IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

No. ED113210

STATE OF MISSOURI, et al.,

Plaintiffs/Counterclaim Defendants-Respondents,

v.

ST. LOUIS COUNTY, MISSOURI, et al.,

Defendants/Counterclaim Plaintiffs-Appellants,

and

SHALONDA WEBB and MARK HARDER,

Proposed Intervenors.

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
CASE NUMBER 24SL-CC07283
THE HONORABLE BRIAN H. MAY

BRIEF OF DEFENDANTS/COUNTERCLAIM PLAINTIFFS-APPELLANTS ST. LOUIS COUNTY, MISSOURI AND SAM PAGE

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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the St. Louis County Circuit Court (the "Circuit Court") in favor of Plaintiffs/Counterclaim Defendants-Respondents declaring that the Governor of the State of Missouri has the exclusive authority to fill a vacancy in the office of the St. Louis County Prosecuting Attorney. (*See* D17 pp. 10-11; App 12-13.) The Missouri Court of Appeals, Eastern District, has jurisdiction pursuant to Article V, Section 3, of the Missouri Constitution, which grants this Court "general appellate jurisdiction in all cases except those within the exclusive jurisdiction of the supreme court." *See also* Section 477.050, RSMo.

STATEMENT OF FACTS

The parties stipulated in the Circuit Court to the following facts.

Wesley Bell currently holds the office of St. Louis County Prosecuting Attorney. (D20 ¶ 1.) In November 2024, Wesley Bell was elected to the United States House of Representatives. (*Id.* ¶ 2.) Wesley Bell is scheduled to be sworn in as a Member of Congress on January 3, 2025. (*Id.* ¶ 3.) On or before that date, Wesley Bell will resign his office as St. Louis County Prosecuting Attorney. (*Id.* ¶ 4.) St. Louis County Executive Sam Page has announced that he will appoint a new St. Louis County Prosecutor upon Wesley Bell's resignation in accordance with the St. Louis County Charter. (*Id.* ¶ 5.) Missouri Governor Michael Parson has announced that he will appoint a new St. Louis County Prosecutor upon Wesley Bell's resignation. (*Id.* ¶ 6.)

St. Louis County is a charter county within the meaning of Article VI, Section 18(a) of the Missouri Constitution. (*Id.* ¶ 7.) Missouri has five charter counties: the counties of St. Louis, St. Charles, Jefferson, Clay, and Jackson. Three—St. Charles, Clay, and Jackson—currently have prosecuting attorneys who were initially appointed to office by county authorities, pursuant to the applicable county charters, due to a vacancy. (*Id.* ¶ 8.) In 2004, Governor Bob Holden appointed Dan White to serve as Clay County Prosecuting Attorney. (*Id.* ¶ 9.) At that time, Clay County was not a charter county. (*Id.*) However, Clay County became a charter county in 2021. (*Id.* ¶ 10.) In 2022, the Clay County Commission appointed Zachary Thompson to serve as the Clay County Prosecuting Attorney. (*Id.*) In 2006, the Jackson County Executive appointed Melissa Mauer-Smith to serve as Acting Jackson County Prosecuting Attorney until the appointment of a

permanent prosecuting attorney. (*Id.* ¶ 11.) In 2007, the Jackson County Executive appointed James Kanatzar to serve as the Jackson County Prosecuting Attorney. (*Id.* ¶ 12.) In 2011, the Jackson County Executive appointed Melissa Mauer-Smith to serve as Acting Jackson County Prosecuting Attorney until the appointment of a permanent prosecuting attorney. (*Id.* ¶ 13.) In 2011, the Jackson County Executive appointed Jean Peters Baker to serve as the Jackson County Prosecuting Attorney. (*Id.* ¶ 14.) In 2013, the St. Charles County Executive appointed Timothy Lohmar to serve as the St. Charles County Prosecuting Attorney. (*Id.* ¶ 15.) In 2023, the St. Charles County Executive appointed Joseph McCulloch to serve as the St. Charles County Prosecuting Attorney. (*Id.* ¶ 16.)

The Circuit Court was presented with no evidence of examples of midterm appointments for prosecuting attorneys in charter counties between 1945 and 2004. (*Id.* ¶ 17.) The Circuit Court was presented with no evidence concerning the Governor's involvement in the midterm appointments of prosecuting attorneys in charter counties, including in the examples referenced above. (*Id.* ¶ 18.)

On November 27, 2024, the State of Missouri, the Governor, and the Attorney General (collectively, "the State") filed their two-count Verified Petition for Declaratory Judgment, Injunctive Relief, and Temporary Restraining Order against St. Louis County, Missouri, and Sam Page, in his official capacity as St. Louis County Executive (together, "the County"). (*See* D2.) On December 3, 2024, the County filed its Answer, Affirmative and Additional Defenses, and Verified Counterclaim against the State. (*See* D4.) On December 10, 2024, the State filed its Reply to the County's Counterclaim. (*See* D11.) The parties briefed the issues raised by the pleadings. (*See* D13, D14, D15, D18, D19.)

On December 18, 2024, the Circuit Court heard argument and took the case under submission. (*See* D16.) On December 20, 2024, the parties filed a Joint Stipulation of Facts, after which the Circuit Court entered its Order and Final Judgment in favor of the State on all counts, declaring that the Governor has the exclusive authority to appoint a new St. Louis County Prosecutor upon the current St. Louis County Prosecutor's resignation. (*See* D17; App 3-13.) The Circuit Court also denied Proposed Intervenors' Motion to Intervene as moot. (D17; App 12-13.)

POINT RELIED ON

I. THE CIRCUIT COURT ERRED IN ENTERING JUDGMENT FOR THE STATE AND AGAINST THE COUNTY BECAUSE ARTICLE VI, SECTION 18(b) OF THE MISSOURI CONSTITUTION AND MISSOURI SUPREME COURT CASE LAW REQUIRE THE ST. LOUIS COUNTY CHARTER TO PROVIDE FOR THE MANNER OF SELECTION OF COUNTY OFFICERS IN THAT A COUNTY PROSECUTING ATTORNEY IS A COUNTY OFFICER AND THUS THE MANNER OF SELECTION OF THIS COUNTY OFFICER, INCLUDING IN THE EVENT OF A VACANCY, MUST BE SET FORTH IN AND GOVERNED BY THE ST. LOUIS COUNTY CHARTER.

Mo. Const. art. VI, § 18(b)

St. Louis Cnty. Charter § 5.050

State on Inf. of Dalton ex rel. Shepley v. Gamble, 280 S.W.2d 656 (Mo. banc 1955)

State ex inf. Ashcroft ex rel. St. Louis Cnty. v. O'Brien, 610 S.W.2d 638, 642 (Mo. App. 1980)

ARGUMENT

I. THE CIRCUIT COURT ERRED IN ENTERING JUDGMENT FOR THE STATE AND AGAINST THE COUNTY BECAUSE ARTICLE VI, SECTION 18(b) OF THE MISSOURI CONSTITUTION AND MISSOURI SUPREME COURT CASE LAW REQUIRE THE ST. LOUIS COUNTY CHARTER TO PROVIDE FOR THE MANNER OF SELECTION OF COUNTY OFFICERS IN THAT A COUNTY PROSECUTING ATTORNEY IS A COUNTY OFFICER AND THUS THE MANNER OF SELECTION OF THIS COUNTY OFFICER, INCLUDING IN THE EVENT OF A VACANCY, MUST BE SET FORTH IN AND GOVERNED BY THE ST. LOUIS COUNTY CHARTER.

