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INTRODUCTION

This is the Second Brief of Appellants/Cross-Respondents Planned Parenthood of Kansas and Mid-Missouri and Planned Parenthood of the St. Louis Region (“Planned Parenthood”). This brief responds on the issue appealed by the State (the trial court’s conclusion that Planned Parenthood’s counseling and referral practices are mandated by Title X), see Point V, and replies to the State’s responses on the issues appealed by Planned Parenthood.

REPLY TO THE STATE’S INTRODUCTION AND STATEMENT OF FACTS

The Introduction to the State’s Brief is permeated with significant mischaracterizations. First, the State’s Introduction wrongly characterizes the central question in this case as, “whether [Planned Parenthood] may seek to excuse itself from the rules for receiving public funds” St. Br. 17.¹ That is

¹ “St. Br.” refers to the State’s Opening Brief, and “St. Br. A” refers to the Appendix thereto. “PP. Br.” refers to Planned Parenthood’s Opening Brief, and “PP. Br. A” refers to the Appendix thereto. “A” refers to the Appendix to this brief.

“P.R.L.F.” refers to the Post-Remand Legal File that Planned Parenthood filed in the present appeal. “L.F.” and “S.L.F.” refer to the Legal File and Supplemental Legal File, respectively, filed during the previous appeal before this

absurd. When the first appropriation was enacted, the Director promulgated rules that construed the terms in that appropriation and Planned Parenthood took steps to comply, and did comply, with all of the Director's rules. Moreover, Planned Parenthood has made clear repeatedly that, if the Director's construction is illegal, then the state courts should issue a binding judicial construction of the appropriations and allow Planned Parenthood an opportunity to achieve compliance. PP. Br. Point VI.

In fact, there are two different central questions in this case. The first is: does the State have the authority under the Attorney General's most recent appointment letters and under Missouri law to challenge the legality of the Director's construction of the statute that she is authorized to implement? In the first appeal, this Court directed the parties to address the issue of the State's authority under Missouri law, and then vacated and remanded the case because of the lack of clarity as to the State's authority under the Attorney General's multiple appointment letters. Thus, this question is hardly, as the State describes it, "a ruse to distract the Court." St. Br. 103.

The second question (if the State does have authority to challenge the Director's construction) is: is the Director's construction legal? If her

Court (No. SC82226). "Tr." refers to the Transcript of the pre-remand summary judgment hearing on October 29, 1999. This Court has taken judicial notice of the Legal File, Supplemental Legal File and Transcript for purposes of this appeal.

construction is legal, then Planned Parenthood is eligible for the program. If her construction is illegal then, depending on the correct construction, Planned Parenthood may or may not be eligible, and may or may not be able to take steps to become eligible.

Next, the State's Introduction asserts that, in papers filed in the parallel federal court case, Planned Parenthood "candidly concedes . . . [that its] family planning operations provide a substantial subsidy to its abortion activities." St. Br. 19. See also St. Br. 71-72. That is wrong. The federal court papers quantify the extent to which the operating costs of both Planned Parenthood and its abortion-affiliates will increase if Planned Parenthood must comply with the extreme construction of the appropriations that the SAAG advocates as an alternative to the Director's construction.² For example, the papers quantify the increased costs of

² The papers quantify more than financial impacts. They quantify loss of the ability for Planned Parenthood to be publicly associated with its abortion-affiliates and their provision of abortion services, St. Br. A31-32, 38, loss of good-will within Planned Parenthood's donor community, St. Br. A34-35, and loss of uniformity in management and direction. St. Br. A36-37. Planned Parenthood's position – which it is asserting in federal court – is that those impacts, individually and cumulatively, are unconstitutional. PP. Br. 23, note 2. The wisdom of the Director's construction of the appropriations – which is the issue in this Court – is

having to employ full-time management and administrative staffs at both Planned Parenthood and the abortion-affiliates, as the SAAG would require, as opposed to the arrangement permitted by the Director, where the abortion-affiliates purchase those services from Planned Parenthood.

The cost-efficiencies Planned Parenthood achieves while complying with the Director's construction of the appropriations are not a "subsidy." St. Br. 19. A subsidy involves the "giving" or "granting" of assistance. See Webster's Third New International Dictionary (1966) (defining "subsidy" as "a grant or gift of money or other property made by way of financial aid").

That is not happening here. Rather, here, payments are made by the abortion-affiliates to Planned Parenthood (not by Planned Parenthood to the abortion-affiliates) for services or facilities provided by Planned Parenthood. All payments are made at undisputed market rates, or by allocations computed according to generally accepted accounting principles. See PP. Br. 29-30, 30-31, 32. These arrangements may be cost-efficient, but they are not subsidies.

Finally, the State's Introduction and Statement of Facts persist in asserting as fact, matters not admitted in the summary judgment proceedings below. For example, the State asserts that Planned Parenthood admits that it provided patients with brochures and advertisements regarding abortion services. St. Br. 20, 38, 41.

that her construction reasonably implements the intent of the Legislature while avoiding all of these federal constitutional questions.

Planned Parenthood does not admit that fact. In both the pre-remand and post-remand summary judgment proceedings, when the State asserted this “fact” as undisputed, Planned Parenthood denied it. See L.F. 357, ¶88; 363, ¶129; 1796, ¶88; 1799, ¶129; P.R.L.F. 192, ¶66; 195, ¶84; 254, ¶66; 258, ¶84.³

As pointed out in our opening brief, the only facts before this Court are those that were not disputed below. Planned Parenthood believes all of the undisputed facts that are material to the issues before this Court are fully set forth in our opening brief. PP. Br. 29-34. To the extent that there are discrepancies between those facts and the facts asserted by the State, all inferences must be drawn in Planned Parenthood’s favor. PP. Br. 41.

³ To support its assertion, the State cites responses to requests to admit, L.F. 1133, 1152-53. Planned Parenthood objected to these requests on the grounds that they were vague. Id. At the pre-remand summary judgment hearing, the State sought to have all of the discovery materials, which would have included these responses, admitted into evidence. Planned Parenthood objected, and the trial court declined to admit those materials. Tr. 2, 21-22.

POINT RELIED ON⁴

POINT V

The Trial Court Correctly Concluded That Planned Parenthood's Counseling and Referral Practices Are Required By Title X Because Title X Requires That A Pregnant Woman Be Offered Counseling, Be Provided Complete and Objective Information About All Options Except Those As To Which She Indicates That She Does Not Desire Counseling, and Be Provided With Referrals For All Options Except Those For Which She Indicates She Does Not Seek Referrals. The Record Demonstrates That Planned Parenthood's Practices Are Required By Title X In That Planned Parenthood Offers Pregnant Women Counseling About All Options, Provides Complete and Objective Information Except About All Options Except Those As To Which The Woman Indicates That She Does Not Desire Counseling, and Provides Referrals For All Options Except Those For Which The Woman Indicates She Does Not Seek Referrals.

65 Fed. Reg. 41270 (July 3, 2000)

42 C.F.R. § 59.5(a)(5)

⁴Planned Parenthood is responding only on the issue appealed by the State. See Point V. Hence, pursuant to Rule 84.04(f), Planned Parenthood is submitting a Point Relied On only for that issue. On all other issues, Planned Parenthood relies on the Points Relied On in its Opening Brief.

ARGUMENT

POINT I

The Trial Court Erred In Concluding That The State Had The Authority To Bring The First And Second Counts In The Second Amended Petition And In Entering Judgment On The Merits Of Those Counts, Because The State Has Only The Authority Granted To The Special Assistant Attorney General By The Attorney General, Who Has Forbidden The Special Assistant Attorney General From Making Claims Against The Director; These Counts Are Claims Against The Director And So Outside The Special Assistant Attorney General's Authority In That The Allegation That Planned Parenthood Is Ineligible For The Program Is Entirely Dependent On The Assertion That The Director's Construction Of The Undefined Terms Of The Appropriations Is Illegal.

The State offers two theories why its assertion that the Director's construction is illegal is a not a claim against the Director. First, the State argues that it is not a claim against the Director because the State's Second Amended Petition does not set it forth as a claim against the Director.⁵ Rather, the State

⁵The State also asserts that the Director "is no longer even a party. . ." St. Br.101. The Director is a party. She has never been dismissed from the litigation. See M & A Elec. Power Coop. v. True, 480 S.W.2d 310, 314 (Mo. Ct. App. 1972) (In absence of court order discharging or dropping party, parties remain parties). She filed papers on the post-remand summary judgment proceedings in the trial court. P.R.L.F. 230-244. The Attorney General's post-remand letter to the SAAG states that the Director will continue to participate in the litigation, and will be bound by

argues that the issue of the legality of the Director's construction is Planned Parenthood's affirmative defense, which the State disputes. St. Br.101. Second, the State argues that, if it is a claim against the Director, that claim has been authorized by the Attorney General. St. Br.102.

