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

DEFENDANTS-APPELLANTS' BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from an Amended Judgment of the Cole County Circuit Court, entered on August 3, 2005. One of the issues resolved in that judgment, and raised on this appeal, is the validity, under Article III, Section 23 of the Missouri Constitution, of restrictions on eligibility for family planning program funds, enacted in appropriations for Fiscal Years ("F.Y.") 2000, H.B. No 10, § 10.705, 90th Leg., 1st Sess. (Mo. 1999), and 2003, H.B. No. 1110, § 10.710, 91st Leg., 2d sess. (Mo. 2002). The lower court also ruled that the restrictions did not violate rights secured under the United States Constitution, and that ruling is also challenged on this appeal. Appellants' Notice of Appeal directly to this Court was filed on August 15, 2005. This Court's jurisdiction to hear this appeal arises under Article V, Section 3, of the Missouri Constitution.

STATEMENT OF FACTS

A. **Introduction**[1]

In its Fiscal Years 2000 – 2003 (July 1, 1999 – June 30, 2003) appropriations, the Missouri Legislature appropriated funds to subsidize the provision of family planning

[1] The facts are essentially uncontested. They are mostly set forth in a stipulation of facts and exhibits that were filed with the lower court. Legal File ("L.F.") at 71-317. There was also a one day hearing, at which two witnesses testified. The transcript of that hearing is referenced in this Brief as "Tr."

services (the "program"). The appropriations contained elaborate and detailed restrictions relating to the eligibility of a family planning provider to participate in the program if the family planning provider was affiliated with a provider of abortion services.[2] When the restrictions were originally enacted in 1999, the Director of the Department of Health ("Director"), who is also a defendant-appellant here, construed some of the undefined terms in the restrictions.[3] Defendants-Appellants ("Planned Parenthood"), who are longstanding program participants and are affiliated with abortion providers, then took all of the steps necessary to comply with the restrictions, and continued to participate in the program.

In June 2002, the plaintiff-appellant, a taxpayer ("taxpayer") filed this lawsuit, alleging, *inter alia*, that the Director had illegally construed the terms of the appropriations, and that Planned Parenthood was not eligible to participate in the program. In August, 2005, more than two years after the program had ceased to exist,

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[2] The issue of these appropriations and the disputed regulations has been before this Court twice before. See, State v. Planned Parenthood of Kansas and Mid-Missouri, et al., 37 S.W.3d 222 (Mo. banc 2001) and State v. Planned Parenthood of Kansas and Mid-Missouri, et al., 66 S.W.3d 16 (Mo. banc 2002).

[3] At the time the appropriation restrictions were interpreted, the Director was Maureen Dempsey. Where reference is made in this Brief to her actions at that time, the brief uses the feminine pronouns "she" or "her," even though the Director named in this appeal is her successor, Ronald Cates.

the lower court granted a judgment to the taxpayer. The judgment ordered Planned Parenthood to repay to the Director the full amount of money it had received (approximately $650,000) for providing program services in Fiscal Years 2000 and 2003[4]--even though there was no dispute that Planned Parenthood had complied with the restrictions, as interpreted by the Director, and that Planned Parenthood had fulfilled all of its obligations to provide program family planning services.

B. <u>The Appropriations</u>

The appropriations state that the funds are for the purpose of funding family planning services, pregnancy testing and follow-up services. The appropriations forbid the use of the funds to subsidize, directly or indirectly, administrative expenses or abortion services. Program participants may be affiliated with separately incorporated abortion providers ("abortion affiliates"). However, as relevant to this appeal:

a. The program participants and the abortion affiliates may not "share" medical or non-medical facilities, expenses, employee wages or salaries, or equipment or supplies; and,

b. The program participants and the abortion affiliates may not have "similar name[s]."

[4] No repayment was sought for the intervening Fiscal Years (2001 and 2002) because, due to injunctions issued by the lower court in the earlier cases – injunctions subsequently vacated by this Court,—Planned Parenthood did not participate in the program in those Fiscal Years.

See, H.B. 10 § 10.705 (1999), L.F. at 87; H.B. 1110 § 10.710 (2002); L.F. at 93. While the appropriations defined many of the terms they use - such as "family planning services," "follow-up services," and "abortion services," id. L.F. at 88-90; 94-96—they do not define "similar names," "share," or "administrative expenses."

The appropriations also require that program participants maintain financial records to demonstrate "strict compliance" with its requirements; and, if the program participant is affiliated with an abortion provider, conduct an independent audit annually to ensure compliance. Id. L.F. at 89; 96.

The appropriations state that the purpose of these restrictions is to ensure that the State does not lend its imprimatur to abortion services, and to ensure that an organization that provides abortion services does not receive a direct or indirect economic or marketing benefit from the program funds. Id.

C. The Director's Construction of the Appropriations' Undefined Terms and Implementation of the Restrictions.

As even one of the sponsors of the appropriations acknowledged, some of the appropriations' undefined terms are ambiguous and amenable of differing constructions: "'Share' was not defined . . . there's several definitions of what 'share' could mean . . . ." L.F. at 236. Accordingly, to resolve the ambiguities, the Director defined "similar name," "share," and "administrative expenses."

In defining those terms, the Director's task was not simply to implement the legislative intent. When restrictions on eligibility for public funds are tied to the exercise of constitutional rights, there are constitutional concerns that also must be considered.

There are limits to how burdensome such restrictions can be before they become unconstitutional conditions and the restrictions must set objective standards so as to avoid arbitrary application. Indeed, just months before the F.Y. 2000 appropriation was enacted, the Eighth Circuit Court of Appeals issued an opinion discussing those very issues and articulating guidelines for imposing such conditions. Planned Parenthood of Mid-Missouri and Eastern Kansas, Inc. v. Dempsey, 167 F.3d 458 (8th Cir. 1999).

The Director defined "share" as anything provided or paid for by the [program participant] on behalf of the [abortion affiliate] without payment or financial reimbursement from the [abortion affiliate]. L.F. at 145; 175; 553 Thus, under the Director's interpretation, things are not shared if the abortion affiliate financially reimburses the program participant for them.

The Director defined "administrative expenses" broadly, to include: "any administrative budget category that cannot be traced to the direct delivery of services provided pursuant to [the program] contract, including but not limited to indirect salaries, supplies, rents, utilities, and other overhead costs." L.F. at 138. Thus, under the Director's construction, no State funds could be used for any expense that was not involved in the direct delivery of the program's clinical services.

Together, these two interpretations meant that: (a) State funds could not have been used to pay for any of the expenses which are alleged to have been "shared," because the interpretation of "administrative expenses" limited the use of those funds to the direct delivery of actual family planning clinical services; and, (b) even for the other expenses, *i.e.*, the ones allegedly "shared," the abortion affiliates were required to

reimburse the program participants for any for any services, space, or other expenses provided by the program participants. Moreover, the Director also required program participants to maintain financial records to demonstrate compliance with the restrictions and to conduct and submit annual audits conducted by independent auditors. L.F. at 144; 175.

