No. SC99966

In the

Supreme Court of Missouri

PLANNED PARENTHOOD OF THE ST. LOUIS REGION; PLANNED PARENTHOOD GREAT PLAINS; COMPREHENSIVE HEALTH OF PLANNED PARENTHOOD GREAT PLAINS,

Respondents,

v.

MISSOURI DEPARTMENT OF SOCIAL SERVICES, MO HEALTHNET DIVISION; MISSOURI MEDICAID AND COMPLIANCE AUDIT; ROBERT KNODELL, IN HIS OFFICIAL CAPACITY AS ACTING DIRECTOR OF THE DEPARTMENT OF SOCIAL SERVICES; TODD RICHARDSON, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE MO HEALTHNET DIVISION; DALE CARR, IN HIS OFFICIAL CAPACITY AS DIRECTOR MISSOURI MEDICAID AND COMPLIANCE AUDIT,

Appellants.

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

REPLY BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT

The General Assembly decided that abortion providers, their associates, and their affiliates did not need additional funding for the 2022 fiscal year, so it did not provide any. Too eager to challenge that decision, the Planned Parenthood entities ran straight to court and argued a statutory claim (as they do here), when they should have gone to the Administrative Hearing Commission. Then, in circuit court, they failed to do any discovery, provide any documents, or produce any experts. They provided no evidence at all that they would have received reimbursements but for the Act they now challenge. For example, Planned Parenthood provided no evidence that its reimbursement claims were even related to people covered by Medicaid. Recognizing too late this fatal problem, Planned Parenthood now shockingly fabricates a quote, falsely saying that the State stipulated that the claims were reimbursable.

This failure to prove any damages becomes even more obvious in Planned Parenthood's merits argument. They argue they should be paid under the "physician services" and "family planning services" appropriation in § 14.230. That of course is a *statutory* argument, not a constitutional argument, so it should have been brought in the AHC. Indeed, it is the same argument Planned Parenthood pleaded in Count I of their initial complaint but purported to drop in their amended complaint once the State pointed out the obvious exhaustion problem with the argument. In any event, Planned Parenthood provides no evidence that their claims fit under that section. Their conclusory allegation that their claims satisfy the statute may have been enough at the pleading stage, but is not enough to prove their claim. At the merits stage, plaintiffs must provide actual evidence.

This Court should not re-work its standing doctrine to bail out the Planned Parenthood entities for not proving their case.

Planned Parenthood's contractual arguments also fail. Planned Parenthood does not dispute that if there is a lack of funding, then their contracts entitle them to no reimbursement. There is no funding, so the contractual waivers kick in. Disputing this, Planned Parenthood presses a statutory argument, contending at length that in fact there is available funding. But Planned Parenthood failed to exhaust this nonconstitutional claim in the AHC. And if there is funding, why is Planned Parenthood even in Court? No better is Planned Parenthood's unsupported, nontextual assumption that they can challenge the lack of funding as unconstitutional. Through contracts, parties waive constitutional claims all the time, as Planned Parenthood did here. Their contracts plainly state that if there is no funding, they cannot be paid. No clause in the contracts creates an exception allowing them to challenge the reason for the funding deficiency.

The Court thus has a number of ways to reverse the judgment without even reaching any constitutional issue, much less the thorny one not passed on by the trial court that threatens to undermine a core sovereign function of the General Assembly. The Planned Parenthood entities should have exhausted their factual and nonconstitutional claims (especially their statutory claim that § 14.230 provides them with funding) before the AHC. They did not. They should have provided evidence (rather than a fabricated quote) that their claims would be eligible for reimbursement but for the Act. They did not. And they should have negotiated different contracts. They did not. Each of these failures provides an independent basis to reverse the judgment.

Finally, the merits favor the State. Antecedent to the constitutional question is the statutory question whether the Planned Parenthood entities are eligible to receive reimbursement from the $84 million appropriated by § 14.230. They plainly are not. A different provision, § 14.277, controls appropriations for the Planned Parenthood entities. In their brief, Planned Parenthood does not even bother to deny that their contrary statutory argument would render § 14.277 entirely superfluous. Planned Parenthood received a $0 appropriation under § 14.277—a common kind of appropriation used by Congress and other States. That appropriation controls.

On the constitutional question, this appropriation is lawful. Even Planned Parenthood concedes that the General Assembly has constitutional authority to distinguish between providers when making appropriations. Of course it does. That is the purpose of appropriations. As Planned Parenthood does not dispute, the General Assembly can choose to prioritize urban providers, rural providers, low-income providers, or providers with a better safety and disciplinary record. And the General Assembly can choose to deprioritize an organization like Planned Parenthood Great Plains, which health officials were forced to shut down after clinic staff admitted the clinic physician had been using moldy equipment on women for months. App. Br. at 24

Making provider-based distinctions in appropriations is exactly what the Act at issue does. Planned Parenthood struggles to refute this argument, admitting that the General Assembly has made and can make provider-based distinctions, but failing to explain why that is not exactly what the General Assembly did here. Instead, Planned Parenthood repeatedly resorts to this Court's decision in *Planned Parenthood of St. Louis Region v.*

Department of Social Services, Division of Medicaid Services (*PPSLR*), 602 S.W.3d 201 (Mo. banc 2020). But there is an enormous difference between the General Assembly telling an agency not to give already-appropriated funds to recipients who are statutorily entitled to them, which is what *PPSLR* forbids, and declining to give the agency funds in the first place, which is what *Doyle v. Tidball*, 625 S.W.3d 459 (Mo. banc 2021) expressly permits and the General Assembly did here.

