SC99185

IN THE SUPREME COURT OF MISSOURI

STEPHANIE DOYLE, *ET AL.*,

Appellants

v.

JENNIFER TIDBALL, *ET AL.*,

Respondents.

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

BRIEF OF AMICI CURIAE JEREMY CADY AND AMERICANS FOR PROSPERITY IN SUPPORT OF RESPONDENTS

This brief is being filed with the consent of all parties.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional and Statutory Authority

Other Authorities

JURISDICTIONAL STATEMENT

This Court has exclusive appellate jurisdiction in cases involving the validity of a provision of the constitution of this state. Mo. Const. art. V, § 3. At issue here is the validity of Article IV, Section 36(c) ("Amendment 2").

SUMMARY OF THE ARGUMENT

The Appellants' argument backs the General Assembly into a corner: since Amendment 2 was passed by a majority of votes in August 2020, according to Appellants, the General Assembly has three, and only three options: (1) fund Medicaid expansion; (2) defund (the existing) Medicaid program altogether; or (3) submit a new constitutional amendment to the voters. Each of these three options demonstrates why Amendment 2 violates Article III, Section 51 of the Missouri Constitution. The threshold question is simple:

Was Amendment 2 a valid amendment to the Missouri Constitution?

Appellants skip this question because they would have to conclude that the answer is equally simple:

No.

This court should not skip over a protection which the framers of our constitution thoughtfully and artfully drafted. Appellants skip this question purposefully -- proponents of Amendment 2 intended to fool voters by evading the plain requirements of Article III, Section 51 of the Missouri Constitution. Proponents knew that Missourians would not approve a new tax or an increase of existing taxes for Medicaid Expansion, so they intentionally omitted any reference to a new or increased tax. This omission may have induced a slight majority of the voters to cast a vote in favor of Amendment 2 in August 2020, but it doomed Amendment 2 from the start. Article III, Section 51 was created to stop just this type of action by proponents of an initiative.

In the aftermath of an attempt to mandate a massive social payment program by the initiative in 1942,[1] it was apparent than an unfettered right of the initiative could serve to bankrupt the state. As a result, the framers of the Constitution of 1945 prudently added new language, which they included in Article III, Section 51:

> The initiative shall not be used for the appropriation of money other than of new revenues created and provided for thereby, or for any other purpose prohibited by this constitution.

Mo. Const. art. III, § 51. This is a constitutional safeguard on the initiative right, and it is the crux of this case.

Here, Article IV, Section 36(c) (Amendment 2) violates Article III, Section 51 because it: (1) purports to appropriate existing funds of the State of Missouri to create a massive constitutional entitlement to Medicaid; but then (2) fails to "create" and "provide for" new revenues to fully pay for the new entitlement. This constitutional entitlement for specific residents to receive free health care, paid for by the state but with no new revenue source, is exactly what voters intended to exclude from the initiative process when they approved the Constitution of 1945.

Under this Court's decision in *Planned Parenthood of St. Louis Region v. Department of Social Services*, 602 S.W.3d 201, 210 (Mo. banc 2020), the General Assembly cannot use appropriation bills to alter Medicaid eligibility requirements. Amendment 2 purports to enshrine an eligibility requirement into the Constitution, precluding the General Assembly from altering the expansion population eligibility by statute. As a result, Amendment 2 forces

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[1] See *Moore v. Brown*, 165 S.W.2d 657, 659 (Mo. banc 1942), *infra* at 17.

the General Assembly to appropriate funding for Medicaid expansion because it fails to articulate any independent revenue stream. Because there is no new revenue stream in Amendment 2, this mandate on the General Assembly causes Amendment 2 to be void *ab initio*.

The test under Article III, Section 51 is simple: if a proposed amendment mandates or reasonably requires funding it must provide for new revenues to pay for the mandate. Amendment 2 fails this test, and Appellants (and the Amendment's proponents) knew it from the start. They are now relying on this Court to bless the proponents' devious stratagem, and are asking this Court to render Article III, Section 51 meaningless. The trial court correctly declined to save Amendment 2. This Court should affirm the trial court's judgment.

INTEREST OF AMICI CURIAE

This Brief is filed by Jeremy Cady and Americans for Prosperity pursuant to Rule 84.05(f)(3), with the consent of all parties.

Jeremy Cady is a citizen, taxpayer, and registered voter of the state of Missouri. Both Americans for Prosperity ("AFP") and Jeremy Cady have a strong interest in ensuring Missouri only uses tax dollars for constitutionally authorized purposes. Cady made a pre-election challenge to Amendment 2, which resulted in the opinion of the Western District of the Court of Appeals in *Cady v. Ashcroft*, 606 S.W.3d 659 (Mo. App. W.D. 2020).

