IN THE SUPREME COURT OF MISSOURI

DANIEL R. SHIPLEY, Plaintiff-Respondent, v. RONALD CATES and RICHARD DUNN, Defendants-Appellants, and PLANNED PARENTHOOD OF KANSAS AND MID-MISSOURI, INC. and PLANNED PARENTHOOD OF THE ST. LOUIS REGION, INC., Defendants-Appellants.	)	Case No. SC87063

On Appeal from the Circuit Court of Cole County, Missouri

APPELLANTS' REPLY BRIEF

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REPLY STATEMENT CONCERNING THE FACTS AND THE PROPER STANDARD OF REVIEW

A. This Appeal Involves Only Legal Issues.

It is undisputed that both Planned Parenthood defendants achieved cost-savings through the relationships that they structured with their abortion affiliates. What is disputed is whether the Director's contract terms – which allowed cost-savings, but assured that the program funds could not be used to pay for any of the expenses where cost-savings were being achieved – were unreasonable and illegal.

Similarly, it is undisputed that the names of the program grantees are Planned Parenthood of the St. Louis Region (PPSLR) and Planned Parenthood of Kansas and Mid-Missouri (PPKM), and that the names of their respective abortion affiliates are Reproductive Health Services of Planned Parenthood of the St. Louis Region (RHS) and Comprehensive Health of Planned Parenthood of Kansas and Mid-Missouri (CH). What is disputed is whether the Director's interpretation of the term "similar" - which required the names to be different, but allowed the words "Planned Parenthood" to appear in both names - was unreasonable and illegal.

Likewise, it is not disputed that one of the Planned Parenthood defendants (PPSLR) – but not the other, see, *infra.*, p. 9 – employed all of the staff that worked in the clinical facility of its abortion affiliate, RHS. Nor is there any dispute that these employees worked 100% of their time in the RHS clinic, did no

work for PPSLR, and that RHS reimbursed PPSLR for 100% of the salary and benefits of these employees. L.F. 178, Tr. 81-82. What is disputed is whether the Director's contract terms, which allowed this arrangement, but assured that no program funds subsidized or reached RHS, were unreasonable and illegal.

The taxpayer characterizes the lower court's legal conclusions on these issues as factual conclusions. See, e.g., Respondent's Brief (Resp.Br.), 17, 18, 51 (characterizing lower court conclusions that Planned Parenthood and its abortion affiliates "shared" and had "similar" names as factual findings). He is wrong. These are legal issues. Therefore, the standard of review is *de novo.* See, Defendants-Appellants' Brief (PP Opening Br.), 26.[1]

B. Two Mischaracterizations of the Facts.

The taxpayer states that the Director, "'unilaterally' altered the Statutes' meaning to grant Planned Parenthood state funds unlawfully." Resp.Br., 20, citing L.F. 550-556. That is wrong. There is nothing in the record to suggest that the Director promulgated the contract terms "to grant" funds to Planned Parenthood "unlawfully." To the contrary, it is clear that the Director construed the terms of

[1] The taxpayer also argues that the order to repay the program funds is subject to deferential review pursuant to Murphy v. Carron, 536 S.W.2d 30 (Mo. 1976). Resp.Br. 73. We address that argument, *infra.*, in Reply Point V, where we demonstrate that the lower court erroneously declared and erroneously applied the law applicable to this issue.

the appropriations, and then Planned Parenthood took the steps necessary to comply with the contract terms. Moreover, while the trial court did repeatedly characterize the Director's contract terms as having been promulgated "unilaterally," it should be remembered that the Director consulted with the Attorney General, and was advised that her contract terms were legal. L.F. 163.

In a section of his Brief captioned "Abortions are performed by Planned Parenthood employees," the taxpayer points out the undisputed fact that the clinical staff of RHS are employees of PPSLR. Resp.Br. 17. Then, the taxpayer asserts that, "[t]he situation is similar for PPKM and its affiliated abortion provider Comprehensive Health." Id. at 18. That is wrong. There is nothing in the record to suggest that the clinical staff of CH are employees of PPKM.[2]

[2] The difference between these two arrangements is not relevant to the legal issues here. As discussed in Planned Parenthood's Opening Brief, PP Opening Br. 45-49, and *infra*., p.31, both arrangements satisfied the Director's interpretation of the appropriations, as well as a dictionary definition of the term "share."

I

THERE IS NO MISSOURI AUTHORITY ESTABLISHING TAXPAYER STANDING TO COMPEL REPAYMENT OF FUNDS, AND THIS IS AN INAPPROPRIATE CASE IN WHICH TO EXTEND SUCH STANDING.

The issue before this Court is whether, in this case, to extend taxpayer standing to include standing to compel repayment of funds already paid. Contrary to the taxpayer's argument, there is no Missouri case that endorses, let alone establishes, that standing.

