IN THE SUPREME COURT OF MISSOURI

No. SC99185

STEPHANIE DOYLE, et al., APPELLANTS

VS.

JENNIFER TIDBALL, et al., RESPONDENTS

Appeal from the Circuit Court of Cole County
The Honorable Jon E. Beetem, Judge

APPELLANTS' REPLY BRIEF

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INTRODUCTION

The Court has a lot of briefs to read in this case. And they raise a lot of interesting, although often obscure, issues. But in even the most complicated of cases, there sometimes lies a simple truth.

The Plaintiffs below, three low income women with healthcare needs, ask the courts to order the members of the executive branch to provide them with health care coverage. They meet the constitutional requirements for that coverage—the State agrees they are between the ages of 19 and 64 and that they have incomes at or below 138% of the federal poverty level. D17; P1-2, ¶ ¶ 1-16; Mo. Const. art. IV, § 36(c). And the legislature has authorized funding for the MO HealthNet program to provide various types of healthcare, including the physician services and pharmaceuticals Plaintiffs need. D24; D29; A10-115. All the Plaintiffs request is that the Courts order the Defendants—all executive branch officials charged with administering the MO HealthNet program—to provide them the services for which they are eligible and for which there is funding.

In response, the trial court invalidated a provision of the Missouri Constitution even though no party had asked it to and even though the Court of Appeals had already considered the issue. Now, the executive branch officials ask this Court to overturn its quite recent precedent which upheld the fundamental and long-followed proposition that appropriations bills are not the right place to change the substantive law. If you do overturn that precedent, those officials then want you to rewrite appropriations language by adding

words that simply are not there to deny funds for the very individuals the Constitution says shall be covered.

Here's an example of what they want you to do to each section of the appropriations bills:

CCS SS SCS HCS HB 11 40

Section 11.715. To the Department of Social Services

For the MO HealthNet Division but not for those eligible because of a vote of the people

For physician services and related services including, but not limited to, clinic and podiatry services, telemedicine services, physician-sponsored services and fees, laboratory and x-ray services, asthma related services, diabetes prevention and obesity related services, services provided by chiropractic physicians, and family planning services under the MO HealthNet fee-for-service program, and for a comprehensive chronic care risk management

When it comes to the legal framework, Plaintiffs ask this Court to follow *Boeving v. Kander*, reject the trial court's re-adjudication of *Cady v. Ashcroft,* and find that on its face, Article IV, Section 36(c) does not appropriate. Once that issue is dispensed with, all this Court needs to do is to read House Bills 10 and 11 to conclude that there is funding for Missouri's Medicaid program ("MO HealthNet"), which includes the population described in Article IV, Section 36(c).

The State's theory of victory, on the other hand, requires this Court to ignore the plain language of House Bills 10 and 11, overrule *Planned Parenthood v. Department of Social Services*, and adopt a new test for Article III, Section 51 cases. While there may be a time when the Court needs to reach all of these complicated,

constitutional questions, it is not now. Rather the Court should seek to avoid the constitutional conflicts the State presents (as precedent says you should).

That approach does the least damage to the people's power to enact laws via initiative petition. Initiatives are pure participatory democracy. *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 827 (Mo. banc 1990). And amending the Constitution to do the work of democracy when an "idle representative government fails to" is the very purpose of the initiative process. *Earth Island v. Union Elec. Co.*, 456 S.W.3d 27, 39 (Mo. banc 2015) (Fischer, J., dissenting). That's why you should be extremely skeptical of those "who would use the judiciary to prevent the initiative process from taking its course." *Brown v. Carnahan*, 370 S.W.3d 637, 645 (Mo. banc 2012).

The Court of Appeals followed this directive a year ago in *Cady*. But the trial court did not here. This Court has *never* endorsed what the trial court did—wholesale invalidation of a law after its adoption because of the manner in which it was adopted. *See Dotson v. Kander,* 464 S.W.3d 190 (Mo. banc 2015) (considering a post-adoption challenge to a ballot title using an election irregularities analysis). There's no reason to start now, particularly given that the initiative (now Article IV, Section 36(c)) *did* comply with the mechanisms for adoption and the Court of Appeals already said so.