Americans for Prosperity ("AFP") is driven by the foundational belief that each person has value and a unique set of gifts. By advocating for long-term solutions to the country's biggest problems, including government waste and health care solutions, AFP works to break down the barriers prohibiting individuals from realizing their full potential.

STATEMENT OF FACTS

A. Amendment 2

Amendment 2 is a new section of the Missouri Constitution: Article IV, Section 36(c). D18. This new section mandates (1) who must receive medical coverage from the state, (2) what care this population will receive, and (3) when that coverage must begin. Amendment 2 requires that Missouri provide this coverage "under" federal statutes and regulations that comprise Medicaid, which—as an absolute certainty because it is a matter of law—require Missouri to spend money.

First, Amendment 2 **requires** that "beginning July 1, 2021," a specific set of "individuals" who "qualify for MoHealthNet" (Missouri's Medicaid program) "under" a specific provision of federal law, 42 U.S.C. 1936(a)(10)(A)(i)(VIII), "shall be eligible for medical assistance under MoHealthNet and shall receive coverage for the health benefits service package." D18, Mo. Const. art. IV, § 36(c)1. Second, that referenced "package" is specific coverage determined under the federal statute and various implementing regulations.[2] D18, Mo. Const. art. IV, § 36(c)2. Further, the General Assembly has no discretion to alter anything, including the care that will be provided, who will receive it, or when the care must be provided: all these mandates are "[n]otwithstanding any provision of law to the contrary." *Id*.

The federal statutes and regulations Amendment 2 cites, the provisions that now become unalterable mandates of the Missouri Constitution, are those

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[2] Amendment 2 identifies "42 U.S.C. Section 1396a(k)(1) and any implementing regulations" as the federal law mandating the benefits Missouri must provide. *See* D18, Section 36(c)2.

"that existed on January 1, 2019." D18, Mo. Const. art. IV, § 36(c)6. Those federal statutes and regulations, like the plain text of Amendment 2 itself, reference a state "plan" that all states, Missouri included, must submit for approval to "the United States Department of Health and Human Services, Centers for Medicare and Medicaid Services" ("CMS"). D18, Mo. Const. art. IV, § 36(c)3. CMS must then approve that plan before the federal government will release its share of Medicaid funding to the state. 42 U.S.C. § 1396a(b). Regardless, the federal share is just one part of the funding, as "The program is jointly financed by the Federal and State governments…" 42 C.F.R. § 430.0. The state finances the portion not financed by the federal government; for most of Medicaid, that is between 50 and 83 percent (42 C.F.R. § 433.10); for the Medicaid expansion population, the federal government would finance 90% in 2020 and each year following 2020 and the states would finance 10%. 42 U.S.C § 1396d(y)(1)(E).[3] Even so, "[p]ayments and services are made directly by the State to the individuals or entities that furnish the services." 42 C.F.R. § 430.0.

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[3] (y) Increased FMAP for medical assistance for newly eligible mandatory individuals
(1) Amount of increase
Notwithstanding subsection (b), the Federal medical assistance percentage for a State that is one of the 50 States or the District of Co with respect to amounts expended by such State for medical assistance for newly eligible individuals described in subclause (VIII) of section 1396a(a)(10)(A)(i) of this title, shall be equal to—
(A) 100 percent for calendar quarters in 2014, 2015, and 2016;
(B) 95 percent for calendar quarters in 2017;
(C) 94 percent for calendar quarters in 2018;
(D) 93 percent for calendar quarters in 2019; and
(E) 90 percent for calendar quarters in 2020 and each year thereafter.

42 U.S.C. 1396(y)(1).

Ordinarily, the state Medicaid-dispensing program (here, MoHealthNet) designs the state's plan based on Missouri's unique circumstances, getting approvals from CMS for various amendments and waivers of some federal requirements. *See generally* 42 C.F.R. §§ 430.1–430.025. Now under Amendment 2: "No greater or additional burdens or restrictions on eligibility, or enrollment standards, methodologies, or practices shall be imposed [on the newly covered population] than on any other population eligible for medical assistance." D18, Mo. Const. art. IV, § 36(c)5.

B. *Cady v. Ashcroft*

Amicus Curiae Cady filed a pre-election challenge to the Medicaid Expansion Initiative, which became Amendment 2. *Cady v. Ashcroft*, 606 S.W.3d 659 (Mo. App. W.D. 2020) Cady made two claims: (1) that Amendment 2 violated Article III, Section 51 of the Missouri Constitution because Amendment 2 appropriated money other than new revenues created and provided for thereby and (2) Amendment 2 violated Article III, Section 50 of the Missouri Constitution for failing to include the full text of the measure. *Id.* at 664.