But if this Court determines that Planned Parenthood's maximalist reading better reads *PPSLR*, this Court should overrule that decision. The *stare decisis* factors favor discarding this precedent, which (read as Planned Parenthood does) slashes the General Assembly's constitutionally protected appropriations power. Indeed, Planned Parenthood offers no theory for how its admission that the General Assembly can distinguish between providers is consistent with its reading of the *PPSLR* decision. Given this Court's conflicting decision in *Doyle v. Tidball*, 625 S.W.3d 459 (Mo. banc 2021), and Planned Parenthood's inability to explain how *PPSLR* still allows the General Assembly to distinguish between providers, *PPSLR* is ripe for reconsideration and repudiation.

ARGUMENT

I. This Court should reverse because Planned Parenthood failed to exhaust before the AHC. (Point I)

This Court's case law on exhaustion is clear. The circuit court lacked jurisdiction because Planned Parenthood did not exhaust administrative remedies. Planned Parenthood's decision to argue at length a statutory question simply highlights this fact.

A. Failure to exhaust bars a circuit court from hearing a case, and even if this argument can be waived, it was preserved here.

Even if exhaustion of administrative remedies is "a statutory prerequisite" rather than a "jurisdictional prerequisite," as the Planned Parenthood entities suggest, *State ex rel. Robison v. Lindley –Myers*, 551 S.W.3d 468, 473 (Mo. banc 2018), the result is the same—the judgment must be reversed, *LO Management, LLC v. Office of Admin.*, 658 S.W.3d 228, 239 (Mo. App. W.D. 2022). Although exhaustion is "waived . . . if an objection is not brought before the trial court," *Kerr v. Missouri Veterans Commission*, 537 S.W.3d 865, 874–75 (Mo. App. 2017), here the State objected, D123 pp.9–10; D135, pp.5–7. Planned Parenthood does not claim otherwise. So even under Planned Parenthood's interpretation of the case law, this Court should still reverse if it determines (as it should) that Planned Parenthood failed to exhaust.

B. Exhaustion was necessary because this case does not involve *exclusively* constitutional issues.

As Planned Parenthood tacitly admits by arguing a statutory claim, this case includes factual questions and nonconstitutional claims that the AHC could have addressed. Planned Parenthood argues at length that the question whether the $0 appropriation in § 14.277 is constitutional "is not a question this Court needs to decide" because they believe they prevail on their statutory argument that § 14.230 provides available appropriations, notwithstanding § 14.277. Resp. Br. at 21; *see also id.* at 18–20, 26. The circuit court adopted this statutory argument, declining to reach the constitutional question Planned Parenthood had raised about § 14.277.

That creates an insurmountable problem for Planned Parenthood because it means the exception to the default rule of exhaustion does not apply. Exhaustion is not required where "there is a constitutional challenge to a statute which forms the only basis for granting declaratory judgment" and the "constitutional claims" are not "mixed with other claims involving construction of statutes and factual issues." *Farm Bureau Town & Country Ins. Co. of Missouri v. Angoff*, 909 S.W.2d 348, 353 (Mo. banc 1995) (emphasis omitted). Planned Parenthood argues (at 21 n.12) that it raised a pure constitutional challenge to § 14.2030, which provides, "No funds shall be expended to any clinic, physician's office, or any other place or facility in which abortions are performed." But Planned Parenthood plainly did not bring a pure constitutional challenge to the $0 appropriation. That constitutional claim is inherently "mixed with other claims involving construction of statutes," *Angoff*, 909 S.W.2d at 353, namely whether the different provision, § 14.230, provides an appropriation notwithstanding the $0 appropriation in § 14.277. As the circuit court held, D143 p.4, and Planned Parenthood argues, the constitutional challenge to § 14.277 could be resolved on statutory grounds. It was thus supposed to be raised first in the AHC.

Indeed, this statutory argument is just like the argument Planned Parenthood raised in its original Count I. D100 pp.7–8. In response to the State's argument that this count created an exhaustion problem, Planned Parenthood dismissed this count and four others. D107, p.1–2, ¶¶ 6–8. What was an exhaustion problem then is still an exhaustion problem. Planned Parenthood cannot avoid the exhaustion requirement by engaging in artful pleading. As *Angoff* held, a party must exhaust administrative remedies if there were ways

the AHC could avoid determining the statute's constitutionality. *Angoff*, 909 S.W.2d at 353. The AHC could have resolved Planned Parenthood's constitutional argument about § 14.277 by adopting the statutory argument Planned Parenthood presses here.