The Director defined "similar names" by reference to the "applicable corporation statutes of Missouri." L.F. at 145; 175; 551 Thus, under the Director's interpretation, if two corporate names are sufficiently distinguishable from each other for purposes of incorporation in Missouri, then they are not "similar" for purposes of the appropriations' rules.

At the time the Director made these interpretations, she conferred with the Attorney General about them. As the Director subsequently advised a Senate Committee, the Attorney General "concur[red] that the [Department] ha[d] complied with the appropriation . . . ." L.F. at 163.

D.. Lower Court Proceedings

The taxpayer filed this lawsuit in June 2002, nearly three full years after the Director officially interpreted the disputed terms. The original petition sought a declaratory judgment that the Director had illegally construed the terms, that Planned Parenthood was not eligible to have participated in the program, and that the restrictions did not violate either the Missouri or the United States Constitution. The petition also sought injunctive relief against Planned Parenthood continuing to participate in the program**.** L.F. at 1-15.

Planned Parenthood moved for judgment on the pleadings, asserting, *inter alia*, that the taxpayer lacked standing to enforce statutory restrictions for the Fiscal Year (F.Y. 2000) that had long since ended, because taxpayer standing extends only to enjoining illegal conduct, and there was nothing left to enjoin from that year. Planned Parenthood also asserted that the restrictions in the appropriations violated the Missouri Constitution; that the Director's interpretation of the undefined terms in the restrictions was legal; and that there was no justiciable controversy on the taxpayer's claim that the restrictions did not violate the United States Constitution because, as the Director had applied the restrictions, Planned Parenthood was not claiming unconstitutionality under the U.S. Constitution. Finally, Planned Parenthood moved for a protective order against the broad-ranging discovery of its books and records sought by the taxpayer. L.F. at 16-18. On May 23, 2003, the lower court denied the motions. L.F. at 20-22.

On April 24, 2003, while the motions were under consideration, the taxpayer filed an amended petition. In this petition, he sought a judgment against Planned Parenthood for all program funds paid to Planned Parenthood under the allegedly illegal interpretation of the appropriations. L.F. at 23-40.

The Legislature chose not to fund the program after Fiscal Year 2003. Effective July 1, 2003, the program ceased to exist Accordingly, on July 21, 2003—as there was no longer any basis for injunctive relief, and there is no Missouri precedent for taxpayer standing to force repayment of funds already paid by the State for services rendered to the State—Planned Parenthood moved to dismiss the amended petition for lack of

standing. L.F. at 55-56. On July 28, 2004, the lower court denied that motion. L.F. at 57-58.

On December 13, 2004, a hearing was held. On May 26, 2005, the trial court granted judgment to the taxpayer. L.F. at 547-563. On June 20, 2005, the taxpayer moved to amend the judgment to specify the amount of attorneys fees to be awarded to him, L.F. at 564-637; and on August 3, 2005, the court amended its judgment accordingly. L.F. at 638-640.

The judgment, as amended:

1. Finds that the Director's interpretation of "similar" was illegal. Purportedly applying a dictionary definition of "similar," the judgment holds that Planned Parenthood and the abortion affiliates have similar names; that, as a result of the similar names and Planned Parenthood's receipt of program funds, the abortion affiliates received economic and marketing benefits; and that Planned Parenthood was, therefore, ineligible to participate in the program. L.F. at 549-553.

2. Finds that the Director's interpretation of "share" was illegal. Again purportedly applying a dictionary definition of "share," the judgment holds that Planned Parenthood and the abortion affiliates share facilities, expenses, wages and salaries, and equipment and supplies; and therefore, Planned Parenthood was ineligible to participate in the program. L.F. at 553-556

3. Finds that Planned Parenthood and the abortion affiliates are so interrelated that the receipt of the program funds by Planned Parenthood "subsidized" the abortion

affiliates and lent the State's imprimatur to abortion services and therefore, Planned Parenthood was ineligible to participate in the program. L.F. at 556-557.

4. Finds that the appropriations' restrictions do not violate either the Missouri Constitution or the U.S. Constitution. L.F. at 556, ¶ 35.

5. Enjoins Planned Parenthood from receiving any State funds for family planning services that are subject to restrictions similar to those in the appropriations. L.F. at 561, ¶¶ 6, 7

6. Orders Planned Parenthood to repay $668,850 plus 9% interest from the dates the funds were received. L.F. at 562, ¶¶ 8, 9.

7. Orders that the taxpayer receive from that sum $105,752 as his attorneys fees. L.F. at 638-39.[5]

E. <u>The Relationship Between Planned Parenthood and The Abortion Affiliates</u>

Both Planned Parenthood of Kansas and Mid-Missouri ("PPKM") and Planned Parenthood of the St. Louis Region ("PPSLR") are affiliated with separately incorporated abortion providers. These abortion affiliates are named, respectively: Comprehensive

[5] The judgment also concludes that Planned Parenthood "directly refers patients to abortion providers," and "distributes marketing materials about abortion services to patients." L.F. at 559, ¶¶ 39(A), (B), 40(A), (B). However, these issues were not raised in either the original or amended petitions. L.F. at 1-15; 23-40. There was no litigation concerning these issues; there is no evidence in the record on these issues; and there are no findings of fact on these issues.

Health of Planned Parenthood of Kansas and Mid-Missouri ("CH") and Reproductive Health Services of Planned Parenthood of the St. Louis Region ("RHS"). RHS is incorporated in Missouri. CH is incorporated in Kansas. The words "Planned Parenthood" are a registered trademark. L.F. at 71-72; 75; 549 ¶¶ 5, 6.

CH is located in a building owned by PPKM, and RHS is located in a building owned by PPSLR. L.F. at 30 ¶¶ 30, 33; 78 ¶ 54, 55. Both abortion affiliates occupy separate floors allocated solely to their services. L.F. at 30 ¶¶ 32-35; 78 ¶¶ 55-57. Both abortion affiliates occupy their spaces under leases that require payment of market rents and of all other occupancy-related expenses, such as water, electricity, etc., apportioned relative to the space occupied. L.F. at 76 ¶¶ 41-43; 180-196; 78 ¶ 58; 197-220. .

In PPKM's building, which is in Kansas, there are two separate street level entrances, one for each floor of the two-story building. One entrance provides access to the CH clinic, which is the sole occupant of the ground floor. The other entrance provides access to the PPKM administrative offices and community education and resource center, which are the sole occupants of the second floor. L.F. at 78 ¶¶ 55-58. PPKM provides no clinical services for the Missouri program or otherwise at this site. Id.