When this Court granted the writ of mandamus in State ex. rel. Planned Parenthood v. Kinder, 79 S.W.3d 905, 906-7 (Mo. banc 2002), Resp.Br., 29, directing the Cole County Circuit Court to follow the mandate in State v. Planned Parenthood, 66 S.W.3d 16 (Mo. banc 2002) (Planned Parenthood II), and dismiss that case, there was a motion pending in the lower court, for leave for the taxpayer to intervene. That motion stated that the taxpayer adopted the "State of Missouri's First Amended Complaint" as his proposed pleading. Appellants-Defendants' Appendix (PP. App.), Exhibit A (Motion To Intervene, Exhibit 3 to Kinder's Return and Answer in Planned Parenthood v. Kinder, SC84394). That First Amended Complaint, however, did not seek repayment of funds; it sought only declaratory and injunctive relief. Id. Therefore, there is no reason to infer that this Court's statement that its order was without prejudice to the taxpayer filing a

separate action, contemplated or endorsed taxpayer standing to seek repayment of funds.

This Court's use of a past-tense verb in one sentence in O'Reilly v. City of Hazelwood, 850 S.W.2d 96, 98 (Mo. 1993), Resp.Br 29, is also no authority for expanding taxpayer standing. Indeed, the taxpayer in O'Reilly was not seeking repayment of funds.

The fact that this Court ordered the reinstatement of a taxpayer's petition that sought both injunctive relief and repayment of funds in Eastern Mo. Laborers v. St. Louis County, 781 S.W.2d 43 (Mo. banc. 1989), Resp.Br., 29, is equally unhelpful. There is no mention in that opinion of taxpayer standing to seek repayment, while the opinion is replete with references to the issue of taxpayer standing to seek injunctive relief. See, *e.g.*, 781 S.W.2d at 46-47.

Likewise, neither Fulton v. City of Lockwood, 269 S.W.2d 1 (Mo. 1954), nor County of St. Francois v. Brookshire, 302 S.W.2d 1 (Mo. 1957), Resp.Br., 30, have any relevance to the issue here. The plaintiffs in those cases were not taxpayers.

The taxpayer's argument that, without standing to seek repayment, "[t]axpayers would be left without a remedy to enforce the law . . . since the executive branch cannot be expected to seek recovery of funds . . .," Resp.Br. 32, is wrong. If the executive branch expends money unlawfully, the Attorney General can seek repayment. This Court recognized as much in Planned Parenthood II, 66 S.W.3d at 19-20, when it acknowledged that the Attorney

General could bring litigation against state officials and private contractors when the Attorney General believed that a contract was unlawful.

The taxpayer's argument that Planned Parenthood has "reversed its position," Resp.Br. 33, from the earlier litigation with the State is equally off-base. In the earlier litigation, Planned Parenthood was challenging the Attorney General's appointing a "Special Assistant Attorney General" (SAAG) to commence litigation on behalf of "the State," against Planned Parenthood and the Director, while simultaneously representing the Director and taking the position that the contract terms were legal. At the outset of the litigation, when the SAAG sought a TRO against the contracts between the Director and Planned Parenthood, Planned Parenthood argued, as noted by the taxpayer, Resp.Br. 33, that, if "the State" ultimately prevailed, it could seek recovery of the funds paid to Planned Parenthood. That remains true today, *i.e.*, the Attorney General could seek to recover funds wrongly paid.[3] That, however, has no bearing on whether the taxpayer has standing to do so.

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[3] Thus, the taxpayer is also wrong when he quotes from a Reply Brief filed by Planned Parenthood in State v. Planned Parenthood, 37 S.W.3d 222 (Mo. banc 2001) (Planned Parenthood I), Resp.Br. 32, and argues that Planned Parenthood has taken inconsistent positions. At that stage of that litigation, the SAAG was only seeking injunctive relief. The SAAG argued, in response to Planned Parenthood's challenges, that, if he could not sue in the name of the State, the

While there is neither authority nor argument for extending taxpayer standing in this case, there is an array of factors which argue that this would be an inappropriate case in which to do so. These factors are enumerated in Reply Point V, *infra.*, because they also demonstrate why the lower court erroneously declared and applied the law when it ordered repayment of the program funds it received. See, also, PP Opening Br., 28-29, 61-62.

Here, on the issue of taxpayer standing to seek repayment, they lead to the conclusion that, while there may arise in the future circumstances that justify extending taxpayer standing to include standing to seek repayment of funds, those circumstances do not exist here, c*f.*, Reproductive Health Services v. Nixon, No. SC86768, 2006 WL 463575, at *6 (Mo. banc. Feb. 28, 2006) ("no reason, within the context of this case" to construe more broadly). Therefore, the lower court's ruling upholding taxpayer standing should be reversed.

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public would be left with no one to act on its behalf. Planned Parenthood's reply was, as quoted by the taxpayer, that taxpayers had standing. Given that the SAAG was only seeking injunctive relief, Planned Parenthood's argument cannot be given any meaning beyond that taxpayers have standing to seek injunctive relief.