The State of course disagrees with Planned Parenthood's statutory argument. The question for purposes of exhaustion, however, is not whether Planned Parenthood would prevail on its statutory argument before the AHC. It is whether a tribunal would need to address the constitutional question *if* Planned Parenthood prevailed on the statutory question. As the Missouri Court of Appeals held in another case brought by Planned Parenthood's counsel: "The futility exception requires consideration of the authority and ability of the administrative body to provide an adequate remedy, not the *subjective likelihood* of it doing so." *Tri-County Counseling Services, Inc. v. Office of Administration*, 595 S.W.3d 555, 569 (Mo. App. W.D. 2020) (second emphasis added).

It is not just Planned Parenthood's statutory argument that required exhaustion. Both constitutional claims require exhaustion because they are "mixed with … factual issues." *Angoff*, 909 S.W.2d at 353. For instance, *Angoff* considered whether the statute even applied to the party challenging it and, if so, whether that party violated the statutes. *Id*. ("Of course, if T & C did not violate the statutes, the constitutional questions need not be reached."). These questions are similar to the preliminary factual questions that had to be decided in this case. Would the reimbursement requests submitted by the Planned Parenthood entities even qualify for reimbursement absent the challenged provisions in the appropriations law? If not, the AHC would not have had to address the constitutional question.

Planned Parenthood's reliance on *Donaldson v. Missouri State Board of Registration for the Healing Arts* is misplaced. 623 S.W.3d 152 (Mo. App. W.D. 2020). *Donaldson*'s posture was different because the petitioner there "filed a petition in the Circuit Court … seeking judicial review of a decision rendered by the Administrative Hearing Commission and by the State Board of Registration for the Healing Arts." *Id.* at 154. Here, Planned Parenthood *never* took the case to the AHC, instead taking it to the circuit court in the first instance. Far from helping Planned Parenthood, *Donaldson* provides a road map for what Planned Parenthood should have done instead.[1]

C. Stipulating to facts waives factual disputes only on the facts stipulated.

Trial on stipulated facts does not waive factual disputes on anything but the facts to which the parties stipulate. Planned Parenthood cites no cases suggesting the opposite. As plaintiff, Planned Parenthood bore the burden of demonstrating that the facts and law supported its claims. *Pearson v. Koster*, 367 S.W.3d 36, 54 (Mo. banc 2012) ("[S]tipulations of fact relieved the parties from proving *the matters stipulated*[.]" (emphasis added)); *Calzone v. Interim Comm'r of Dep't of Elementary & Secondary Educ.*, 584 S.W.3d 310, 315 (Mo. banc 2019) (plaintiff has burden of proving unconstitutionality

[1] *Little Sisters of the Poor v. Missouri Department of Social Services*, 611 S.W.3d 781 (Mo. App. W.D. 2020), is also inapposite because it is a case about how to file a case in the circuit court after that case had already been brought in the AHC. *Id*. at 788 ("[I]t was improper for Nursing Homes to seek contested case review in the circuit court. Instead … Nursing Homes should have brought 'an action in appealing from the [AHC] … in the circuit court … [under] the statute authorizing a declaratory judgment."). Any discussion of exhaustion in *Little Sisters* is dicta.

of statute); *Revis v. Bassman*, 604 S.W.3d 644, 659 (Mo. App. E.D. 2020) ("[P]laintiff bears the burden of proof at trial.").

This Court should reverse and enter judgment in favor of the State because Planned Parenthood failed to exhaust its administrative remedies.

II. This Court should reverse because Planned Parenthood cannot demonstrate standing. (Point II)

Planned Parenthood lacks "[a] legally protectable interest" that is "adversely affected" by H.B. 3014. *St. Louis Cnty. v. State*, 424 S.W.3d 450, 453 (Mo. banc 2014). Contrary to Planned Parenthood's suggestion (at 13) that standing is an affirmative defense, Planned Parenthood has the burden of proof, which it has not carried. *Schweich v. Nixon*, 408 S.W.3d 769, 774 (Mo. banc 2013) ("[P]arties seeking relief bear the burden of establishing that they have standing."); *Lee's Summit License, LLC v. Office of Admin.*, 486 S.W.3d 409, 416 (Mo. App. W.D. 2016) (same).

Tellingly, Planned Parenthood does not dispute that they never submitted evidence that their claims would have been eligible for reimbursement but for H.B. 3014. Instead, Planned Parenthood shockingly fabricates a quotation to assert—falsely—that the State stipulated to the claims being reimbursable. Planned Parenthood mis-quotes the Joint Stipulations as stating that "Plaintiffs['] claims are otherwise eligible for payment, notwithstanding HB 3014." Resp. Br. at 15 (misquoting D125, ¶ 139) (brackets in Respondent's brief). In fact, the Joint Stipulations say the opposite: "Defendants agree that PPGP and PPSLR had been properly submitting claims (that *Plaintiffs claim* are otherwise eligible for payment, notwithstanding 3014) …." D125, ¶ 139 (emphasis added). In other

words, the State stipulated only that Planned Parenthood *contends* its claims were reimbursable. The State did not agree they were reimbursable. Planned Parenthood misleads this Court to the contrary by adding an apostrophe on "Plaintiffs" and an extra "s" on "claim" to completely change the meaning of this statement. Resp. Br. at 15. The Joint Stipulations contain no concession from the State about reimbursement eligibility. *See generally* D125.