The rest of the analysis is simple. Is there funding for Article IV, Section 36(c)? The answer is found in the plain language of the appropriations bills at issue. Despite the State and its amici's

persistent urgings to look everywhere but House Bills 10 and 11, the plain language of those bills make clear that there is funding for the MO HealthNet program, which includes the new eligibility category established by Article IV, Section 36(c). The State's arguments to the contrary are little more than an acknowledgment that the plain language is inconvenient for their position.

ARGUMENT

I. Article IV, Section 36(c) does not violate Article III, Section 51 because it does not appropriate on its face and the General Assembly has discretion over funding for the MO HealthNet program.

We address this issue first, not because Plaintiffs or the State asked for a declaration on it, but because the trial court's decision requires it. The constitutional provision does not require an appropriation. The State apparently agrees, but then argues that this Court must disavow *Planned Parenthood v. Department of Social Services* to make sure. The amici calling themselves the "House of Representatives"[1] straddle both side of the issue. Unsurprisingly, Mr. Cady (now as amicus) continues to assert Section 36(c) appropriates. But, except for Cady, Plaintiffs, the State, and the House all agree that *Cady* was correctly decided.

[1] Appellants consented to an amicus filing by the House of Representatives, but now there appears to be doubt as to whether the brief that was filed speaks for the House. Motion of State Representatives Quade and Brown for Leave to file Amicus Brief or in the Alternative Strike the "House of Representatives" Amicus Brief.

A. On its face, Section 36(c) establishes a new eligibility category, but does not mandate an appropriation for it. The General Assembly maintains complete discretion over funding for the MO HealthNet program, including services for the newly eligible population. The test under Article III, Section 51 is whether the measure appropriates on its face.

The reason Plaintiffs have never made the above argument is simple. *Boeving v. Kander* properly articulates the law—Section 51 challenges are limited to facial reviews. Courts entertain "such challenges only to the extent that [] a purpose and effect [to appropriate funds] are plainly and unavoidably stated in the language of the proposal." *Boeving v. Kander* 496 S.W. 3d 498, 512 (Mo. banc 2016) (citing *Comm. For a Healthy Future, Inc. v. Carnahan,* 201 S.W.3d 503, 510 (Mo. banc 2016).

That test is correct and consistent with the maxim that an enactment of the legislative body (here the people, by-passing the General Assembly) is presumed lawful unless it "clearly and undoubtedly" violates the Constitution, a concept sometimes expressed as "plainly and palpably affront[ing] fundamental law embodied in the constitution." *See e.g. State v. Shanklin*, 534 S.W.3d, 240, 242 (Mo. banc 2017); *Pearson v. Koster,* 367 S.W.3d 43 (Mo. banc 2012). If the Court has any doubt at all, it should be

resolved in favor of constitutionality. *See Mo. Prosecuting Attorneys v. Barton County,* 311 S.W.3d 737, 741 (Mo. banc 2010).

The Cady amicus in particular attempts to impose a different test that, rather than resolving doubts in favor of constitutionality, creates its own doubts and then asks they be resolved in a way that overturns the vote of the people. Their test? "If a proposed amendment mandates or reasonably requires funding, it must provide new revenues to pay for the mandate." Cady Br. at 9.

Not only is this test foreign to prior decisions or concepts of constitutional analysis, it is completely unworkable. It is so devoid of legal or policy foundation that neither the State nor the "House" adopt it—or anything close to it. Rather they acknowledge that *Boeving's* facial test is the standard under Article III, Section 51. See State's Br. at 42; "House" Br. at.42.

B. The decision in *Cady* is correct—Article IV, Section 36(c) does not appropriate on its face.

Cady was correctly decided. The State's amici, and the trial court fail to point to any language in Article IV, Section 36(c) that looks at all like an appropriation—a bill that "set[s] aside moneys for a specific purpose." *See State ex rel. Hueller v. Thompson,* 289 S.W. 338, 340-41 (Mo. banc 1926)

Indeed, it would be impossible to appropriate based solely on the language of Section 36(c) as there is no amount associated with any of the provisions of Section 36(c). To appropriate, a law must "distinctly specify the amount and purpose of the appropriation

without reference to any other law to fix the amount or purpose." Mo. Const. art. IV, § 23. There are no amounts listed in Article IV, Section 36(c) nor are there any associated purposes.