The State's first argument ignores the long line of Missouri precedent that the nature of an action is determined by its actual substance, not by how it is plead. PP. Br. 43. The State's first argument also ignores multiple lines of authority which establish that a plaintiff makes a claim against a party when a central component of the plaintiff's legal position is antagonistic to, or where there is a collision of interests with, the other party. PP. Br. 43-45. Finally, the State's first argument fails to explain why its assertion that the Director's construction was illegal was a claim against the Director when the State sought to intervene in federal court, was a claim against the Director in the pre-remand proceedings, but is no longer a claim against the Director if the State deletes that explicit language from an otherwise identical proceeding. PP. Br. 45-47.

It does not matter that, because the State deleted allegations about the Director's construction from its Second Amended Petition, Planned Parenthood raised the issue in its Answer. The State remains the party who is asserting, and

the judgment. P.R.L.F. 51. If the Director is not a party, then the judgment must be vacated and the Second Amended Petition dismissed because of the lack of a necessary party. See PP. Br. 46 n.10.

has the burden of establishing, that the Director's construction is illegal.

Foremost-McKesson, Inc. v. Davis, 488 S.W.2d 193, 197 (Mo. banc 1972). The Director (who is a party) continues to take the position that her construction, which she promulgated with the advice of the Attorney General, is legal.

The nature of this action is governed by its substance. Prior to this Court's remand, the substance of this action was repeatedly acknowledged by the State, in pleadings filed both in federal and state court. The State was challenging the Director's construction of the appropriation. S.L.F. 10-23, 78-95; L.F. 0001-0028, 0115-0148. This claim was integral to its claim that Planned Parenthood was not eligible for the program. None of this is changed by the pleading gimmick of deleting the claim from the Second Amended Petition and leaving it to Planned Parenthood to raise the issue in its Answer. The substance remains the same: the State is making a claim, which is a claim against the Director, that the Director's construction is illegal.

The State's second argument also fails. This Court directed that the Attorney General "clearly and specifically state the authority granted to the SAAG" State v. Planned Parenthood of Kan. & Mid-Mo., 37 S.W.3d 222, 227 (Mo. banc 2001) (PP. Br. A4). In compliance, the Attorney General wrote that the SAAG was "not authorized to file, maintain, or pursue any action or claim of any sort against the director of the Department of Health" P.R.L.F. 51; PP. Br. A24. That is quite clear and specific.

The State argues that this Court should infer that an, at best, ambiguous phrase, in a second post-remand letter should be read as modifying the unequivocal language in the first post-remand letter. St. Br.102-103. That second letter clarified that the SAAG was authorized to pursue claims that Planned Parenthood is not eligible for the program and must repay funds already received, and stated that, to the extent the first letter did not authorize these actions, it was amending the first letter. P.R.L.F. 53-54; PP. Br. A 26-27. According to the SAAG, since the Attorney General was aware from the pre-remand proceedings that the basis of the SAAG's claim against Planned Parenthood was the SAAG's claim that the Director's construction was illegal, this Court should infer and conclude that the Attorney General, "expected that the State would assert the same . . . [claims] as the State asserted before." St. Br.103.

Against the backdrop of the history of this litigation, that argument must be rejected. This Court directed that the Attorney General set forth the SAAG's authority "clearly and specifically." PP. Br. A4. The first post-remand letter could not be more clear or more specific that the SAAG was not authorized to make any sort of claim against the Director.

However, the first letter was not explicit that the SAAG was authorized, in addition to defending the constitutionality of the appropriations, to challenge Planned Parenthood's eligibility for the program, and to seek repayment of funds already received. P.R.L.F. 50-52; PP. Br. A23-25. The second post-remand letter makes that clear. P.R.L.F. 53-54; PP. Br. A26-27. It is nothing but creative

speculation to argue that, in clarifying that the SAAG could challenge Planned Parenthood's eligibility and could seek repayment, the Attorney General intended to nullify his earlier, clear and specific, prohibition against making a claim of any sort against the Director. It is more plausible to infer that the Attorney General was just making clear that the SAAG could challenge Planned Parenthood's eligibility and could seek repayment, with no intention of altering the clearly stated limit on the SAAG's authority - that he could not make claims against the Director as he pursued Planned Parenthood.

The SAAG has had multiple opportunities to gain explicit authority to challenge the Director's construction of the appropriation. The Attorney General has not given him that authority – presumably, at least in part, because of the “significant constitutional issues,” State v. Planned Parenthood, 37 S.W.3d at 227 (PP. Br. A4), that would be raised by authorizing the State to do so. Thus, the SAAG lacks authority to pursue the First and Second Counts in the Second Amended Petition. This Court should put an end to this merry-go-round, vacate the trial court's judgment, and order that the First and Second Counts be dismissed.

POINT II

The Trial Court Erred In Concluding That The First And Second Counts In The Second Amended Petition Are Justiciable And In Entering Judgment On Those Counts For Three Reasons: First, Because The State Does Not Have

Standing To Challenge An Executive Official's Construction Of The Undefined Terms Of A Statute That The Official Is Authorized To Implement, In That Such An Action By A State Official Does Not Cause Concrete Injury To The State Or Implicate The State's General Welfare, Obligations Or Functioning. Second, Because The Governor, Not The Attorney General Or A Special Assistant Attorney General, Has The Responsibility Under The Missouri Constitution To See To The Faithful Execution Of The Laws; Entertaining This Action On The Merits Would Violate This Principle In That The Governor's Delegee, The Director, Has Determined How The Appropriations Are To Be Interpreted And The Attorney General Has No Authority To Countermand That Determination. Third, Because Claims In The Name Of The State Must Be Made By The Attorney General Or A Delegee Who Is Accountable To Him; The Claims In This Case Violate That Principle In That They Are Made By A Special Assistant Attorney General Who Is Adverse And Not Accountable To The Attorney General.

The question before this Court is: can the State challenge a private entity's participation in a state-funded program, where that challenge depends on the State's claim that the executive official authorized to implement that program has illegally construed undefined terms of the program's enabling statute. This question arises in a context where the executive official's (the Director)

construction was approved as legal by the Attorney General, S.L.F. 131, and the Director is represented by the Attorney General and is defending her construction.

The State has cited no authority to refute Planned Parenthood's assertion that there is no Missouri precedent for what the State seeks to accomplish in this lawsuit. Nor does the State explain why this Court should create such a precedent when the Missouri Constitution assigns to the Governor the responsibility to ensure that the laws are faithfully executed.

The State cites Missouri cases holding that the Attorney General can sue private parties for such things as to prevent accepting bets under illegally obtained licenses, State ex rel. Delmar Jockey Club v. Zachritz, 65 S.W. 999 (Mo. banc 1901), to enjoin bullfights as a public nuisance, State ex rel. Attorney General v. Canty, 105 S.W. 1078 (Mo. 1907), or to recover funds paid as a result of fraudulent misrepresentations made to a public authority. People ex rel. Hartigan v. E & E Hauling, Inc., 607 N.E.2d 165 (Ill. 1992). St. Br. 106. Yet, none of these cases involved the central issue that sets this case apart: in none of these cases did the State challenge an executive official's implementation of a statute which that official was authorized to implement.

In addition, the State cites State ex rel. Taylor v. Wade, 231 S.W.2d 179, 182 (Mo. banc 1950), where this Court held that the Attorney General can bring actions to compel public officials to perform "mandatory" duties mandated by statute, and three cases, State ex Inf. McKittrick v. Murphy, 148 S.W.2d 527 (Mo. banc 1941), State ex rel. Circuit Attorney v. Saline County Court, 51 Mo. 350

(1873), and State, to Use of Consol. Sch. Dist. No. 42 of Scott County v. Powell, 221 S.W.2d 508 (Mo. 1949), all of which involved legal proceedings commenced to prevent officials from “usurping a power which they do not have.” State ex Inf. McKittrick, 148 S.W.2d at 530. St. Br. 111-112.

State ex rel. Taylor was, however, a *mandamus* proceeding. State ex Inf. McKittrick was a *quo warranto* proceeding, and this Court treated both State ex rel. Circuit Attorney and State, to Use of Consol. Sch. Dist. No. 42 of Scott County as involving challenges to powers not lawfully possessed, and thus the same as a *quo warranto* proceeding. See, e.g., State, to Use of Consol. Sch. Dist. No. 42 of Scott County, 221 S.W.2d at 511 (if State can proceed in *quo warranto* to challenge exercise of ungranted power, then State can bring action to recover funds expended in exercise of ungranted power).