With respect to the second claim, the court found that Amendment 2 included the full text of the measure. *Id.* at 669. As for the "appropriation by initiative" claim, the court made two determinations. First, that Amendment 2 did not facially violate the prohibition against appropriation by the Initiative. *Id.* at 668. Second, the court "agree[d] with the circuit court that the substantive challenge…[wa]s **not ripe** for judicial determination." *Id. at 667* (emphasis added). The court expressly stated that a post-election challenge on the merits (under Article III, Section 51) would be appropriate. *Id.*

C. The 2021 Legislative Session

Although the Governor's recommended budget included funding for Medicaid Expansion (D17), the legislature rejected such funding. D20-34. Amendments to add funding for Medicaid Expansion to House Bills 5 and 10 were all defeated. D17, D20-34. A separate bill to fund Medicaid expansion also failed. D17, D34. The amounts ultimately appropriated for Medicaid matched the recommendations for Medicaid without expansion. D17.

ARGUMENT

Standard of Review

When reviewing a case tried on stipulated facts, the appellate court conducts a *de novo* review on all issues. *Archey v. Carnahan,* 373 S.W.3d 528, 531 (Mo. App. W.D. 2012); *Schroeder v. Horack*, 592 S.W.2d 742, 744 (Mo. banc 1979). The only question on appeal is whether the trial court drew the proper legal conclusions. *Mo. Mun. League v. Carnahan*, 303 S.W.3d 573, 580 (Mo. App. W.D. 2010) (citing *Overfelt v. McCaskill*, 81 S.W.3d 732, 735 (Mo. App. W.D. 2002)).

I. The Circuit Court correctly determined Amendment 2 violates Article III, Section 51 of the Missouri Constitution because it requires the appropriation of revenues not created by the Initiative

A. Appellants misconstrue *Cady v. Ashcroft*

Appellants incorrectly claim that *Cady* "determined that Amendment 2 did not violate the prohibition on appropriation through the initiative process." Appellants' Brief, p. 16. Instead, the court made clear that review of Cady's "article III, section 51 challenges on the merits...is appropriate only **after** the election, should the Proposed Measure pass." *Cady v. Ashcroft*, 606 S.W.3d 659, 667 (Mo. App. W.D. 2020) (emphasis added). The *Cady* court did not determine the constitutionality of the Amendment 2, but instead determined that question was not ripe. *Id.*

Counsel for Appellants made a similar argument before, and the Court of Appeals rejected it. *Mo. Elec. Coops. v. Kander*, 497 S.W.3d 905, n.20 (Mo. App. W.D. 2016). A pre-election determination on ripeness does not preclude post-election review of constitutional claims. As the Court explained:

> Plaintiffs next suggest that we decided the Proposed Measure's constitutionality in *Reeves* by holding that neither "the passage of

> time [n]or the gathering of signatures will change the relative merits of Reeves's claim." 462 S.W.3d at 857. *Reeves* did not determine the constitutionality of the Proposed Measure, and instead declined to reach that issue because it was not ripe for adjudication. The referenced sentence from *Reeves* was not an endorsement of the trial court's determination about the constitutionality of the Proposed Measure, and did no more than note that Reeves's ability to adjudicate her claims would not be impaired by the passage of time.

Id.; see also Kuehner v. Kander, 442 S.W.3d 224, 230 (Mo. App. W.D. 2014).

Respondents raised Article III, Section 51 in their Answer, explaining that an interpretation by the Court that Article IV, Section 36(c) requires an appropriation that would conflict with Article III, Section 51's prohibition on appropriation by initiative. D9, Affirmative Defense 3, pages 18-19.

The *Cady* court did not consider this question on the merits, but this Court can and should consider it now. The plain language of Article III, Section 51 precludes that which Amendment 2 seeks to accomplish -- to force funding for a new program without providing the necessary revenues or the same. The plain language is compelling, and decisive. Still, the history of Section 51 shows that the intent of the framers was to prevent exactly the type of measure that is now before this Court.

B. Article III, Section 51 Was Born as a Voter Protection

Missouri has a constitutional initiative petition process. While the power of the people to propose the initiative is broad, there are express prohibitions and requirements that are absolute. Article III, Section 51 is one of these absolute prohibitions.

Article III, Section 51 was added at the Constitutional Convention of 1945. Three years earlier, in November 1942, there was an attempt to directly appropriate by constitutional amendment a sum to "pay a monthly grant to

designated incapacitated persons over 65 years old, and in aid of dependent children." *Moore v. Brown*, 165 S.W.2d 657, 659 (Mo. banc 1942). It was a Medicaid precursor. That massive appropriation-by-initiative—coming then, as now, in the middle of a national crisis—would have cut deeply into the state revenue already constitutionally pledged for public schools. *Id.*

As Mr. Phillips of Jackson County noted, in introducing the text of what would become Article III, Section 51 on behalf of the Special Committee drafting the 1945 state constitution:

> The section…is prompted by the suggestions contained in the opinion of the Supreme Court…in the case of [*Moore v. Brown*]…That is the famous twenty-nine million dollar appropriation proposal with respect to old age pensions.