STANDARD OF REVIEW

This appeal concerns only questions of law decided in a court-tried case. Therefore, "[t]his Court applies *de novo* review[.]" *Pearson v. Koster*, 367 S.W.3d 36, 43 (Mo. banc 2012) ("This Court applies *de novo* review to questions of law decided in court-tried cases."); *see also Gray v. Taylor*, 368 S.W.3d 154, 155 (Mo. banc 2012) (per curiam) ("This Court reviews the trial court's interpretation of the Missouri Constitution *de novo*."); "With respect to such questions, 'the appellate court reviews the trial court's determination independently, without deference to that court's conclusions.'" *Pearson*, 367 S.W.3d at 43-44 (quoting *Moore v. Bi-State Dev. Agency*, 132 S.W.3d 241, 242 (Mo. banc 2004)).

PRESERVATION

The County's claim of error has been preserved for appellate review by raising these arguments to the Circuit Court, in its Answer, Affirmative and Additional Defenses, and Verified Counterclaim (D4), and in both its Opening Brief (D13 and D14) and its Response Brief (D18), and then timely filing its Notice of Appeal (D21) challenging the Circuit Court's Order and Final Judgment (D17; App 3-13).

ANALYSIS

A. Introduction

The Missouri Constitution provides that "[a]ny county having more than 85,000 inhabitants . . . may frame and adopt and amend a charter for its own government as provided in this article, and upon such adoption shall be a body corporate and politic." Mo. Const. art. VI, § 18(a). Such a "charter may provide for the vesting and exercise of legislative power." Mo. Const. art. VI, § 18(c). But in every case, the "charter ***shall*** provide for . . . the number, kinds, ***manner of selection***, terms of office and salaries ***of the county officers***[.]" Mo. Const. art. VI, § 18(b) (emphasis added).

St. Louis County adopted a charter for its own government in 1950. *See, e.g.*, *State on Inf. of Dalton ex rel. Shepley v. Gamble*, 280 S.W.2d 656, 657 (Mo. banc 1955) (recognizing that "[o]n March 28, 1950, the county of St. Louis, by a vote of its people, adopted a charter for its own government pursuant to § 18, Art. VI, of the 1945 Constitution of Missouri"). As required of a charter county, St. Louis County's Charter (the "Charter") provides for the manner of selection of County officers. *See* Mo. Const. art. VI, § 18(b). The Charter defines the "elective county officers" as the "county executive, council members, prosecuting attorney, and assessor." St. Louis Cnty. Charter § 6.010; App 65. With respect to the prosecuting attorney, the current Charter provides that this "elective county officer" "shall be elected at the general election in 1982 and every four years thereafter." *Id.* § 5.040; App 64. The Charter further provides that a "vacancy in the office of prosecuting attorney shall be filled by the county executive subject to confirmation by the council." *Id.* § 5.050; App 64. The Missouri Supreme Court has confirmed that

pursuant to Section 18(b), "St. Louis County ***alone*** has the right to determine 'the number, kinds, manner of selection, terms of office and salaries' of its county officers." *Gamble*, 280 S.W.2d at 660 (emphasis added).

The Circuit Court erred in entering judgment for the State and against the County in concluding that the Governor "has the exclusive authority to fill a vacancy in the Office of the St. Louis County Prosecuting Attorney[.]" (D17 pp. 9, 10; App 11-12.) The Circuit Court erred at each step in its analysis. First, the Circuit Court erroneously held that a county prosecuting attorney is not a county officer within the meaning of Section 18(b). Second, the Circuit Court incorrectly determined that the phrase "manner of selection" does not apply to the manner of selecting an officer in the event of a vacancy. And finally, the Circuit Court applied an inapplicable test for resolving conflicts between state and county law.

B. A County Prosecuting Attorney Is a County Officer

Article VI, Section 18(b) of the Missouri Constitution concerns "county officers." The Circuit Court concluded that this section is not applicable here because county prosecuting attorneys are state officers, not county officers. (D17 pp. 6-9; App 8-11.) The Circuit Court based its conclusion on the fact that county prosecuting attorneys prosecute violations of state law and on "the fact that a county prosecuting attorney's authority is not limited to crimes that occurred only within the geographic boundaries of his or her county." (D17 pp. 7, 9; App 9, 11.) The Circuit Court's conclusion was erroneous. As the Missouri Supreme Court has repeatedly recognized, albeit in other contexts, county prosecuting attorneys are "county officers." This conclusion is bolstered by tools of constitutional

interpretation, all of which reveal that county prosecuting attorneys are indeed county officers.

1. *County Prosecuting Attorneys Meet Both Definitions of "County Officers" Under Missouri Law*

Under long-established Missouri law, "[t]he words 'county officers' have two well-defined meanings." *State ex rel. Buchanan Cnty. v. Imel*, 146 S.W. 783, 784 (Mo. banc 1912). "In their most general sense they apply to officers whose territorial jurisdiction is coextensive with the county for which they are elected or appointed. In a more precise and restricted sense, those words mean officers 'by whom the county performs its usual, political functions, its functions of government.'" *Id.* (quoting *Sheboygan Cnty. v. Parker*, 70 U.S. 93, 96 (1865)). The words "state officer," meanwhile, "are generally used to refer to officers whose official duties and functions are co-extensive with the boundaries of a state . . . ." *Gamble*, 280 S.W.2d at 660.

A county prosecuting attorney is a county officer in the "general sense" of the term. A county prosecuting attorney's jurisdiction is geographically limited to the County in which he or she serves. *See* Section 56.060, RSMo. ("Each prosecuting attorney shall commence and prosecute all civil and criminal actions ***in the prosecuting attorney's county*** . . . ." (emphasis added)); *see also* St. Louis Cnty. Charter § 5.060; App 64 ("The prosecuting attorney shall possess and exercise all the powers and duties now or hereafter given to that office by the constitution, by law and ordinance."). In this regard, the Missouri Supreme Court has stated that it "will not be seriously asserted, we think, by any lawyer, that the circuit attorney of St. Louis has authority to prosecute a crime committed outside

of the corporate limits of St. Louis." *State ex rel. Mo. Pac. Ry. Co. v. Williams*, 120 S.W. 740, 749 (Mo. banc 1909). In fact, "the duties and powers of prosecuting attorneys are conferred by the same section which limits such duties and powers to action in their respective counties." *Id.*; *see also* Section 56.060, RSMo; St. Louis Cnty. Charter § 5.060; App 64.