As pointed out in Planned Parenthood’s opening brief, however, *mandamus* is limited to enforcing mandatory duties on public officials, and *quo warranto* is limited to challenging the exercise by public officials of powers not granted to them. PP. Br. 54-55. Neither can be used where, such as here, there is no question that the public official is authorized to implement the statute in question, and the dispute is over how she construed undefined terms in that statute. State ex Inf. McKittrick, 148 S.W.2d at 530 (*Quo warranto* cannot “be used to prevent an improper exercise of power lawfully possessed.”). State ex rel. Phillip v. Public Sch. Ret. Sys., 262 S.W.2d 569, 573–74 (Mo. banc 1953); State ex rel. Igoe v. Bradford, 611 S.W.2d 343, 347 (Mo. Ct. App. 1980) (mandamus not used to

resolve issues centered on an ambiguous statute). Thus, the Missouri cases cited by the State prove nothing.⁶

⁶The State also cites cases and statutes from other states, but none have bearing on the issue here. In People ex rel. Scott v. Illinois Racing Bd., 301 N.E.2d 285, 288 (Ill. 1973), St. Br. 112, the Illinois Supreme Court relied entirely on explicit state statutes that authorized the Attorney General to “enforce the provisions of the Horse Racing Act,” when it upheld the power of Illinois’ Attorney General to seek judicial review of the racing board’s grant of licenses. Here, there is no “explicit statute.” Dickinson v. Hot Mixed Bituminous Industry, 58 N.E.2d 78, 86 (Ohio Ct. App. 1943), St. Br. 115, involved a “conspiracy [involving members of] the Highway Commission of Ohio . . . to *defraud* the State of Ohio . . . of large sums of money.” (Emphasis added.) Here, there is no suggestion of a “conspiracy to defraud” the State. State ex rel. Brocklyn v. Savidge, 249 P. 996 (Wash. 1926), St. Br. 115, is a case about whether the Supreme Court of Washington has original jurisdiction over a *mandamus* proceeding to compel a land commissioner to grant a lease. It says nothing relevant to this dispute. Both Arizona Revised Statute § 35-212(A), and North Carolina General Statute § 143-32, St. Br. 115, are addressed to illegal misappropriations of public funds. See Flaherty v. Hunt, 345 S.E.2d 426 (N.C. Ct. App. 1986) (governor’s use of state aircraft for campaign purposes); State v. Mecham, 844 P.2d 641 (Ariz. Ct. App. 1992) (governor’s use of public funds for inaugural ball and personal expenses). Thus, they are also

On the issue of the allocation to the Governor of the power to ensure that the laws are faithfully executed, the State says noticeably little. It argues that

irrelevant. Finally, the State cites cases from Maine, Mississippi, Rhode Island, Montana, and New Jersey, St. Br. 116, that all involved rate-setting, or comparable decisions of regulatory commissions. The courts in those cases found that the Attorneys General could proceed only because there was either an explicit authorization under a state statute, Superintendent of Ins. v. Attorney Gen., 558 A.2d 1197, 1201 (Maine 1989) (statute grants standing to any party to administrative hearing; Attorney General was a party); Providence Gas Co. v. Burke, 419 A.2d 263, 270 (R.I. 1980) (statute authorizes Attorney General to intervene on behalf of state or its citizens in public utility rate proceeding), or explicit findings of injury to the state and its taxpayers based on the fact that the state and inevitably its taxpayers would have to pay the challenged rate increase. State ex rel. Allain v. Mississippi Pub. Serv. Comm'n, 418 So.2d 779, 781-82 (Miss. 1982) (state has standing because it must pay rate increases); State ex rel. Olsen v. Public Serv. Comm'n, 283 P.2d 594, 596, 600 (Mont. 1982) (same); Petition of Pub. Serv. Coordinated Transp., 74 A.2d 580, 586 (N.J. 1950) (same; also noting that Governor, who is responsible for enforcing laws under New Jersey Constitution, had “directed the Attorney General to take this appeal in the name of the State”). None of these factors are present here and, thus, these cases are also irrelevant.

since Missouri has recognized taxpayer standing in circumstances such as here, it follows that the State as well should have standing.

The opposite conclusion is the correct one. The issue here involves allocated powers and proper roles among components of state government. The Missouri Constitution allocates to the Governor the responsibility within state government to ensure that the laws are faithfully executed. Mo. Const. art. IV, §2. This Court has a strong tradition of respect for the allocation of powers within the state government. PP. Br. 55-57.

Taxpayer standing is different. It does not raise constitutional or legal policy issues concerning the allocation of power among government bodies. Moreover, the existence of taxpayer standing demonstrates that it is also unnecessary to accord standing to the State. To the extent that a “watchdog” function is necessary, it already exists.

Accordingly, this Court should rule this dispute non-justiciable because the State does not have standing to challenge the legality of the Director’s construction of the undefined terms in the appropriation she is authorized to implement. This Court should reverse the trial court, and order that the First and Second Counts in the Second Amended Petition be dismissed.

Even if the State has standing, this case should be dismissed. This Court should adopt the same position as the Supreme Courts of Mississippi and Rhode Island, both of which held that where the State challenges an executive agency’s rate-setting determination, the State must be represented by the Attorney General.

PP. Br. 60. If this Court rules that the State has standing to challenge the legality of an executive's implementation of a statute, then this Court should also rule that the Attorney General must represent the State, and appoint a subordinate or special assistant to represent the executive official.

The State argues that this is not necessary here because following this Court's remand, the Attorney General wrote in his clarifying appointment letter that the SAAG is accountable to him⁷ and, the State asserts, the Director is no longer a party. St. Br. 108-109, 108 n.11.⁸

⁷The SAAG concedes, however, that pre-remand, "he controlled the litigation on behalf of the State." St. Br. 108 n.11.

⁸ The State also argues that the power of the Attorney General to fire the SAAG assures sufficient accountability. St. Br. 109 n.12, citing United States v. Nixon, 418 U.S. 683 (1974) and Morrison v. Olson, 487 U.S. 654 (1988). Those cases involved a unique and fundamentally different problem: how the federal government conducts a criminal investigation of the President or his cabinet when the President appoints the Attorney General. Recognizing the need for such investigations to be essentially independent from the President, they upheld a regulation and a statute creating the independent counsel. Here, there is no need for such a compromise because the Attorney General is not appointed by the Governor, and the Attorney General can appoint a deputy or special assistant to represent the agency. However, only if the Attorney General, and not someone

The Director is a party. As pointed out, supra note 5, the Director was never dismissed from the litigation; she participated in the proceedings in the trial court, and opposed the State's challenge to her construction of the appropriations, L.F. 327-339, 1310-1357, 1729-1736; P.R.L.F. 230-244; and she was represented by the Attorney General. She must be a party because, if she is not, then the judgment must be vacated and the petition dismissed because of the absence of a necessary party. PP. Br. 46 n.10.

Moreover, it is hard to understand how the Attorney General can, in fact, be directing the SAAG in this litigation. The SAAG is asserting that the Director's construction of the appropriations is illegal, but the undisputed fact is that the Attorney General advised the Director at the time she promulgated her construction that it was legal. S.L.F. 131.

This scenario – the SAAG purporting to speak for the State, challenging the Director's construction of the appropriations when her construction was approved by the Attorney General, asserting an extreme and constitutionally problematic construction of the appropriations, and the Attorney General representing the Director and opposing the SAAG's position – can only lead to serious questions as to whether the positions taken by the SAAG are really the positions of the State or,

adverse and unaccountable to him, speaks for the State, can the courts and the people be assured that the positions taken by the State are in fact the positions of the State.

as revealed in the Attorney General's original appointment letter, of the Legislature or a faction of the Legislature. S.L.F. 71, 73. See also S.L.F. 75-76. All of these problems would be avoided if the Attorney General was required to represent the State. Then, because he is the official designated by statute to represent the State in litigation, there would be no question that positions he asserted were the position of the State.

If this Court determines that this is a justiciable controversy (which Planned Parenthood asserts it is not) then, nonetheless, this Court should vacate the judgment and dismiss the Second Amended Petition without prejudice to the same claims being filed by the Attorney General.

POINT III

The Trial Court Erred In Concluding That The Director's Construction Of Undefined Terms In The Appropriations Was Illegal And That Planned Parenthood Was Not Eligible And Should Be Enjoined From Participating In The Program, Because The Construction Of Terms In A Statute By The State Official Charged With Its Implementation Is Entitled To Deference And Should Be Sustained Unless It Is Shown That The Official's Construction Is Not Reasonably Related To The Statute's Purpose; The Director's Construction Here Should Be Sustained Under This Standard In That The Director's Construction Of The Terms At Issue Reasonably Implements The Permissible Intent Of The Legislature That State Funds Not Subsidize The

Provision Of Abortion Services While Avoiding Constitutional Problems And Being Consistent With Other Statutes *In Pari Materia*.

A. Similar Names

The State urges that the question of what constitutes “similar” names be resolved by reference to dictionary definitions of the word. St. Br. 59-60.

