No. SC99092

In the
Supreme Court of Missouri

CONSERVATION COMMISSION, *et al.*,

Respondents,

v.

ERIC SCHMITT, *et al.*,

Appellants.

Appeal from the Circuit Court of Cole County, Missouri
The Honorable S. Cotton Walker, Circuit Judge

REPLY BRIEF OF APPELLANTS

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Where, as here, funds are held in the state treasury, an appropriation must authorize their withdrawal for a subsequent expense and use. Plaintiffs agree. *See* Resp'ts' Br. 37 (state constitution requires that "each dollar spent be pursuant to an appropriation made by law") (quotation marks omitted). In other words, no money from the treasury may be withdrawn in the absence of an appropriation made by law.

The "general rule" is that the power over appropriations belongs solely to the legislature. Again, Plaintiffs agree. *See id.* at 35. Within this general rule lies a "bedrock" principle that is "beyond question": the legislature has discretion to appropriate or not appropriate each fiscal year. *Planned Parenthood of St. Louis Reg. v. Dept. of Soc. Servs.*, 602 S.W.3d 201, 210–11 (Mo. banc 2020). The exceptions to this rule (acknowledged by Plaintiffs, *see* Resp'ts' Br. 37), are twofold. *First*, when the text of the Constitution provides that funds "stand appropriated," the legislature simply has no role in the appropriations process. *Second*, when the text of the Constitution "mandates an appropriation be made," the legislature has no choice but to appropriate the funds. *Planned Parenthood*, 602 S.W.3d at 210–11.

As to the first exception, Plaintiffs concede (as they must) that the text of Article IV, §§ 40-44 does not state that conservation funds "stand appropriated." *See, e.g.*, Resp'ts' Br. 37 ("The words 'stand appropriated' were

not used by the people in drafting and enacting §§ 43(a), (b), and (c)."); *id.* at 50 (arguing that §§ 43(a)-(c) purportedly appropriate conservation funds "[d]espite omission of the words … 'stands appropriated' ").

As for the second exception, Plaintiffs simply do not invoke it. Indeed, they disclaim it by treating the "expend[ ] and use[]" language in § 43(b) as akin to the first exception. *See id.* at 49. Regardless, nothing in the text of §§ 40-44 mandates an appropriation.

Accordingly, because the conservation funds at issue neither stand appropriated nor are required to be appropriated, the General Assembly undoubtedly has the discretion to appropriate or not appropriate such funds each year. *See Planned Parenthood*, 602 S.W.3d at 210–11. The circuit court's judgment, therefore, should be reversed.

Unable to find support in the *text* of Article IV, §§ 40-44, Plaintiffs attempt to distract this Court from the proper textual and historical constitutional analysis by resorting to interpretations that stretch the plain and ordinary meaning of these constitutional provisions; offering *a*textual bases to support their interpretations; conflating the critical distinction between an appropriation and an expenditure, as aptly represented by *amicus curiae* here (the same entity that spearheaded and drafted the 1936 amendment) to this Court in *Conservation Federation of Missouri v. Hanson*, 994 S.W.2d 27 (Mo. banc 1999); misreading this Court's precedents; and

heavily relying on policy arguments better addressed at the electorate, not the judiciary.

Suffice it to say that the Court should not deviate from the proper textual and historical constitutional analysis laid out in the State's Opening Brief, which has addressed most (if not all) of Plaintiffs' arguments. Although the State will not "replow" covered grounds, *see State ex rel. Monsanto Co. v. Pub. Serv. Comm'n*, 716 S.W.2d 791, 798–99 (Mo. banc 1986) (Blackmar, J., dissenting); Rule 84.04(g) ("The appellant may file a reply brief but shall not reargue points covered in the appellant's initial brief."), it will address the few arguments not already addressed in its Opening Brief.

I. The Conservation Commission Fund is subject to the general rule that the power over the purse is vested solely in the General Assembly and that no money from the treasury may be withdrawn in the absence of an appropriation made by law.

Plaintiffs draw up four categories of special funds, some of which are (and others not) subject to the general rule over appropriations. Of course, none of these distinctions really matter because Plaintiffs conveniently consider the Conservation Commission Fund to be a part (and the only member) of an entirely different category they too crafted: "Category 5." *See* Resp'ts' Br. 42. Plaintiffs argue that "the constitution does not *expressly* state the legislature's role for the Conservation Fund." *Id.* (emphasis added). This silence, Plaintiffs argue, means that the Constitution "assigns authority and

responsibility" over the Conservation Commission Fund "to a non-legislative body" such as the Conservation Commission. *Id.* Plaintiffs are incorrect.