In reaching its contrary conclusion, the Circuit Court erroneously declared that "a county prosecuting attorney's authority is not limited to crimes that only occurred within the geographic boundaries of his or her county" because "venue for a criminal prosecution is proper in any county where any element of the crime occurred." (D17 p. 9; App 11.) The Circuit Court's conclusion is a *non-sequitur*, and this argument was urged by no party below. It is of course true that venue for a criminal prosecution under Section 541.033.1 RSMo is proper only in a county where the offense or an element thereof occurred. But this shows only that a county prosecuting attorney's prosecutorial authority is in fact ***limited*** to crimes that occurred within the boundaries of his or her county. Neither Missouri law, *see* Section 56.060, RSMo, nor the Charter, *see* St. Louis Cnty. Charter § 5.060; App 64, permits a county prosecuting attorney to prosecute crimes that occurred entirely outside of his or her county, or to prosecute offenses in the state courts of a county other than the county in which the county prosecuting attorney serves.[1] In other words, a county

[1] Of course, an attorney serving as a prosecuting attorney in one county might be appointed as a special prosecutor to prosecute a case in another county. *See, e.g.*, Section 56.110, RSMo (providing that "the court having criminal jurisdiction may appoint some other attorney to prosecute or defend the cause" in the event that the county prosecuting attorney has a conflict of interest).

prosecuting attorney's prosecutorial powers are limited to commencing proceedings *within the county prosecuting attorney's county* regarding criminal offenses that occurred, in whole or in part, *within the county prosecuting attorney's county*. This means that the county prosecuting attorney is a county officer, not a state officer.[2] *See Gamble*, 280 S.W.2d at 660 ("[T]he words 'state officer' are generally used to refer to officers whose official duties and functions are co-extensive with the boundaries of a state and not to a sheriff whose functions are confined to his county . . . .").

A county prosecuting attorney is a county officer in the "more precise" sense of the term as well, in that the county prosecuting attorney represents the uniquely local interests of the county, while the state's interest is represented by the Attorney General. *See Williams*, 120 S.W. at 749. In this regard, the Missouri Supreme Court has recognized that the General Assembly "charged the Attorney General with the duty of conducting all litigation on behalf of the state, as distinguished from a county or some municipality, and that it was the obvious purpose to restrict the circuit attorney of St. Louis, and the various prosecuting attorneys of the counties of the state, to those matters which arise in their respective counties or city *and which affect the interests of their respective local*

[2] Generally, county prosecuting attorneys' ability to pursue quo warranto proceedings is likewise limited to pursuing actions in their own counties. *See* Section 531.010 RSMo ("In case any person shall usurp, intrude into or unlawfully hold or execute any office or franchise, the attorney general of the state, or any circuit or prosecuting attorney *of the county in which the action is commenced*, shall exhibit to the circuit court . . . an information in the nature of a quo warranto . . . ." (emphasis added)); Mo. Sup. Ct. R. 98.02(b)(2) (providing that a prosecuting attorney can be a relator in a quo warranto proceeding, with the caveat of "the prosecuting attorney being limited to filing with respect to matters pertaining solely to the prosecuting attorney's county or circuit").

jurisdictions." *Id.* (emphasis added). And, more recently, the Missouri Supreme Court noted that prosecuting attorneys are "elected, county-level officials." *State ex rel. Peters-Baker v. Round*, 561 S.W.3d 380, 387 (Mo. banc 2018); *see also State v. Yount*, 691 S.W.3d 321, 326 (Mo. App. 2024). This is why all of the General Assembly's statutes governing prosecuting attorneys are contained in Title VI of the Revised Statutes: "County, Township and Political Subdivision Government."

And the fact that county prosecuting attorneys prosecute acts declared as offenses under state law, and commence proceedings in the name of the State of Missouri, changes nothing. Just as sheriffs, as county officers, "carry out the laws of the State," *Gamble*, 280 S.W.2d at 661, so too do county prosecuting attorneys, albeit in respect to the interests of their local jurisdiction. To be sure, the power of county prosecuting attorneys—and indeed, the power of the county generally—ultimately derives from the State. *E.g.*, *Gamble*, 280 S.W.2d at 659 ("St. Louis County, regardless of its charter, remains a legal subdivision of the state. As such, it is charged with the performance of state functions just as other counties are." (internal citations omitted)). But this unremarkable proposition has no impact whatsoever on the analysis here. *See, e.g.*, *State ex rel. Kirks v. Allen*, 250 S.W.2d 348, 350 (Mo. 1952) (rejecting contention that county prosecutor was a "state officer" even though "there ha[d] been . . . some substantial part of the state's sovereign power" delegated to the county prosecutor); *see also Gamble*, 280 S.W.2d at 661. Nor does the fact that the state can require charter counties to provide in their charters that certain duties be discharged by county officers, *see* Mo. Const. art. VI, § 18(b) ("The charter shall provide . . . for the exercise of all powers and duties of counties and county officers

prescribed by the constitution and laws of the state"); still, "the county has the choice as to what officer or agency will be designated to perform the duties." *Gamble*, 280 S.W.2d at 660; *see also* Opinion Letter from Attorney Gen. Norma. H. Anderson to Sen. Maurice Schechter, No. 234-1996, at p. 9 (Mo. A.G. Mar. 29, 1996) ("It is the opinion of this office that the legislature may validly pass a statute requiring the Prosecuting Attorney of a Constitutional Charter County to devote full time to his duties, and prohibit him from engaging in the practice of law.").[3]

The fact that charter county prosecuting attorneys are paid by, and their rates of pay are set by, their charter counties further evidences that prosecuting attorneys perform the charter county's "functions of government." *Imel*, 146 S.W. at 784. The State does not pay prosecuting attorneys' salaries—the counties do. *See State ex rel. George v. Verkamp*, 365 S.W.3d 598, 600 (Mo. banc 2012). And though state statute sets the salary for full-time elected prosecutors in non-charter counties, the Missouri Constitution prevents the General Assembly from setting the salaries of county prosecuting attorneys in charter counties. *See* Mo. Const. Art. VI, § 18(b); Section 56.265, RSMo ("The county prosecuting attorney in any county, *other than in a chartered county*, shall receive an

[3] Of course, this Attorney General Opinion *necessarily assumes* that a county prosecuting attorney is a county officer within the meaning of Article VI, Section 18(b); if the county prosecuting attorney were not a county officer within the meaning of Article VI, Section 18(b), then there necessarily would be no concern regarding whether Article VI, Section 18(b) presented an obstacle to the General Assembly's desire to require the county prosecuting attorney to devote full time to his duties and prohibit him from engaging in the practice of law.

annual salary computed using the following schedule . . . ." (emphasis added)).[4] This makes sense, because Section 18(b) requires a charter county's charter to provide for the "salaries of the county officers," such as the county prosecuting attorney.