And the State admits as much. The State concedes that Article IV, Section 36(c) "merely expands eligibility for Medicaid benefits leaving decisions about how to fund the program to the legislature." State's Br. at 47. And that is how it works—the people reserved the power to "regulate the internal government" (Mo. Const. art. 1, § 3), but left it to the legislature to make funding decisions within the government. A mere expansion of eligibility is different than an appropriation—a setting aside of money—for such expansion. On this Plaintiffs and the State agree.

But the trial court relied on the fallacy that because a general law might cost money to implement it must therefore require an appropriation. *Cady* rejected this approach and so should this Court. *See Cady,* 606 S.W.3d at 668. The facts are no different today than they were at the time *Cady* was decided. Providing health coverage still costs money. What the *Cady* Court said still holds true—Article IV, Section 36(c) does not require the General Assembly to appropriate funds.

C. There are no post-election challenges available under Article III, Section 51.

Underlying the trial court's analysis is the idea that a post-election Article III, Section 51 challenge is even available. That was wrong. Now that the measure has passed, it is a part of the

constitution, subject to general laws with a much more narrowly tailored remedy, as explained in *Boeving v. Kander:*

> If Amendment No. 3 is approved by the voters and this "donor" believes that an imminent application of the provisions of Amendment No. 3 **will result in the expenditure of his or her $100 without legislative appropriation, he or she should raise this challenge at that time, and if it succeeds, it is likely that a remedy can be fashioned that is far more narrowly tailored than the wholesale rejection Opponents seek here.**

Boeving, 496 S.W.3d at 511 (emphasis added).

That is not to say that appropriation authority is irrelevant. The Constitution requires that funds be spent only when the general assembly appropriates. *See* Mo. Const. art. III, § 36; Mo. const. art. IV, § 23. So, if an expenditure were to occur "without legislative appropriation," a Plaintiff might successfully block the expenditure as contrary to the general constitutional prohibition. The "House" amici agree with Plaintiffs that a post-election challenge would be under a provision other than Article III, Section 51. "House" Br. at. 43.

Those types of challenges follow the directive to uphold enactments if possible. For example, in *State ex rel. Kansas City Symphony v. State,* 311 S.W.3d 272 (Mo. App. 2010), the Court fashioned a narrow remedy in a challenge to a statute purportedly appropriating without an appropriations bill. Rather than declaring the statute unconstitutional, it found that the transfer of funds was

"directory, rather than mandatory, and does not supplant the appropriations process." *Id.* at 277. The Court was guided by the principle that it "should reject an interpretation of a statute that would render it unconstitutional, when the statute is open to another plausible interpretation by which it would be valid." *Id.* at 278 (citing *Blaske v. Smith & Entzeroth, Inc.,* 821 S.W.2d 822, 838-39 (Mo. banc 1991).

This treatment of a general law that is alleged to appropriate is confirmed in *Boeving,* and makes sense, particularly in the context of provisions adopted by a vote of the people. It is the duty of the Courts to "zealously guard the power of the initiative petition process that the people expressly reserved to themselves in article III, section 49." *Boeving,* 496 S.W.3d at 506. Thus, a narrowly tailored remedy should not invalidate a provision adopted by the people, but instead find some way to preserve it. *Buchanan v. Kirkpatrick,* 615 S.W.2d 6, 12 (Mo. banc 1981).

But, to the extent that an initiative can be invalidated under Article III, Section 51 after the voters have already approved the measure, such a direct rebuke of the will of the voters would be possible only where there is "an imminent application" of the initiative that "will result in the expenditure of [funds] without legislative appropriation." *Boeving v. Kander*, 496 S.W.3d 498, 511 (Mo. banc 2016). This case does not present such a scenario.

Here, there *is* in fact an appropriation available to pay for the expansion population. So there is no "imminent" risk that Medicaid expansion "will result in the expenditure of [funds] without

legislative appropriation." *Id.* Thus, there is no basis for the Court even to consider whether Article IV, Section 36(c) violates Article III, Section 51.

D. Even if the test under Article III, Section 51 is whether the provision appropriates by "practical necessity," Article IV, Section 36(c) easily passes as the General Assembly retains complete discretion over whether to appropriate and how much.