However, the definitions submitted by the State reveal why that is an unworkable approach. Dictionary definitions fail to provide the kind of precision necessary for determining eligibility for state funds in a context overlaid with constitutional considerations. Are two names similar only if they are ““very much alike,”” or is it sufficient that they ““hav[e] a resemblance?”” St. Br. 59-60, quoting Webster’s Third New International Dictionary (1986) and New World Dictionary (2d college ed. 1982).

The duty of construing this term is more complex than looking up a dictionary definition. The construction must provide objective guidance for program administrators, reasonably achieve the legislative intent in light of program practicalities, avoid constitutional issues, and be consistent with other statutes *in pari materia*. The Director’s construction, although not as extreme as the State would like, accomplishes these goals. Her construction illustrates why this Court has held that the interpretation and construction of a statute by an agency charged with its implementation is entitled to great weight. Foremost-

McKesson, 488 S.W.2d at 197; see also Linton v. Missouri Veterinary Med. Bd., 988 S.W.2d 513, 517 (Mo. banc 1999).

The State attacks the Director's construction on two grounds. First, the State argues that the Director's construction allows Planned Parenthood to achieve an economic or marketing benefit from the state's funds, and places the state's imprimatur on abortion services. St. Br. 61.

This assertion assumes a substantial amount that Planned Parenthood disputes. Planned Parenthood admits that its name "stands for. . . reliable and high quality, affordable, confidential reproductive health services, plus a commitment to public advocacy and education to protect safe and legal access to those services, including abortion." St. Br. A31-32. However, there is no undisputed fact to establish that the receipt of program funds by Planned Parenthood gives an economic benefit to the abortion-affiliate, because the words "Planned Parenthood" appear in both names. Nor is there any factual basis for asserting that, by granting family planning funds to Planned Parenthood, the state is giving its imprimatur to abortion because the words "Planned Parenthood" are also in the abortion-affiliates' names.

The State asserts that the trademark "Planned Parenthood" has marketing value as a provider of abortions. St. Br. 61. This is not an undisputed fact. More

likely, the words “Planned Parenthood” have marketing value as a provider of family planning services.⁹

Second, the State argues that linking the appropriation to the corporation statutes fails to give effect to every word in the appropriation. The State advances three theories to support this argument: (a) the appropriation precludes similar names and the corporation statutes only preclude same names; (b) linking to the corporation statutes is redundant because a separate part of the appropriation already requires separate corporations; and (c) the Director’s construction does not prevent entities from doing business under the same names. St. Br. 63-65.

As to (a): The Director’s duty is not simply to give meaning to every word in a statute, no matter what the outcome. The Director’s duty is to give a statute an interpretation that reasonably implements the legislative intent while avoiding constitutional problems and being consistent with other statutes *in pari materia*. Planned Parenthood of Mid-Missouri and Eastern Kansas, Inc. v. Dempsey, 167 F.3d 458 (8th Cir. 1999) (“Dempsey I”), made no mention of a restriction on corporate names. See PP. Br. 70, 72. Therefore, by proceeding cautiously, the Director avoided possible constitutional problems. PP. Br. 72-73. Moreover, the

⁹ If the words “Planned Parenthood” have marketing value for abortion, then the State does not achieve its goals by requiring that the abortion-affiliates’ names not include those words. The words “Planned Parenthood” will remain in the name of the entity to whom the State is granting the program funds.

corporation statutes are *in pari materia* with the appropriation because they are also aimed at avoiding confusion between corporate names. Therefore, the Director was obligated to attempt to construe them consistently.

As to (b): either the abortion affiliate or the contractor could be incorporated in another state. Indeed, Comprehensive Health is incorporated in Kansas. Under these circumstances, the Director's construction is not redundant. It is an independent standard to assure that the names are not similar.

As to (c): the Director's construction applies to the appropriations' restriction against similar names. If that restriction applies both to an entity's corporate name and to the name under which that entity does business, then the same is true of the Director's construction. Here, that would mean, for example that Planned Parenthood of the St. Louis Region and its abortion affiliate, Reproductive Health Services of Planned Parenthood of the St. Louis Region, could not both do business under the name Planned Parenthood. There is nothing to suggest that they do, and there is undisputed evidence that they do not. Compare P.R.L.F. 267, 268 (classified telephone directory listings under Birth Control Information for "Planned Parenthood of the St. Louis Region") and P.R.L.F. 224 (classified telephone directory listings under "Abortion" for "Reproductive Health Services of Planned Parenthood of the St. Louis Region").

The names employed by the two Planned Parenthoods and their abortion affiliates differ by substantially more than one word. Essentially, what they have in common are the words "Planned Parenthood." What the State really seeks is a

construction that would prevent the words “Planned Parenthood” from appearing in both names. In order to avoid constitutional problems, particularly given that Dempsey I made no mention of regulating corporate names, the Director wisely rejected that course. Her construction was more than reasonable; it was proper.

B. Share

As with “similar names,” dictionary definitions of the word “share” do not provide sufficient guidance in the context of the program. The State’s own efforts illustrate this point. For example, if “share” means “to divide and distribute in portions . . .” St. Br. 66 (quoting Webster’s Third New International Dictionary (1986)), then why is it sharing when Planned Parenthood and its abortion affiliate occupy separate floors in a building owned by Planned Parenthood, and *not* sharing (as the State suggests it would not be, St. Br. 67 n.6) if Planned Parenthood and an abortion affiliate occupy separate floors in a building owned by another? Both arrangements involve a facility divided and distributed in portions.

The State suggests that the answer has something to do with “economic benefits flow[ing] between them as a result of their dual presence in the same building.” St. Br. 67 n.6. This “explanation” makes no sense. The cost efficiencies are the same in principle regardless of whether Planned Parenthood’s and its abortion affiliates’ shelter expenses are allocated because they occupy

separate spaces in a building owned by Planned Parenthood, or separated spaces in a building owned by a third party.¹⁰

Other examples of the unworkability of the State's dictionary approach are found in the State's position on certain equipment and staff at Reproductive Health. The equipment in the Reproductive Health clinic is owned by PPSLR, and Reproductive Health pays a market rent to PPSLR pursuant an equipment lease. L.F. 1802, 1953-1956. The clinical staff of Reproductive Health are employees of PPSLR, and Reproductive Health reimburses PPSLR for all of the salary and benefit costs for those employees. L.F. 1803, 1814, 1828. The equipment is used solely and exclusively by Reproductive Health, and the clinical staff work solely and exclusively at Reproductive Health. Id.

The State asserts that this equipment and these employees are "shared." Yet, neither the equipment nor the clinical employees are "divided" or "apportioned." Moreover, there is nothing to suggest that this arrangement results

¹⁰There is no evidence that the rent paid to Planned Parenthood by the abortion affiliates is anything but a fair market rent. L.F. 1935-36, 1941, 1961-62, 1963. Thus, the fact that Planned Parenthood owns its building may, arguably, mean that there is an economic benefit to Planned Parenthood by its rental of space to its abortion affiliate, but that is not relevant here. The appropriations do not express a concern about economic benefits flowing to the program grantee, only about economic benefits flowing to the abortion affiliate from the program funds.

in an economic benefit flowing to the abortion affiliate from the program funds. Rather, it would appear that the rental of the equipment results in an economic benefit flowing to Planned Parenthood in the form of equipment rental payments from the abortion affiliate, and that the arrangement concerning the Reproductive Health clinical staff is of no economic consequence since their wages and benefits are the same whether Reproductive Health reimburses PPSLR or pays the employees directly.

Not only is the State's construction unworkable and extreme, the Director's construction is reasonable, workable, and faithful to the legislative intent. It assures that no program funds subsidize anything other than the direct provision of the clinical family planning services for which they are intended. Her construction of "administrative expenses" assures that program funds do not pay for anything that is not directly traceable to the family planning services. PP. Br. 20, 71. That construction prevents state funds from being used for expenses associated with the non-clinical facilities and staff that are in common between Planned Parenthood and the abortion affiliates. Id. Her construction of "share" assures that there are no indirect subsidies by requiring that the non-clinical facilities and staff services – even though they are not subsidized by program funds in the first place - be purchased by the abortion affiliate at a reasonable market rate. PP. Br. 21, 71. Together, the constructions ensure that there are no economic or marketing benefits flowing to the abortion affiliates from the program funds.

The State argues that the Director’s construction only prohibits gifts. St. Br. 73. That is wrong. Her construction limits the state funds to subsidizing direct patient services, and requires reimbursement to the program participant for any services or facilities provided to the abortion-affiliates even though those services and facilities, since they are outside the patient service realm, were financed entirely by non-state funds in the first place. This structure fully ensures that there is no economic benefit to the abortion affiliates from the state funds.