II

THE APPROPRIATIONS' RESTRICTIONS VIOLATE ARTICLE III OF THE MISSOURI CONSTITUTION

While the taxpayer is correct in arguing that statutes are presumed constitutional,[4] and this Court has stated that an Article III challenge such as this one is "not favored," Resp.Br. 36-37, *quoting*, Hammerschmidt v. Boone County, 877 S.W.2d 98 (Mo. banc 1994), it remains equally true that the constitutional prohibition against injecting substantive legislation into an appropriation is a rule to be "strictly followed." State ex. rel. Hueller v. Thompson, 289 S.W. 338, 341 (Mo. banc 1926). Indeed, in Hammerschmidt, this Court struck legislation as in violation of Article III.

The taxpayer argues that the appropriations do not amend Mo.Rev.Stat §188.025 because they, "merely appropriate and condition the use of certain state funds for a single year, consistent with existing law, rather than change the general laws of this State in any way." Resp.Br. 39-40. The problem with this argument is that the "conditions" are not "consistent with existing state law." They go

[4] It is ironic that the taxpayer cites Reproductive Health v. Nixon, *supra.*, for the presumption of constitutionality point. Resp.Br. 36. This Court upheld the statute in that case only by construing it to avoid constitutional problems – exactly what the Director did with the appropriations here.

beyond the policy set by §188.025, that public funds not be expended on abortions; and impose elaborate rules on recipients of state funds who are affiliated with abortion-providers. And, they eliminate the exception in §188.025 that allows public funds to be spent on counseling and referrals when a woman's life is at risk. Thus, the appropriations enact restrictions on these funds that are contrary to the policies in established in §188.025.

This case is different than Bayne v. Sec'y of State, 392 A.2d 67 (Md. 1978), Resp.Br. 42-43. In Bayne, the Maryland court ruled that a provision in the appropriation for Maryland's Medicaid program, that specified the medical circumstances under which the program would cover an abortion, was an appropriation, "for maintaining state government," thus not subject to referendum. Here, the appropriations' restrictions go considerably further than specifying for what purposes the funds could be spent.

The taxpayer's answer to the problem of the misleading title to the appropriations, Resp.Br. 43-44, blinks at reality. The question here is whether the title – "To appropriate money for the expenses of the [various] Departments. . . ," L.F. 87, 93 – puts anyone on notice that buried within is a complex set of rules and regulations such as those at issue here. The answer is no. Article III, Section 23, requires that the subject of legislation, "be clearly expressed in its title." That is not the case here.

The fundamental question is whether the appropriations simply set forth the purpose for which the funds are being set aside, or whether the appropriations go

sufficiently further as to violate the limitations of Article III. The similar restrictions that were at issue in Rust v. Sullivan, 500 U.S. 173 (1991), and Velazquez v. Legal Services Corp., 349 F. Supp. 2d 566 (E.D.N.Y. 2004), provide a useful comparison, and demonstrate how absurd it is to argue that the appropriations do no more than specify how funds are to be spent. Both the federal family planning regulations (Title X) in Rust, and the Legal Services Corporation (LSC) regulations in Velazquez, were addressed to the interest purportedly underlying the appropriations' restrictions – ensuring that government funds not subsidize disfavored activities – and both were comparably detailed. Yet, both of those restrictions were written as regulations because of the detailed and substantive nature of what they sought to regulate. Yet, here, the same restrictions were not even enacted as substantive legislation, but were engrafted on an appropriation. Just as the Title X and LSC regulations plainly went far beyond specifying how funds could be spent, and thus were promulgated as regulations, it is inescapable here, that the appropriations' restrictions go far beyond simply specifying how funds are to be spent.

Therefore, the lower court judgment that the restrictions do not violate the Missouri Constitution must be reversed, and the restrictions declared unconstitutional under Article III of the Missouri Constitution.

Finally, the taxpayer argues that if the Court agrees with Planned Parenthood that the appropriations' restrictions constitute substantive legislation in

violation of Article III, the Court must strike the appropriations in their entirety. To the contrary, Missouri law, and the intent of the Legislature as articulated in the appropriations themselves, require that this Court sever the invalid provisions of the appropriations.

In Missouri, the presumption is 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 courts are required "to sever unconstitutional provisions of statutes where possible." Carmack v. Dir., 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.

L.F. 90 (H.B.10), 96 (H.B. 1110).

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, as to be unconstitutional. Therefore, pursuant to the legislature's expressed intent, everything following the quoted, constitutional, portion of subsection 1 should be severed.

III

THE DIRECTOR'S INTERPRETATION WAS REASONABLE AND SHOULD BE UPHELD

The taxpayer bases his argument that the Director's interpretation is entitled to no deference on entirely inapplicable authority. The applicable authority is clear: the Director's interpretation is entitled to deference and is to be upheld, unless it bears no reasonable relationship to the legislative intent.

Moreover, the taxpayer's argument, that there were no constitutional issues that the Director was compelled to take into account, must be rejected. The constitutional issues were clear at the time the Director promulgated the contracts, and have been reaffirmed least twice since then.

Finally, while the Director's interpretation is reasonable, objective, and avoids constitutional problems, the lower court's approach is not.