The State and its amici contend there is a different test under Article III, Section 51 post-election. The State is incorrect, as discussed below. But, even if the State is right and the test is "practical necessity" it does not change the fact that Article IV, Section 36(c) does not require the General Assembly to appropriate any funds, instead leaving it fully to the discretion of the legislature whether and how much to appropriate for the MO HealthNet program.

Putting aside that no court has ever explained what "practical necessity" means[2]—the State misrepresents Plaintiffs' arguments here. Plaintiffs do not assert that the General Assembly is forced into

[2] Appellants' research reveals that the phrase "practical necessity" in relation to an appropriation appears in only one case. *City of Kansas City v. Chastain,* 420 S.W.3d 550 (Mo. banc 2014). Appellants suggest that phrase does not mean what amicus think it means. *See below.*

a binary choice. *See* State's Br. at 36-7; *see also* App. Br. at 25 ("[T]he General Assembly retained completed discretion over appropriations: it could have kept the appropriations amounts the same as Fiscal Year 2021; it could have increased those appropriations; it could have decreased those appropriations; and it could have refused to appropriate any funds to MO HealthNet at all.").

The choices facing the General Assembly may be *politically* difficult, but that is not an issue for this Court. The General Assembly could choose to limit the amount of money spent in the MO HealthNet program by reducing eligibility for the categories listed in Chapter 208 as the legislature did in 2005 and 2007. *See* App. Br. at 30.[3] The General Assembly could even seek a change in eligibility for the newly eligible group by sending another initiative petition to the voters. Mo. Const. art. XII, § 2(b). They did that for "CLEAN Missouri" and convinced the voters to enact what some call "CLEANER Missouri." *See* Mo. Const. art. III, §§ § 2, 3, and 7.[4]

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[3] The State mistakenly relies on *McNeil-Terry* to suggest - incorrectly- that the State cannot make budgetary changes without violating federal law. Respondents Br. at 38-39. In fact, Missouri has ample flexibility to adjust its Medicaid program as exemplified by the 2005 Medicaid cuts implemented in SB 539. That bill eliminated an array of optional services and eligibility groups, including the very dental services that were previously reduced without a statutory change and thus struck down in *McNeil-Terry*. See SB 539, 2005 legislative session (modifying §§ 208.151 and 208.152).

[4] This option is not the least bit farfetched. Even this year the House of Representatives considered a piece of legislation (HJR 64) that

At first blush, the State and amici reject the idea that the General Assembly has a choice at all if there are only two choices: fund MO HealthNet or not because the choice is too difficult—MO HealthNet is too big to fail. Those aren't the only two options, but even if they were, the fact that there is a choice necessarily means that the General Assembly has discretion. And as an amici points out, this Court has rejected Article III, Section 51 challenges when the choices are limited to only two. *See* Community Health Ctrs. Br. at 15; *see also Dujokovich v. Carnahan,* 370 S.W.3d 574 (Mo. banc 2012).

The Court's decision in *Dujakovich v. Carnahan* provides a stark example of how Article III, Section 51 does not protect the legislature from *hard* choices. In *Dujakovich*, the Court considered an Article III, Section 51 challenge to a proposition that presented the City of Kansas City with a choice: abolish the City's earnings tax, or hold regular elections to re-authorize that tax. 370 S.W.3d 574, 576-77 (Mo. banc 2012).

Challengers claimed that the requirement to hold re-approval elections would necessarily involve the expenditure of money. *Id.* at 577. But the Court rejected this claim, reasoning that any

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would have brought the issue of Medicaid eligibility to another vote of the people but chose not to move that legislation forward. The failure to make another Medicaid ballot initiative a legislative priority does not mean that the legislature had no options; Rather, it shows that the legislature has the legal means to eliminate the expansion eligibility group, thereby debunking the State's "practical necessity" theory.

appropriations to finance elections arose from the "pure discretion" of the City. The City could avoid making any expenditures at all simply by abandoning its earnings tax. *Id.* at 578. The City Council retained a choice, and thus the initiative did not appropriate by practical necessity. *Id.*

The *Dujakovich* choice was much harder than the General Assembly might face here, even if the Court accepts the State's formulation of that choice. The earnings tax accounts for nearly 40% of the City's general revenues. *See* Sherae Honeycutt, *Between refunds and renewal vote, earnings tax could hit Kansas City's budget hard*, Fox 4 (Mar. 3, 2021), *at* https://fox4kc.com/news/between-refunds-and-renewal-vote-earnings-tax-could-hit-kansas-citys-budget-hard. The "pure discretion" in *Dujakovich* involved a choice between making an appropriation or jettisoning 40% of the City's revenues.

