is instead proper in St. Louis County, Hillsdale cites the general venue statute, § 508.010. Second Amended Petition at 2; Exh. p. 2. Subsection 2 of that section applies to "all actions in which there is no count alleging a tort." Hillsdale carefully crafted its Petition to avoid pleading a tort count, so if § 508.010 applies, it must be, as Hillsdale pleads, through subsection 2. Subsection 508.010.2 contains four subparts. In its Second Amended Petition, Hillsdale appropriately cites just one, § 508.010.2(1).

That subpart contains two "arms" (this Court's word in *Ormerod*, 130 S.W.3d at 572). One "arm" provides for venue in "the county within which the plaintiff resides, and the defendant may be found" (§ 508.010.2(1)). That "arm" cannot apply here because Hillsdale does not "reside" in any Missouri county. And though Hillsdale may wish, as it suggested below, that courts would adopt some legal fiction and deem Hillsdale a resident of St. Louis County, Hillsdale cited no precedent or authority making that option available—particularly where, as here, no legal fiction is necessary to find another statutory venue for Hillsdale's claim to be brought as a nonresident.

The other "arm" says that an action against a "defendant [that] is a resident of the state" may be filed "in the county within which the defendant resides." But this Court concluded in *Ormerod* that The Curators "simply does not have a county of residence for venue purposes." 130 S.W.3d at 572. So unless this Court reconsiders that *Ormerod* conclusion (which it should, if it reaches § 508.010), that "arm" of subsection 508.010.2(1) cannot apply here, and there would be no statutory venue absent § 456.2-204 (leading to Point III, below).

In *Ormerod*, this Court addressed the availability of both "arms" of § 508.010.2(1) to a resident plaintiff suing The Curators. Ormerod, a resident of Boone County suing The Curators in Jackson County, invoked the first "arm." Ormerod claimed that he could force The Curators to defend in Jackson County, apparently on the theory that The Curators "resides" there because of the location of the University of Missouri-Kansas City. 130 S.W.3d 571.

This Court rejected that premise—because it could not find a statute designating any county as The Curators' residence:

> While Curators is a resident of the state and the University of Missouri has offices for conducting its business in every county of the state, no statute defines or assigns a specific county as corporate residence for Curators. Curators simply does not have a county of residence for venue purposes.

Id. at 572. Thus, the Court held, "only the second arm of section 508.010(1) … can apply to determine venue." *Id.* And the "second arm," available to Ormerod but not to Hillsdale, put venue in Boone County, where plaintiff Ormerod resided.

If this Court moves past applying § 456.2-204, it should revisit its curious conclusion that The Curators has no Missouri residence. The Curators has a residence, and it is in Columbia, Boone County, where The Curators has always operated and where its staff and records are today.

The Curators is governed by a nine-member board established by the Missouri Constitution. Art. IX, § 9(a). Its sole task is "[t]he government of the state university." *Id.* The University has been located in Boone County since 1839 and the offices of its governing Board of Curators and President are located there. But the Court was right in *Ormerod* that the General Assembly has never taken time to confirm Columbia as the statutory "residence" of The Curators. *See* 130 S.W.3d 572.

Nor should the legislature have to. True, The Curators later established other campuses—Missouri School of Mines and Metallurgy, now Missouri University of Science and Technology, in Phelps County in 1870, and University of Missouri-St. Louis and University of Missouri-Kansas City in St. Louis and Jackson Counties, respectively, in 1963. And the University system has extension offices scattered across the State to fulfill its "role in performing essential governmental functions for the benefit of all of the people of the state." *Id.* But The Curators has always operated from Columbia—and, as in this case, is served with process there and only there.

Section 508.010.1 contemplates one, not many counties of residence. "Resides" is not defined. And the definition may vary; as the Supreme Court has observed in *Rothermich*: "The term 'residence' is a legal term of art having different meanings resulting from the different circumstances in which it is applied." 816 S.W.2d at 199-200. Nonetheless, subsection 508.010.2 gives us some clues—most notably the use of contrasting articles.