A. The people of Missouri didn't remove the legislature's exclusive, traditional role over appropriations by vesting the Conservation Commission with the sole authority to spend conservation funds.

When the people of Missouri draft and adopt a constitutional amendment, they express their intent clearly and unambiguously. Much like legislatures, they don't "hide elephants in mouseholes." *R.M.A. by Appleberry v. Blue Springs R-IV Sch. Dist.*, 568 S.W.3d 420, 430 n.12 (Mo. banc 2019). In other words, if the people "intended to exclude" the legislature from the appropriations process and place the Conservation Commission Fund within the exceptions to the general rule described in *Planned Parenthood*, "it is unlikely [they] would have hidden [their] intent to do so" in phrases such as "expend[ ] and use[]" or leave out the traditional "stands appropriated" language expressly used in several other constitutional provisions. *Id.* Removing the legislature's historical role in the appropriations process would be accompanied by trumpets, not silence.

Unlike the special funds for which the Constitution's text removes the General Assembly's traditional discretion over appropriations because monies "stand appropriated" or must be appropriated, there is simply nothing in the text of Article IV, §§ 40-44 that comes close to the clear and unambiguous language contained in the constitutional provisions governing these special

funds. Thus, the Conservation Commission Fund is no exception to the general rule that a legislative appropriation is a necessary prerequisite to an expenditure.

Plaintiffs argue that the Conservation Commission has "plenary authority over *expenditures* of the Conservation Fund" and, therefore, the legislature has no discretion over appropriations as applied to conservation funds. Resp'ts' Br. 27 (emphasis added). This too is incorrect.

Appropriations authorize state agencies to spend money. *See State ex rel. Fath v. Henderson*, 160 Mo. 190, 60 S.W. 1093, 1097 (1901) (act creating a fund which must be appropriated before it can be withdrawn from the treasury is not an appropriation). That the Conservation Commission (like any other state agency) has the sole authority to spend money is beside the point. This says nothing about whether the legislature retains its traditional discretion over appropriations. Two reasons support this.

First, spending money is not akin to appropriating money; the latter is exclusively a legislative function, as Plaintiffs readily concede. *See* Resp'ts' Br. 50 (citing dictionary definition of an "appropriation" as a "legislative body's … act"). Even when the Constitution states that funds "stand appropriated" or the funds must be appropriated, that doesn't convert an appropriation from a legislative act to a non-legislative one; it simply means that the legislature has no discretion and thus the funds must be appropriated. Indeed, as

Plaintiffs correctly point out, "even funds that 'stand appropriated' have been historically included in appropriations bills." *Id.* at 62 n.23 (citing H.B. 4, § 4.400 (2019) (appropriating moneys from the state road fund)). Because nothing in the text of Article IV, §§ 40-44 removes the legislature's traditional discretion over appropriations through the two narrow exceptions described in *Planned Parenthood*, the legislature can choose to appropriate or not appropriate conservation funds on an annual basis, irrespective of whether that decision frustrates the Conservation Commission's ability to spend money for a particular fiscal year.

Second, not only is appropriating money exclusively a legislative function, it is also simply a different act than spending money. Although Plaintiffs argue that the "expend[ ] and use[]" language in § 43(b) constitutes an appropriation, *see id.* at 58, their *amicus curiae* here disagrees.

Amicus curiae here (the same entity that spearheaded and drafted the 1936 amendment) persuasively distinguished an appropriation from an expenditure before this Court in *Hanson*, describing the former as an exclusively legislative function:

> [An] appropriation means the act of applying public revenue to a specific purpose. An element of the definition of appropriation is that the money appropriated be out of the general revenues of the state. An expenditure is the expending, a laying out of money, disbursement, *and its [sic] not the same as an appropriation, the setting apart or assignment to a particular person or use.* A specific appropriation is an act of the legislature by which a named sum of

> money has been set apart in the treasury, and devoted to the payment of a particular demand.

Reply Br. of Appellants Conservation Federation of Missouri, 1998 WL 34351382 (Mo. banc), at *8-9 (emphasis added) (cleaned up).