The (false) choice between funding the expansion population and defunding MO HealthNet entirely provides *at least* as much discretion as the choice faced in *Dujakovich*. The fact that the People of Missouri—with whom all sovereignty in this State rests—presented their elected representatives with a tough choice does not mean that they eliminated that choice altogether. Making hard choices is precisely what the People send their elected officials to Jefferson City to do. Thus, even under the State's framing of the issue, Article IV, Section 36(c) does not appropriate through practical necessity.

That's also the analysis in *Kansas City v. McGee*, 269 S.W.2d 662 (Mo. banc 1954). The State and its amici think they have found a smoking gun because the initiative there was unconstitutional even though it did not appropriate a dollar amount on its face. They read *McGee* too fast.

To the extent *McGee* is good law, *see City of Kansas City v. Chastain,* 430 S.W.3d 550, 558 (Mo. banc 2014) (Wilson, J., concurring), it also follows the "lack of discretion" test of *Boeving* and *Dujakovich*. The *McGee* initiative fell because it "place[d] the entire control of the administration of the pension fund in the hands of trustees. The only duty delegated to the City Council [was] a ministerial duty to make appropriations whenever it is requested to do so." 269 S.W.2d at 665. As a result, "the ordinance ha[d] the same effect as if it read that a sum necessary to carry out its provisions as certified by the trustees shall stand appropriated." *Id.* at 666. "Stand appropriated" is a very important phrase there. The initiative in *McGee* required the legislative body to appropriate money. And that is why it was struck down.

Undeterred by the actual words of the decision, the state and its amici fast-forward 60 years to a case that discussed and summarized *McGee*. *Chastain* described *McGee* as preventing an appropriation "through practical necessity." Id. at 555. But *Chastain* did not announce a new test—nor a different one than *Boeving*—rather that language was simply a way of describing what happened in *McGee*. A full reading of *Chastain* makes that apparent.

Section 36(c) *might* be unconstitutional if the new constitutional section used the word appropriate somewhere, such as to say "the general assembly shall appropriate sufficient funds to provide coverage" or "the legislature shall appropriate such amounts as are requested by the Governor." Instead, this provision leaves discretion to the General Assembly as to whether and how much to fund the Medicaid program.

The situation here is similar to *Committee for Healthy Future, Buchanan v. Kirkpatrick,* and *Dujakovich* —all cases where the Court concluded there was no violation of Section 51 because an appropriation was still necessary. *See* Community Health Ctrs. Br. at 14. As the State has agreed, Article IV, Section 36(c) just establishes a new eligibility category. It is up to the General Assembly to fund it.

E. The constitutional convention debates confirm that Article IV, Section 36(c) does not violate Article III, Section 51.

As described in Plaintiff's Opening Brief, the 1943-1944 constitutional convention debates make clear that Article III, Section 51—as understood at the time of its enactment—prohibited "appropriations" only in a narrow and technical sense of the word. There was no consideration of "practical necessity" or the like.

But the State invites the Court to look beyond the constitutional text to the broader policy preference that—according to the State—gave rise to that provision. In the State's view, Article III, Section 51 reflects a concern that the People might be unable to

take into account various revenue sources and spending needs when voting on an initiative. *See* State's Br. at 45-46. From this, the State seemingly infers that Article III, Section 51 prohibits initiatives that would require spending to implement, regardless of whether the initiatives actually purport to interfere with the appropriations process. *See id.*

That presents at least two problems. First, it is the original meaning of the *text*—not the perceived original underlying policy preferences of the drafters—that determines the scope of the Constitution. Assuming the State has accurately conjured up the underlying policy preference that led to Section 51's adoption, that policy preference would provide "no authority for this Court to read into the Constitution words that are not there." *Independence—Nat'l Educ. Ass'n v. Independence Sch. Dist.*, 223 S.W.3d 131, 137 (Mo. banc 2007). Policy preferences "must give way to the plain language." *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 828 (Mo. banc 1990).