Far from conceding the issue of eligibility for reimbursement, the Joint Stipulations in fact highlight the kinds of evidence Planned Parenthood would need to submit to establish that their Medicaid claims were eligible for reimbursement: "[t]o be reimbursed, the enrolled provider must also, for instance, provide a covered service to a covered individual and submit a valid claim for payment" and "[a] valid claim must include, among other things, sufficient information to correctly identify the patient and diagnostic information to justify the medical need for the services or treatments being billed." *Id.* ¶¶ 44–45. Here, Planned Parenthood has not so much as demonstrated that even one of the claims it submitted was related a person covered by Missouri Medicaid.

None of Planned Parenthood's three backup standing arguments work either. They contend (1) this Court's precedents hold that being "subject to" an unconstitutional statute is automatically an injury; (2) MO HealthNet's failure to process claims is an injury, and (3) the suspension letter prohibited Planned Parenthood from submitting claims. None of these arguments has merit.

First, Planned Parenthood argues that, under *Rebman v. Parson*, 576 S.W.3d 605 (Mo. banc 2019), being "subject to" an unconstitutional statute automatically creates

injury. Resp. Br. at 6. Not only have they not established that their claims would be eligible for reimbursement but for the statute (and thus they are ultimately not affected by it),[2] but *Rebman* states no such thing. *Rebman* holds only that *if* there is an injury, and *if* the injury is caused by an unconstitutional statute, that injury is "irreparable." *Rebman*, 576 S.W.3d at 612. Standing was never challenged in *Rebman* because there was no question that the plaintiff was injured—the General Assembly eliminated Rebman's salary. *Id.* at 608.

Second, when MO HealthNet does not process claims, this is not, without more, an injury. Planned Parenthood never identifies any procedural right to have claims processed, so without any evidence that processing claims would have led to payment under the rules of Missouri Medicaid, Planned Parenthood cannot claim that lack of processing caused actual injury. Failure to process claims only results in injury if there is something of merit to process. Because Planned Parenthood bore the burden of establishing this, and failed to, this Court should reverse. Further, nothing in H.B. 3014 prohibits the State from processing claims by Planned Parenthood. H.B. 3014 would have equally allowed MO HealthNet to process the claims and decide not to pay them on the back end. Failure to process does not injure Planned Parenthood.

Third, the letter from the State to Planned Parenthood caused no injury. The plain language of the letter does not prevent Planned Parenthood from submitting claims, thus

[2] Unlike Rebman, whose "employment [was] unconstitutionally terminated" due to "the funding restrictions," *Rebman*, 576 S.W.3d at 612, Planned Parenthood cannot even show that it served any Medicaid patient during the relevant timeframe. Because Planned Parenthood has not demonstrated it "is adversely affected by the statute in question," this Court should reverse for lack of standing. *Missouri Coalition for the Environment v. State*, 579 S.W.3d 924, 927 (Mo. banc 2019).

the premise for this alleged injury is nonexistent. D132. Even so, Planned Parenthood would not have been injured simply by being prohibited from submitting claims, as Planned Parenthood has not shown it had any reimbursable claims to submit. And finally, Planned Parenthood submitted its claims anyway, D125 ¶ 39, so the letter by itself did not injure Planned Parenthood.

Planned Parenthood wrongly suggests that they could not have shown that their claims should have been paid absent State processing. This argument demonstrates a lack of creativity and effort. Planned Parenthood could have deposed MO HealthNet or sent interrogatories addressing this question, but it declined to do so. This Court should not reward the lack of effort in this case. Because Planned Parenthood has not demonstrated it "is adversely affected by the statute in question," this Court should reverse for lack of standing. *Missouri Coalition for the Environment v. State*, 579 S.W.3d 924, 926–27 (Mo. banc 2019).

III. This Court should reverse because Planned Parenthood contractually waived its claims. (Point III)

Planned Parenthood waived its current claims as part of its Medicaid Provider Agreements. Planned Parenthood does not dispute that if there is a lack of funding, then their contracts provide that they get nothing.[3] That ought to be the end of the question because there is no funding.

[3] Planned Parenthood does not respond to the State's dismantling of the trial court's suggestion that the contractual waiver did not contemplate a $0 appropriation because a $0 payment cannot be pro rata. D143 p.2 (trial court pro-rata holding); App. 30–31 (State response to trial court pro-rata holding); Resp. 17. Planned Parenthood simply doubles down on the trial court's holding without addressing the State's argument that "[a] pro-rata

Planned Parenthood nonetheless argues that in fact, there is funding. In support, Planned Parenthood cites the $84 million appropriated by § 14.230. As explained in the next section, that statutory argument is incorrect. And as explained in Part I, even making that statutory argument highlights Planned Parenthood's serious exhaustion problem. Planned Parenthood cannot make this claim without first exhausting it in front of the AHC.