2. *The Missouri Supreme Court Has Consistently Characterized County Prosecuting Attorneys As County Officers for Nearly a Century*

The Circuit Court's conclusion that county prosecuting attorneys are "state officers" rather than "county officers" is contrary to over a century of Missouri Supreme Court precedent.[5] In 1925, the Court unambiguously identified prosecuting attorneys as "county officers," alongside circuit clerks and county clerks. *See State ex rel. Summers v. Hamilton*, 279 S.W. 33, 36 (Mo. 1925) (explaining that, in connection with analyzing the constitutionality of a statute, "it was the duty of the Legislature to pass a law that would regulate the fees of all county officers, including circuit clerks, county clerks, prosecuting attorneys, etc. . . . ."). Since then, the Missouri Supreme Court has continued to describe prosecuting attorneys as county officers when addressing questions of county governance and administration. In *Perkins v. Burks*, the Supreme Court referred to prosecuting

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[4] While Section 105.050 RSMo lacks an express charter county carveout like that found in Section 56.265 RSMo, this is unsurprising because Section 105.050 was last amended in 1947—three years before the existence of any charter counties. Similarly, Section 58.040 RSMo, which provides that the Governor shall fill any vacancy in the office of county coroner, contains no express charter county carveout but was last amended in 1945, before any charter counties came into existence.

[5] In its Order and Final Judgment, the Circuit Court stated, "neither party has cited to authority from this state deciding whether a county prosecuting attorney is a 'county officer[.]'" (D17 p. 8; App 10.) This statement is not correct; the County cited a number of cases to the Circuit Court in which the Missouri Supreme Court has characterized county prosecuting attorneys as county officers. (D18 pp. 5-6.)

attorneys when discussing the "county officers' salaries." 78 S.W.2d 845, 847 (Mo. 1934). A decade later, the Supreme Court again listed the prosecuting attorney among "[c]ounty officers" when analyzing sources of county revenue (*i.e.*, fees). *Lancaster v. Atchison Cnty.*, 180 S.W.2d 706, 707-08 (Mo. banc 1944). Then, the Supreme Court recognized that a county prosecuting attorney, as "a county officer," may initiate quo warranto proceedings in the name of the State, but this power "is limited to the county of which [the county prosecuting attorney] is an officer" and, indeed, the county prosecuting attorney "is not authorized to institute quo warranto proceedings in the name of the state against an officer of the state[.]" *State ex rel. Schneider's Credit Jewelers v. Brackman*, 272 S.W.2d 289, 293 (Mo. banc 1954). The Supreme Court more recently reaffirmed that a county prosecuting attorney is a county officer, explicitly referring to the county prosecuting attorney as "a county officer." *State ex rel. Lafayette Cnty. Comm'n v. Ravenhill*, 776 S.W.2d 17, 18 (Mo. banc 1989). Even more recently, the Supreme Court understood county prosecuting attorneys to be "county officers" for purposes of analyzing county prosecuting attorney pension compensation within the meaning of the phrase, "compensation of county officers," found in Article VI, Section 11. *Mo. Prosecuting Att'ys v. Barton Cnty.*, 311 S.W.3d 737, 741-48 (Mo. banc 2010). The Circuit Court's Order and Final Judgment would disturb this otherwise unbroken, nearly century-old, non-controversial understanding that county prosecuting attorneys are county officers—not state officers.

The Supreme Court has also offered guidance on the state officer versus county officer distinction in the context of Section 18(b). For example, *State ex rel. St. Louis*

County v. Kirkpatrick demonstrates why county prosecuting attorneys, unlike state judges, are county officers. 426 S.W.2d 72, 74 (Mo. 1968). In *Kirkpatrick*, the Supreme Court held that St. Louis County lacked authority to determine the manner of selecting state judges because "[c]ircuit judges are judges of the State of Missouri and not merely judges of the circuit in which they are elected or appointed." *Id.*; *see also Cantrell v. City of Caruthersville*, 255 S.W.2d 785, 786 (Mo. 1953) ("Any circuit judge may sit in any other circuit at the request of the judge thereof." (quoting Mo. Const. art. V, § 15)).

This reasoning shows why county prosecuting attorneys differ from state judges. Unlike state judges, who may hear and determine cases throughout the state, a county prosecuting attorney's authority is limited to his or her county. *See* Section 56.060, RSMo; St. Louis Cnty. Charter § 5.060; App 64. Moreover, the *Kirkpatrick* Court found it significant that the St. Louis County Charter had previously "made no effort to legislate in the field of the manner of selection of judges," noting that the St. Louis County Charter did "not include circuit, probate, or magistrate judges as elective county officers and the charter does not purport to provide for their selection or election." 426 S.W.2d at 74. In contrast, here, the St. Louis County Charter explicitly provides that the prosecuting attorney is an elective county officer and provides for the manner of the prosecuting attorney's selection, including in the event of a vacancy. St. Louis Cnty. Charter §§ 5.010, 5.040-.070; App 63-64; *see also id.* § 3.050; App 49-50. And the St. Louis County Charter has done so since it was adopted in 1950. *See* St. Louis Cnty. Charter § 3 (1950); App 86 ("The following County Officers shall be elected: . . . Prosecuting Attorney . . . ."); *id.* § 5; App 86 ("Whenever for any cause the office of any elective County Officer shall become vacant,

except that of County Supervisor or Councilman, the same shall be filled by the County Supervisor subject to confirmation by a majority of the Council. A person appointed to a vacant office shall be a member of the same political party as the previous occupant.").

Gamble also considered the county-officer issue with regard to sheriffs and constables. 280 S.W.2d at 660. In *Gamble*, the Missouri Supreme Court considered and upheld the creation of the St. Louis County Board of Police Commissioners and the office of Superintendent of Police. *Id.* at 662. It was argued in that case, similar to here, that that "the sheriff and constables of St. Louis County are not county officers within the meaning of § 18 of Art. VI of the Constitution of 1945, but, on the other hand, are state officers performing governmental functions which cannot be taken from them by the charter of St. Louis County." *Id.* at 659. The Supreme Court had little difficulty rejecting this argument, applying the geographic litmus test from *Williams* and, as detailed *infra*, looking to the records and debates of the 1943-44 Constitutional Convention. *Id.* at 660-62.

Moreover, the Missouri Supreme Court has already rejected an attempt to characterize county prosecuting attorneys as state officers. In *State ex rel. Kirks v. Allen*, the issue presented concerned whether the prosecuting attorney of Linn County was a "state officer" within the meaning of then Article V, Section 3 of the Missouri Constitution, which vested appellate jurisdiction in the Missouri Supreme Court in all cases in which "any state officer as such is a party." 250 S.W.2d at 349-50. Just like the State argued below, and the Circuit Court held, it was argued that the Linn County prosecuting attorney had been "delegated . . . some substantial part of the state's sovereign power, to be independently exercised with some continuity and without control of a superior power

other than the law." *Id.* at 350 (internal quotations omitted). The Missouri Supreme Court rejected this argument, explaining that this "is not the determinative factor" in the Court's analysis. *Id.* Rather, an officer can be a state officer only if "his official duties and functions are co-extensive with the boundaries of the state." *Id.* (collecting and reaffirming cases). Because the Linn County prosecuting attorney's "official duties and functions [were] not coextensive with Missouri's boundaries" and "[h]is rights and duties (to exercise portions of the state's sovereign powers) [were] limited to Linn County, the county in which he was elected and which he [was then] serving," he was not a "state officer." *Id.* The same analysis applies, and the same result follows, here.