The State also argues that the Director’s construction was “implicitly rejected” by the Legislature. St. Br. 74. In fact, the Legislature never voted on whether to allow allocation or reimbursement. Such an amendment was proposed but never voted on because a substitute was adopted. L.F. 1294-98. Adopting the substitute was not an “implicit” rejection of the Director’s approach, let alone the kind of clear expression of intent required by this Court in L & R Distributing, Inc. v. Missouri Dep’t of Revenue, 529 S.W.2d 375, 379 (Mo. 1975) (legislative intent clear when two separate sessions of the Legislature voted not to enact amendment incorporating construction urged by party to litigation). Rather, what happened here is illustrative of exactly what this Court had in mind when it held in Blue Springs Bowl v. Spradling, 551 S.W.2d 596, 601 (Mo. banc 1977), that “reliance on bills not passed provides a tenuous basis for determining legislative intent.”

The State also argues that nothing in Dempsey I “mandate[s]” the Director’s construction. St. Br. 76-78. The State is wrong.

The appropriation at issue in Dempsey I said nothing about abortion affiliates and restrictions on the relationship such affiliates could have with program grantees. Rather, that appropriation disqualified any program grantee that performed abortions, and was silent on whether abortion affiliates were permissible. 167 F.3d at 462-63. Recognizing that an outright disqualification of an entity providing abortions would be unconstitutional, and seeking a construction that would save the appropriation from being unconstitutional, the Eighth Circuit ruled that the appropriation was ambiguous about whether a grantee could provide abortions through an affiliate, and construed it as allowing abortion affiliates. Id. at 463. In that context, and obviously mindful of the constitutional considerations involved in the state regulating the relationship between its grantee and the grantee's abortion-affiliate, the Eighth Circuit set forth what it viewed as the permissible requirements a state could impose: separate incorporation, separate facilities, and financial records to demonstrate that the abortion affiliate does not receive program funds. Id.

The Director's construction followed the language of Dempsey I. The State argues that she could have gone further. In theory, perhaps; but her duty is to impose reasonable constructions that implement legislative intent without risking constitutional problems, and that is what she did.

Neither Rust v. Sullivan, 500 U.S. 173 (1991), nor Legal Aid Society of Hawaii v. Legal Services Corporation, 145 F.3d 1017 (9th Cir. 1998) ("LASH"),

St. Br. 78, helps the State. Rather, they support the legality of the Director's construction.¹¹

The regulations in those cases required “physical and financial separation” that would meet a standard of “objective integrity and independence” between the entity receiving government support and the entity providing “restricted” services. The regulations stated that this objective integrity would be determined based on a review of “facts and circumstances,” and they set forth a non-exclusive list of factors that would be considered. Among the factors was “the degree of separation” between the facility receiving government funds and the facility where the “restricted” activities were occurring, and the “existence of separate personnel.” See LASH, 145 F.3d at 1024-1026 (discussing both sets of regulations).

Thus, the regulations upheld in those cases did not require what the State seeks here: for example, totally different management and administrative staff,

¹¹In discussing the Director's duty to adopt construction that avoids constitutional problems, Planned Parenthood refers to federal cases that discuss some of these constitutional issues. Planned Parenthood does this to illustrate the shoals within which the Director had to work, not to litigate the constitutional issues here. Planned Parenthood has reserved its right to litigate the federal constitutional issues, if necessary, in the pending federal action.

and totally different management and administrative facilities which must be located in different buildings.

The State seeks a construction of the appropriations that goes substantially further than the regulations upheld in Rust and LASH, as well as substantially further than the limits articulated in Dempsey I. The Director's duty, however, was not to "push the envelope" and create a constitutional collision. Her duty was to achieve reasonably the legislative intent and to avoid constitutional problems. Against the backdrop of Rust, LASH, and Dempsey I, her construction is clearly reasonable and should be upheld.

Finally, the State argues that, even if the Director's construction was correct, Planned Parenthood would still fail to satisfy the appropriation because the cost accounting methods used by Planned Parenthood are "theoretical models" that "[do] not accurately reflect the expenses incurred by [the] abortion providers and . . . [do] not truly and completely 'reimburse . . .'" St. Br. 75. There is nothing in the record to support this speculation, and the State cites nothing.

There is, however, ample evidence to the contrary. First, Planned Parenthood asserted as a fact that payments were computed according to methods that conformed with generally accepted accounting practices, and submitted declarations from the outside accountants for both PPSLR and PPKM. The State did not dispute these facts. L.F. 1800-01, 1802, 1806, 1935-37, 1960-62. Second, at PPKM, all direct management services are tracked and reimbursed in ¼-hour increments, L.F. 1806, and all common building expenses are split 50-50 because

the building has only two stories. L.F. 1806. Third, both PPKM and PPSLR collect additional “safety net” payments from their abortion affiliates to ensure that there is no accidental under reimbursement. L.F. 1803, 1807. Thus, there is ample support for Planned Parenthood’s position, which the State has never disputed below, that Planned Parenthood complies with the appropriations as construed by the Director.

POINT IV

The Trial Court Erred In Construing The Appropriations’ Prohibitions Against “Counseling Patients To Have Abortions,” “Distributing Marketing Materials About Abortion Services,” And Providing “Direct Referrals” To Abortion Providers To Include Planned Parenthood’s Practices, Because The Trial Court’s Construction Of Those Terms Was Unreasonable, In That Those Terms Cannot Reasonably Be Construed To Include Practices Revealed By The Record: The Provision Upon A Patient’s Request Of Factual, Non-Directive Information About Abortion, And A List Of Providers Of Abortion Services.

A. Referrals For Abortions

The State asserts, “It is undisputed that Planned Parenthood directly referred patients to abortion providers.” St. Br. 79. That is wrong. Planned Parenthood disputes that assertion. The specific portions of the record the State cites to support its assertion establish the following, relative to referrals:

- Planned Parenthood provides “referrals for abortion services upon a patient’s request for such a referral.” Planned Parenthood “provides a list of abortion providers, and the patient must choose and contact those providers on her own.” P.R.L.F. 62, ¶54; 65, ¶73.
- “[W]hen a woman inquires over the telephone about obtaining an abortion, [Planned Parenthood] will provide her with a list of abortion providers.” P.R.L.F. 65, ¶76.

In addition, although the State does not include this, the record establishes that Planned Parenthood provides pregnant women with referral lists of providers of other services, depending on how she indicates that she intends to proceed with her pregnancy. L.F. 1804, 1827, 1932; P.R.L.F. 62, ¶56; 66, ¶78.

The question for this Court is: do these practices constitute “direct referrals,” as forbidden by the appropriations, or are these practices something else, i.e., the provision of referral lists? For the reasons set forth in Planned Parenthood’s opening brief, PP. Br. 73-78, to which the State did not respond,

Planned Parenthood believes the answer must be that these practices are not direct referrals.¹²

¹² The State makes a variety of other accusations concerning the issue of direct referrals that are entirely peripheral and mostly inaccurate:

- The State cites a PPSLR “Pregnancy Testing Protocol,” which stated that PPSLR staff should offer Reproductive Health Services to a pregnant woman seeking an abortion. St. Br. 80. However, the record shows that Protocol was revised in October, 1999, “to make clear what PPSLR’s practice had always been: that patients are to be given a list of referrals. . . and they must choose and contact those providers. . . .” P.R.L.F. 253, ¶58.
- The State points out that in at least one telephone directory, the PPSLR phone number, which is labeled as a “referral line,” is the same as Reproductive Health’s phone number. St. Br. 80. However, the record shows the “referral line” listing was published prior to the enactment of the appropriations, P.R.L.F. 63, ¶58, and was eliminated in subsequent directories, P.R.L.F. 253, ¶59; that PPSLR’s phone line was not a referral line, but a “switchboard that receives incoming calls for all purposes. . .,” *id.*; and that, “[i]f a caller asks for Reproductive Health, the caller will be transferred to Reproductive Health [but if] a caller asks

B. Counseling To Have Abortions

for information about obtaining an abortion, the caller will be provided a list of abortion providers. . . .” Id.

- The State claims that when a woman calls PPKM seeking information about abortion services, PPKM “directly refer[s]” the woman to an abortion provider. St. Br. 80. The record cite provided by the State, however, is to deposition testimony that the trial court refused to allow as “evidence,” see supra note 3, citing Tr. 2, 21-22; involves a subject about which the deponent stated he has no personal knowledge; and discusses conduct that does not constitute a direct referral. L.F. 1002-03.
- The State cites a form that PPKM gives to some women. St. Br. 80-81. This form is required by Kansas law to be given to women before they obtain an abortion, and is only given to women who, “after having been provided with a list of abortion providers, indicate that they intend to contact Comprehensive Health [(which is located in Kansas)] for an abortion.” P.R.L.F. 257, ¶83.