In PPSLR's building in St. Louis, there is one entrance to a three story building. The building houses PPSLR's administrative offices on one floor, PPSLR's health clinic that provides the program services on another floor, and the RHS clinic on the remaining floor. L.F. at 75 ¶¶ 31-35. Anyone coming to the PPSLR building uses the same parking lot, enters the building through the same entrance, passes through the same security

screening system, and uses the same lobby and the same elevator. As well, there is one lunchroom in the building, one conference room, one staff restroom, and one staff locker-room, all utilized by staff of both PPSLR and RHS. L.F. at 76 ¶¶ 36-40. Staff members of PPSLR and RHS are also able to communicate via internal electronic mail. L.F. at 78 ¶ 53. However, to be clear: the clinical facility providing program services and the abortion affiliate's facility are physically completely separate. Tr. at 55.

Both PPKM and PPSLR provide management services for their respective abortion affiliates. In both instances, pursuant to written agreements, the abortion affiliates purchase these services, either based on time records that track time in quarter-hour increments or based on cost-allocation formulae. L.F. at 76-77 ¶¶ 41, 43, 50; 177-179; 79 ¶ 60; 216-225. In addition to these payments, both abortion affiliates pay separate fees to assure that neither PPKM nor PPSLR inadvertently subsidizes the provision of these management services. L.F. at 178; 217-218. At least in the case of PPSLR, at the end of each Fiscal Year., any excess revenue after expenses earned by RHS is paid to PPSLR. L.F. at 556 ¶ 31, citing Tr. at 71-72.

While management services are provided by Planned Parenthood's employees to their respective abortion affiliates and paid for by the abortion affiliates, this is not the case with clinical employees. All *clinical* employees work either entirely and exclusively

in Planned Parenthood's health clinics, or entirely and exclusively in the clinics of the abortion affiliates.[6] L.F. at 178 ¶¶ 74-75; Tr. at 81-82.

PPSLR also owns and leases equipment to RHS. RHS pays market prices for this equipment. L.F. at 78 ¶ 51-52; 191-194. In addition, there is one local phone number for the PPSLR building.[7] RHS reimburses PPSLR for access to the phone system. L.F. at 77 ¶ 42, 178, 183.

These facts illustrate how Planned Parenthood restructured the way it was organized to comply with the Director's interpretation of the appropriations' restrictions: creating separate corporations, entering into cost-allocation agreements to guarantee that there was no subsidization, either with program funds or otherwise, of the abortion affiliates, and, as required by the contracts, maintaining books and records and conducting annual independent audits to verify financial compliance.

There is no claim, and certainly no evidence, that these arrangements did not comply with the Director's interpretation. Nor is there a claim that these arrangements were some sort of sham. Rather, the taxpayer's claim, to which we turn in the argument

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[6] The clinical staff of CH are employees of CH. The clinical staff of RHS are employees of PPSLR. L.F. at 77 ¶ 48; Tr. at 74-75, 81-82. The Director's construction of the appropriations does not require that the medical staff of RHS be on the payroll of RHS, so long as RHS fully reimburses PPSLR; and RHS reimburses PPSLR 100% of the expenses associated with these employees. Tr. at 82.

[7] PPKM and CH have separate phone numbers.

sections of this brief, is that the Director's interpretation was illegal in the first place and that, therefore - even after the all services have been provided by Planned Parenthood and the program has ceased to exist – a taxpayer, by challenging the Director's interpretation, can force Planned Parenthood to repay all of the program funds it received, plus interest, even though it used all those funds to provide services to indigent women under the program and complied with the conditions for use of those funds in effect while Planned Parenthood was providing program services.

POINTS RELIED ON

POINT I

The Trial Court Erred In Finding That The Plaintiff Had Standing To Seek Repayment, Because There Is No Authority In Missouri Law For A Taxpayer To Have Standing To Seek Repayment Of Funds Already Paid By The State For Services Already Rendered, In That Missouri Law Only Allows Taxpayer Standing To Seek To Enjoin Illegal Conduct, And That Law Should Not Be Extended To Include Taxpayer Standing Where The Funds Have Already Been Fully Paid And The Services Fully Rendered, And There Is No Allegation Of Fraud.

Eastern Missouri Laborers District Council v. St. Louis County, 781 S.W.2d 43 (Mo. banc 1989)

Civic League of St. Louis v. City of St. Louis, 223 S.W. 891 (Mo. 1920)

POINT II

The Trial Court Erred In Entering Its Judgment Declaring That The Restrictions 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, In That The Restrictions Do Not Set Aside Money For Specified Purposes, Create Complex Legal Requirements That Create Substantive Legislation And Amend Substantive Legislation, And Result In The Title Of The Appropriations Being Misleading About The Contents Of The Bill.

State ex rel. Hueller v. Thompson, 289 S.W. 338 (Mo. banc 1926).

State ex rel. Davis v. Smith, 75 S.W.2d 828 (Mo. 1934).

State ex rel. Gaines v. Canada, 113 S.W.2d 783 (Mo. banc 1937).

Webster v. Reproductive Health Servs., 492 U.S. 490 (1989).

Mo. Const. art. III, § 23

Mo. Rev. Stat. § 188.205

POINT III

The Trial Court Erred In Concluding That The Director's Construction Of Undefined Terms In The Restrictions 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, In That The Director's Construction 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*, And In That The Trial Court Mis-Applied Provisions Of The Restrictions

Foremost-McKesson, Inc. v. Davis, 488 S.W.2d 193 (Mo. banc 1972).

Planned Parenthood of Mid-Missouri and Eastern Kansas, Inc. v. Dempsey, 167 F.3d 458 (8th Cir. 1999).

Planned Parenthood of Houston and Southeast Texas v. Sanchez, 403 F.3d 324 (5th Cir. 2005).

Velazquez v. Legal Services Corp., 349 F.Supp.2d 566 (E.D.N.Y. 2004).

Mo. Rev. Stat. § 349.035

POINT IV

The Trial Court Erred In Adjudicating The Taxpayer's Claim That The Restrictions Do Not Violate The United States Constitution, Because That Was A Non-Justiciable Claim, In That The Defendants Made No Claim That The Restrictions As Implemented Violated Their Constitutional Rights, But Had Conditionally Reserved Such A Claim Pending The Outcome Of The Challenge To The Implementation Of The Restrictions.

Commonwealth Ins. Agency v. Arnold, 389 S.W.2d 803 (Mo.1965).

Tintera v. Planned Indus. Expansion Auth., 459 S.W.2d 356 (Mo.1970).

State ex. rel. City of Crestwood v. Lohman, 895 S.W.2d 22 (Mo. Ct. App. 1994).

Velazquez v. Legal Services Corp., 349 F.Supp.2d 566 (E.D.N.Y. 2004).

POINT V

The Trial Court Erred In Ordering Planned Parenthood To Repay Funds Already Received, Because The Director Had Legal Authority To Enter Into The Contracts, Planned Parenthood Was Entitled To Rely On Her Construction Of The Statutory Terms, And It Would Be Inequitable To Require Repayment, 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, And Planned Parenthood Complied With All Of The Terms Of The Contract And Provided All Of The Services For Which It Was Reimbursed

Aetna Ins. Co., et al. v. O'Malley, 124 S.W.2d 1164 (Mo. banc 1938).