Debates of the Missouri Constitution, Vol. 2, page 445.[4] Missouri voters ultimately adopted this provision as a safeguard on the initiative power. They had just witnessed (as Mr. Phillips observed) that the petition in *Moore* failed only because the measure's drafters had forgotten to specify that it would directly conflict with a pre-existing constitutional pledge funding education, among other parts of the Constitution. It had been a dangerously close call.

Mr. McReynolds of Jasper County explained the problems of permitting voters to appropriate money without being part of the complex and lengthy appropriations process during the debate:

> [It] illustrates the extreme difficulty when you commence to appropriate money by a direct vote of the people when the people have no opportunity …[to] deal with the problem of the whole state budget…inevitably, you must protect the sources of your revenue and when you make it possible to disturb or destroy those sources by intervening forces from the outside,

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[4] Available online at https://dl.mospace.umsystem.edu/umkclaw/islandora/object/umkclaw%3A56.

> you're endangering the whole scheme of your public financial situation in the state[.]

Debates of the Missouri Constitution, Vol. 2, pp. 485-486. It was with this in mind that voters closed the loophole three years after *Moore*. Since 1945, it has been clear that any spending mandate in any initiative must come with new revenues, both "created" and "provided for" by the initiative itself.

In adopting Article III, Section 51, voters did not intend some quest for eventual fiscal neutrality. Instead, they chose a direct, measurable method of enforcing fiscal discipline: the spending must be paid for with **revenue** that is **new** and that is both **created** and **provided for** by the initiative itself.

If Appellants get their way, financial disaster looms. For example, if voters approved an amendment to require all interstates in Missouri to have a minimum of three lanes in each direction and that such construction must occur within the next five years, appropriations would be required to carry out the amendment. Under Appellants' argument, the General Assembly has no discretion but to come up with the billions of dollars to fund such construction.[5] With no new revenues created, the General Assembly must fund the mandate

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[5] The cost of a third lane on I-70 was estimated to cost $3.0 billion in 2002 (see, Improve I-70, Frequently Asked Questions: http://www.improvei70.org/servlet/com.hntb.improvei70.webc49e-2.html) under 2021 construction cost increases of 186%, that would amount to $5.56 billion. (*See* U.S. DOT National Highway Construction Cost Index: https://explore.dot.gov/views/NHIInflationDashboard/NHCCI). This amount by itself is equivalent to one-seventh of the $35 billion FY2022 budget of the state of Missouri and is more than half of the total general revenue of the state (e.g., excluding federal funds) of $10.5 billion. (See, https://governor.mo.gov/press-releases/archive/governor-parson-takes-action-fy22-state-operating-budget-bills).

with existing (rather than new) revenues. This is exactly what is prohibited by the plain language of Article III, Section 51, and is exactly what Appellants are advocating for in this matter.

C. Appellants' discussion of the Constitutional Debates ignores the Park Amendment

Appellants cite the Constitutional Debates for support for their argument that Section 51 uses the term "appropriation" in a "restricted sense" and repeatedly rely on statements by Mr. Phillips, who made the report on behalf of the Initiative and Referendum Committee. Appellants' Brief, at 32. Indeed, as set forth by Appellants, Mr. Phillips stated:

> [A]ll **the Committee** had in mind was to prevent the initiative from endeavoring to appropriate the money officially as the word appropriations is used in the Constitution in other sections…Now, **the Committee** had only that in mind...As used by **the Committee** it meant the very act of passing an appropriation bill receiving the approval of the Governor[.]

Debates of the Missouri Constitution, Vol. 2, pp. 495, 476 (emphasis added).

However, the **Committee** did not actually propose Article III, Section 51 as it exists today. Instead, Mr. Phillips, on behalf of the Committee proposed:

> [T]he Initiative shall not be used for the appropriation of money or for any other purpose prohibited by this Constitution.

Id. at 443.

Instead, what we now know as Article III, Section 51 can be attributed to the **Park Amendment**. Governor Park submitted an amendment to the Committee's language "inserting after the word 'money'...the following language: 'other than new revenues created and provided by the Initiative Act itself'" *Id.* at 476. The Park Amendment ensures that while earmarking is

not prohibited by Article III, Section 51, earmarking of existing funds **is** prohibited. *Id.* at 497 ("under this initiative ...you could...initiate a new act for an increase in the gasoline tax and earmark if for that purpose.").