The State’s Brief asserts that Planned Parenthood also “counseled patients to have abortions.” St. Br. 79. The record cites provided by the State to support that assertion reveal the following:

- Planned Parenthood “provides . . . a woman who is pregnant information about all services, relevant to the management of that pregnancy, about which the woman expresses an interest.” P.R.L.F. 62, ¶56, 66, ¶78.
- Planned Parenthood “requires . . . its employees [to] answer a patient’s questions about pregnancy options, including abortion.” P.R.L.F. 26, ¶74, 65, ¶74.
- Planned Parenthood “provides a woman who is pregnant with as much information as she requests about any option for managing her pregnancy, including abortion, in which she expresses an interest.” P.R.L.F. 65, ¶75.
- Planned Parenthood “provides a woman who is pregnant with information about all options for managing her pregnancy in which she expresses an interest.” If a woman “expresses an interest only in obtaining an abortion [she] could leave a [Planned Parenthood] healthcare facility with brochures about abortion, but without brochures about adoption and parenthood.” P.R.L.F. 62, ¶55 and 66, ¶77.

The question before this Court is: does this conduct constitute “counseling a woman to have an abortion” or is it something else: counseling *about* abortion,

i.e., the provision of neutral and objective information to enable a woman to make an informed choice about her options?

Planned Parenthood urges that this Court rule that these practices do not constitute, under state law, counseling a woman to have an abortion.

C. Marketing Materials

The State offers no argument to support its assertion that Planned Parenthood distributes marketing materials. Instead, it cites four items in the record.

Two of these items – “Abortion Questions and Answers,” L.F. 868-890, and “Coping Successfully After An Abortion,” L.F. 2072-2079 –are undisputed.¹³ The question for this Court is whether these brochures are marketing materials, or are they something else, i.e. neutral and factually accurate sources of information

¹³In addition to the undisputed items, the State cites a purported “admission[.]” concerning, “brochures, advertisements, pamphlets. . .” St. Br. 82. Planned Parenthood’s response to the State’s request for this admission was made subject to an objection and, when the State attempted to admit it into “evidence,” the trial court refused. See supra note 3, citing Tr. 2, 21-22. Thus, this is not an undisputed fact. The State also cites a document, “Options Counseling and Abortion Services.” St. Br. 82. The record reveals, however, that document has not been distributed since October, 1999. P.R.L.F. 255, ¶68.

to assist a woman in making an informed choice about abortion. For the reasons set forth in Planned Parenthood's opening brief, PP. Br. 76-77, to which the State did not respond, this Court should rule that these brochures are not marketing materials.

POINT V

The Trial Court Correctly Concluded That Planned Parenthood's Counseling and Referral Practices Are Required By Title X Because Title X Requires That A Pregnant Woman Be Offered Counseling, Be Provided Complete and Objective Information About All Options Except Those As To Which She Indicates That She Does Not Desire Counseling, and Be Provided With Referrals For All Options Except Those Which For Which She Indicates She Does Not Seek Referrals. The Record Demonstrates That Planned Parenthood's Practices Are Required By Title X In That Planned Parenthood Offers Pregnant Women Counseling About All Options, Provides Complete and Objective Information Except About All Options Except Those As To Which The Woman Indicates That She Does Not Desire Counseling, and Provides Referrals For All Options Except Those For Which The Woman Indicates She Does Not Seek Referrals.

At this point in the litigation, there appears to be no dispute about what Title X requires. Both Planned Parenthood and the State cite 42 C.F.R. §

59.5(a)(5). PP. Br. 19; St. Br. 86-87. Moreover, since the Supplementary Information that accompanied that regulation stated that it was not changing the pre-existing rules (contained in the Program Guidelines) but only incorporating those rules into the regulations, 65 Fed. Reg. 41270 at 41271 (July 3, 2000) (located at P.R.L.F. at 269B; PP. Br. A13), the State apparently agrees that these are the relevant Title X rules for the entire period covered by this litigation.

Title X requires that a pregnant woman be offered the opportunity to be counseled about all of her options. 42 C.F.R. § 59.5(a)(5) (located at P.R.L.F. 276; PP. Br. A21). If she requests that counseling, then she is to be given factual information and nondirective counseling about all of her options, id., and she is to be given a referral if she requests, id., but she is not to be given counseling or referral on options as to which she indicates she does not wish to receive information and counseling. Id.

That is exactly what Planned Parenthood does. PP. Br. 32-34; P.R.L.F. 62, ¶¶54-56; 63-64, ¶¶62-63; 65, ¶¶73-78; 253, ¶¶55-57; 256-257, ¶¶77-82. The trial court correctly concluded that these practices are mandated by Title X.

The State challenges this conclusion on two spurious grounds.

First, the State argues that “direct referrals,” “counseling a woman to have an abortion,” “assisting a woman to have an abortion,” and “marketing” abortion, which are forbidden by the appropriations, are not required by Title X. The State attempts to invoke the recent letters from the federal Department of Health and

Human Services (HHS) and the Missouri Department of Health (DOH) to support its argument.

The State's argument conflates two distinct questions. The first is: Are Planned Parenthood's practices required by Title X? The second is: Are those practices direct referrals, counseling or assisting a woman to have an abortion, or marketing abortion, as those terms from the appropriations are to be construed under state law? These two issues must be kept separate because the state law labels finally attached to Planned Parenthood's practices are irrelevant to the Title X issue. For purposes of answering the Title X question, it does not matter what name these practices are given under state law; what matters is: what are the practices, and are they required by Title X?

The trial court recognized that Planned Parenthood's practices are mandated by Title X. That was the correct conclusion. This Court should affirm that conclusion.

The HHS and DOH letters do not change this. The HHS letter concludes that the appropriations and Title X can be construed consistently. Apparently, DOH then chose, in spite of the trial court's ruling, to do so. As Planned Parenthood argued above and in its opening brief, PP. Br. 77-78, Planned Parenthood agrees that Title X and the appropriations can be construed consistently, and urges this Court to do so by holding that Planned Parenthood's admitted practices are not direct referrals, counseling to have an abortion, or marketing abortion.

However, even if this Court rejects that course, and holds that Planned Parenthood’s practices do run afoul of the appropriations’ prohibitions on direct referrals, etc., nonetheless this Court must affirm the trial court’s Title X holding because it is clear that Planned Parenthood’s practices are required by Title X.

Second, the State argues that, “[t]here is no evidence that Planned Parenthood complied with § 59.5(a)(5).” St. Br. 87.¹⁴ This is both legally irrelevant, and factually wrong.

It is legally irrelevant because the question is not whether Planned Parenthood met every Title X requirement; the question is whether the practices attacked by the State were mandated by Title X. The answer to that question, as the trial court correctly concluded, is yes.

In any case, the record is full of evidence that Planned Parenthood complied with Title X, PP. Br. 32-34; supra p. 49. There is no evidence that any entity responsible for Title X oversight has ever suggested otherwise.

The State offers three meager accusations of non-compliance. All are meritless.

First, the State argues that Planned Parenthood’s opening brief

¹⁴The State’s Brief captions the section where this argument is presented: “The Title X Regulations Did Not Mandate Planned Parenthood’s [practices].” St. Br. 86. The argument the State presents, however, that there is no evidence that Planned Parenthood complied with the Title X regulations, is entirely different.

“admits . . . that once a woman indicated that she may choose . . . abortion,”

Planned Parenthood does not offer information or counseling on other options. St. Br. 87-88. The State is mischaracterizing both Planned Parenthood’s Brief, see PP. Br. 32-34, and the actual record. See supra p. 49.

Second, the State argues that the automated telephone answering system for PPSLR and Reproductive Health somehow violates Title X because a caller seeking to reach Reproductive Health can do so by pushing the indicated key on her telephone when prompted by the system. St. Br. 88. Planned Parenthood does not contend that this telephone answering system is required by Title X. Planned Parenthood contends that it is not a “direct referral,” under the appropriations, when an unknown caller to an automated telephone answering system is advised which button to push to be connected to Reproductive Health Services.¹⁵

Third, the State argues that PPKM violates Title X when it gives a woman who has chosen to obtain an abortion at Comprehensive Health the form that Kansas law requires she receive at least 24 hours before her abortion. St. Br. 89. Planned Parenthood does not contend that this practice is mandated by Title X. Planned Parenthood contends that this does not run afoul of any of the

¹⁵ Nor is that answering system a violation of § 59.5(a)(5). That section applies to women who are pregnant, and Planned Parenthood has no way of knowing which callers are pregnant women.

appropriations' restrictions on direct referrals, or counseling or assisting a woman to have an abortion.¹⁶

The trial court was correct in finding that Planned Parenthood's counseling and referral practices are required by Title X. This Court should affirm that holding.