3. *The Overall Constitutional Structure and Constitutional Debates Concerning Article VI, Section 18(b) Confirm Prosecuting Attorneys' Status as County Officers*

The *Debates of the Missouri Constitution 1945* confirm the County's proper interpretation of the law. In a discussion concerning the provision that would become Article VI, Section 18(b), the Constitutional Convention debated who would be included among the county officers. *See Gamble*, 280 S.W.2d at 661 ("It is proper to consult the proceedings and debates of the Constitutional Convention even though they are never of binding force on the courts and their persuasive value depends upon the circumstances of each case."). In one discourse, a proponent of charter home rule answers the questions of another delegate:

> Q: Judge, in Section 2 where you provide the government of such [charter] counties shall provide the officers, that would not include circuit judge, would it?

A: No, there is absolutely no provision made for the circuit judges and the election commission in that section.

Q: How about the prosecuting attorney that enforces criminal laws of the county? Do they elect him under Section 5 or Section 2 or would he be elected otherwise?

A: Well, I will read you the section on that. I think that will speak for itself. "Section 2. Every such charter shall provide the method or methods for its amendment; the form of government of such county; what officers the county shall have, manner of their selection, and their terms of office and their salaries; the exercise of the powers vested in, and the performance of all duties imposed upon, counties and county officers by the constitution and the laws of the State."

Q: Do you interpret that, Judge, as the authority to provide in the charter for the prosecuting attorney?

A: Well, if they want to call him prosecuting attorney; they will have to provide somebody to prosecute the laws of the state or represent the state.

Q: *Well, whatever name they call him, it is your interpretation that the charter could create the office of circuit attorney or prosecuting attorney or any office that reports criminal law, is that right?*

A: *That is right.*

9 *Debates of the Missouri Constitution 1945* 2772-73 (emphasis added); App 220.[6] These "records and debates . . . fortify [the] conclusion as to the purpose and intent of these county charter provisions of the constitution." *Gamble*, 280 S.W.2d at 660; *see also Metro. St. Louis Sewer Dist. v. City of Bellefontaine Neighbors*, 476 S.W.3d 913, 924 (Mo. banc 2016) (Fischer, J., concurring) ("[R]eference to the constitutional debates is a proper aid

[6] These debates reflect no consideration of the King of England's delegation of prosecutorial authority, or how any such matters would be relevant to whether, in 1945, a county prosecuting attorney in a Missouri charter county would be a county officer within the meaning of Article VI, Section 18(b) of the Missouri Constitution. (*See* D15 pp. 9-10 (discussing the King of England's historical prosecutorial powers).)

for interpretation and context."). Importantly, *Gamble* relied on virtually identical comments from the same delegate to confirm its determination that county sheriffs were county officers:

> Q: May I inquire further? You mention that the new governmental creature here would determine what officers they would have. Now, if determining those officers they would or would not determine to have a sheriff, would they . . .
>
> A: (Interrupting): *They might call him anything but they must provide some officer to carry out the laws of the State*.

Gamble, 280 S.W.2d at 660-61 (emphasis in original). The Court found this exchange significant because it showed that the delegates were under the impression that the county sheriff would be one of those county officers for which a charter county's charter must provide. *Id.* Likewise, here, the record of proceedings confirms that the delegates were of the mind that the county prosecuting attorney is one of the county officers to be provided for by a charter county pursuant to what ultimately became Article VI, Section 18(b) of the Missouri Constitution. The Circuit Court's analysis regarding the use of state power mattering is simply, constitutionally, wrong.

A comparison of Sections 18(b) and 31 of Article VI also confirms that the county prosecuting attorney is a county officer. As noted, Section 18(b) governs charter counties and requires the charters of such counties to provide for the manner of selection of county officers. Section 31 governs the City of St. Louis specifically. It provides that the "City of St. Louis . . . [a]s a county . . . shall not be required to adopt a county charter but may, ***except for the office of circuit attorney***, amend or revise its present charter to provide for the number, kinds, ***manner of selection***, terms of office and salaries of its ***county officers***."

(emphasis added). Thus, while the Constitution generally empowers the City's Charter to provide for the manner of selection of its county officers, the Constitution expressly excludes such power with respect to the office of the circuit attorney—who is a prosecuting attorney by a different name. *See* Section 56.430, RSMo (requiring the circuit attorney for the City of St. Louis to "possess the same qualifications and be subject to the same duties that are prescribed by this chapter for prosecuting attorneys throughout the state"). If a county prosecuting attorney were not a county officer, then the language in Section 31 authorizing the City's Charter to provide for the manner of selection of the City's county officers "except for the office of circuit attorney," is rendered surplusage. This Court cannot accept such an interpretation. *See State ex rel. Dep't of Health & Senior Servs. v. Slusher*, 638 S.W.3d 496, 498 (Mo. banc 2022) ("Every word contained in a constitutional provision has effect, meaning, and is not mere surplusage.").

Finally, the Circuit Court's conclusion that prosecuting attorneys are exempt from charter county control because they exercise "state power" would effectively nullify Article VI, Section 18(b)'s express delegation of authority to charter counties. Under the Circuit Court's conclusion, charter counties would lose authority over virtually all county officers, as most—if not all—exercise authority derived from the state. *See* Mo. Const. art. VI, 18(b) ("The charter shall provide for . . . the exercise of all powers and duties of counties and county officers prescribed by the constitution and laws of this state."). The county assessor and treasurer enforce state tax laws. *See* Section 53.010 RSMo., *et seq.* (county assessors); Section 54.010 RSMo, *et seq.* (county treasurers). The recorder of deeds implements state law regarding real property and marriages. *See* Section 59.010

RSMo, *et seq.* The county sheriff protects the courts and serves legal process. *See* Section 57.010 RSMo, *et seq*. Under the Circuit Court's conclusion and in the State's apparent view, this means that a county charter cannot provide for the manner of selection for these county officers, either. This sweeping proposition lacks support in law; it is plainly wrong and is belied by the line of authority described above, treating county prosecuting attorneys as county officers while recognizing that they exercise powers ultimately derived from the state—just like most, if not all, other county officers. *See Hamilton*, 279 S.W. at 36; *Perkins*, 78 S.W.2d at 847; *Lancaster*, 180 S.W.2d at 707-08; *Brackman*, 272 S.W.2d at 293; *Ravenhill*, 776 S.W.2d at 18; *see also Engelage v. City of Warrenton*, 378 S.W.3d 410, 413 (Mo. App. 2012) ("Local governments, such as the county and city here, possess only those powers expressly delegated by the sovereign . . . .").