ARGUMENT

STANDARD OF REVIEW

This case comes before this Court on a record of essentially undisputed facts, and involves exclusively questions of law relating to: the standing of the taxpayer, the constitutionality of the restrictions, the legality of the executive's interpretation of the restrictions, the justiciability of the taxpayer's request for a declaration that the restrictions do not violate the federal constitution, and whether Planned Parenthood can be legally and equitably required to repay the funds it received for the services it provided. Therefore, the only issues under review are legal issues, and the standard of review is *de novo.* City of Cape Girardeau v. Fred A. Groves Motor Co., 142 S.W.2d 1040, 1045 (Mo. 1940) ("the constitutionality of an ordinance is generally a question of law"); Smith v. Shaw, 159 S.W.3d 830, 833 (Mo. banc 2005) ("interpretation of a statute is a question of law"); Commerce Bank, N.A. v. Blasdel, 141 S.W.3d 434, 442 (Mo. Ct. App. 2004) (quoting H & B Masonry Co., Inc. v. Davis, 32 S.W.3d 120, 124 (Mo. Ct. App. E.D. 2000) ("'Questions of law are matters reserved for *de novo* review by the appellate court, and we therefore give no deference to the trial court's judgment in such matters.'").

POINT I

THE TRIAL COURT ERRED IN FINDING THAT THE PLAINTIFF HAD STANDING TO SEEK REPAYMENT, BECAUSE THERE IS NO AUTHORITY IN MISSOURI LAW FOR A TAXPAYER TO HAVE STANDING TO SEEK REPAYMENT OF FUNDS ALREADY PAID BY THE STATE FOR SERVICES ALREADY RENDERED, IN THAT MISSOURI LAW ONLY ALLOWS TAXPAYER STANDING TO SEEK TO ENJOIN ILLEGAL CONDUCT, AND THAT LAW SHOULD NOT BE EXTENDED TO INCLUDE TAXPAYER STANDING WHERE THE FUNDS HAVE ALREADY BEEN FULLY PAID AND THE SERVICES FULLY RENDERED, AND THERE IS NO ALLEGATION OF FRAUD.

Missouri law grants a taxpayer standing to sue to enjoin the illegal expenditure of State funds. Eastern Missouri Laborers District Council v. St. Louis County, 781 S.W.2d 43, 46 (Mo. banc 1989) ("right of a taxpayer . . . to bring an action to enjoin the illegal expenditure of public funds cannot be questioned."). See also, id. quoting Civic League of St. Louis v. City of St. Louis, 223 S.W. 891, 893 (Mo. 1920) ("'[A] single taxpayer may maintain an action . . . to restrain the illegal acts complained of . . . .'").

However, there is no precedent in Missouri for taxpayer standing to seek a judgment requiring a private party to pay back to the State funds received for services rendered. And, in many states where taxpayers have standing to challenge the legality of a public official's expenditure of State funds, courts have concluded that taxpayer

standing does not extend to seeking recovery from private parties of funds already paid to them for services already rendered. See, e.g., Kordus v. City of Garland, 561 S.W.2d 260, 261-62 (Tex. App. 1978); Anderson v. Kennedy, 264 N.W.2d 714, 717 (S.D. 1978); Morse v. City of Boston, 157 N.E. 523, 527 (Mass. 1927). But see, Young v. Gard, 277 P. 1005, 1008 (Or. 1929).

Nonetheless, the lower court found, without explanation, that the taxpayer had standing to pursue repayment. L.F. at 557 ¶ 34. This Court should vacate that holding, and decline, at least given the facts of this case, to extend taxpayer standing to situations such as the one presented here.

Putting aside whether there could ever be circumstances appropriate for granting taxpayer standing to seek recovery of State funds paid to a private contractor (e.g., in instances of fraud), it is clear that those circumstances do not exist here. Restitution is sought of State funds that were paid as reimbursement for services indisputably rendered. They were rendered in compliance with all contract terms. There are no allegations of fraud or deceit.

Moreover, the taxpayer did not file suit until approximately three years after the statutory provisions at issue had first been interpreted and implemented by the Director and Planned Parenthood began receiving program funds for services rendered. Even then, the taxpayer only sought injunctive relief. The amended petition seeking repayment was not filed until nearly four years after the Director's disputed interpretation. The program literally ceased to exist only a few months after the amended petition was filed.

If taxpayers can sue under these circumstances – where there is nothing more than a disagreement over the interpretation of undefined terms in a statute, and where the claim for repayment is made after almost all services have been rendered - then private contractors will face huge risks when they bid to do business with the State. Under the present law of taxpayer standing in Missouri, that risk is limited to the possibility that the contract will be enjoined. If taxpayer standing is extended to obtaining repayment, then the increased and unmanageable risks will surely deter private contractors from continuing to do business with the State.[8]

This Court should not extend taxpayer standing into this realm, at least not on the facts of this case. It should hold that this taxpayer lacked standing to seek repayment in this case, and order the lower court judgment vacated, and the amended petition dismissed.

[8] There is the added problem of discovery. Here, even though the appropriations required independent audits to confirm compliance with the restrictions, and even though these audits had been conducted, the taxpayer was allowed to conduct massive and invasive discovery of Planned Parenthood's business records. L.F. at 18.

POINT II

THE TRIAL COURT ERRED IN ENTERING ITS JUDGMENT DECLARING THAT THE RESTRICTIONS 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, IN THAT THE RESTRICTIONS DO NOT SET ASIDE MONEY FOR SPECIFIED PURPOSES, CREATE COMPLEX LEGAL REQUIREMENTS THAT CREATE SUBSTANTIVE LEGISLATION AND AMEND SUBSTANTIVE LEGISLATION, AND RESULT IN THE TITLE OF THE APPROPRIATIONS BEING MISLEADING ABOUT THE CONTENTS OF THE BILL.

The restrictions at issue on this appeal are part of a complex web of restrictions that not only regulate the conduct of program participants in terms of what they do with program funds, but also what they are forbidden from doing with non-program funds, and their relationships with separate entities that receive no program funds, if those entities provide abortions. All of this is accomplished in an appropriations bill. This violates Article III, Section 23, of the Missouri Constitution, which requires that appropriations bills only set aside funds for specific purposes.

Nonetheless, the lower court held that the restrictions did not violate the Missouri Constitution, saying simply:

> No defendant has met the high burden of proof required to prove otherwise. The Court finds that the Statutes are proper appropriation bills, which set aside State funds for specified purposes.

L.F. at 558, ¶ 37. This was error, and this Court should vacate that holding, and declare the restrictions in violation of Article III of the Missouri Constitution.

Article III provides:

> No bill shall contain more than one subject which shall be clearly expressed in its title, except . . . general appropriation bills, which may embrace the various subject and accounts for which moneys are appropriated.

Mo. Const. Art. III, § 23.