A. The Director's Interpretation Is Entitled To Deference

The taxpayer offers five arguments why the Director's statutory construction is not entitled to deference. None are right.

First, the taxpayer quotes from Gulf Transport v. PSC, 658 S.W.2d 448, 453 (Mo. Ct. App. 1983), Resp.Br. 46. However, as Gulf Transport, itself, makes clear, the standard employed there – that the court exercise independent judgment – applied because the court was reviewing an administrative adjudication. In a

sentence that precedes the portion of the opinion quoted by the taxpayer (a sentence that the taxpayer does not include in the quotation in his brief), Gulf Transport makes clear that the standard is different when, as here, a court is reviewing an administrative interpretation made by an executive official implementing a statute:

> Where an agency of the state . . . is charged with enforcement of a statute, the construction given that statute by the agency is entitled to some weight. . . But, where an administrative decision is based upon an administrative agency's interpretation of the law. . . [upon judicial review, the court shall exercise independent judgment]. [5]

Second, the taxpayer relies on Blue Springs Bowl v. Spradling, 551 S.W.2d 596 (Mo. 1977), Resp. Br. at 47, to argue that Missouri courts do not defer to agency interpretations in order to prevent agencies from rewriting statutes. But, in Blue Springs Bowl, this Court was addressing a statute that was unambiguous and, thus, there was no need for statutory construction. 551 S.W.2d at 599. That is not

[5] Daily Record v. James, 629 S.W.2d 348 (Mo. Banc 1982), Resp.Br. 46-47, is equally unhelpful. It involved an administrative adjudication by the Administrative Hearing Commission, whose decisions are subject to a statutorily mandated standard of review, Daily Record, 629 S.W.2d at 350; Mo. Rev. Stat. § 621.193.

the case here. Even members of the Senate acknowledged that the terms were ambiguous. L.F. 236.

Third, the taxpayer argues that the contract terms are "rules" subject to the requirements of Chapter 536. This is wrong. A rule is a "statement[s] of general applicability," Mo. Rev. Stat. § 536.010(6), that "acts on unnamed and unspecified persons or facts." Missourians For Separation of Church and State v. Robertson, 592 S.W.2d 825, 841 (Mo. Ct. App.1979), *quoted* in NME Hospitals v. Dep't of Social Services, 850 S.W.2d 71, 74 (Mo. banc 1993). Yet, these contract terms apparently only affected Planned Parenthood. They hardly acted on unnamed or unspecified persons. Moreover, it is common practice for executive agencies to write contract language without engaging in the procedures set forth in Chapter 536. See, L.F. 283-284 (letter from Director to Senate Committee).

Fourth, the taxpayer argues that administrative interpretations, "cannot change legislative intent." Resp.Br. 48. This mis-states the law. Administrative interpretations are to implement legislative intent reasonably, without running afoul of constitutional protections. State ex inf. McKittrick v. American Colony Ins., 80 S.W.2d 876, 883 (Mo. banc 1934).

Last, the taxpayer argues that, at least as to "share," the Director's interpretation was impermissible because it had been "expressly rejected" by the Legislature. Resp.Br. 54-55. In fact, the Legislature never voted on whether to define "share" as the Director did. Such an amendment was proposed, but never voted on because a substitute was adopted. PP. App. Exhibit B (Missouri Senate

Journal, April 19, 1999, pp. 773-788). Adopting the substitute was not an "express rejection" of the Director's approach, let alone the kind of clear expression of legislative intent required by this Court. L&R Distributing v. Mo. Dep't of Revenue, 529 S.W.2d 375, 379 (Mo. 1975). Rather, what happened here is illustrative of what this Court had in mind when it held in Blue Springs v. Spradling, 551 S.W.2d at 601, that "reliance on bills not passed provides a tenuous basis for determining legislative intent."

Therefore, the Director's interpretation of the appropriations' restrictions is entitled to deference, and is to be upheld unless the taxpayer can demonstrate that it was unreasonable.

B. The Director's Interpretation Correctly Avoided Constitutional Issues.

The taxpayer's argument on the constitutional issues misunderstands Rust v. Sullivan, *supra.*, and how Rust has been interpreted by subsequent holdings such as Planned Parenthood v. Dempsey, 167 F.3d 458 (8th Cir. 1999); Planned Parenthood v. Sanchez, 403 F.3d 324 (5th Cir. 2005); and Velazquez v. Legal Services Corp., *supra.*[6]

[6] The taxpayer also misunderstands the difference between the argument that Planned Parenthood is making on this appeal, and the claim that Planned Parenthood conditionally reserved. Resp.Br. 58-59. Planned Parenthood is arguing on this appeal that there are constitutional limitations on how far a state

Rust held that the state could choose to fund family planning services, and not fund other services, such as abortion. At the same time, Rust acknowledged that the state could not forbid a grantee from providing abortions, especially given that abortion is a fundamental constitutional right. 500 U.S at 196-197. See also, Dempsey, 167 F.3d at 463. Rust also held that the state could require, "a certain degree of separation . . . in order to ensure the integrity of the [government] funded program" between the activities being funded and those not funded. 500 U.S. at 198.