C. Manner of Selection Includes the Manner of Filling a Vacancy

Although the State never advanced the argument, the Circuit Court, for whatever reason, *sua sponte* determined that the phrase "manner of selection" in Article VI, Section 18(b) "merely requires counties with charter forms of government to define the manner by which county officers are selected for a term of office. . . . It does not address the issue here: filling a ***vacancy*** that arises during the term of a county officer."[7] (D17 p. 6; App 8.) In so doing, the Circuit Court disregarded the plain text of the Constitution and,

[7] If anything, the State advanced a contrary position to the Circuit Court. In its Responsive Brief below, the State explained: "The State has never claimed the authority to select all charter county officers, nor could it." (D19 p. 5.)

with the stroke of a pen, unilaterally amended (and narrowed) Article VI, Section 18(b). The Circuit Court's interpretation that Article VI, Section 18(b) only applies to the initial selection of a county officer and not vacancies is thus atextual, unsupported, and erroneous.

"The fundamental purpose of constitutional construction is to give effect to the intent of the voters who adopted the Amendment." *State v. Shanklin*, 534 S.W.3d 240, 242 (Mo. banc 2017) (citation omitted). Words used in constitutional provisions are thus interpreted in a way that gives effect to "their plain, ordinary, and natural meaning." *Id.* (citing *Wright-Jones v. Nasheed*, 368 S.W.3d 157, 159 (Mo. banc 2012)). Courts may not read constitutional provisions in a way that renders any term therein meaningless, *City of Arnold v. Tourkakis*, 249 S.W.3d 202, 206 (Mo. banc 2008), nor may courts add words by implication, *Wright-Jones*, 368 S.W.3d at 159 (citing *State ex rel. Young v. Wood*, 254 S.W.3d 871, 873 (Mo. banc 2008)).

The Circuit Court's error in this case is similar to that presented to the Missouri Supreme Court in *Nasheed*. There, the trial court was tasked with interpreting Article III, Section 6 of the Missouri Constitution, which states, in pertinent part, that each candidate for State senator must be "a resident of the district which he is chosen to represent for one year, if such district shall have been so long established, and if not, then of the district or districts from which the same shall have been taken." 368 S.W.3d at 159 (emphasis omitted). The issue before the Court was whether, when a district is created by reapportionment, a candidate satisfies the residency requirement by residing in any district from which a portion was incorporated into the new district where the candidate seeks

office, even if the candidate does not reside in that portion. *Id.* The Court held that the answer to this question was yes, explaining:

> The plain and ordinary meaning of the words "the district or districts" is ***broad and unrestrictive*** and, hence, includes any part of such district(s). Had the drafters of the constitution wished to limit eligibility to candidates residing only in those parts of the old districts that were absorbed into the new one, ***they could have crafted narrowing language to that effect. They did not***, and, given the clear and unambiguous language of the clause this Court need not speculate as to their intent.
>
> Wright–Jones's interpretation ***obliges this Court to read words into the clause that are not there***. The language of this clause is susceptible to a clear and unambiguous interpretation based only on the plain and ordinary meaning of the words. A court may not add words by implication when the plain language is clear and unambiguous.

Id. (emphasis added).

Likewise here, the plain and ordinary meaning of the phrase "manner of selection" is broad and unrestrictive, including the initial manner of selection as well as the manner of selection in the event of a vacancy or any other instance. Had the drafters of Article VI, Section 18(b) wished to give charter counties the power to provide only for the ***initial*** manner of selection of county officers, and not the power to determine the manner of selection of county officers in the event of a mid-term vacancy, they could have crafted narrowing language to that effect. They did not. No ambiguity is present.

But even if the phrase "manner of selection" could somehow be deemed ambiguous, any such ambiguity is dispelled by reference to the commonly understood meanings of the words, as found in the dictionary. *E.g.*, *Johnson v. State*, 366 S.W.3d 11, 25 (Mo. banc 2012). "Under traditional rules of construction, undefined words are given their plain and ordinary meaning as found in the dictionary in order to ascertain the intent of lawmakers."

Asbury v. Lombardi, 846 S.W.2d 196, 201 (Mo. banc 1993). Consultation of "the dictionary in use at the time the provision was written" is appropriate. *Id.* In 1944, Webster's New International Dictionary defined "manner," in relevant part, as: "A way of acting; a mode of procedure; the mode or method in which something is done or in which anything happens; way; mode[.]" WEBSTER'S NEW INTERNATIONAL DICTIONARY 1946 (1944). The same dictionary defined "selection," in relevant part, as: "1. Act of selecting, or state of being selected" and "2. One that is selected. . . ." *Id.* 2268. And the same dictionary defines "selected," in relevant part, as: "Chosen from a number." *Id.* Thus, the phrase "manner of selection" is properly understood to mean, "the way of choosing." Significantly, in no way do these definitions suggest, as the Circuit Court *sua sponte* determined without prompting from the parties, a temporal limitation, *i.e.*, only an "initial" selection to a term of office of four years. That is simply not what the constitutional language provides. The Circuit Court's interpretation of the phrase "manner of selection" as only including the initial manner of selection to a four-year term of office, and not selections in the event of vacancies, thus improperly "read[s] words into the clause that are not there." *Nasheed*, 368 S.W.3d at 159.

Not only does the Circuit Court's interpretation of "manner of selection" lack textual support, it lacks any other legal support. The Circuit Court cited no case law or other authority to support the proposition that the phrase "manner of selection" encompasses only the initial manner of selection, and not the manner of selection in the event of a vacancy. (D17 p. 6; App 8.) Again, the State never asserted this argument—or argued any such construction. The Circuit Court simply declared it to be so. *Cf. Morrison*

v. Olson, 487 U.S. 654, 711 (1988) (Scalia, J., dissenting) (explaining, in dissent, that the majority's opinion "simply *announce[d],* with no analysis," the majority's constitutional holding, the underpinning of which "[a]pparently . . . [was] so because we say it is so.").

Further, the interpretation espoused by the Circuit Court would have sweeping implications, which serve only to demonstrate the erroneous nature of its untethered reading. Article VI, Section 18(b) is not limited to the prosecuting attorney of a charter county but applies to ***all county officers***. Thus, the Circuit Court's expressed determination—that charter counties only have the power to decide the initial manner of selection of their county officers, and have no power to determine the manner by which county officers are elected or appointed in the event of a mid-term vacancy—would appear to destroy charter counties' ability to replace the office of ***any county officer*** that becomes vacant at any time, for any reason. Such a practice would be an intrusion on charter counties' constitutionally prescribed powers, which have been exercised innumerable times by charter counties since Article VI, Section 18(b) came into existence in 1945. The Circuit Court's *sua sponte* holding that Article VI, Section 18(b) empowers charter counties only to provide for the initial manner of selection of county officers is an atextual, unsupported, erroneous interpretation of the Missouri Constitution.