Next, the Planned Parenthood entities assume that their contracts allow them to challenge the lack of funding as unconstitutional. But nothing in their contracts permits them to do so. The contracts plainly state that the Planned Parenthood entities "agree to accept" no payment "[i]f *at any time* state or federally appropriated funds available to the DSS/MMAC for payment to [Planned Parenthood]" do not exist. D125 ¶¶ 10–15 (emphasis added); D127, ¶ 8 (emphasis added). Planned Parenthood identifies no clause creating an exception. When the contract says that Planned Parenthood will "accept" reduced payments, it means that Planned Parenthood will "assent" to, or "agree[ ]" or "approv[e]" of them. Black's Law Dictionary (11th ed. 2019) (defining "acceptance" as "assent"); *id*. (defining "assent" as "[a]greement" or "approval"). Nor can this Court simply imply an exception to the express agreement simply because Planned Parenthood believes that the lack of funds is unconstitutional. Parties can and do waive constitutional rights via contract all the time. *See, e.g.*, *Malan Realty Inv'rs, Inc. v. Harris*, 953 S.W.2d 624, 626–27 (Mo. banc 1997) ("[A] party may contractually relinquish fundamental and due process rights" and its "right to present their claim to *any* judicial tribunal deciding the

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reduction for a 100% funding deficiency is a 100% reduction—that is, no payment at all." App. Br. at 31; Resp. Br. at 17.

case."). Planned Parenthood cites no case for the proposition that a party cannot waive its right to challenge a statute's validity.[4] And because the contract plainly states that they must accept no payment if there are no funds (and there are in fact no funds), the Planned Parenthood entities must abide by this contract.

Any other interpretation would render the broad waiver meaningless. This Court does not favor textual interpretations that make parts of a contract superfluous. *State ex rel. Riverside Pipeline Co., L.P. v. Pub. Serv. Comm'n of State*, 215 S.W.3d 76, 84 (Mo. banc 2007) ("A contract must be construed as a whole so as not to render any terms meaningless" and such a "construction … is preferred over a construction that leaves some of the provisions without function or sense."). If the waiver provision does not mean that Planned Parenthood will accept (and consequently, not challenge) the insufficient funds appropriated, it does not mean anything. This Court should find waiver and reverse the circuit court's judgment.

[4] Planned Parenthood very briefly states (at 17) that it does not believe the Medicaid Provider Agreement is valid, but does not explain why. Since a party cannot preserve an argument simply by making a conclusory statement like this one, Planned Parenthood has waived this argument. *See, e.g.*, *Gunn v. Div. of Employment Sec.*, 423 S.W.3d 820, 823 (Mo. App. W.D. 2014) ("Mere conclusions and the failure to develop an argument with support from legal authority preserve nothing for review."). Either way, the waiver is valid because it was listed clearly, it was not buried deep in the contract, it used clear language, it was not too small to read, and Planned Parenthood is a sophisticated bargaining party. *See Malan Realty Inv'rs, Inc. v. Harris*, 953 S.W.2d 624, 627 (Mo. banc 1997).

IV. Planned Parenthood loses on the merits because the $0 supplemental appropriation in H.B. 3014 does not violate article III, section 23. (Points IV and V)

H.B. 3014 provided Planned Parenthood, as an abortion provider or affiliate or associate thereof, $0 in *supplemental funding* for Fiscal Year 2022 in § 14.277. That appropriation controls, and it does not violate article III, section 23. Planned Parenthood argues that the $0 supplemental appropriation in § 14.277 either is not an appropriation at all or that Planned Parenthood is entitled to appropriations under a different section, § 14.230, for "family planning services" and "physician services" when the $0 appropriation runs out, which Planned Parenthood claims happens immediately. In the alternative, Planned Parenthood argues that the $0 appropriation attempts to circumvent the rule that appropriations statutes cannot amend other statutes and thus violates article III, section 23. Neither argument is correct.

A. Planned Parenthood is not eligible for the $84 million appropriation in § 14.230.

At the outset, Planned Parenthood's extended *statutory* argument about which appropriation provision applies simply highlights that this case should have been brought before the AHC in the first instance. *See* Part I. In any event reading the two appropriation provisions together leads to only one permissible conclusion: the $0 appropriation, not the $84 million appropriation, applies to the Planned Parenthood entities and similar organizations. By its plain text, the $0 appropriation applies "[f]or medical and health related services performed by any clinic, physician's office, or any other place or facility in which abortions are performed or induced other than a hospital, or any affiliate or

associate of any such clinic, physician's office, or place or facility in which abortions are performed or induced other than a hospital." D125 ¶ 25. The $84 million appropriation, in contrast, applies "[f]or physician services and related services," more generally, including "family planning services." There is no way to read the $84 million appropriation to apply to the Planned Parenthood entities without entirely nullifying the $0 appropriation provision.