This Court long ago explained that the purpose of this provision is to prevent the Legislature from proposing "all sorts of ill conceived, questionable, if not vicious, legislation . . . with the threat . . . that, if not assented to and passed, the appropriations would be defeated." State ex rel. Hueller v. Thompson, 289 S.W. 338, 341 (Mo. banc 1926). Thus, the rule in Missouri is that:

> An appropriation bill is just what the terminology imports, and no more. Its sole purpose is to set aside moneys for specified purposes, and the lawmaker is not directed to expect or look for anything else in an appropriation bill except appropriations . . . .

Id. at 340-41. Substantive legislation is not permitted in appropriations. See, e.g., State ex rel. Davis v. Smith, 75 S.W.2d 828, 830 (Mo. 1934) ("[t]here is no doubt but what the amendment of a general statute . . . and the mere appropriation of money are two entirely

different and separate subjects"); State ex rel. Gaines v. Canada, 113 S.W.2d 783, 790 (Mo. banc 1937), rev'd on other grounds, 305 U.S. 337 (1938) ("[l]egislation of a general character cannot be included in an appropriation bill" pursuant to Article III, Section 23); Hueller, 289 S.W. at 340 ("to inject general legislation of any sort into an appropriation act is repugnant to [Article III, Section 23 of] the Constitution"). This rule is to be "strictly followed." Id. at 341.[9]

[9] This distinction, between appropriating funds for a specified purpose, and legislating substantive eligibility and other requirements, is also the law in most other states. See, e.g., Washington State Legislature v. State, 985 P.2d 353, 362 (Wash. 1999) (en banc) ("[an appropriations bill] cannot add restrictions to public assistance eligibility . . . proper legislative procedure is to enact separate, independent, properly titled legislation"); id. at 363 ("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."); Planned Parenthood Affiliates v. Swoap, 219 Cal. Rptr. 664 (Cal. Ct. App., 1985) (Budget Act, which prohibited the grant of family planning funds to any group, clinic, or organization which provides, performs, promotes, or advocates abortion, unconstitutional for violating the constitutional single subject rule); Dep't of Educ. v. Lewis, 416 So. 2d 455, 460 (Fla. 1982) (appropriation restriction providing that funds may not be given to schools that assist organizations advocating pre-marital sex impermissibly constitutes "substantive policy"); State ex rel. Coll v. Carruthers, 759 P.2d 1380, 1384 (N.M. 1988) ("By including the condition that no

The appropriations at issue here make a mockery of this rule. They go far beyond stating the amount and the purpose for which the funds are being appropriated. They legislate what services may or may not be provided by an entity that receives the appropriated funds, regardless of the source of funds used to pay for those services. They legislate an elaborate set of rules that regulate in minute detail the relationship between a recipient of the appropriated funds and a separate provider of abortion services, including: the names of the funds-recipient and the separate abortion provider, the location of the fund-recipient's facilities (not just its clinical facilities where patients receiving program services are seen, but all of its facilities) relative to the separate abortion provider, and the ability of the fund-recipient to "share" personnel, supplies, or equipment with the separate abortion provider.

Thus, the appropriations establish a substantial array of legal requirements beyond stipulating the amount and purpose of the appropriated funds. They create an entire body

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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."); Dodge v. Dep't of Soc. Servs. of State of Colo., 657 P.2d 969, 975 (Colo. Ct. App. 1982) ("sole purpose of [a general appropriations bill] is to meet charges already created against the public funds by affirmative acts of the General Assembly;" programs are to be separately authorized and specifically detailed in other bills).

of rules that control a fund-recipient's operations in multiple realms beyond the services provided to program beneficiaries, as well as a fund-recipient's relationship to a separate entity that provides abortions.

The issue here is not whether these restrictions are "wise" or "fair." The issue is whether they go beyond "set[ting] aside moneys for specified purposes," Hueller, 289 S.W. at 340, and amount to substantive legislation. Especially when the rule against substantive legislation in an appropriation is "strictly followed," id. at 341, the answer must be "Yes."

Frequently, in determining whether an appropriation impermissibly legislates substantively, this Court has looked to whether the challenged provision amends existing substantive law. Where an appropriation does amend existing substantive law, the offending portion is unconstitutional "because a statute that makes an appropriation and also amends a general statute would contain more than one subject . . . " Rolla 31 Sch. Dist. v. State, 837 S.W.2d 1, 4 (Mo. banc 1992). See also Opponents of Prison Site, Inc. v. Carnahan, 994 S.W.2d 573, 580 (Mo. Ct. App. 1999) (quoting Rolla, 837 at 4). ("appropriation . . . cannot amend substantive legislation because such an amendment would violate the constitutional requirement that '[n]o bill contain more than one subject'").

This inquiry should be unnecessary here because of the substantial new law created by the appropriations that goes far beyond simply stating the amount and purpose of the appropriated funds. Nonetheless, this inquiry reveals that the appropriations'

labyrinth of restrictions amend Mo. Rev. Stat. § 188.205 ("Use of public funds prohibited, when"). That statute states:

> It shall be unlawful for any public funds to be expended for the purpose of performing or assisting an abortion, not necessary to save the life of the mother, or for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life.

The appropriations amend Section 188.205 in at least two ways. First, Section 188.205 enunciates a State policy, "'directed . . . at those persons responsible for expending public funds,'" Webster v. Reproductive Health Servs., 492 U.S. 490, 511 (1989) (quoting from Brief of State of Missouri). Section 188.025 enunciates a general policy that focuses only on limiting the uses to which public funds are put. That policy should apply here. Yet, the appropriations dramatically alter that general policy for the program by elaborately regulating the activities of program participants, even activities not funded by the appropriations, as well as the details of the relationship between a program participant and a separate provider of abortion services.

Second, Section 188.205 permits the use of public funds to counsel or encourage a woman to have an abortion where necessary to protect her life and presumably also permits the use of public funds to refer a woman for an abortion, at least when her life is

endangered. Yet the appropriations forbid that counseling and those referrals for fund recipients, not just with program funds, but with any funds.[10]

Another indicator that the restrictions violate Article III is the resulting misleading nature of the title of the bill. This Court has held that one of the purposes of Article III, Section 23 is to ensure that titles of bills give adequate notice to interested parties, and to prevent fraud or surprise of the legislature and public. Murphy v. Pemiscot County, 639 S.W.2d 384 (Mo. banc1982); State v. Weindorf, 361 S.W.2d 806 (Mo. 1962); State v. Ludnis, 322 S.W.2d 841 (Mo. banc 1959); Graff v. Priest, 201 S.W.2d 945 (Mo.1977). The titles of the appropriations give no indication of the program restrictions hidden within the text. See, e.g., H.B. 10 § 10.705 (1999) ("To appropriate money for the expenses, grants, refunds, and distributions of the Department of Mental Health, the Board of Public Buildings, the Department of Health, and the several divisions and programs thereof and the Missouri Health Facilities Review Committee to be expended only as provided in Article IV, Section 28 of the Constitution of Missouri, for the period beginning July 1, 1999 and ending June 30, 2000."). This is further evidence that the restrictions violate Article III.