Appellants wrongly suggest that the framers expressly authorized earmarking relying on Phillips' statement (about the **Committee's** proposal) that Article III, Section 51 "is an inhibition against appropriation and not an inhibition against earmarking." When asked about his [the Park] Amendment, Governor Park clarified:

> Mr. Burkhead: I would like to inquire of Governor Park if his amendment to the amendment would prohibit the people by the initiative, from earmarking or appropriating a certain part of the sales tax for road highway, old age pension, or schools?
>
> Mr. Park. It would any money, that is of the general revenue, that is already in the general revenue and could not be interfered with[.]

Id. at 468. Contrary to the Committee's proposal as described by Phillips, the Park Amendment was made to reach (and prohibit) earmarking existing funds.[6] Here, the framers went beyond just the example of the Court in *Moore* and set out additional examples, that would be prohibited by the Park Amendment.

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[6] *Id.* at 485 ("[Mr. Mc Reynolds] Now I think Governor Park was endeavoring to reach that when he suggested that it should be new revenue created and provided for by the initiative act itself."); *Id.* at 488 ("Now, if you utilize the form of your amendment then you have taken over part of the [existing] state revenues. Of course, Governor Park undertook to get away from that with this language."); *Id.* at 496 "[the Park Amendment] means that they cannot use revenues then being used by the General Assembly of the state...but [only] new revenues...and earmark those funds.").

All that is required to earmark funds through the initiative is to ensure such initiative creates and provides for new revenues to cover the earmark. Phillips' original language and what the Committee originally "had in mind" was not enough in the minds of the framers to protect the state coffers. Instead, Governor Park, and the rest of the framers, made clear that what must be prohibited is exactly what proponents sought to do with Amendment 2.

D. Courts consistently hold that Article III, Section 51 prohibits elections on initiatives that mandate spending without new revenues

When initiative petitions violate Article III, Section 51, this Court has held them to be invalid *ab initio*. *See Kansas City v. McGee*, 269 S.W.2d 662 (Mo. 1954); *State ex rel. Sessions v. Bartle*, 359 S.W.2d 716 (Mo. 1962); *State ex rel. Card v. Kaufman*, 517 S.W.2d 78 (Mo. 1974). In each case, the proposed measure tried to create a right to a particular benefit without creating and then providing new revenues to pay for the benefit.

In *Kansas City v. McGee*, *supra*, decided only nine years after the new constitution had been debated and passed, this Court reviewed a local initiative petition. That petition would have created a firemen's pension fund with a board of trustees and required the City of Kansas City to fund the pension fund. *Id*. at 665. The Court turned to the second and most important issue: whether the initiative petition appropriated existing city funds such that it was invalid. *Id*. The Court affirmed the purpose of Article III, Section 51 as "expressly prohibit[ing] an appropriation law being voted through the initiative process u**nless the law at the same time provides the revenue**." *Id*. at 665 (emphasis added). The Court noted that the proposed ordinance would require initial and recurring payments by the City, and while it did not,

in language, appropriate money to carry out the new pension plan, it left no discretion to the City Council and was therefore fatally defective. *Id*. at 666.

Eight years later, in *State ex rel. Sessions v. Bartle*, supra, this Court affirmed the denial of a mandamus action to compel the City of Kansas City to place an initiative on the ballot that, once again, violated the constitutional ban on appropriation-by-initiative. The proposed ordinance classified basic city service positions and established basic salaries for the various positions. *Id*. at 717. The changes to the salary schedules increased the salaries of certain fire department employees and therefore would have required appropriations in excess of what the legislature appropriated for the salaries. *Id*. at 718. Proponents argued that the ordinance itself did not appropriate any funds, but the Court rejected that argument noting the City was obliged to maintain a fire department. *Id*. at 718–19. Relying on *McGee* and noting that the ordinance would require an additional $500,000 to pay increased salaries, the Court held the ordinance was "fatally defective in failing to provide new revenues out of which to pay the increased salaries." *Id*. at 719.

In 1974, this Court again affirmed the prohibition against appropriation by the initiative in *State ex rel. Card v. Kaufman*, *supra*. That case arose from an initiative in University City which would have required all employees of the city fire departments to be paid the same as employees of the St. Louis City fire department. *Id*. at 79. This change would have increased expenditures by at least $55,000 and would have usurped all authority and discretion by the city manager or city council to set salaries and to increase or decrease budget items according to overall financial need. *Id*. at 79-80. This Court expressly identified and rejected the same argument Appellants make here:

> While the proposed amendment does not in terms and in and of itself appropriate the money necessary to pay the compensation it

> mandates, it leaves no discretion to the city manager or the city council and in effect is an appropriation measure…The proposed amendment has the same effect as if it read that the sums necessary to carry out its provisions stand appropriated.