POINT VI

The Trial Court Erred In Voiding The Director's Construction Of The Appropriations And Permanently Enjoining Planned Parenthood From Participating In The Program, Because After Voiding An Executive's Construction Of A Statute, A Court Should Either Construe The Statute Or Remand To The Executive With Instructions That She Do So, And Should Allow The Parties Reasonable Time To Achieve Compliance With The New Construction; The Trial Court's Judgment Is Deficient In That It Does Not Set Forth The Proper Construction Of The Appropriations, Or Remand To The Director For Her To Do So, And Does Not Allow Planned Parenthood A Reasonable Opportunity To Comply With A New Construction Of The Appropriations.

¹⁶Nor does this practice violate Title X. It is not “explaining and obtaining [a] signed” form. St. Br. 89, quoting Brief of *Amicus Curiae* Missouri Family Health Council, Inc., p. 16 and Appendix, pp. 42-43.

The State argues that this issue is moot. St. Br. 90. That is wrong. Although the fiscal years have ended for the two appropriations that are the subject of this appeal, the exact same language is contained in the appropriation for this fiscal year. See House Bill No. 10, §10.710 (2001) (located at A1-A7). Thus, the issue of the failure of the trial court either to construe the appropriation or to remand to the Director with guidance for her to promulgate a new construction of the appropriation should be decided. See, e.g., State ex rel. Reser v. Rush, 562 S.W.2d 365, 367 (Mo. banc 1978) (questions involving public rights or interests which may be repeated at any time are capable of repetition, yet evading review, and should be resolved and put to rest.)

In its argument on this issue, the State makes two statements which are wrong. Planned Parenthood will limit its reply argument on this issue to correcting those mis-statements.

First, the State asserts that, when PPKM filed its motion in federal court, it had no trouble understanding what the trial court's ruling required. St. Br. 91. That is wrong. PPKM's Memorandum of Law in support of its motion stated several times that there was no state court construction of the undefined terms, and that PPKM was proceeding on what it understood to be the State's construction of those terms. See, e.g., Plaintiff's Suggestions in Support of Motion for Preliminary Injunction at 1-2, 7, 11, filed July 13, 2001, Planned Parenthood of Kan. & Mid-Mo. v. Dempsey, No. 99-4145-CV-C-5 (W.D. Mo. June 22, 1999) (located at A8-A9, A14 and A18).

Second, the State asserts that the trial court “conclusively construed the Appropriations,” and that the trial court “explained what the Appropriations meant. . . .” St. Br. 92.¹⁷ That is also wrong. The trial court’s judgment offers no explanation or construction of the appropriations. P.R.L.F. 359-364; PP. Br. A28-33.

As Planned Parenthood argued in its opening brief, when a court invalidates an executive’s construction of undefined terms in a statute, it cannot leave the parties in the dark as to the correct construction. PP. Br. 78-81. This is particularly true where, as here, the matter is before the state court because a federal court has abstained to allow the state court to determine the meaning of the disputed terms. This is also particularly true where there is a risk in the future (which is the State’s position here) that a grantee will have to repay funds to the State if it turns out that the executive official authorized to implement the statute has misconstrued one of the terms.

With no definitive judicial construction, should Planned Parenthood seek to comply with the appropriations, and should the Director then enter into another contract with Planned Parenthood, Planned Parenthood would be at risk of a further legal challenge and the possibility that, again, the Director erred. Then,

¹⁷The State also repeats its claim that “[t]he Director is no longer a party... .” St. Br. 92. As explained, supra note 5, this is wrong; the Director is a party.

Planned Parenthood would face, again, having to repay funds received under that contract for services rendered pursuant to it.

The trial court erred in not construing the appropriations. It erred in not allowing Planned Parenthood time to comply with its construction. This Court should so rule, and should provide a construction of the appropriations.

POINT VII

The Trial Court Erred In Entering Its Judgment Declaring That The Appropriations Do Not Violate The Constitution Of Missouri, Because Under Article III, Section 23, Of The Constitution The Sole Permissible Purpose Of An Appropriations Bill Is To Set Aside Moneys For Specified Purposes, So That An Appropriation Bill May Not Contain Substantive Legislation; These Appropriation Bills Do Contain Substantive Legislation In That They Change Existing Law And Create New Regulations Governing The Activities (Not Funded By The Appropriations) Of Entities Receiving The Funds Appropriated.

The State argues that the appropriations' restrictions do not run afoul of Article III, §23 of the Missouri Constitution because they merely "specified the

purpose of the Appropriations,” as required by Article IV, §23 of the Constitution. St. Br. 119, 120, 124.¹⁸

However, Article IV, § 23 does not grant the legislature license to enact substantive legislation in appropriations under the guise of stating the legislature’s purpose. Particularly when this Court has held that Article III, §23, is to be “strictly followed,” State ex rel. Hueller v. Thompson, 289 S.W. 338, 341 (Mo. banc 1926), the elaborate rules contained in the appropriations cannot be excused by reference to the narrow “purpose” requirement of Article IV, §23.

In the absence of any Missouri case law to support its position, the State relies on a decision of a Maryland appellate court, Bayne v. Secretary of State, 392 A.2d 67 (Md. 1978). At issue in Bayne was the appropriation for the Maryland’s Medicaid program. Among other provisions, the appropriation specified which abortions were reimbursable: where the abortion was necessary to protect the woman’s life or health, where there

¹⁸ Similarly, the State defends the appropriations’ detailed restrictions as necessary “to ensure that the State’s funds were not spent contrary to the General Assembly’s intent.” St. Br. 119. However, Appellants do not dispute that the legislature may enact restrictions to ensure that state monies are spent in accordance with the legislature’s intent. Rather, the crux of the matter is that the legislature may not enact restrictions amounting to substantive legislation in appropriations.

was a risk of the birth of a child with a permanent deformity or genetic defect, or where the pregnancy was the result of rape or incest reported to a law enforcement agency. Id. at 69.

The Maryland court held, as relevant here,¹⁹ that the limitations imposed on the use of the funds were not an enactment of general policy, but were a permissible limitation on the use of the funds, because they were, “directly related to the expenditure of the sum appropriated, [and did] not, in essence, amend . . . substantive legislation” Bayne, 392 A.2d at 74.

Contrary to the State’s assertion, the Missouri appropriations’ restrictions are not “analogous to the conditions in the appropriation bill in Bayne,” St. Br. 125. The Missouri restrictions go far beyond issues directly related to how the

¹⁹ The central issue in Bayne was not whether an appropriation violated Maryland’s rule against substantive legislation in appropriations, but rather, whether the appropriation constituted an “appropriation for maintaining [s]tate government,” and therefore was not subject to challenge by citizen referendum under Maryland law. 392 A.2d at 69-70. The court held that because the appropriation furthered the state’s function of providing medical services to indigent people, the appropriation was for the maintenance of the state government, and thus the appropriations’ provisions were not subject to referendum. Id. at 74-75.

funds are to be expended. The Missouri appropriations denote the services that program participants may not perform, even with non-public funds; establish a framework of rules that dictate the program participants' and the affiliates' (who receive no program funds) names, corporate relationship, and matters relating to their personnel, expenses, equipment and supplies; create an exception to the restrictions for recipients of Title X funds; and devise monitoring and enforcement mechanisms, including that the affiliate be audited at least every year. House Bill No. 10, §10.705 (1999) (located at L.F. 0014-15; St. Br. A9-10); House Bill No. 1110, §10.710 (2000) (located at P.R.L.F. 46-47; St. Br. A14-15). Given the reach of these requirements far beyond directly determining how the appropriated funds are to be spent, they are not remotely analogous to the provisions at issue in Bayne.²⁰

²⁰ This conclusion is supported by cases in other states addressing the issue of what constitutes “substantive law” for purposes of determining when an appropriation improperly contains substantive law. See, e.g., Washington State Legislature v. State, 985 P.2d 353, 363 (Wash. 1999) (holding that provisions adding restrictions on eligibility for public assistance constituted substantive law in violation of state constitution, stating that “where the policy set forth in the [appropriation] has been treated in a separate substantive bill . . . or the policy defines . . . eligibility for services, such factors may certainly indicate substantive law is present.”); State ex rel. Coll v. Carruthers, 759 P.2d 1380, 1384 (N.M.

Moreover, the Bayne court held that an appropriations' conditions on the use of appropriated moneys are permissible so long as the conditions do not "amend . . . substantive legislation." 392 A.2d at 74. Whereas the appropriation restrictions in Bayne did "not require that the program . . . be implemented in a manner contrary to statute" (Id. at 74-75), the Missouri appropriations conflict with § 188.205. PP. Br. 65-66. Therefore, even if the conditions in Bayne could be viewed as "analogous" to those at issue here, the restrictions at issue are constitutionally infirm under the analysis in Bayne because they amend existing substantive law.