It cannot be assumed, thus, that an appropriation has been made simply because the law authorizes an expenditure. Absent appropriation authority, the "expend[ ] and use[]" language in § 43(b) is simply not triggered. Thus, even if § 43(b) "requires" the expenditure of conservation funds, Resp'ts' Br. 44, that doesn't mean unappropriated monies can be spent.

This case, therefore, is unlike *Hanson*, where the legislature *chose* to appropriate conservation funds for someone *other than* the Conservation Commission. 994 S.W.2d at 30. In other words, even if it's true that the General Assembly cannot appropriate conservation funds for an entity that is not the Conservation Commission to spend on non-conservation purposes, that doesn't necessarily mean that the legislature *must* appropriate conservation funds for the Conservation Commission to spend on conservation purposes.

This distinction is consistent with the Court's other cases where it has concluded that the legislature's choice to fund an agency prohibited it from limiting expenditures. *Cf. Doyle v. Tidball*, 625 S.W.3d 459, 467 (Mo. banc 2021) (per curiam) ("The General Assembly *chose* to appropriate funds for the MO HealthNet programs for FY 2022. … [H]aving made this decision, DSS

and MO HealthNet are *bound* by article IV, section 36(c) concerning which individuals are eligible to enroll when it *spends the appropriated funds*."); *Planned Parenthood*, 602 S.W.3d at 211 ("[T]he General Assembly *chose* to appropriate nearly $400 million for, among other things, providing physicians' services and family planning to Medicaid-eligible individuals in section 11.455 of HB2011. … [H]aving made this decision, MO HealthNet is *bound* by general law – e.g., sections 208.153.1 and 208.152.1(6), (12) – defining what those services are and which providers are *entitled to payment* for delivering them.") (emphases added).[1] That the legislature chose *not* to appropriate here is also consistent with *Rebman v. Parson*, where the Court acknowledged that the legislature may attempt to "control" the Executive Branch by the power of appropriation. 576 S.W.3d 605, 610 (Mo. banc 2019).

At bottom, the Executive Branch cannot withdraw money from the state treasury without authorization through an appropriation. Nor can the Commissioner of Administration—who must certify that expenditures are "within the purpose as directed by the general assembly of the appropriation," Article IV, § 28—certify such a withdrawal. Thus, the Conservation Commission and the Department of Conservation cannot draw on the

[1] Because the legislature chose *not* to appropriate here, there are simply no single-subject concerns under existing case law. *See* Appellants' Br. 64-67.

Conservation Commission Fund within the state treasury absent an appropriation.

B. The Court's recent decision in *Doyle v. Tidball*, 625 S.W.3d 459 (Mo. banc 2021) (per curiam), forecloses much of Plaintiffs' untenable position.

Plaintiffs argue that Article IV, §§ 40-44 do not need to expressly use the words "stands appropriated" because these words "are unnecessary for an initiative to have that effect[.]" Resp'ts' Br. 56.

But this argument is inconsistent with the Court's recent decision in *Doyle v. Tidball*, where it observed that the lack of the "use" of the phrase " 'stand appropriated' or any similar phrase" in a constitutional provision meant that no appropriation of existing funds had been made nor was the legislature directed to appropriate such funds. 625 S.W.3d at 464 (citing *Cady v. Ashcroft*, 606 S.W.3d 659, 668 (Mo. App. 2020)). Because the text of Article IV, §§ 40-44 does not contain the "stand appropriated" language or any similar phrase, and does not otherwise mandate an appropriation be made, the legislature is not "specifically require[d] … to authorize the expenditure and disbursement of a specific amount of money for a specified purpose[.]" *Id.* Thus, the legislature's discretion to appropriate or not appropriate remains undisturbed. *See Planned Parenthood*, 602 S.W.3d at 210–11.

This conclusion is further bolstered by *Doyle* in an additional way: nothing in the text of Article IV, §§ 40-44 removes the General Assembly's

exclusive, traditional discretion over appropriations. In *Doyle*, the Court surveyed prior cases involving proposed local ordinances that expressly used the phrase "shall appropriate" or expressly took away the legislative body's discretion over appropriations, albeit in the context of a challenge under Article III, § 51. 625 S.W.3d at 463–65. For this reason, Plaintiffs' heavy reliance on *State ex rel. Card v. Kaufman*, 517 S.W.2d 78 (Mo. 1974), is misplaced. As this Court explained in *Doyle*, in *Card*,

> [t]he proposed amendment would have required that "the salaries of members and employees of the University City Fire Department not be less than salaries received by members and employees of the Fire Department of the City of St. Louis." This Court found, "The obligation under the proposed amendment would afford the officers of the city *no discretion* in the matter of fire department salaries." Therefore, the Court held the proposed amendment "in effect is an appropriation measure" prohibited under article III, section 51.