Here, the constitutional text provides that "[t]he initiative shall not be used for the appropriation of money." Mo. Const. art. III, § 51. Thus, the only relevant question is whether an initiative constitutes an "appropriation of money." As understood at the time of the provision's enactment, this phrase meant "the very act of passing an appropriation bill." Debates at 476. And the enactment of Article IV, Section 36(c) was not the very act of passing an appropriations bill.

Second, the State overestimates the unanimity of the framers on the underlying policy questions. While some delegates expressed concern about the voters' potential profligacy, many others expressed a preference for broad initiative powers. Given the disparate policy perspectives that ultimately yielded Article III, Section 51, the Court should avoid implementing perceived policy views that were not enshrined in the constitutional text. *Cf. Camps Newfound/Owatunna, Inc. v. Town of Harrison*, 520 U.S. 564, 620 (1997) (Thomas, J., dissenting) (noting that "the Court should confine itself to interpreting the text of the Constitution" rather than engage in "policy-laden decision making").

The State claims that Plaintiffs' account of the original meaning of Article III, Section 51 conflicts with the practical-necessity test. *See* State's Br. at 43-44. There is no such conflict. The Court's practical-necessity doctrine simply recognizes that, through savvy draftsmanship, some initiatives may constitute the functional equivalent of an appropriations bill, even they do not use magic words like "stand appropriated. "[5]

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[5] *Amici* Cady's arguments focus on the so-called "Park Amendment," which added to Article III, Section 51 the language "other than of new revenues created and provided for thereby." From a purely textual perspective, that amendment made Article III, Section 51 *less restrictive* than the Committee draft, not *more restrictive*. It created an exception to the committee's general prohibition against appropriation by initiative. No principle of interpretation supports the notion that adding an exception to a general prohibition somehow increases the breadth of that general prohibition.

II. The Court need not even consider *Planned Parenthood* in order to resolve this appeal.

The State's lead argument—presumably the one in which it has the most confidence—requires this Court to overrule a one-year-old 6-1 decision. There is no reason to even consider the invitation. The Constitution's single-subject rule has no bearing on whether Article IV, Section 36(c) appropriates by initiative.

The State claims that Section 36(c) appropriates by practical necessity *only when* combined with the single-subject rule as articulated by *Planned Parenthood*.[6] The State cites no authority for the novel theory that an initiative that, on its own, does not appropriate can become invalid when combined with generally applicable limitations on the legislative and appropriation processes.

This Court has never taken or endorsed such an approach. Indeed, the State's theory would be a dramatic expansion of the Court's existing practical-necessity jurisprudence. Rather than scouring the Constitution for provisions that can be cobbled together to require an appropriation, the Court should stick to the approach it has taken for nearly 70 years by looking only at the initiative itself. The State's complaint is about the single-subject rule, not Article IV, Section 36(c).

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[6] While the State does not put the point quite this bluntly, it must be the upshot of the State's argument. Otherwise, overruling *Planned Parenthood* would not avoid a constitutional question, as the State contends.

Even if *Planned Parenthood* has any relevance, Article IV, Section 36(c) does not appropriate by practical necessity. The State claims that Article IV, Section 36(c) required the General Assembly to appropriate by practical necessity, because the amendment gave legislators only two options: fund coverage of the expansion population, or else defund MO HealthNet entirely. As explained elsewhere, Plaintiffs disagree with the notion that the General Assembly faced only those two options. But even if Article IV, Section 36(c) really did present the legislature with this choice, it would not violate Article III, Section 51 for the reasons already explained—hard choices are still choices.

Finally, the only reason *Planned Parenthood* enters the discussion is because of what the trial court described as "semantic and legal" gymnastics. D66; A2. If the Court follows the plain and ordinary meaning of the relevant appropriations bills, the Court need not turn to its prior decision. *Planned Parenthood* is relevant only if one entertains the State's extra-textual arguments that the appropriations bills surreptitiously flouted the will of the voters by effectively eliminating Medicaid expansion. In that case, the doctrine of constitutional avoidance would require the court to consider whether the state's proposed reading violates *Planned Parenthood*'s interpretation of the single-subject rule. In other words, if the state convinces you that the appropriations bills change eligibility, you must consider whether that violated the single subject rule.