In the first "arm" of subsection 508.010.2(1), we read that a suit may be filed in "***the*** county within which the defendant resides," not *a* county, *some* county, or *one of the counties* within which the defendant resides. The second "arm" uses the same article with regard to a plaintiff: suit can be brought "in ***the*** county," not *a* county, *some* county, or *one of the counties*, in "which the plaintiff resides." "The" in both instances suggests a single, specific county. By contrast, subsection 508.010.2(3) and (4) refer to "any county." "The county" cannot be the same as "any county."

That "resides" refers to a single location was a concept familiar to those who enacted § 508.0102. Each member of the House of Representatives "shall have been … a resident of *the* county or district which he is chosen to represent for one year." Mo. Const., Art. III, § 4 (emphasis added). And each Senator "shall have been … a resident of *the* district which he is chosen to represent for one year." Mo. Const., Art. III, § 6 (emphasis added). No legislator or candidate can be a resident of more than one county or district at the same moment.

That "resides" refers to a single location is familiar to judges, too. "[J]udges of the court of appeals shall be residents of the court of appeals district in which they serve." Mo. Const., Art. V, § 21. "Circuit judges shall have been … residents of the circuit for at least one year." *Id.* "Associate circuit judges shall be … residents of the county." *Id.*

The venue statute may not expressly restrict "residence" to a single county, as it restricts "principal place of residence," a specific term used in defining available venues in some tort actions brought against corporations. *See* § 508.010.1, & 508.010.5((1) & (2). But implicitly, it uses "resides" to refer to a single location. And the sole location where The Curators "resides" is the location where it was found and served by Hillsdale: Boone County.

POINT RELIED ON III

In the alternative, Relator is entitled to an order prohibiting Respondent from proceeding other than to transfer venue to Boone County or in mandamus requiring the circuit court to transfer venue to Boone County, because Boone County is the appropriate venue if there is no available statutory venue in that it is the place where any actions at issue took place (or where actions alleged to have been omitted should have taken place), the location of records and witnesses, and the residence of the only Missouri-resident party.

III. If no statute provided a venue for this case, venue would be proper only in Boone County under *forum non conveniens* principles.

Though Hillsdale in its Petitions and its various venue filings has invoked § 508.010.2, Hillsdale has also recognized—as it must—that absent this Court revisiting *Ormerod*, that section does not actually provide for a venue for its suit. Thus Hillsdale pointed below to two recent cases in which *no* venue statute could be applied, but the case fell within the jurisdiction of Missouri courts: *State ex rel. Heartland Title Servs. v. Harrell,* 500 S.W.3d 239 (Mo. 2016), and *State ex rel. Neville v. Grate*, 443 S.W.3d 688 (Mo. Ct. App. W.D. 2014). There, the courts said that the General Assembly's silence meant that the nonresident plaintiffs could choose any Missouri venue. 500 S.W.3d at 244; 443 S.W.3d at 695.

Those cases are distinguishable because, as discussed in Point I, ***one*** venue statute § 456.2.204, ***can*** be construed to cover this case. And this Court has in the past insisted on searching for and construing, if possible, a venue statute to cover a particular case, rather than finding that a case fell

entirely outside the scope of legislation. Thus in *Rothermich*, this Court made an extraordinary effort to read a venue statute (a portion of the former § 508.010) to cover the case. The Court's object was to conform to legislative intent, because, again, "[v]enue in Missouri is determined by statute." 816 S.W.2d at 200. And here, the only statute that any party has identified that can be read to cover this case (again, absent revisiting *Ormerod*) is § 456.2-204.

But for purposes of this portion of the argument, assume that § 456.2-204 did not apply because Mr. Hibbs failed to create the trust that he wanted, and that § 508.010 does not apply because of *Ormerod*. Then this, too, would be a case as to which the General Assembly had not addressed venue. And it would raise this question: When venue cannot be determined by provision enacted in any statute, what is a court to do?