The constitutional question that the Director had to address was: what is a permissible degree of separation to impose, without, "in practical terms work[ing] the same mischief . . . as it would if [the statute] disallowed affiliation entirely." Sanchez, 403 F.3d at 342.[7] At the time the Director had to address this question,

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can go in imposing separation between subsidized activities and disfavored, but constitutionally protected, activities; and that, the contract terms avoided raising constitutional problems by staying within those limitations. Planned Parenthood has reserved the claim that an interpretation different than the Director's could, depending on what that interpretation is, be unconstitutional as applied to Planned Parenthood. L.F. 67 (Planned Parenthood's Second Amended Answer). See also, PP Opening Br., Point IV, and Point IV of this Reply Brief.

[7] The taxpayer's suggests that Sanchez is distinguishable from this case because it involved preemption. Resp.Br. 63. This is wrong. Sanchez not only repeatedly

Dempsey had recently been decided, and addressed the issue directly. Dempsey holds that the state may require: separate incorporation, separate facilities, and adequate financial records to demonstrate that the abortion-affiliate receives no state funds. 167 F.3d at 463.

This language defined the constitutional limits constraining the Director. The Director stayed within these limits, and reasonably accomplished any legitimate legislative purpose. There are separate corporations; the clinical facilities of the abortion affiliates and the family planning programs are entirely separate; and it is clear that no state funds flow, even indirectly, to the abortion-affiliates.

Nonetheless, the taxpayer argues that the Director's interpretation is illegal. The Director's interpretation may not be as extreme and punitive as the taxpayer would prefer, but her interpretation is not unreasonable or illegal.

The taxpayer's and the lower court's fundamental objections to the Director's interpretation are: it allows for cost-savings; it allows the abortion affiliates to be located in the same buildings where other Planned Parenthood facilities are also located; and it allows the words "Planned Parenthood" to appear in the names of the abortion affiliates. See, *e.g.*, Resp.Br. 23, 51, 56.

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cites Dempsey, but in the portion of the opinion which the taxpayer cites, Sanchez states that Dempsey is instructive. 403 F.3d at 302.

The problem with the objection to cost-savings is that Dempsey spoke of preventing subsidies, and held that no subsidy will exist if financial records demonstrate that the abortion affiliate receives no State family-planning funds. 167 F.3d at 463. Dempsey said nothing about the need to prevent cost-savings; and cost-savings and subsidies are different. See, Webster's Third New International Dictionary (1966) (subsidy: "a grant or gift of money or other property made by way of financial aid . . . "). Further, Velazquez held that there was no legitimate state interest in requiring duplication of costs and thereby preventing grantees from achieving cost-savings. 349 F. Supp. 2d at 609-612.[8] Finally, it is worth noting that, to the extent there is any real subsidy in these

[8] The taxpayer argues that Velazquez should be disregarded because it was an "as applied" challenge where specific facts relating to burdens on the parties had been established. Resp.Br. 63-64. This misses the point of Planned Parenthood's argument. Velazquez confirms that the Director was correct to implement the appropriations to avoid the constitutional problems of "going too far" with separation requirements. Planned Parenthood has reserved its right to do exactly what the Velazquez plaintiffs did, if the Director's interpretation is invalidated: to prove that the interpretation that replaces the Director's is unconstitutional as applied to Planned Parenthood. See, PP Opening Br., Point IV, and Point IV of this Reply Brief.

arrangements, it is a subsidy from the abortion affiliates to Planned Parenthood. Tr. 71-72.

As for separate facilities, it is clear that the abortion affiliates' clinics are completely separate from the Planned Parenthood clinics. Indeed, in the case of PPKM, Comprehensive Health's facilities are located in Kansas, L.F. 78, and are thus not even in the same state as the Planned Parenthood clinics that receive program funds. This interpretation of separate facilities – where the clinics are entirely separate, but patients use the same building lobbies and parking lots, etc. – is consistent with the line drawn in Velazquez: it is permissible to require that legal services offices and conference rooms, where clients meet with their attorneys, be separate; it is impermissible to require total separation that would require, for example, separate libraries and back-offices, even though clients are not normally in those spaces. 349 F. Supp. 2d at 612.

Moreover, requiring more, especially to the extent advocated by the taxpayer and the lower court, would run afoul of the line drawn by the Fifth Circuit in Sanchez, between requirements that are a, "relatively empty formalism" and those that are "a more substantial obstacle," and would, "in practical terms work[ing] the same mischief. . .as it would if [the statute] disallowed affiliation entirely." 403 F.3d at 342.

As for the words "Planned Parenthood" being in both sets of names, Dempsey says nothing about restrictions on names. Thus, the Director wisely proceeded cautiously in imposing such restrictions.

The Director was also obligated to impose a rule that was objective, and not subject to arbitrary enforcement. PP Opening Br., 50, *citing* Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969), Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992).