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[10] The appropriations forbid funds being granted to an organization that provides "abortion services," and forbids funds from being used for "abortion services." Then, the appropriation defines "abortion services" to include: "directly referring for abortions, or encouraging or counseling patients to have abortions," with no exception for life endangering situations. HB 10 § 10.705, L.F. at 88-90; HB 1110 §10.710, L.F. at 94-96.

The provisions of the appropriations that go beyond "set[ting] aside moneys for specified purposes," Hueller, 289 S.W. at 340, must therefore be stricken. See Hueller, 289 S.W. at 341; State ex rel. Gaines, 113 S.W.2d at 790; Board of Educ. of City of St. Louis v. State, 47 S.W.3d 366, 371 (Mo. banc 2001). Such a holding does not prevent the Legislature from enacting the exact same restrictions in the future, should it choose to do so. It simply upholds the constitutional requirement that the Legislature do so in legislation devoted to the subject of eligibility for participation in State programs, and that the Legislature not impose these rules by holding entire appropriations hostage to their enactment. Hueller, 289 S.W. at 340.

POINT III

THE TRIAL COURT ERRED IN CONCLUDING THAT THE DIRECTOR'S CONSTRUCTION OF UNDEFINED TERMS IN THE RESTRICTIONS 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, IN THAT THE DIRECTOR'S CONSTRUCTION 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*, AND IN THAT THE TRIAL COURT MIS-APPLIED PROVISIONS OF THE RESTRICTIONS

The trial court concluded the Director's interpretation of the terms "share" and "similar" to be illegal. The trial court substituted, instead, an interpretation that it called the "plain and ordinary meaning" of those terms. Then, applying that interpretation, it concluded that the Planned Parenthood defendants were ineligible for the program

because they "shared" facilities, wages, expenses, and equipment, and because they had names that were "similar" to those of their abortion affiliates.

The trial court separately concluded that the Planned Parenthood defendants were ineligible for the program because, regardless of the Director's interpretation, they and their abortion-affiliates "were so interrelated . . . that [Planned Parenthoods'] receipt of State funds subsidized their affiliated abortion providers" and lent the State's imprimatur to abortion services. L.F. at 556 ¶¶ 31, 32.

The trial court erred on all counts. The Director's interpretation was reasonable, especially in view of the need for objectivity in administration of the restrictions, the need to avoid constitutional problems, and the need to construe consistently statutes *in pari materia.* Moreover, the alternative interpretations declared by the lower court, dictionary definitions, are unworkable and create constitutional problems. Additionally, the separate conclusions about the inter-relationships of the organizations amounting to impermissible "subsidies" and "imprimatur" are wrong because they amount to an implementation of the restrictions that would create all of the same constitutional problems that the Director's interpretation and implementation was designed to avoid. Therefore, the lower court's judgment should be vacated.

A. The Director's Interpretation Was Reasonable and Should Be Upheld

The terms construed by the Director are, standing alone, ambiguous and amenable to multiple understandings and applications. Indeed, one Senate sponsor of the appropriation acknowledged that "there's several definitions of what 'share' could mean." L.F. at 236. Thus, it was the responsibility of the Director to construe these

terms. Abrams v. Ohio Pac. Express, 819 S.W.2d 338, 340 (Mo. banc 1991) (where statute's terms are not defined and are subject to different interpretations, it is necessary for the statute to be interpreted).

"The interpretation and construction of a statute by an agency charged with its administration is entitled to great weight." Foremost-McKesson, Inc. v. Davis, 488 S.W.2d 193, 197 (Mo. banc 1972). See also Linton v. Mo. Veterinary Med. Bd., 988 S.W.2d 513, 517 (Mo. banc 1999). The burden here is on the taxpayer to demonstrate that the Director's interpretation bears "no reasonable relationship" to the legislative intent. Foremost-McKesson, 488 S.W.2d at 197. See also Heavy Constructors Ass'n v. Div. Labor Standards, 993 S.W.2d 569, 571-72 (Mo. App. W.D. 1999); Pen-Yan Inv. v. Boyd Kansas City, Inc., 952 S.W.2d 299, 303 (Mo. App. W.D. 1997) (defer to administrative interpretation unless it is unreasonable and plainly inconsistent with the legislative objective, and there are weighty reasons to invalidate).

The legislative intent was:

> To ensure that the State does not lend its imprimatur to abortion services, and to ensure that an organization that provides abortion services does not receive a direct or indirect economic or marketing benefit from these funds. . .

H.B. 10, § 10.710, 90th Leg. (1999), L.F. at 89; HB 1110 § 10.710, 91st Leg. (2002), L.F. at 95.

The Director's task was not simply to interpret the undefined terms to implement this intent. The Director had a duty to choose an interpretation that would avoid rather than create constitutional problems. State ex inf. McKittrick v. American Colony Ins.

Co., 80 S.W.2d 876, 883 (Mo. banc 1934). The Director also had to give the undefined terms an objective framework that could be applied with consistency and certainty in determining eligibility. Finally, the Director was obligated to construe the appropriations consistently with other statutes *in pari materia,* "even though [those] statutes are found in different chapters and were enacted at different times." Romans v. Dir. of Revenue, 783 S.W.2d 894, 896 (Mo. banc 1990).

When the Director's interpretations are evaluated not just in terms of their relationship to legislative intent, but with appreciation of these other legal duties imposed upon an executive official in these circumstances, it is clear that the taxpayer did not, and cannot, meet his burden of showing that the Director's interpretations had "no reasonable relationship" to the legislative intent. Foremost-McKesson, 488 S.W.2d at 197.

In fulfilling the duty to construe the appropriations so as to avoid, not create, constitutional problems, the Director was presumably guided by the then-recent decision of the Eighth Circuit Court of Appeals in Planned Parenthood of Mid-Missouri & Eastern Kansas, Inc. v. Dempsey, 167 F.3d 458 (8th Cir. 1999).[11] Dempsey involved the same

[11] In discussing the Director's duty to adopt an interpretation that avoids constitutional problems, Planned Parenthood refers to federal cases that discuss the constitutional issues. These cases are discussed to illustrate the parameters within which the Director had to work, not to litigate the constitutional issues at this time. If the Director's construction is voided, then Planned Parenthood has reserved its right to litigate a claim that a new

program as at issue here, but an earlier version of the appropriation that provided that, "organizations or affiliates of organizations that 'provide or promote abortions'" were not eligible for the program. Id. at 461, quoting H.B. 1010, § 10.715, 89th Leg., 2d Sess. (Mo. 1998). In construing that appropriation to avoid constitutional problems, the Eighth Circuit held that, while the State may "validly choose to fund family-planning services but not abortion services," the State could not, as a condition of funding, prohibit a family planning grantee from being affiliated with an "independent" abortion provider. Id, at 461-463. Dempsey explained what it meant by "independent:"

> To remain truly "independent," however, any affiliate that provides abortion services must not be directly or indirectly subsidized by a [family planning] grantee. This will ensure that State funds are not spent on an activity that Missouri has chosen not to subsidize. No subsidy will exist if the affiliate that provides abortion services is separately incorporated, has separate facilities, and maintains adequate financial records to demonstrate that it receives no State family-planning funds.