D. <u>The Circuit Court Applied an Inapplicable Test</u>

Despite the Missouri Supreme Court's definitive explication of the plain language of the Missouri Constitution, the Circuit Court relied on inapplicable cases distinguishing between governmental and private, local, corporate functions of charter counties to conclude that "Section 105.050 RSMo, supersedes Section 5.050 of the St. Louis County

Charter" because "the appointment of a prosecutor to fill a vacancy is clearly a governmental function that pertains to the administration of justice." (D17 p. 6; App 8.) These cases are inapposite where, as here, the Missouri Constitution ***explicitly*** provides a grant of power, in this case to determine the manner of selection of a charter county's county officer.

For example, the Circuit Court relied on *Information Technologies, Inc. v. St. Louis County*, where the court determined that state law, not county law, needed to be followed with regard to the procurement of a computer-aided-dispatch system for St. Louis County. 14 S.W.3d 60, 66 (Mo. App. 1999). The state statute required contracts for more than $3,000 to go to the lowest and best bidder after due opportunity for competition. *Id.* at 62-63. On the other hand, the St. Louis County Charter permitted the county council to make exceptions to the competitive bidding process by ordinance. *Id.* at 63. Unlike here, this charter provision was not explicitly authorized by the Missouri Constitution. Instead, the parties appear to have agreed that the charter provision was supported by the Missouri Constitution's "implied grant of such powers as are reasonably necessary to the exercise of the powers granted [to charter counties]." *Id.* (internal quotations omitted). The appellate court explained that, when exercising this implied grant of authority, a charter county "may not invade the province of general legislation involving the public policy of the state as a whole." *Id.* (internal quotations omitted). Thus, *Information Technologies* and cases like it stand for the unsurprising (and inapplicable) proposition that a charter county's exercise of *implied* (as opposed to express) legislative powers is constrained by

reasonableness and consistency with state law. *Id.* at 64; *Grant v. Kansas City*, 431 S.W.2d 89, 92 (Mo. banc 1968).

But here, the issue is not of implied power. St. Louis County has the ***explicit*** constitutional authority to select its prosecuting attorney. The relevant cases—the ones that involve appointments—recognize as plenary a charter county's authority to establish the manner of selecting its officers via its charter. *See Gamble*, 280 S.W.2d at 660 ("St. Louis County alone has the right to determine 'the number, kinds, manner of selection, terms of office and salaries' of its county officers."); *State ex inf. Ashcroft ex rel. St. Louis Cnty. v. O'Brien*, 610 S.W.2d 638, 642 (Mo. App. 1980).

For example, at issue in *O'Brien* was whether a state statute or county charter provision governed the appointment of members of the Board of Directors of the Sheltered Workshop and Residence Facility of St. Louis County. 610 S.W.2d at 640. The state statute generally authorized the "county court" (the equivalent of the county council) to make the appointments, but the county charter gave that power to the county executive. *Id.* at 639-40. To decide the case, the court noted that its "course has been ***clearly set*** by *State ex inf. Dalton ex rel. Shepley v. Gamble*." *Id.* at 640 (emphasis added). Because members of the Board of Directors of the St. Louis County Sheltered Workshop were county officers, the court held that:

> The legislature may not provide for such office or determine the manner of selection because Mo. Const. art. VI, § 18(b) grants the power and imposes the duty upon the county to provide by charter for the "number, kinds, manner of selection, terms of office and salaries" of its county officers, and by § 18(c) *the legislature is prohibited* from providing for any office or employee of the county except for election and judicial offices and officers.

Id. (emphasis added). *O'Brien* thus explicitly held that a state statute cannot "provide for the appointment of the members of the board contrary to the provisions . . . of the charter." *Id.* at 641.

No case concerning a charter county's power to determine the number, kinds, manner of selection, terms of office and salaries of its county officers has ever discussed, let alone sanctioned, the amorphous governmental versus private, local, corporate test urged by the State and adopted by the Circuit Court below. This test, however, is inapplicable because a charter county's authority in this regard is complete and exclusive. Instead, this case and its proper resolution begins and ends with Article VI, Section 18(b) and the Missouri Supreme Court's controlling application of that constitutional provision.

It also makes complete sense that no case discussing a charter county's power to determine the manner of selection of its county officers has ever applied the Circuit Court's test because doing so would be nonsensical. The county officers are those "by whom the county performs its usual, political functions, its functions of *government*." *Imel*, 146 S.W. at 784 (emphasis added). If the governmental versus private, local, corporate test applied, there would be no county officers; governmental officers perform government functions, of course. Additionally, the Circuit Court's rationale on this point cannot be squared with *Gamble*. *Gamble* held that sheriffs were county officers. State law requires sheriffs to "quell and suppress assaults and batteries, riots, routs, affrays and insurrections . . . apprehend and commit to jail all felons and traitors, and execute all process directed to him by legal authority." Section 57.100, RSMo. These are all, in the Circuit Court's terms, "governmental function[s] that pertai[n] to the administration of justice." (D17 p. 6; App

8.) Yet the Missouri Supreme Court has held that St. Louis County alone has the power to provide for the manner of selection of those who execute the duties of sheriff. *See Gamble*, 280 S.W.2d at 660.

E. Historical Precedent Confirms that the Missouri Constitution Grants St. Louis County the Authority to Determine the Manner of Selecting its Prosecuting Attorney

There are at least seven examples in recent history of charter county authorities appointing a prosecuting attorney to fill a vacancy. To this, the Circuit Court said, "And, so what?"—despite the import of the historical understanding of whether a public official was a county officer. (Tr. 23:8, 27:21-22.) Of Missouri's five charter counties, three currently have prosecuting attorneys who were at least initially appointed to office due to a vacancy—as mentioned, all were appointed by the relevant county executive or county commission. First, St. Charles County, which just went through this replacement process in April 2023, has a charter provision ***identical*** to that of St. Louis County. Specifically, St. Charles County's Charter provides, in pertinent part: "A vacancy in the office of Prosecuting Attorney shall be filled by the County Executive subject to confirmation by the Council." St. Charles Cnty. Charter § 4.1002; App 175. As such, it was not a surprise that St. Charles County Executive Steve Ehlmann—not the Governor—appointed the prosecuting attorney upon a vacancy in that county office, as required by Article VI, Section 18(b) of the Missouri Constitution and the St. Charles County Charter. (D20 ¶ 16.) This process was also followed with regard to Timothy Lohmar's appointment as St. Charles County Prosecuting Attorney by the St. Charles County Executive to fill a vacancy in 2013. (D20 ¶ 15.)