The taxpayer argues that courts decide specific cases, not hypothetical ones. Resp.Br. 65. This misses the point. Under Shuttlesworth and Forsyth County, the Director's duty was to interpret the "similar names" requirement by imposing an objective standard. The requirement of an objective standard is not met by imposing a subjective standard, such as results from the dictionary definitions, see, PP Opening Br. 52, and then arguing that a court can decide a specific dispute.[9]

At bottom, the taxpayer and the lower court object to the words "Planned Parenthood" appearing in both sets of names. Justice Blackmun's concurrence (joined by Justices Brennan and Marshall) in Regan v. Taxation With

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[9] In his response to the Director's Brief, the taxpayer asserts that "whether two things are similar is a question of fact . . ." Resp.Br. 78, *citing* Gen. Fin. Loan v. Gen. Loan, 163 F.2d 709 (8th Cir. 1947), Cleo Syrup v. Coca-Cola, 139 F.2d 416 (8th Cir. 1943), and Muffet v. Smelansky, 158 S.W.2d 168 (Mo. Ct. App. 1942). That is not what those cases say. Those cases were unfair competition cases. They recogize that it is a question of fact whether, in the totality of the circumstances, consumers are, or are likely to be, confused.

Representation, 461 U.S. 540, 553 (1983), PP Opening Br. 49-50, makes clear that, where the state seeks to ensure that its funds are neither spent, nor perceived as being spent, on a constitutionally protected activity that it has chosen not to subsidize, it may not do so in a way that prevents the public from knowing that the separate entity (here, the abortion-affiliate) is engaging in the protected activity in the name of the funds recipient (here, Planned Parenthood). The taxpayer's only response is to argue that Planned Parenthood is relying on a concurring opinion. Resp.Br., 64-65. Yet, the Blackmun concurrence is commonly understood as central to the outcome in Taxation With Representation and is, in fact, cited by the majority opinion in FCC v. League of Women Voters, 468 U.S. 468 U.S. 364, 400 (1984).

In the end, the taxpayer argues, as Planned Parenthood concedes, that the state has a legitimate interest in ensuring that its funds do not subsidize abortion, and that the public knows the state is not subsidizing, or lending its imprimatur to, abortion. Resp. Br. 65-67. In making this argument, the taxpayer cites FCC v. League of Women Voters, 468 U.S. at 395. Resp.Br. 66. Yet, FCC endorses allowing the separate entities to utilize the same facilities, and makes clear that the state's interest in the public knowing that the state is not subsidizing or lending its imprimatur to the disfavored activity is to be accomplished by requiring disclaimers, not by restricting names. 468 U.S. at 395 (disclaimers), and 400 (separate affiliates sharing facilities). See also, Capitol Square Review Bd. v. Pinette, 515 U.S. 753, 769 (1995) (use disclaimers); Velazquez, 349 F. Supp. 2d at

612 (employ appropriate signage); and Regan v. Taxation With Representation, 461 U.S. at 553 (Blackmun, concurring) (government must allow public association of the two entities).[10]

C. The Lower Court's Interpretation Is Inconsistent and Unworkable

Not only was the Director's interpretation reasonable and objectively enforceable, but the lower court's was not. For example, as the taxpayer notes, Resp.Br. 52, RHS uses equipment that it leases from PPSLR. If this equipment is in the RHS facility and not also used by PPSLR, L.F. 191-194, then why is that "sharing?" The equipment is not used "in common," nor does each entity use "a

[10] In making his argument about public confusion, the taxpayer again overstates the facts: "When patients enter Planned Parenthood, a grantee of state funds, to get an abortion . . ." Resp.Br. 66. The facts show that, in St. Louis, when patients enter the building, they are not "enter[ing] Planned Parenthood," but are entering a building that houses both PPSLR and RHS. L.F. 314-315. Patients seeking family planning services proceed to the PPSLR clinic; patients seeking abortions proceed to the RHS clinic on a different floor. In Kansas City, where PPKM's administrative headquarters and CH are located in the same building, "There are two street-level entrances to the building: one provides access to [CH] and the other provides access to PPKM's administrative offices. . . " PP. App., Ex. C, at ¶8 (Declaration of Peter Brownlie filed in PPKM v. Dempsey. (Exhibit 15 in the lower court, see, L.F. 85))

portion." L.F. 553-554. Likewise, as the taxpayer and the lower court frequently repeat, the staff of RHS is on the PPSLR payroll. Resp.Br. 17, 51; L.F. 554. If, those employees work 100% of their time in the RHS clinic, and RHS reimburses PPSLR fully for their salaries and benefits, Tr. 82, then why is that arrangement "sharing?" Again, there is no use "in common," nor each entity using "a portion."