Id. at 463 (citations omitted) (emphasis added). See also id. at 464 (stating that these requirements ensure that the abortion affiliate does not receive benefits in the form of marketing, fixed expenses, or State family planning funds from grantee).

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construction (such as the one substituted by the trial court), as applied to Planned Parenthood, is unconstitutional. See Point IV, infra., and L.F. at 67.

Thus, in construing the appropriations, the Director was necessarily mindful of Dempsey and, specifically, the language defining the limit to which the State could go to achieve the permissible purpose of ensuring that its family planning funds do not subsidize abortion. The limit is separate incorporation, separate facilities, and financial records that establish that the abortion affiliate does not receive State family planning funds.[12]

Significantly, subsequent holdings by two federal courts have affirmed the wisdom of the Director's interpretation. Both decisions acknowledge that there are constitutional limits to how far a state can go in requiring separation of government funded and disfavored activities, and that, when restrictions exceed those limits, the regulations become unconstitutional burdens on the exercise of protected conduct. Further, both cases indicate that if the Director had implemented the restrictions as the lower court did here, they would have been unconstitutional.

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[12] The dispute here focuses on the Director's implementation of the "share" and "similar names" restrictions. It should not be overlooked, however, that the appropriations required, Dempsey allowed, and the Director enforced rigorous independent audit requirements for program participants affiliated with abortion providers. See, H.B. 10, §10.705 (1999), L.F. at 89; H.B. 1110, §10.710 (2002), L.F. at 95; L.F. at 144 (Invitation to Bid); L.F. at 175 (Contract).

One case, Planned Parenthood of Houston and Southeast Texas v. Sanchez, 403 F.3d 324 (5th Cir. 2005) involved the State of Texas' effort to ensure, like Missouri has, that its family planning program funds did not subsidize the provision of abortions. The Fifth Circuit upheld the statute in question, as the Eighth Circuit did in Dempsey, by construing it to allow the family planning program participants to operate separately incorporated abortion affiliates. The Fifth Circuit then addressed the issue of implementing an "affiliate-permissible interpretation of [the Texas statute]," without, "in practical terms work[ing] the same mischief . . . as it would if [the statute] disallowed affiliation entirely." The court made clear that there were limits to the burdensomeness of requirements the State may impose to insure separation: "[E]ither the affiliate requirement is a relatively empty formalism or it is a more substantial obstacle. The former is permissible, while the latter likely is not." 403 F.3d at 342.

The second case, Velazquez v. Legal Services Corp., 349 F. Supp. 2d 566 (E.D.N.Y. 2004), involved separation requirements imposed on federally funded legal services programs that were engaging in activities that the federal Legal Services Corporation (LSC) refused to fund. Again, the court recognized the need to balance the LSC's interest in not subsidizing disfavored activities, with the legal services programs' First Amendment right to provide a full range of legal services, and that, therefore, there were limits on the extent of separation that the LSC could require its grantees to maintain from the grantees' separately funded affiliates. Id. at 607-613. Particularly instructive here, Velazquez held that any government interest in "indirect subsidization of restricted activities is not so weighty as to support the imposition of significant restrictions on the

sharing" of facilities, id. at 610. The court struck down LSC limitations on sharing of equipment, sharing of physical premises, and sharing of employee time that are indistinguishable from how the lower court in this case applied the appropriations' restrictions. In doing so, the Velazquez court endorsed the Director's approach of allowing cost allocations of certain "shared" facilities, expenses, and employees. Id. at 612.

1. The Director's Interpretation of "Share."

The Director's interpretation of "share" and "administrative expenses," especially when implemented together, fully achieved the permissible legislative intent that program funds not subsidize abortion services. Moreover, the regime implemented by the Director under these interpretations stayed within the limits set forth in Dempsey, and confirmed in Sanchez and Velazquez.

The Director construed "administrative expenses" to include any budget category that could not be traced to the direct delivery of services. Thus, because the appropriation restrictions stated that the funds could not be used for administrative expenses, the Director's construction limited the use of the State funds to the direct delivery of the family planning services. This construction prevented State funds from being used for any indirect expenses, including all of the expenses (e.g., rent, utilities, bookkeeping, etc.) that the abortion affiliates purchased from Planned Parenthood. As a result, the State funds did not even indirectly reach the abortion affiliates because the services purchased by the abortion affiliates were services that were not subsidized by the State funds; they were services financed solely from other funding sources.

The Director's construction of "share," in effect, reinforced the construction of "administrative expenses." It required that any service or facility provided by a program participant to its abortion affiliate be purchased by the abortion affiliate at a fair market rate, even though, as explained above, that service or facility was first purchased by the program participant with non-State funds.

Thus, the Director's interpretations of "administrative expenses" and "share" together prevented State funds from being used to finance any activities other than direct family-planning services, and also required program participants to obtain reimbursement from abortion affiliates for any of the administrative expenses provided to the abortion affiliates, even though those administrative expenses were not financed by State funds. Together, these requirements assure that the Legislature's purpose, to the extent permitted by Dempsey is met: that the abortion affiliate "receives no State family-planning funds." Id. at 463.

While the Director's implementation of the appropriations' restrictions fits within the guidelines established Dempsey, Sanchez and Velazquez, the lower court's does not. The lower court applied a dictionary definition to interpret "share:" "'to receive, use, experience, enjoy, endure, etc. in common with others.'" L.F. at 553-4, ¶ 22, *quoting* Webster's New World Dictionary (also citing Ragsdale v. Tom-Boy, Inc., 317 S.W.2d 679, 686 (Mo. App. Ct. 1958)).

Yet, this approach would forbid a program participant and an abortion affiliate from being tenants in the same building, regardless of who owned the building. They

would still "share" the same lobby, elevator, utilities, parking lot, etc. They could not purchase commodities in bulk, and allocate the costs; they could not employ a unitary management and administrative team, and allocate the costs; they could not even utilize the same computer network. Indeed, it would also presumably prevent the two entities from receiving electricity from the same power source, and through the same delivery network; and it would seemingly also prevent them from receiving water from the same public utility, particularly if the water flowed to them through the same water main.

Additionally, some of the lower court's findings further illustrate the unworkability of its interpretation. For example, the lower court notes that the chief executive of PPSLR testified that, at the end of each fiscal year, if the abortion affiliate has any revenue remaining after paying all of its expenses, it pays those funds over to PPSLR. Somehow, the lower court found this objectionable, as an impermissible subsidization. L.F. at 556 ¶ 31 citing Tr. at 71-72. But, this was not PPSLR (the recipient of the State's funds) subsidizing the abortion affiliate; this was the abortion affiliate subsidizing PPSLR.