Planned Parenthood acknowledges this. Unable to make the $0 appropriation do any work under Planned Parenthood's interpretation of the $84 million appropriation, Planned Parenthood undermines its own argument by stating that "it would be a waste of legislative effort—to appropriate zero dollars [because] [t]hat is the status quo until an appropriation is made." Resp. Br. at 25 (internal quotation marks omitted). In essence, Planned Parenthood agrees that its reading of the $84 million appropriation in § 14.277 is superfluous, which is disfavored. *See Bateman v. Rinehart*, 391 S.W.3d 441, 446 (Mo. banc 2013). To avoid this problem, this Court should interpret § 14.277 as the exclusive appropriation for abortion providers, their affiliates, and their associates in conjunction with the rule of construction that the specific controls the general. *See Greenbriar Hills Country Club v. Dir. of Revenue*, 935 S.W.2d 36, 38 (Mo. banc 1996).

But even accepting Planned Parenthood's statutory argument, Planned Parenthood submitted no evidence that its claims are reimbursable under § 14.230. As discussed in Part II (lack of standing), there is absolutely no evidence that the claims Planned Parenthood submitted are for "family planning services" or "physician services" referenced in § 14.230.

B. The $0 appropriation in § 14.277 complies with article III, section 23.

Section 14.277's $0 appropriation for abortion providers, their affiliates, and their associates does not violate article III, section 23's single-subject requirement. That provision states, "No bill shall contain more than one subject which shall be clearly expressed in its title …."[5] In analyzing the "single subject requirement" this Court has "attempted to avoid an interpretation … that will limit or cripple legislative enactments any further than what was necessary by the absolute requirements of the law." *Calzone v. Interim Comm'r of Dep't of Elementary & Secondary Educ.*, 584 S.W.3d 310, 321 (Mo. banc 2019). To determine whether the single-subject rule is satisfied, "[t]his Court will examine whether all provisions of the bill fairly relate to the same subject, have natural connection therewith or are incidents or means to accomplish its purpose." *Id.* (internal quotation marks omitted).

Certainly, a $0 appropriation for abortion providers, their affiliates, and their associates has "a natural connection" with or is an "incident[ ] of or means to accomplish the purpose" of the supplemental appropriations bill here. The $0 appropriation clarifies that the large appropriation in § 14.230 is limited to organizations who are not abortion providers, their affiliates, or their associates.

Planned Parenthood raises two principal counterarguments. Neither succeeds.

[5] The title of H.B. 3014 is "AN ACT To appropriate money for supplemental purposes for the expenses, grants, refunds, and distributions of the several departments and offices of state government and the several divisions and programs thereof, and to transfer money among certain funds, to be expended only as provided in Article IV, Section 28 of the Constitution of Missouri for the fiscal period ending June 30, 2022."

1. Planned Parenthood first contends that § 14.277 violates the single-subject rule because it is not an appropriation at all, as an appropriation must give money to someone. No so. There are many other instances in which legislatures have made $0 appropriations. For instance, Congress included several $0 appropriations in its 2020 Medicaid Improvement Fund. 42 U.S.C. § 1396w-1(b)(1), (b)(3) (effective Dec. 27, 2020 to Dec. 28, 2022) ([(b)(1)] "There shall be available to the Fund, for expenditures from the Fund for fiscal year 2023 and thereafter, $0. . . . [(b)(3)] In addition to the amount made available under paragraph [(b)](1), there shall be available to the Fund . . . $0[.]") (A0096). The Kansas legislature has passed several $0 appropriations, even though Kansas has a single-subject ("one-subject") rule. *See Gannon v. State*, 319 P.3d 1196, 1240 (Kan. 2014) (listing three years in which the Kansas legislature "made a specific appropriation of '$0' for capital outlay aid"); *Kansas Nat'l Educ. Ass'n v. State*, 387 P.3d 795, 804–05 (Kan. 2017) (referencing Kansas's single-subject constitutional provision). The West Virginia "Legislature reduced to zero the appropriations for four agencies," and yet these were considered appropriations. *State ex rel. Moore v. Blankenship*, 217 S.E.2d 232, 240 (W.Va. 1975). And Congress's most recent budget bill contained ten examples of agencies that were given conditional $0 appropriations that could rise above $0 only if revenue and fees were not enough to offset costs.[6]

[6] https://www.congress.gov/bill/117th-congress/house-bill/2617/text (providing "$0" in appropriations, unless fee revenues are insufficient, for certain purposes of the (1) U.S. Patent and Trademark Office; (2) U.S. Trustee System Fund; (3) Innovative Technology Loan Guarantee Program; (4) Operation and Maintenance, Southeast Power Administration; (5) Federal Energy Regulatory Commission; (6) Committee on Foreign Investment in the U.S. Fund; (7) Federal Communications Commission; (8) Securities and

2. Planned Parenthood next contends (at 23) that the appropriation is unconstitutional because it has the same "effect" as the non-appropriation funding bar in *PPSLR*, 602 S.W.3d 201. That proves too much. The "effect" also would be the same if the legislature wholly declined to fund Medicaid at all. While that would be unwise, it would not be unconstitutional, as *Doyle* plainly held. And there is no dispute that the General Assembly could constitutionally take that action even though it would have the same "effect" as the statute in *PPSLR*.