Second, the Clay County Commission appointed a new prosecutor due to a vacancy back in October 2022. (D20 ¶ 10.) This was in accordance with Section 4.05 of the Clay County Constitution (equivalent to a charter), which provides that, in the event of vacancy in the prosecuting attorney's office, "the County Commissioners shall, within sixty (60) days of the occurrence of such vacancy, appoint a replacement to serve until the end of the term to which he or she is appointed or until the next regular county election, whichever is sooner." Clay Cnty. Const. § 4.05; App 210. Significantly, the prior incumbent Clay County Prosecutor, Dan White, was originally appointed as Clay County Prosecuting Attorney by then-Governor Bob Holden in 2004. (D20 ¶ 9.) At that time, Clay County was not a charter county. (D20 ¶ 9.) However, effective January 1, 2021, Clay County became a charter county. *See* Clay Cnty. Const. § 1.01. As a result, when a vacancy in the office of the Clay County Prosecuting Attorney arose in 2022, it was filled by the Clay County Commission, not the Governor. (D20 ¶ 10.)

Third, the current prosecutor of Jackson County, Jean Peters Baker, was initially appointed by the County Executive of Jackson County to fill a vacancy in 2011. (D20 ¶ 14.) This was in accordance with the Jackson County Charter. *See* Jackson Cnty. Charter, art. V, § 2; App 128 ("If the Office of Prosecuting Attorney becomes vacant, the County Executive shall appoint, as provided in this charter, a person . . . to hold office . . . ."). This same process was followed when the County Executive of Jackson County appointed Judge James Kanatzar to fill a vacancy and serve as the prosecuting attorney in 2007. (D20 ¶ 12.) Notably, in both instances, the County Executive of Jackson County

temporarily appointed Melissa Mauer-Smith to serve as Acting Prosecuting Attorney until the appointment of a permanent prosecuting attorney. (D20 ¶¶ 11, 14.)

The Circuit Court expressly refused to consider this established understanding of Section 18(b) as applied to charter county prosecuting attorneys throughout the State over time, reasoning that "there is no indication that any such county action resulted in litigation, let alone a determination by a court concerning the issues presented here."[8] (D17 p. 9; App 11.) But the Missouri Supreme Court has considered counties' understanding of their powers and their exercise (or failure to exercise) the same when analyzing the "county officer" issue under Section 18(b). *See, e.g.*, *Kirkpatrick*, 426 S.W.2d at 74. Such historical understanding, combined with the plain text of Article VI, Section 18(b) and the related decisions of the Missouri Supreme Court, control the outcome of this matter, unless and until the Missouri Supreme Court overrules its prior decisions. *See Imel*, 146 S.W.at 784 (overruling prior precedent in concluding that probate judges are not county officers); *id.* at 786-87 (Woodson, J., dissenting) (arguing that prior precedent was correct and consistent with the universal understanding of the bench and bar).

[8] The Circuit Court's rationale ignores the fact that there would be no litigation if all involved knew the vacancy appointment process pursuant to the charter counties' charters was correct as applied. If anything, the absence of litigation further establishes the universally understood correctness of the charter county appointments of their county prosecuting attorneys pursuant to their county charters.

F. The State's Proposed "Harmonization" Argument Lacks Merit and Contradicts the Attorney General's Prior Formal Opinion Concerning Article IV, Section 4 and Governing Law

The State argued in the Circuit Court that the provisions of the Missouri Constitution and the St. Louis County Charter that vest authority in St. Louis County to fill county-office vacancies serve "at most, only . . . as a gap-filler if the Governor chooses not to fill the vacancy." (D9 p. 5.) The State contended that the St. Louis County Executive—and this Court—should "defer to the Governor's primary appointments authority in the first instance if the Governor announces an intent to fill [a] vacancy." (D9 p. 14.) It is unclear whether the State will argue that position here, as it did not press it in its Responsive Brief filed with the Circuit Court. (*See* D19 *passim*.)

The State has cited no law to support its previous assertion that the Governor ***may*** "choose" not to exercise his constitutional appointments power, and the clear legal authority to the contrary belies this argument. Indeed, over twenty years ago, then Governor Bob Holden sought an opinion from then Attorney General Jay Nixon as to whether the Governor was ***required*** to make appointments under Article IV, Section 4, or whether he could ***choose*** not to fill vacancies. *See* Opinion Letter from Attorney Gen. Jeremiah W. Nixon to Gov. Bob Holden, No. 172-2001, 2001 WL 392099, at *1, *3 (Mo. A.G. Apr. 12, 2001). The Attorney General looked to the plain text of the constitutional provision, noting that the "section explicitly provides that the 'governor *shall* fill all vacancies in public offices unless otherwise provided by law.'" *Id.* (quoting Mo. Const art. IV, § 4) (emphasis in original). The Attorney General then took note of the "Missouri precedents recogniz[ing] that constitutional provisions are usually deemed mandatory, and

not merely directory." *Id.* (collecting cases). Thus, the Attorney General opined that the Governor is "required to fill" vacancies in public offices subject to Article IV, Section 4. *Id.* At least initially, the State argued the contrary view to the Circuit Court. (D15 pp. 13-15.) In the end, no Missouri Governor has ever attempted to fill a vacancy in the office of a charter county prosecutor because no Missouri Governor has ever believed that he had the authority to do so. Of course, that is because they in fact do not have the authority to do so.

The Circuit Court, in adopting the State's position that "the Governor of the State of Missouri has the exclusive authority to fill a vacancy in the Office of the St. Louis County Prosecuting Attorney," seemingly undermined (if not indicted) the authority of those charter county prosecutors who were appointed to office by charter county authorities pursuant to their respective counties' charters. If it is actually the case that the Governor alone possesses the authority to fill a vacancy in the office of a charter county prosecutor, then the various prosecutors of Clay, Jackson, and St. Charles County were not lawfully appointed, it would appear. And if this Court affirms the Circuit Court's Judgment, there is no apparent reason why the Attorney General could not, or even be required to, seek their ouster in a *quo warranto* proceeding, and/or why the legitimacy of their official actions could not potentially be challenged. This Court should not countenance such an absurd result, in defiance of the express language of the Missouri Constitution, the many relevant decisions of the Missouri Supreme Court, the longstanding historical practice in charter counties, proper constitutional interpretation, and the recorded intentions of the constitutional delegates.

CONCLUSION

For the reasons set forth above, the Circuit Court's Order and Final Judgment should be reversed, its injunctions against St. Louis County should be vacated, and, pursuant to Rule 84.14, judgment should be entered in favor of the County and against the State on the County's Counterclaim Count I and on the State's Counts I and II, and for such other and further relief as this Court believes should be granted.

Respectfully submitted,

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CERTIFICATE PURSUANT TO RULES 84.06(c)

The undersigned counsel states that the foregoing Brief of Appellants:

1. Complies with the limitations set forth in Mo. Sup. Ct. R. 84.06(b);

2. Contains 9,789 words, as determined by Microsoft Word software;

3. Complies with the requirements of Mo. Sup. Ct. R. 55.03; and

4. Has been served in compliance with Mo. Sup. Ct. R. 103.08.

/s/ Neal F. Perryman

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 27th day of December, 2024, a copy of the foregoing document was served via the court's electronic filing system on counsel listed below. Additionally, the undersigned certifies under Mo. Sup. Ct. R. 55.03(a) that he has signed the original of this Certificate and the foregoing Appellant's Brief:

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