Similarly, the lower court concluded that Planned Parenthood violated the "sharing" prohibition by, "operat[ing] in the same building as their affiliated abortion providers." L.F. 554. Yet, this expansive application of share forbids Planned Parenthood and its abortion affiliate from being in the same building, regardless of who owns it. PP Opening Br. 46-47.[11] The taxpayer argues that it

[11] Moreover, while the lower court never defined "facility," the taxpayer argues that a "facility" is something that is built, established, constructed, installed or provided to perform a function or facilitate a particular end, and would include, for example, plumbing. Resp. Br. at 49, *citing* Webster's Third New International Dictionary (1986). This raises the specter that Planned Parenthood and its abortion-affiliates could not, for example, receive water through the same water main, or have staff and patients come to their clinics on the same bus line because those, also, are things constructed or established for relevant functions. PP Opening Br. at 47. Indeed, the taxpayer complains that PPKM and CH "share" a utility meter. Resp.Br. at 52. The Director's approach avoids all of these unreasonable results, while still achieving the Legislature's legitimate purpose.

would not be "sharing," if the building was owned by a third party, because "no economic benefits flow[ed] between them." Resp.Br. 50, n.6. This argument fails. If the building in Kansas City – that houses PPKM's headquarters on one floor, and the CH clinic on the other floor – was owned by a third party, PPKM and CH would still "use [it] in common" and each "have a portion." L.F. 553-554. Moreover, they would enjoy the same cost savings associated with only being responsible for a portion of the common expenses.

These examples illustrate that the Director's interpretation not only avoided constitutional issues, but was also more rational and objectively enforceable. The lower court's interpretation is none of these. That is why the lower court's judgment must be reversed, and the Director's interpretation must be upheld.

IV

THE LOWER COURT ERRED IN HOLDING THAT THE RESTRICTIONS DID NOT VIOLATE THE U.S. CONSTITUTION

At the time the taxpayer filed this litigation and at least up until the time the lower court rendered its judgment, there was no justiciable controversy concerning whether the appropriations violated rights secured to Planned Parenthood under the U.S. Constitution. Planned Parenthood had never challenged the constitutionality of the Director's interpretation of the appropriations; and Planned Parenthood was not in a position to evaluate the constitutionality of a different interpretation of the appropriations until one was declared, at least by the lower court, if not finally by this Court. Thus, it was error for the lower court to declare a new interpretation of the appropriations, and simultaneously find that the appropriations did not violate the federal Constitution, in light of Planned Parenthood's repeated reservation of a conditional (depending on whether there would be a new interpretation, and what it would be) claim of unconstitutionality.

There is no question that such a claim exists. Rust only upheld the Title X regulations in a facial challenge, 500 U.S. at 183, thereby leaving open subsequent "as applied" challenges. When Legal Aid Society of Hawaii v. Legal Services Corp., 145 F.3d 1017, 1027 (9th Cir. 1998), Resp.Br. at 61, rejected a facial challenge to the LSC regulations, the court noted that it was leaving open the

possibility of later "as applied" challenges. Indeed, the court emphasized that it was doing so because the LSC regulations (unlike the regulations here):

> do not state that the organizations are limited to overlapping boards of directors, or that no sharing of staff is permissible.

Finally, Velazquez, *supra.*, was an "as applied" challenge. Thus, an "as applied" challenge should remain open to Planned Parenthood.

The taxpayer cites Planned Parenthood I for the proposition that a declaratory judgment is an appropriate means of defending the constitutionality of a statute. Resp. Br. 67. This proposition is not disputed; but, as pointed-out in Planned Parenthood's Opening Brief, the dispute must not be hypothetical. The defendant must be taking an adverse position. PP. Opening Br., at 58-59, (citing cases).

The taxpayer also cites Mo. Dep't of Social Servs. v. Agi-Bloomfield Convalescent Ctr., 682 S.W.2d 166 (Mo. Ct. App. 1984), and City of Nevada v.Welty, 203 S.W.2d 459 (Mo. 1947). Resp.Br. 68. These cases essentially confirm Planned Parenthood's position. In both of those cases, it was clear that the defendants took the position that specific actions the government agencies were preparing to undertake would be unconstitutional. Mo. Dep't of Social Servs., 682 S.W.2d at 168; City of Nevada, 203 S.W.2d at 459-460.

Here, by comparison, when the taxpayer filed suit, Planned Parenthood had not challenged the constitutionality of the appropriations. Thus, at least until the lower court ruled, it was uncertain whether the taxpayer's claim that the Director's

interpretation was illegal would be upheld or dismissed. More important, if the Director's interpretation was declared illegal, it was equally uncertain what interpretation would be substituted. Until that interpretation was declared, Planned Parenthood was not in a position to evaluate whether, and then to assert and prove that, the new interpretation was unconstitutional as applied. Thus, Planned Parenthood conditionally reserved its right to assert such a claim until when and if a new interpretation was declared, at least by the lower court.

The taxpayer argues that Planned Parenthood somehow knew, or should have known, what the outcome would be because of the prior litigation in federal and state court. Resp.Br. 68, 71-73. This argument misleadingly over-simplifies history. When Planned Parenthood filed its amended complaint in the federal court action, See, Appendix to Resp. Br., the ruling by the Circuit Court in State v. Planned Parenthood was being applied to Planned Parenthood. Thus, Planned Parenthood had an actual interpretation and application of the appropriation which it believed was being applied unconstitutionally. See, PP. App., Ex. D (Suggestions In Support of Motion for Preliminary Injunction, filed in PPKM v. Dempsey, Exhibit 14 in the lower court, L.F. 84).