Finally, the State argues that if the Court agrees with Planned Parenthood that the appropriations' restrictions constitute substantive legislation in violation of Article III, § 23, the Court must strike the appropriations in their entirety. To the contrary, Missouri law, and the intent of the Missouri legislature as clearly articulated in the appropriations themselves, require that this Court sever the invalid provisions of the appropriations.

1988) ("By including the condition that no money be expended on rental of parking space, the legislature has attempted to enact policy which is better addressed by general legislation and is not suitable for inclusion in the general appropriation bill.").

Section 1.140 of the Missouri Revised Statutes states the presumption that unconstitutional provisions of every law are severable. Mo. Rev. Stat. § 1.140 (“The provisions of every statute are severable”) This Court has confirmed that the courts are required “to sever unconstitutional provisions of statutes where possible.” Carmack v. Director, Mo. Dep’t of Agric., 945 S.W.2d 956, 961 (Mo. banc 1997). This presumption of severability can only be overcome if the legislature expresses otherwise in the legislation at issue.

Here, the appropriations state explicitly the legislature’s intent for severance:

If any provision of subsection 1 of this section is held invalid, the provision shall be severed from subsection 1 of this section and the remainder of subsection 1 shall be enforced. If the entirety of subsection 1 of this section is held invalid, then this appropriation shall be in accordance with subsection 3 of this section; otherwise subsections 3 and 5 of this section shall have no effect.

House Bill No. 10, § 10.705 (1999) (located at L.F. 0015; St. Br. A10); House Bill No. 1110, § 10.710 (2000) (located at P.R.L.F. 47; St. Br. A15) (emphasis added).

Not all of subsection 1 is unconstitutional. Surely, the legislature can appropriate funds to be used for family planning services. Therefore, the following portion of subsection 1 is constitutional:

For the purpose of funding family planning services, pregnancy testing and follow-up services, provided that none of these funds appropriated herein may be expended to directly or indirectly subsidize abortion services or administrative expenses.

Everything after that portion, however, is so infused with substantive legislation beyond what is permitted by Article III, § 23, as to be unconstitutional. Therefore, pursuant to the legislature's expressed intent, everything following the quoted, constitutional, portion of subsection 1 should be severed and declared unconstitutional.

POINT VIII

The Trial Court Erred In Ordering Planned Parenthood To Repay Funds Already Received, Because The Director Had Legal Authority To Enter Into The Contracts, And Planned Parenthood Was Entitled To Rely On Her Construction Of The Statutory Terms, In That The Director Is The Executive Official Responsible For Implementing The Family Planning Program And

**Planned Parenthood Is Only Charged With The Duty Of Being Sure That
The Person Contracting On Behalf Of The State Is Authorized To Do So.**

The parties disagree about the reach of this Court's holding in Aetna Insurance Company v. O'Malley, 124 S.W.2d 1164 (Mo. 1938). Planned Parenthood does not dispute that, under Aetna, it was charged with the knowledge of the authority of the Director to enter into contracts for the family planning program. The State does not dispute that she had that authority. St. Br. 98.

The question before this Court is whether Planned Parenthood is also charged with the knowledge of the legality (or illegality) of every statutory construction and other legal judgment that the Director made in exercising her authority. The State urges this Court to hold that, under Aetna, every time an executive official construes a statute as part of his acknowledged duty to implement that statute and then enters into contracts for the provision of services, and a subsequent legal challenge invalidates that construction and consequently voids the contracts, parties to those contracts are obligated to repay funds received for services rendered under those contracts.

The State not only reads too much into Aetna, it advocates a dangerous rule of law. Such a holding will deter entities, particularly charitable entities, from doing business with the state for fear of having to repay funds received for rendering services pursuant to a contract with an executive official with authority to enter into the contract solely because of an error in legal judgment by the executive official.

Planned Parenthood urges this Court to make clear that, while Aetna charges a party with knowledge of an official's authority to enter into a contract, it does not charge the party with knowledge of the legality of every administrative interpretation of statutory language attendant to that contract.

In its argument on this issue, the State asserts that Planned Parenthood filed its federal lawsuit because Planned Parenthood had "been on notice from the beginning" that the State believed Planned Parenthood was not eligible for the program, St. Br. 97 n.10, and the State argues that statements made when the State sought a temporary restraining order at the time it filed this case, "Planned Parenthood acknowledged its liability to repay." St. Br. 96. Both assertions mischaracterize history.

First, Planned Parenthood did not file its federal lawsuit because it knew the State believed Planned Parenthood was not eligible. Planned Parenthood filed the federal lawsuit because it recognized that there were undefined terms in the appropriations, and that those terms could be construed by the Director in a way that would impose unconstitutional penalties on Planned Parenthood.

Second, the statements at the TRO hearing did not acknowledge liability. Those statements argued that there was no basis for an injunction because there was an adequate remedy at law: If Planned Parenthood was found to owe the State the funds paid to Planned Parenthood, the State had available to it the remedy of an action at law to recover the funds.

POINT IX

The Trial Court Erred In Declaring The Appropriations Constitutional Under The United States Constitution, Because The United States Supreme Court Has Expressed Confidence That The State Courts Will Not Address Claims Reserved By A Federal Court When That Court Abstains; The Federal Constitutional Issues Were Reserved In That The United States District Court Issued An Abstention Order In Planned Parenthood v. Dempsey, No. 99-4145-CV-C-5 (W.D. Mo. filed June 22, 1999), In Which That Court Reserved The Issue Of The Constitutionality Of The Appropriations Under The United States Constitution For Resolution In Federal Court.

The State notes that Planned Parenthood has not “challenge[d] the merits” of the trial court’s ruling that the appropriations’ restrictions do not violate the U.S. Constitution. St. Br. 130. This is correct. Planned Parenthood has reserved its right to litigate those issues in federal court.

Planned Parenthood urges this Court to vindicate the U.S. Supreme Court’s “confiden[ce] that state courts. . . will respect a litigant’s reservation of his federal claims for decision by the federal courts,” England v. Louisiana State Bd. of Med. Exam'rs, 375 U.S. 411, 421 n.12 (1964) (citation omitted), and to reverse the trial court’s unfounded ruling on the federal constitutional question.

CONCLUSION

For the reasons set forth in this brief and Planned Parenthood’s Opening Brief, the judgment of the trial court should be vacated and reversed. This Court should order that the First and Second Counts be dismissed: (1) because the State is not authorized, and thus lacks standing, to pursue claims against the Director; and (2) because, if the State were authorized to bring such claims, nonetheless the State lacks standing to do so, and the claims are non-justiciable. Alternatively, this Court should order that the First and Second Counts be dismissed because the State has failed to demonstrate that the Director’s construction of the appropriations is illegal, and because the trial court’s construction of the statutory terms “counseling patients to have abortion,” “marketing materials,” and “direct referrals” is in error. This Court should order that the Third Count be dismissed because the trial court should respect the order of the federal court reserving its right to adjudicate the federal constitutional questions. This Court should affirm the trial court’s holding on the Title X issue. Alternatively, this Court should vacate the judgment of the trial court and order that the Second Amended Petition be dismissed because the appropriations’ restrictions violate Article III, Section 23, of the Missouri Constitution. This Court should also rule that the trial court erred in declaring Planned Parenthood ineligible for the program and enjoining Planned Parenthood from participating in the program, and in failing either to definitively construe the appropriations or to remand the matter to the Director with instructions for promulgating a proper construction, and in failing to allow

Planned Parenthood a reasonable time within which to comply with a new construction of the appropriations. This Court should also rule that the trial court erred in ordering Planned Parenthood to repay funds already received under the appropriations.

Dated: December ____, 2001

Respectfully submitted,

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APPELLANTS/CROSS-RESPONDENTS' RULE 84.06 CERTIFICATE

Come now Appellants/Cross-Respondents, by and through counsel and certify to the Court that the foregoing brief, and all copies filed and served in accordance with Rule 84.06(g):

1. Comply with Rule 55.03
2. Comply with the limitations set forth in Rule 84.06(b); and
3. Contain 15, 055 words according to Microsoft Word software.

Appellants also certify that a copy of the foregoing brief was stored on an IBM-PC compatible 1.44 MB, 3 ½ -inch size floppy disk which was scanned for viruses with Norton Anti-Virus software, and that according to said software, the floppy disk and all copies of same were virus free.

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On this ____ day of December, 2001, a copy of the foregoing brief, in both the format required pursuant to Rule 84.06(b) and 84.06(g) was served on all counsel of record, via Federal Express, to:

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APPENDIX

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House Bill No. 10, § 10.710 (2001).....A1

Plaintiff’s Suggestions in Support of Motion for Preliminary Injunction, filed
July 13, 2001, Planned Parenthood of Kansas and Mid-Missouri v.
Dempsey, No. 99-4145-CV-C-5 (W.D. Mo. filed June 22,
1999).....A8