The fundamental problem with Planned Parenthood's argument is they cannot square their assertion that *PPSLR* bars this appropriation with their admission (at 28) that "*PPSLR* does not render provider-specific appropriations unconstitutional. No one is arguing that." Planned Parenthood concedes, as it must, that the General Assembly can use appropriations to distinguish between providers or distinguish between services. That is exactly what appropriations are for. Nobody doubts that the General Assembly, for example, recognizing that an area has a higher proportion of low-income individuals, could pass an appropriation "for physicians services in X county" or "for physicians services provided by Tier 1 Safety Net Hospitals." *See* A0085. Nobody doubts that the General Assembly could pass an appropriation "for physician services provide by X, Y, and Z organizations."

The problem Planned Parenthood runs into is they have no way of denying that this is exactly what the $0 appropriation does. If the General Assembly can pass an

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Exchange Commission; (9) Environmental Programs and Management; and (10) Export-Import Bank of the United States).

appropriation "for physician services provide by organizations A through W"—as Planned Parenthood admits they can do—then the General Assembly can certainly provide an appropriation "for physician services provided by any organization *except* X, Y, and Z." There is no substantive difference between the two. Planned Parenthood stresses heavily that this is a $0 appropriation, but they provide no response to the State's argument that a $1 appropriation would have the same basic effect on the Planned Parenthood entities, App. Br. at 38, and they identify no judicially manageable standard or text for courts to evaluate different amounts of appropriations.

What Planned Parenthood misunderstands is that there is a fundamental difference between declining to provide an appropriation (permitted under *PPSLR* and *Doyle*) and purporting to tell an agency what it must do with an appropriation already provided (not permitted, like in *PPSLR*). Put another way, when a statute *first* appropriates money and *then* instructs MO HealthNet not to give that money out to certain providers covered by that appropriation even though they would be eligible for it under § 208.152, then the new statute is amending § 208.152 and violates article III, section 23 under this Court's precedent. But when the statute simply *appropriates zero supplemental dollars* for a particular purpose, this does not amend § 208.152. There is just no money appropriated to MO HealthNet to give out as § 208.152 would otherwise dictate. That is exactly what *Doyle* said the legislature could do.

Courts simply cannot micromanage provider-based or service-based distinctions that the legislature draws in appropriations without wrecking that core sovereign function. Suppose, for example, that the Court determined that provider-based distinctions were not

permissible—despite Planned Parenthood's admission that they are. Resp. Br. at 28 ("*PPSLR* does not render provider-specific appropriations unconstitutional."). The problem this Court would run into is that it is incredibly difficult, if not impossible, to distinguish between appropriations based on services and appropriations based on providers because different services are issued by different providers. What comes to mind is the famous phrase that "a tax on wearing yarmulkes is a tax on Jews." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993). Is an appropriation for "hospitals" a provider-based appropriation, or an appropriation for comprehensive medical services? Is an appropriation "for physician services including podiatry" an appropriation for podiatry services, or for providers that do podiatry?

3. Planned Parenthood has no argument other than their (incorrect) contention that the $0 appropriation is no appropriation at all and that the appropriation is unconstitutional because it has the same "effect" as the clause in *PPSLR*. So Planned Parenthood instead quibbles with the State's arguments about which appropriations create provider-based distinctions. In the end, all this is an academic exercise because Planned Parenthood concedes that the General Assembly is allowed to make provider-based distinctions. Resp. Br. at 26; *id.* at 27 (admitting that "Section 14.230 includes a provider-specific appropriation"); *id.* at 28 ("*PPSLR* does not render provider-specific appropriations unconstitutional. No one is arguing that.").

In any event, Planned Parenthood's quibbling with specific examples of provider-specific appropriations fails. For instance, Planned Parenthood claims that the allocation in § 14.245 is a service-based, not provider-based, appropriation. Not so. That section

provides "funding for long-term care services" but only for "care *in nursing facilities* … and for contracted services to develop model policies and practices that improve the quality of life for long-term care residents[.]" That limitation is not found in § 208.152.8. If the $0 appropriation violates *PPSLR* because it has the "effect" of rendering certain providers ineligible for an appropriation, then § 14.245 is likewise unconstitutional. That cannot be. The legislature could not function without being able to make distinctions between providers.

Or take § 14.230, which singles out certain "physician … services" appropriations to be made solely to "Certified Community Behavioral Health Organizations." D131, pp.12–13. This excludes reimbursement for any other physician services, even if the general appropriation for all physician services runs out. Under Planned Parenthood's argument, § 14.230 unconstitutionally limits how the physician-service appropriation can be spent by adding in distinctions that do not exist in § 208.152.1(6) (providing reimbursement for "[p]hysicians' services, whether furnished in the office, home, hospital, nursing home, or elsewhere").

Older statutes like H.B. 2011 (2018) highlight similar provider-based distinctions. Section 208.152.1(1)–(2) covers both inpatient and outpatient hospital services. But § 11.505 of H.B. 2011 (2018) allocates funding only for "physician … services," and only for "supplemental payments to Tier 1 Safety Net Hospitals"—not all hospitals. Under Planned Parenthood's argument, this provision for physician services would violate article III, section 23 because it does not include entities like abortion clinics, their affiliates, and their associates.