Id. This Court thus found the initiative violated Constitution and barred the measure from going forward to the ballot. *Id.* at 81-82.[7]

E. Amendment 2 violates Article III, Section 51

As aforementioned, Article III, Section 51 provides a simple test: (1) does an initiative require spending; and, if so, (2) is that spending funded by (a) "new" (b) "revenues" that are (c) "created and provided for thereby"? Amendment 2 fails on every point.

Amendment 2 purportedly requires Missouri to participate in Medicaid by providing coverage to an expansion population that is defined in the federal statutes cited in Amendment 2. It further defines the coverage they are to receive, and when (July 1, 2021) they must start receiving that coverage and the Medicaid program cited in the Petition requires Missouri to spend its state share, which for 2020 and each following year is 10% of the cost. There is no question that Amendment 2 mandates spending on its face. This is true even without considering the undisputed facts. For example, MoHealthNet must spend money at the outset to obtain CMS approval of the new state plan that

[7] Since 1974, other initiative proponents have been careful to create and provide new revenues for their governmental programs. Whether successfully, such as the Conservation Sales Tax (Article IV, Section 43 (1976)) and the Parks and Soils Sales Tax (Article IV, Section 47a (1984)), or unsuccessfully, such as tobacco tax increases (*e.g., Committee for a Healthy Future v. Carnahan,* 201 S.W.3d 503 (Mo. banc 2006); *Boeving v. Kander,* 496 S.W.3d 498 (Mo. banc 2016)).

the Petition requires, and MoHealthNet must also create and hire the new administration to run the expanded Medicaid program.

Critically, Amendment 2 does not fund this spending by creating new revenues, nor have Appellants attempted to identify any such funding. The Amendment merely mentions an attempt to "maximize federal financial assistance" under Article IV, Section 36(c)4. Regardless of this attempt, Amendment 2 itself clearly recognizes that federal law controls. The federal government and states jointly fund Medicaid. There is still a substantial state share. To cover this state funding, Amendment 2 makes no reference to any "new" revenues that are "created" and also "provided for." Amendment 2 thus violates the Constitution.

Appellants argue that the Amendment survives because it carefully avoids the word "appropriation." Appellants' Brief, at 19. This argument was properly rejected in *Bartle*, 359 S.W.3d at 719. The test is not whether an amendment self-identifies as an appropriation; rather, it is whether it leaves any discretion to those constitutionally charged with appropriation authority. In both *McGee* and *Card*, proponents argued that the proposal did not "in and of itself appropriate" money. *McGee*, 269 S.W. 2d at 666, and *Card,* 517 S.W.2d at 80. But this Court found that of no consequence given that the proposals did "not leave any discretion to the City Council." *McGee*, 269 S.W. 2d at 666.[8]

Recently, this Court rejected an argument similar to Appellants that a violation of Article III, Section 51 required the use of the term "appropriate." In *City of Kansas City, Missouri v. Chastain*, 420 S.W.3d 550 (Mo. banc 2014),

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[8] This Court in both *Bartle* and in *Card* used identical language. *Bartle*, 359 S.W.3d at 719; *Card,* 517 S.W.2d at 80.

this Court confirmed that Article III, Section 51 prohibits any "initiative that, either expressly **or through practical necessity**, requires the appropriation of funds to cover the costs associated with the ordinance." *Id.* at 555 (emphasis added). This explanation refutes Appellants' argument about the meaning of Article III, Section 51. This Court determined that the effect of an initiative is more important than a single magic word. *Id.* Appellants want this Court to elevate form over substance by enabling future petitioners to simply omit the word "appropriate" to circumvent the Constitution, even if the initiative, through practical necessity, requires new appropriations. *Chastain* indicated that such an argument has no merit (and would be ruinous to the state), and *Cady* reinforced this position.

Here, Amendment 2 will require state spending—the Petition leaves no discretion to the General Assembly. It purportedly forces MoHealthNet to send a new plan to CMS and obligates Missouri to provide coverage to an expanded group that will be partly paid for by Missouri taxpayers. The General Assembly could never alter this group, nor could it fail to fully fund the state share of the plan's requirements. *See, e.g.*, Appellants' Brief at 43–44.[9] In *Cady*, Amicus here asked the Western District:

> Is there any doubt that such a decision would immediately subject Missouri to a lawsuit on behalf of those who are deprived of their

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[9] "There are only two options – either the language of the appropriations bills prohibits the use of funds for the new population, which would unconstitutionally amend Article IV, Section 36(c), *or* the language permits the use of those funds. Under the doctrine of constitutional avoidance, the Court should select the latter option. If the legislature wishes to change the Constitution, it may propose an amendment for a vote of the people. Mo. Const. art. XII, § 2(b). But it may *not* amend the Constitution in an appropriations bill." Appellants' Brief at 43-44.