After this Court twice vacated the lower court rulings in the State v. Planned Parenthood litigation, there was no legal reason for Planned Parenthood to presume the outcome of the taxpayer's claims. Thus, Planned Parenthood simply explicitly reserved a claim that, if the Director's interpretation was voided, and a new interpretation imposed, depending on what that interpretation was, Planned

Parenthood could assert that the new interpretation was unconstitutional as applied to Planned Parenthood.

The hardest part of the taxpayer's argument to understand is his claim that Planned Parenthood waived this claim for failure to raise it, "at the earliest possible opportunity consistent with good pleading and orderly procedure." Resp.Br. 71. To the contrary, Planned Parenthood noted its position from the outset of the litigation, L.F. 63-64, 67, at the trial, Tr. 172-177, and in post-trial submissions, L.F. 496.

Nonetheless, the trial court rolled right over this claim, and declared that its interpretation did not violate the federal constitution. Given Planned Parenthood's clear reservation of its claim otherwise, this was error. If this Court upholds the lower court's rulings that the taxpayer has standing to seek repayment, that the restrictions do not violate Article III, that the Director's interpretation of the restrictions was illegal, and that the restrictions should be applied as they were by the lower court, then this Court should remand this case to the lower court for proceedings on Planned Parenthood's claim that, as applied, the restrictions violate the U.S. Constitution.

V

THE LOWER COURT ERRED IN ORDERING PLANNED PARENTHOOD TO REPAY THE FUNDS IT RECEIVED

The taxpayer argues that the lower court's order that Planned Parenthood repay the program funds it received should be reviewed under the standards set forth in Murphy v.Carron, 536 S.W.2d 30 (Mo banc 1976), Resp.Br. 73. Even under this standard, the order should be reversed because the lower court erroneously declared the law, and erroneously applied the law. Id. at 32. See, *e.g.*, Pollock v. Brown, 569 S.W.2d 724 (Mo. banc 1978) (reversing lower court for erroneously declaring and erroneously applying the law); Maudlin v. Lang, 867 S.W.2d 514 (Mo. banc 1993) (reversing lower court for erroneously declaring the law).

As set forth in Planned Parenthood's Opening Brief, the law in Missouri is that repayment should not be required when factors such as these are present:

- There has been complete performance of the contract on both sides.
- There is no evidence of bad faith, fraud, or deceit.
- The general purpose of the contract was within the powers of the state.

- There has been no loss to the state because the services would have to have been provided in any event.[12]
- The contract was, as a matter of fact, fair and reasonable
- The state retains and enjoys the benefits of the contract.
- The consideration received by the state cannot be returned.

PP Opening Br., 61-62; Sparks v. Jasper County, 112 S.W. 265, 269-70 (Mo.banc 1908); Bride v. City of Slater, 263 S.W.2d 22, 27 (Mo. 1953); Witmer v. Nichols, 8 S.W.2d 63, 65-66 (Mo. 1928); Grand River Twp. v. Cooke Sales and Serv., 267 S.W.2d 322, 325-326 (Mo. 1954); City-Wide Asphalt v. City of Independence, 546 S.W.2d 493, 497 (Mo. Ct. App. 1976).

The lower court ignored all of these principles and seemingly rests its holding on the fact that Planned Parenthood had been sued by "the State," and therefore had knowledge of the "questionable legality" of the Director's interpretation. L.F. 558. That litigation, however, was dismissed. Moreover, the Attorney General was on record as having advised the Director, from the beginning, that her interpretation was legal. L.F. 163. And, the Attorney General had defended the Director's interpretation in the State v. Planned Parenthood. Under these circumstances, it is unreasonable, to hold Planned Parenthood responsible for being on notice that the Director's interpretation might be illegal.

[12] Indeed, not only was there no loss to the state, the funds only partially covered the actual costs of delivering the family planning services. Tr. 149-150.

More important, whatever the "notice" charged to Planned Parenthood as a result of the State v. Planned Parenthood litigation – and Planned Parenthood contends that, taken with all of the other facts, there was little or none – that notice cannot legally outweigh all of the factors articulated by earlier cases, and present here, that require a finding that there should not be repayment.

Thus, in ignoring all of those other cases, and in ruling otherwise, the lower court erroneously declared the law and erroneously applied it. Its order directing Planned Parenthood to repay the funds, with 9% interest, should be vacated.

CONCLUSION

For all of the reasons set forth in this Reply and in Planned Parenthood's Opening Brief, the judgment of the lower court should be reversed, and the petition dismissed, with costs.

Respectfully Submitted,

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APPELLANTS' RULE 84.06 CERTIFICATE

Come now appellants, by and through counsel and certify to the Court that the foregoing reply 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 7,703 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 3rd day of February, 2006, two copies 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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