Planned Parenthood's answer to this conundrum is likely to be that none of the other provider-based limitations appropriated $0. That argument fails on its own merits for the reasons explained above. But it especially fails here given that H.B. 3014 is a *supplemental* appropriations bill. So Planned Parenthood was not appropriated $0 for the entire 2022 Fiscal Year, but appropriated $0 *additional* dollars for the final three months of that year. It is incorrect to view a $0 supplemental appropriation as a $0 overall appropriation.

C. In the alternative, this Court should overrule *PPSLR*.

To the extent that this Court reads *PPSLR* as requiring the General Assembly to appropriate enough money to cover all MO HealthNet providers, this Court should overrule it. Though it is true that this Court does not "lightly overrule[ ]" its own cases "[u]nder the doctrine of *stare decisis*," the doctrine has *more force* "where … the opinion has remained unchanged for many years." *Doe 122 v. Marianist Province of the United States*, 620 S.W.3d 73, 80 n.8 (Mo. banc 2021). Where, as here, "it appears that an opinion is clearly erroneous and manifestly wrong … *stare decisis* is never applied to prevent the repudiation of such a decision." *Id*. *PPSLR* is clearly erroneous and manifestly wrong, as demonstrated by its conflict with *Doyle*.

1. *Stare decisis* does not prevent this Court from overruling *PPSLR*.

With respect to *stare decisis*, this Court may overrule its prior opinions even without significant passage of time.[7] In fact, under *Doe 122*, the shorter the time a holding exists,

[7] *See, e.g.*, *Payne v. Tennessee*, 501 U.S. 808 (1991) (overruling *Booth v. Maryland*, 482 U.S. 496 (1987), four years later); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), seven years later); *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624 (1943) (overruling *Minersville School Dist.*

the weaker *stare decisis* is. 620 S.W.3d at 80 n.8. Here, *PPSLR*'s holding has only been in force for a few years, meaning that *stare decisis* is weak. It is also weak because *PPSLR* creates an unworkable rule, because there are few if any reliance interests,[8] and because the decision was not well reasoned for the reasons below and those in the Appellant Brief. *See Montejo v. Louisiana*, 556 U.S. 778, 792–93 (2009) (listing out *stare decisis* considerations).

2. As interpreted by Planned Parenthood, *PPSLR*'s ruling conflicts with *Doyle*.

Per *Doyle*, under the Single Subject Clause, "[t]he General Assembly maintains the discretion to decide whether and to what extent it will appropriate money for MO HealthNet programs." 625 S.W.3d at 465. To hold otherwise would violate the separation of powers. *See id.* at 465 n.4 (holding that "considerations" about what money to put where "belong to the General Assembly and not to this Court"). Planned Parenthood's reading of *PPSLR* prohibits what *Doyle* says must be permitted—that the General Assembly decide how the State's limited budget should be appropriated. *PPSLR*, 602 S.W.3d at 209–10. Contrary to Planned Parenthood's argument, adopting the State's position does not grant

v. Gobitis, 310 U.S. 586 (1940) three years later); *see also Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2263 n.48 (2022) (recognizing these overrulings).

[8] It is unclear who would have relied on *PPSLR* to his, her, or its detriment. It is the General Assembly's law that the State asks this Court to uphold here, so there is no reliance interest by the General Assembly. And Planned Parenthood does not proffer anyone else as relying on *PPSLR*.

the General Assembly "unfettered appropriation power."[9] *See* Resp. Br. at 29. Rather, it gives the General Assembly the powers that *Doyle* affirmed—the ability to decide what money goes where. 625 S.W.3d at 465 & n.4.

Planned Parenthood's interpretation does precisely what this Court condemned in *Calzone*—cripple the General Assembly's ability to do its job. 584 S.W.3d at 321. The natural consequence of siding with Planned Parenthood is that the General Assembly will be required to provide blanket funding to all aspects of MO HealthNet instead of being able to make critical policy decisions about where finite resources should go. This could lead to serious problems, like responding to a certain population's or provider-type's greater need for funding in one year than in others. Under Planned Parenthood's logic, the General Assembly cannot divert funds away from any providers to fill those gaps. Nor could the legislature provide funds only to organizations serving critical-need areas or organizations with demonstrated safety or efficacy records. The General Assembly similarly would be forced to provide funds to organizations with demonstrated records of being unsafe.

In the end, the quickest route is the one this Court should take. *PPSLR* cannot possibly mean that the General Assembly is prohibited from making provider-based distinctions when appropriating funds. But if this Court reads *PPSLR* that way, the case should be overruled or limited.

[9] Unlike in *Rebman*, the appropriations power in this case is not in conflict with the executive branch's article IV, section 19 power to "select and remove all appointees in the department." 576 S.W.3d at 610.

CONCLUSION

This Court should reverse.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 7,658 words, is in compliance with Missouri Supreme Court Rule 84.06(b), includes the information required by Rule 55.03, and includes information on how the brief was served on the opposing party. The undersigned attorney signed the original version of this document.

/s/Maria A. Lanahan

CERTIFICATE OF SERVICE

I hereby certify that, on October 24, 2023, a true and correct copy of the foregoing was filed with the Court's electronic filing system to be served by electronic methods on counsel for all parties entered in the case

/s/ Maria A. Lanahan