III. The resolution of this case is simple—there are funds appropriated for the MO HealthNet program.

The State and its amici invite the Court to engage in an esoteric and complicated analysis. The trial court's decision explicitly acknowledges this fact. *See* D66: P2; A2. ("If Amendment 2 was validly enacted, Plaintiffs are absolutely right. Any appropriation for Medicaid services would be available for all **eligible** including the Medicaid Expansion class of eligibles, not just those who are eligible prior to July 1, 2021."). As discussed above, it is without doubt that Amendment 2 was validly enacted because it does not appropriate on its face. All that is left to resolve is the initial question in this case: is there funding to implement Article IV, Section 36(c). The plain language of House Bills 10 and 11 says there is.

A. The plain language of House Bills 10 and 11 fund the MO HealthNet program.

The State and its amici say there is no funding—relying on language that is not actually in the appropriations bills. But that is not how plain text analysis works.

House Bills 10 and 11 include line items funding various kinds of services under the MO HealthNet program. *See* Appellant's Br. at 38. The State and its amici fail to analyze crucial phrases in all of these line items. The bills appropriate "to the Department of Social Services [f]or the MO HealthNet Division." That phrase appears throughout the appropriations and then is followed by "for" and then

describes services, such as pharmacy. *See e.g*. D29:P37; A92, Section 11.605. A comprehensive example is Section 11.715 of House Bill 11. D29: P41; A96. There the legislature appropriated 294 million dollars to the MO HealthNet division "for physician services" and related expenditures.

The record contains a stipulation that the "Department of Social Services" administers the MO HealthNet program. D17; P2, ¶ 18, and that the "MO Healthnet Division" is responsible for administering the MO Healthnet program. D17; P2, ¶ 21. The MO HealthNet program "provides medical assistance to eligible Missouri residents." D17:P3, ¶ 25. Who are those eligible individuals? The groups listed in Chapter 208 and Article IV, Section 36(c), which include the plaintiffs here. *See* D17:P3, ¶ 28. The language of the appropriations bills authorizes expenditures to provide services to individuals eligible to enroll in the MO HealthNet program, like plaintiffs.

Despite the State's misplaced reliance on *NFIB v. Sebelius,* it is undisputed that the MO HealthNet program is the State's Medicaid program and there is only one.[7] Nowhere in the record, until the State's brief, is there ever any question of whether Article IV, Section

[7] The language from *NFIB* relied on by the State had to do with whether the federal government could force a state to implement Medicaid expansion and has no bearing on a state's decision to expand Medicaid of its own volition, let alone a choice that was made by the People of Missouri.

36(c) created a new program. Regardless, the stipulated facts say otherwise. *See* D17; P2-3, ¶ ¶ ¶ 18, 21, 25, and 28.

The House Bills fund the MO HealthNet program, not some subset of it, as the State contends. Indeed, the State and its amici acknowledge that the Parson Administration took various steps to add the expansion group to Missouri's MO HealthNet program by amending its state Medicaid plan (acknowledging that this was an amendment to an existing program, not creation of a new one) and proposing to revise MO HealthNet regulations before deciding not to go forward with implementation. Thus, House Bills 10 and 11 need not identify any "new program" for them to fund the expansion eligibility group.

And relying on the plain language of House Bills 10 and 11 avoids a potential constitutional concern with those bills. It would be a violation of the single-subject requirement to read House Bills 10 and 11 as amending the Missouri constitution to deny funding for the newly eligible population. *See Planned Parenthood v. Department of Social services,* 602 S.W. 2d 201, 210-11 (Mo. banc 2020). Only the State's interpretation of the appropriations bills raises a constitutional issue. But if the Court can construe a statute or bill to avoid a constitutional problem, it should do so. *See e.g. Lang v. Goldsworthy,* 470 S.W.3d 748, 752 (Mo. banc 2015); *State v. Vaughn,* 366 S.W.3d 513, 517 (Mo. banc 2012). Here, an interpretation that avoids *Planned Parenthood* is easy to find.