> new constitutional entitlement to specific Medicaid coverage, as occurs in other states (like Kansas) that constitutionally require spending on specific items?

Cady v. Ashcroft, Brief of Appellants Cady and Johnson, at 47. And so it has come to pass.

Just as in *McGee,* Amendment 2 has the "same effect as if it read that a sum necessary to carry out its provisions … shall stand appropriated." 269 S.W.2d at 666. And as in *Card*, Amendment 2 would transform budget planning and "require the City Council [here, the General Assembly] to approve it, regardless of any other financial considerations." *State ex rel. Card v. Kaufman*, 517 S.W.2d at 80.

Amendment 2 creates an entirely new obligation without fully funding it using new revenues created and provided for by the initiative itself. Such schemes have violated the Missouri Constitution since 1945, and Missouri voters have never second-guessed their sound judgment in providing themselves with this fundamental safeguard. If "a law is to be enacted through the initiative it can only be done by making provision for new revenue to pay the bill." *McGee*, 269 S.W.2d at 666.

As in *Moore* and the post-1945 cases, Amendment 2 carries major fiscal implications. It requires Missouri to expand Medicaid to a new population, and Missouri must pay state funds for their health care without a newly created source of revenue. Reversing the trial court would be expressly undoing the longstanding protections voters thought they had cemented after the close call in *Moore*.

F. Substantive claims under Article III, Section 51 are properly heard in court following adoption of a measure by the voters

Appellants now claim that "[o]nce the court allowed the measure on the ballot, the decision was one for the voters -- not to be taken away now by the courts." Appellants' Brief at 18. This has never been the law. Courts have always retained the jurisdiction to decide constitutional questions following an election. *See Dujakovich v. Carnahan*, 370 S.W.3d 574, 577 (Mo. banc 2012) (considering an Article III, Section 51 claim post-election, after voter approval).

Other states that have similar state constitutional prohibitions on appropriation by initiative. Courts in those states have invalidated initiatives post-election. Voters in the District of Columbia approved an initiative, with a 78% vote, providing for substance abuse treatment as an alternative to incarceration for certain drug offenses. *D.C. Bd. of Elections & Ethics v. D.C.*, 866 A.2d 788, 791 (D.C. 2005). The Court explained the District of Columbia's that the ban on appropriation by initiative includes an initiative that "requires the allocation of revenues to new or existing purposes." *Id.* at 794. The court determined that to be effective, the "Treatment Instead of Jail Initiative" would "compel the allocation of funds" and therefore was an impermissible subject for an initiative. *Id.* at 795.

Similarly, the Alaska Supreme Court struck down a law making an appropriation as an "illegitimate subject for an initiative." *Thomas v. Bailey*, 595 P.2d 1 (Ak. 1979). The "Alaska Homestead Act," which would make available 30 million acres of state land to residents of Alaska, was ultimately approved by voters, and the Alaska Supreme Court then addressed the merits of the claim that the initiative unconstitutionally appropriated funds. *Id.* at 4. The concern of the Alaskan constitutional delegates was the same as those in

Missouri, they wanted to prohibit appropriation initiatives "which have an inherent popular appeal, [but] would endanger the state treasury." *Id.* at 7. The Court explained, "The danger with direct legislation relating to appropriations is that it 'tempt(s) the voter to (prefer)…his immediate financial welfare at the expense of vital government activities." *Id.* at 8 (citations omitted).

Just as the courts did in the District of Columbia and Alaska, this Court is the only institution that can protect our state's constitution and the original intent of the framers -- Appellants are wrong when they suggested voters, by approving the initiative, have stripped this Court of that authority. Appellants' Brief, at 18.

As the Alaska Supreme Court noted, in language perfectly fitting for today:

> Thus, the Alaska Homestead Act would substantially deplete the state government of valuable assets just as surely as an initiative allotting to residents of specified years large sums of money. In the same manner, it constitutes an appropriation and hence may not be enacted by initiative.

Id. at 9. This is exactly the case with Amendment 2. This Court should follow the logic of other courts and affirm the trial court's judgment.