This Court has answered that question by saying that "if personal and subject matter jurisdiction are established, venue is proper in any county in Missouri in the absence of an express provision by the General Assembly restricting venue." *Heartland Title Servs.,* 500 S.W.3d at 244. But that conclusion cannot be reconciled with the Court's insistence that venue is determined by statute. It makes no sense to conclude that the legislature silently declared that nonresident plaintiffs can sue in every county when it expressly limited resident plaintiffs to suing in one or perhaps two counties. Further, such a conclusion would place obvious and needless burdens on parties and courts to litigate in counties having no connection to matters at hand, and would fly in the face of the legislature's manifest intent throughout the venue statutes to site litigation in counties having a definite connection to the parties or the matters in dispute.

If this Court does not find a venue authorized in § 456.2-202 or § 508.010.2, this petition presents an opportunity for the Court to reconsider whether for a case for which the legislature has not given an answer, the venue question is answered by the courts—and answered using the traditional doctrine of *forum non conveniens*.

We recognize that this Court has stated: "Missouri does not recognize intrastate forum non conveniens, which would permit a circuit court to transfer venue from one proper county under the venue statute to another proper county under the venue statute." *Heartland Title Servs.,* 500 S.W.3d at 243 n.6, citing *State ex rel. Sharp v. Romines*, 984 S.W.2d 500, 500 (Mo. 1999). That statement makes sense when there *is* a "proper county under the venue statute." But to the extent it is applied to broadly justify the complete abolition of intrastate *forum non conveniens*—even where the legislature has *not* spoken and *no* county is "proper…under the venue statute"—it lacks support in the caselaw structure on which it relies.

We begin with the case cited in *Heartland* to support the proposition: *Sharp*—a very brief *per curium* opinion in a case involving the University of Missouri. The Curators had "filed a motion asserting venue was improper in the city of St. Louis." *Id.* The judge "found that venue was proper in St. Louis County but that St. Louis County was not a convenient forum for the suit," so he "ordered the case transferred to Boone County." *Id.* On a writ petition, this Court concluded that "venue statutes" (unspecified, but presumably including the statute that made venue in *Sharp* "proper in St. Louis County") "do not permit an intrastate application of the doctrine of inconvenient forum." *Id.* In support the Court cited *Anglim v. Missouri Pacific R. Co.*, 832 S.W.2d 298, 302 (Mo. 1992).

But *Anglim* was a case in which "the residence of plaintiff [was] in Nebraska, … the action accrued in Nebraska, and … most witnesses reside in Nebraska," where the Court was asked whether *inter*state use of *forum non conveniens* in a case brought by would justify dismissing a suit. The Court did not have before it whether *intra*state *forum non conveniens* could be used to determine venue in a case where the legislature had determined that a particular venue was proper, much less a case where the legislature had not spoken.

Following the broad conclusion for which it cited *Anglim*, the Court in *Sharp* quoted this sentence from *Willman*: "The statutory designation of proper venue as the site where the cause of action accrued presupposes *legislative determination* that it cannot be overly inconvenient for a defendant to appear in that location." *Willman*, 779 S.W.2d 586 (emphasis added.) The Court then concluded that because the General Assembly had by statute provided for venue in St. Louis County, the judge could not use *forum non conveniens* to, in essence, overrule the legislative determination and move the case to Boone County. *Sharp*, 984 S.W.2d at 500.

But *Willman* and *Sharp* were both cases in which there was a "statutory designation"—an affirmative "legislative determination" that venue in a particular county was appropriate. The question before this Court in each instance was whether judges could overrule that legislative determination. Thus in *Willman* the Court agreed that then-§ 508.010(6) applied, and said: "The legislature's language is *specific, definite, and certain* in its *provision for* a plaintiff's determination of proper venue for his suit." *Willman v. McMillen*, 779 S.W.2d at 585 (emphasis added).