Doyle, 625 S.W.3d at 464 (citations omitted).

Unlike in *Card*, nothing in the text of Article IV, §§ 40-44 expressly appropriates money or divests the General Assembly of its exclusive, traditional discretionary power over appropriations, particularly when compared to several other express provisions of the Constitution that *do*. *See id.* ("In [*Card*], the proposed initiative[] deprived the local legislative body of discretion by requiring it to appropriate money for the initiative's purpose. … [A]rticle III, section 51 prohibits only initiatives that expressly appropriate money … for its purposes or that deprive the General Assembly of discretion

and require it to appropriate money for its purposes. *An initiative that simply costs money to implement does not necessarily require the appropriation of funds so long as the General Assembly maintains discretion in appropriating funds to implement that initiative*.") (emphasis added) (citations omitted).

That it costs money for the Conservation Commission to acquire land or pay PILTs "does not necessarily require the appropriation of [conservation] funds[,]" *id.*, particularly here, where nothing in the text of Article IV, §§ 40-44 removes the General Assembly's exclusive, traditional discretion over appropriations.

II. Plaintiffs' comparison between the Conservation Commission Fund and the State Road Fund, MO. CONST. art. IV, § 30(a)-(b), is meritless because the funds in the former, unlike those in the latter, do not stand appropriated.

Plaintiffs claim that the authority held by the Conservation Commission under Article IV, § 43(b) is akin to the authority possessed by the Highway and Transportation Commission under Article IV, §§ 30(a)-(b). *See* Resp'ts' Br. 42.

But as Plaintiffs concede, "[w]ith the state road fund, the constitution declares that the funds 'stand appropriated.' " *Id.* at 39. And unlike the state road fund, funds in the Conservation Commission Fund do not stand appropriated—also conceded by Plaintiffs. *See id.* at 37, 50. Thus, the constitutional provisions that govern the State Road Fund place monies in that

fund within the first exception in *Planned Parenthood* and, therefore, remove the legislature's discretion over those monies. The opposite is true here.

Contrary to Plaintiffs' assertion, if mere delegation of administrative responsibilities to a non-legislative agency and providing that agency the power to "expend[ ] and use[]" monies for enumerated purposes was sufficient, the language in § 30(b) stating that the State Road Fund monies "stand appropriated without legislative action" would become surplusage, in violation of well-established canons of construction. *See State Highways & Transp. Comm'n v. Director of Revenue*, 672 S.W.2d 953, 955 (Mo. banc 1984) (per curiam).

III. Plaintiffs' comparison between the Conservation Commission Fund and the State Parks Sales Tax Fund, MO. CONST. art. IV, § 47(a)-(b), is meritless because an agency's determination as to how much should be spent on a PILT doesn't mean there's appropriation authority to spend that amount.

Plaintiffs attempt to draw a distinction between the language of Article IV, § 47(a), which "directs PILTS to be paid from the state parks sales tax fund 'in such amounts as determined by appropriation,' " and § 43(b), which states that conservation funds arising from § 43(a)'s taxes "shall be used" to make PILTs "in such amounts as may be determined by the commission," as evidence that appropriation isn't required because the *amount* of PILT payments is determined by the Conservation Commission, not the legislature. Resp'ts' Br. 48. This too is incorrect.

An agency's determination as to *how much* should be spent on a PILT doesn't mean there's appropriation authority to spend that amount. Unlike Article IV, § 43(b)—which doesn't state that funds stand appropriated or the legislature must appropriate—the last sentence of § 47(b) unequivocally states that monies deposited in the State Parks Sales Tax Fund "shall … be appropriated" for PILTs. Section 47(a) then states that these monies, already subject to a mandated appropriation, are to be paid out "in such amounts as determined by appropriation." Thus, whereas the legislature has no discretion over state parks funds, the legislature's discretion remains undisturbed over conservation funds.

More generally, Plaintiffs argue that the Conservation Commission (not the legislature) decides "whether, when, [how much], and on what" to spend conservation funds. Resp'ts' Br. 24; *see also id.* at 25 ("If there is a dispute as to timing or needs, the General Assembly cannot reduce the amount in an appropriations bill for a particular year below what the Commission finds to be necessary and appropriate[.]").