II. House Bills 10 and 11 are a reflection of *Planned Parenthood,* not any intent to fund Medicaid Expansion

This Court's decision in *Planned Parenthood of Saint Louis Region v. Department of Social Services,* 602 S.W.3d 201 (Mo. banc 2020) demonstrates the overall invalidity of Amendment 2 and gives further cause for why the trial court's judgment should be affirmed. In *Planned Parenthood,* this Court determined that the General Assembly is not authorized to amend any statute in an appropriation bill. *Id.* at 207. This Court held that when the General

Assembly sought to limit the availability of Medicaid funding to certain providers in an appropriations bill, such limitation conflicted with the provider eligibility requirements contained in Sections 205.152 and 205.153, RSMo. *Id.* at 210. This conflict constituted a violation of the single subject rule found in Article III, Section 23 of the Missouri Constitution. *Id.* This Court's holding in *Planned Parenthood* shows that the General Assembly cannot amend, limit, or restrict funding for Medicaid providers or eligible persons via appropriations bills. This Court in *Planned Parenthood* also noted that if the General Assembly wanted to change provider qualifications, it could do so by passing a standalone statute amending the provisions of sections 205.152 and 205.153, RSMo.

Appellants reason that the General Assembly's failure to include limiting language in House Bills 10 and 11 suggests an intent to fund Medicaid expansion. Appellants' Brief at 40. The General Assembly had, prior to *Planned Parenthood*, included language in House Bills 10 and 11 stating that no funds contained in either bill could be used for Medicaid expansion. After this Court's decision in *Planned Parenthood*, the General Assembly knew that such language would violate the Constitution's single subject limitation. The change to the language in House Bills 10 and 11 is not a reflection of an intent to fund Medicaid expansion, but rather a reflection of this Court's decision in *Planned Parenthood*. However now, unlike as suggested in *Planned Parenthood*, the General Assembly cannot pass a standalone statute on eligibility for individuals to participate in Medicaid because that eligibility determination is established not in statute but in the Constitution.

The proponents of the Amendment 2 structured their amendment to take away any discretion of the General Assembly to be able to amend the eligibility

requirements with respect to the expansion population. This is an attempt to force the General Assembly to provide funding for the expansion population. Under *Planned Parenthood*, the General Assembly is also prohibited from placing a substantive limitation on expansion in an appropriations bill.

The combined effect of Amendment 2 and *Planned Parenthood* would be to force the General Assembly to fund the expansion. Such a mandate on the General Assembly is prohibited unless the amendment itself provides its own revenue. See *City of Kansas City v. Chastain*, 420 S.W.3d 550, 555 (Mo. banc 2014). Amendment 2 fails to contain any funding mechanism. The (1) lack of funding mechanism combined with (2) the mandate of the eligibility expansion and (3) this Court's decision in *Planned Parenthood* prohibiting the General Assembly shows that Amendment 2 violates the ban on appropriation by the initiative found in Article III, Section 51.

Appellants have argued that the General Assembly has the discretion to defund Medicaid altogether or when the current appropriations in House Bills 10 and 11 run out, that the General Assembly can choose not to appropriate supplemental funds to cover Medicaid. Appellants Brief, at 29. Federal law does not support this position.

Missouri is required to provide health benefits to a defined set of individuals. "The program is jointly financed by the Federal and State governments…." 42 C.F.R. § 430.0. For the Medicaid expansion population, the federal government finances 90%, and the state finances 10%. 42 U.S.C § 1396d(y)(1)(E). The federal share is just a reimbursement to the states for what they directly pay: "Payments and services are made directly by the State to the individuals or entities that furnish the services." 42 C.F.R. § 430.0.

States that participate in Medicaid are obligated to pay a portion of the costs. *See, e.g.*, 42 U.S.C. § 1396d(y)(1)(E). They cannot decide in a financially tight year to alter or renege on their CMS-approved plans, as this will only cause CMS to withhold federal reimbursements for medical expenses the state has already paid providers. *See, e.g.,* 42 C.F.R. § 430.35. Nor can the state simply choose to eliminate the state share of payments to providers, using only federal reimbursements to pay for services because reductions in state expenditures will reduce the federal reimbursement. *See* 42 C.F.R. § 430.30(a). The state must pay.

Because the state must pay, it cannot walk away from the existing program. Since Amendment 2 requires fully funding the expansion and provides no new funds, there is no option for the General Assembly to stop funding the expansion. This straitjacket is further evidence that Amendment 2 violates Article III, Section 51 and is void *ab initio*.

CONCLUSION

This Court should deny the relief requested by Appellants. Amendment 2 violates Article III, Section 51 of the Missouri Constitution. This Court should affirm the trial court's judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

A copy of this document was served on counsel of record through the Court's electronic notice system on July 8, 2021.

This brief complies with the limitations contained in Supreme Court Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 7,128, excluding the cover, signature block, and this certificate. The font is Century Schoolbook 13-point type. The electronic copies of this brief were scanned for viruses and found to be virus free. Pursuant to Rule 55.03, the undersigned further certifies the original of this brief has been signed by the undersigned.

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