Unlike *Willman* and *Sharp*, this is not a case in which there is "specific, definite, and certain" venue language (unless it is the language in § 456.2-

204). In fact, Hillsdale has not claimed (and cannot claim, absent this Court revisiting *Ormerod*) that here there is *any* legislative "provision for" this suit to be filed in St. Louis County. The rationale used in *Willman* and subsequent cases for rejecting *intra*state *forum non conveniens* does not exist here.

Legislative silence should not be read as having answered the venue question in a way that permits a non-resident to choose any county it pleases regardless of where the defendant is found and the events complained of took place. Instead legislative silence should be read to have left the question to the courts. And courts are free to apply, traditionally did apply, and should apply the principles of *forum non conveniens*. Thus should this Court determine that the General Assembly did not provide plaintiff with a venue option in either § 456.2.204 or § 508.010, it should apply, or instruct the circuit court to apply, traditional *forum non conveniens* considerations.

The considerations to be used in applying the doctrine of *forum non conveniens* are well-established:

> The basic factors to be weighed in making a determination whether to invoke the doctrine of *forum non conveniens* include the "place of accrual of the cause of action, location of witnesses, the residence of the parties, any nexus with the place of suit, the public factor of the convenience to and burden upon the court, and the availability to plaintiff of another court with jurisdiction of the cause of action which affords him a forum for his remedy."

Anglim v. Mo. PAC. RR. Co, 832 S.W.2d at 301, *quoting State ex rel. R.I. &*

P.R. Co. v. Reiderer, 454 S.W.2d 36, 39 (Mo. banc 1970). Here, each of those leads to Boone County:

- The "place of accrual of the cause of action" is Boone County, home of the campus and school where the funds are and must be used.
- The "location of witnesses"—all personnel of the University of Missouri system, which operates from Boone County, or the University of Missouri campus in Boone County—is Boone County.
- The "residence of" the University, if it has one, is Boone County—and Hillsdale has no residence in Missouri.
- The dispute has no "nexus with" St. Louis County—indeed, its sole nexus with Missouri is with Boone County, where Sherlock Hibbs attended college and where he required that the funds in his bequest be used.
- The "public factor of the convenience to and burden upon the court" is no greater in St. Louis than in Boone County—and the public interest in "convenience to and burden upon" the University of Missouri leads only to Boone County.
- And Hillsdale has "another court with jurisdiction of the cause of action which affords him a forum for his remedy": the circuit court of Boone County.

The *forum non conveniens* approach allows courts to import principles adopted by the legislature, crafting rules or practices that lead to results that are in line with ones the legislature required in comparable cases—*i.e.*, "to provide a convenient, logical and orderly forum for litigation" (*Rothermich*, 816 S.W.2d at 196) that is consistent for similarly situated parties, resident and nonresident, and in comparable cases. Such a conclusion would keep the Court's jurisprudence for cases in which the legislature has not provided a

venue in line with the legislature's approach when it has done so. Applying those principles here leads to an obvious conclusion, for the only "convenient, logical and orderly forum" for this suit is Boone County.

* * *

Throughout the litigation over the proper venue for this case, The Curators have never asked, as Hillsdale has often claimed, that the courts interpret or apply Missouri's venue statutes to "close the courthouse doors" to Hillsdale. To the contrary, The Curators have repeatedly said that the General Assembly has in § 456.2-204 expressly provided Hillsdale with a statutory venue. But it is not St. Louis County. A courthouse door is open, but that door is in Columbia, not Clayton.

CONCLUSION

For the reasons stated in the Petition and above, the Court should issue a permanent writ of prohibition, barring the circuit court from proceeding except to transfer the case to Boone County, or of mandamus requiring transfer pursuant to § 456.2-204(2), RSMo., and Rule 51.045.

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Certificate of Compliance

I hereby certify, pursuant to Supreme Court Rule 84.06(c), that Brief of Relator, The Curators of the University of Missouri includes information required by Supreme Court 55.03, complies with the limitations contained in in Rule 84.06(b), and contains 9496 words as determined by the Microsoft Office Word-Counting System.

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