B. The State's interpretive arguments lack merit.

Much like its briefs in the trial court, the State claims to rely on the plain text of the appropriations bills, while effectively ignoring the bills' actual language. Instead, the State turns plain text analysis on its head. The State interprets the appropriations bills by relying on language *not* in the bills and on documents other than the appropriations bills. The trial court called this "semantic and legal gymnastics." They should be rejected.

For example, the State claims there is no funding for Article IV, Section 36(c) because the funds appropriated in House Bills 10 and 11 are only at the regular rate, not enhanced Medicaid federal matching funds rate. *See* State's Br. at 55. They say this evinces the legislature's intent not to fund the newly eligible population. *Id.* Neither Plaintiffs nor the State have any clue as to why the General Assembly appropriated the amount of funds it appropriated. And this court should not care why—it is not relevant to the plain language analysis. No language prohibits using the funds appropriated for any particular eligibility population. So the matching rate percentages do not matter.

As discussed in the introduction, the bedrock of the State's argument is that this Court should add restrictive words that are simply not there. You don't do that and you shouldn't. *See Hill v. Ashcroft,* 526 S.W.3d 299, 309 (Mo. App. 2017)("[C]ourts do not engraft language onto a statute that the legislature did not provide.")(quotation omitted).

The State also attempts to insert ambiguity in the appropriations bills by pointing out the General Assembly may have under-appropriated for the MO HealthNet program. State's Br. at 65. First, no one has any idea whether the amount of money the General Assembly appropriated is too much, not enough, or just right. The number of enrollees in the MO HealthNet program fluctuates from year to year, as do the quantity and types of services used. And even if the General Assembly under-appropriated, that happens every single year. *See* D41-45. There is nothing absurd about this fact, despite the State's attempts to make it so. For the past five years, the General Assembly (for whatever reason) did not appropriate enough funds for the MO HealthNet program. *Id.* It is just part of the legislative process.

The State further asserts that without "magic language" there cannot possibly be an appropriation for the individuals eligible for MO HealthNet program under Article IV, Section 36(c). State's Br. at 62. But plain text analysis does not rely on words *not* in the statute. This is the fatal flaw in all of the State's arguments. The State says there are no magic words indicating that there is funding for the Article IV, Section 36(c) population, but the bills appropriate for the MO HealthNet program, not individual eligibility categories. If the bills do not expressly identify the eligibility groups the State concedes *can* receive benefits (the previous population), there is no reason to think that the bills would expressly identify the population under Article IV, Section 36(c) (the expanded population). If the State is correct, then because House Bills 10 and 11 do not

specifically identify *any* eligibility group, no eligibility group is funded.

The rest of the State's arguments amount to little more than wishful thinking. The State argues that this Court should consider extra-textual information because otherwise the appropriations bills are ambiguous. State's Br. at 69. The State cites to this Court's recent example of the phrase "the batter flew out." *Id.* The situations are not analogous.

There is nothing ambiguous about an appropriations bill. The context is that it is an appropriation. The Court should not go on a snipe hunt for legislative history and excerpts from debates in the general assembly. The Court should spend no time considering this extraneous and irrelevant information. The appropriations bills are unambiguous in providing funding for the entire MO HealthNet program, including the population in Article IV, Section 36(c).

Conclusion

Article IV, Section 36(c) entitles Plaintiffs and others like them to enroll in the MO HealthNet program on July 1, 2021 as long as there is funding. The State is wrong to refuse to enroll Plaintiffs because there is appropriation authority in House Bills 10 and 11 to implement Article IV, Section 36(c). The judgment of the Circuit Court should be reversed and this Court should enter the judgment the trial court should have entered, enjoining the State from denying MO HealthNet benefits to those who are eligible for coverage. Rule

84.14; *Woods v. Department of Corrections,* 595 S.W.3d 504, 505 (Mo. banc 2020).

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was filed electronically via Missouri CaseNet e-filing system, which notifies counsel of record on this 30th day of June, 2021.

I also certify that the foregoing brief complies with the limitations in Rule 84.06(b) and that brief contains 6,717 words.

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