Even accepting this as true, it still does not affect the legislature's exclusive power over appropriations. *See Heinkel v. Toberman*, 360 Mo. 58, 67, 226 S.W.2d 1012, 1014 (1950) ("If and when house bill 185 becomes effective, the revenue derived from the 4 cent tax on motor fuels, together with the license fees on motor vehicles, must first pay the expense of these items. *To do*

so there must first be an appropriation act passed by the legislature for that purpose.") (emphasis added).

In other words, although monies in the Conservation Commission Fund can only be used for conservation purposes, such monies must still be appropriated to the Conservation Commission before they can be expended by that agency. There is simply no provision in Article IV, §§ 40-44 that says otherwise.

IV. The self-enforcing nature of Article IV, §§ 43(a)-(c) does not create an appropriation in the absence of clear and unambiguous language that states otherwise.

Plaintiffs argue that "[t]he 'self-enforcing' language of § 43(c) solidifies a *constitutional* appropriation—an 'appropriation made by law' sufficient to meet the requirements of Art. IV, § 28." Resp'ts' Br. 53. Again, this is incorrect.

While the State will not rehash why this self-enforcing language does not create an appropriation, *see, e.g.*, Appellants' Br. 41-46, it's quite telling that Plaintiffs cite *no* authority to support their untenable proposition.

And suffice it to say that the "self-enforcing" nature of the constitutional provisions at issue here simply disregards the general rule (and two limited exceptions) the Court enunciated in *Planned Parenthood*. 602 S.W.3d at 210–211. Constitutional provisions removing legislative appropriation discretion say so clearly and directly, and are not shoehorned into phrases that expand their plain and ordinary meaning. Section 43(c) doesn't pass the test.

V. Plaintiffs' policy arguments are a poor substitute for any *text* in Article IV, §§ 40-44 declaring that conservation funds "stand appropriated" or an appropriation is mandated.

Unable to find any support in the *text* of Article IV, §§ 40-44 that supports their untenable position, Plaintiffs resort to policy arguments.

Plaintiffs first assert that their interpretation must be right because the Conservation Commission's use of its Fund will never "deprive the legislature of revenue for other projects[.]" Resp'ts' Br. 57. That is beside the point. Even accepting that assertion as true, it still doesn't supply any appropriation authority to expend money from the Conservation Fund. And it's a poor substitute for any *text* in the pertinent constitutional provisions declaring that conservation funds "stand appropriated" or must be appropriated on an annual basis, per this Court's *Planned Parenthood* decision.

Plaintiffs finally argue that the legislature simply cannot choose to *not* exercise its discretion involving appropriations—discretion allowed under *Planned Parenthood*—over conservation funds because that may cause the Conservation Commission to not receive funding for a certain purpose during a certain fiscal year, defeating the overall "purpose" for which the Conservation fund was created. *See, e.g.*, Resp'ts' Br. 25, 58.

Of course, it's "not for this Court to evaluate the wisdom or desirability of [such] policy decisions[.]" *Dodson v. Ferrara*, 491 S.W.3d 542, 561 (Mo. banc 2016). Policy calls are for the political branches, not this Court. Ultimately

fidelity to the text of the Constitution—not results-oriented purposivism—is what matters.

At bottom, "bedrock" principles governing the legislature's power over appropriations yields a clear answer. The Constitution "vests" this "power of the purse in the general assembly for good reason. The legislative branch is historically the branch of government closest to the people and the branch that most directly represents the citizens of this state." *Rebman*, 576 S.W.3d at 609. The people of Missouri chose not to remove the legislature's exclusive, traditional role over appropriations with respect to conservation funds. Affirmance of the circuit court's judgment only usurps that power reserved for the legislature, not a state agency steps removed from the people.

CONCLUSION

The Court should reverse the circuit court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that on this 23rd day of September, 2021, pursuant to Rule 84.06(c), this Reply Brief of Appellants complies with the limitations contained in Rule 84.06(b), was prepared using Microsoft Word in 13-point Century Schoolbook font, contains 4,060 words, as determined by Microsoft Word, and was electronically served on all counsel of record through Case.net.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of September, 2021, I electronically filed this Reply Brief of Appellants with the Clerk of the Court using the Court's electronic filing system, to be served on all counsel of record.

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