The lower court also concluded that PPSLR "shares" clinical staff with its abortion affiliate because those employees are on the PPSLR payroll, even though they work 100% of their time for the abortion-affiliate. This conclusion illustrates the arbitrariness of the lower court's interpretation of "share." These employees may be on the PPSLR payroll, but they work 100% of their time in the RHS clinic. L.F. at 78; Tr. at 74-75, 81-82. So, there is no "use . . . in common" for those employees.

The lower court rejected the Director's interpretation because it allowed Planned Parenthood and its abortion affiliates to enjoy cost savings and, "[t]his sort of cost-saving relationship between a recipient of State family planning funds and its affiliated abortion provider is precisely what the plain language of the [appropriations] prohibits." L.F. at 555, ¶ 27. Yet, it was not "plain language;" it was ambiguous language. L.F. at 236 ("there's several definitions of what 'share' could mean . . . ."). Moreover, the limit of the State's interest is in being sure that its funds do not reach the abortion affiliate, or support abortion services. Dempsey, 167 F.3d at 463 ("No subsidy will exist if the affiliate that provides abortion services . . . maintains adequate financial records to demonstrate that it receives no State family-planning funds."). It has no interest in preventing cost-sharing. Velazquez, 349 F. Supp. 2d at 610 (government has interest in ensuring that funds not used to support restricted activities, but no reason this cannot be accomplished by timekeeping and accounting methods).[13]

Thus, the lower court's interpretation is hardly more reasonable than the Director's. To the contrary, the lower court's interpretation of "share" is unworkable and extreme. By going beyond ensuring that program funds do not reach the abortion-

[13] The lower court stated that some management employees of PPSLR do not track their time when performing duties for RHS. L.F. at 554, ¶ 25. Yet, the record is clear that RHS reimburses PPSLR for management services according to allocation formulae that reflect the relative management responsibilities of the two entities. L.F. at 76-77 ¶¶ 41, 43, 50; 177-179

affiliates, and precluding any cost savings whatsoever, it not only goes beyond Dempsey and runs afoul of the holding in Velazquez. It creates, "the same mischief . . . [as if the appropriation] disallowed affiliation entirely." Sanchez, 403 F.3d at 342.

By comparison, the Director's interpretation—by limiting the use of program funds only to subsidizing direct program services, and by requiring full reimbursement to the program participant for services provided to the abortion affiliate, even though those services (because they were not direct patient services) were not paid for by program funds in the first place—avoided these issues, while fully ensuring that no program funds reach the abortion affiliates. It reasonably implements the restrictions, balances the State's interest with Planned Parenthood's rights, stays within the guidelines first articulated in Dempsey, and its wisdom has been confirmed in Sanchez and Velazquez.

2. The Director's Interpretation of "Similar Names."

When considering the Director's interpretation of the "similar names" restriction, it is important to recall that, while Dempsey recognized that a state could require separate incorporation, Dempsey made no mention of the permissibility of the State putting any limitation on the names of the independent affiliates. Thus, any limitation of names was going beyond what Dempsey allowed. The Director wisely chose a cautious approach.

Any more extreme restriction would have raised significant constitutional issues, not just because a restriction on names would be outside the guidelines enunciated in Dempsey. In Regan v. Taxation With Representation, 461 U.S. 540 (1983), the Supreme Court upheld the IRS requirement of separate incorporation of 501(c)(3) and 501(c)(4) tax-exempt organizations as a permissible way of ensuring that the tax-deductibility of

contributions to 501(c)(3) organizations did not function as a government subsidy of political activities. This requirement was only constitutional because the 501(c)(3) organization could conduct those activities through a separate 501(c)(4) organization that did not receive tax deductible contributions. In his concurring opinion, Justice Blackmun noted that the separate incorporation requirement was only constitutional so long as the IRS allowed the 501(c)(4) organization to lobby explicitly on behalf of the 501(c)(3) organization. Any regulations that interfered with that ability, Justice Blackmun stated, would interfere with the First Amendment rights of the 501(c)(3) entity. 461 U.S. at 553 (Blackmun, J concurring).

The same principle applies here, to the provision of abortions. Had the "similar names" restriction been interpreted in a way that interfered with Planned Parenthood's ability to be publicly associated with its abortion affiliates, the same constitutional concerns expressed by Justice Blackmun would have arisen. By linking the "similar names" restriction to the corporation statutes, the Director avoided these problems.

Additionally, it is axiomatic that any regulation affecting the First Amendment must be written with precise and objective standards, so as to give clear guidance, and avoid the possibility of arbitrary enforcement by governmental regulators. See, e.g., Shuttlesworth v. City of Birmingham, Ala., 394 U.S. 147 (1969); Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123 (1992). Simply applying a test of "similarity," even with the guidance of a dictionary, is the paradigm of what these cases forbid. See, infra, at 52.

The Director was also obligated to interpret the appropriations consistently with other Missouri statutes *in pari materia.* Missouri's corporation statutes are aimed at preventing a corporate name from being "so nearly similar to that of another corporation . . . as to lead to confusion and uncertainty . . . ." Mo. Rev. Stat. § 349.035. The corporation statutes are therefore *in pari materia* with the statute's "similar names" requirement. Thus, it was incumbent upon the Director to construe the appropriations consistently with the corporation statutes. Romans, 783 S.W.2d at 896.

By relating the interpretation of "similar names" to the corporation statutes, the Director did more than interpret it consistently with other statutes *in pari materia*. The Director also gave the restriction an objective standard, and the Director avoided running afoul of the concerns expressed by Justice Blackmun in Taxation With Representation. Thus, the Director's interpretation was surely reasonable.[14]

[14] The lower court opined that the Director's interpretation of "similar" effectively read the requirement out of the appropriation because a separate provision of the appropriation already required that the program participants and their abortion affiliates be separately incorporated. L.F. at 551, ¶ 15. However, the situation of PPKM and its abortion-affiliate, CH, illustrates why what the lower court suggests is not necessarily so. PPKM is a Missouri corporation; but CH is a Kansas corporation. Thus, they could have identical names, and satisfy the appropriation's requirement of separate corporations. Only the requirement of dissimilar names prevents that from happening.

The holding of the lower court raises all of the constitutional problems that the Director avoided and ignores the *in pari materia* requirement. As with "share," the lower court relied on a dictionary definition, although, without explanation, the lower court chose a different dictionary: Webster's Third New International Dictionary. That dictionary defined "similar" as: "'having characteristics in common: very much alike;'" and then the court cited State v. Harris, 705 S.W.2d 544, 549 (Mo. App. Ct. 1986), where "similar" was defined as, "'nearly corresponding, resembling in many respects, somewhat alike, have general likeness.'" L.F. at 550, ¶ 12. These are flexible definitions that provide little objective guidance. For example, are the names impermissible if they are simply "somewhat alike," or must they be "very much alike?" Or, take another dictionary definition: "Exactly corresponding; resembling in all respects; precisely like nearly corresponding; resembling in many respects; somewhat like; having a general likeness." Webster's Revised Unabridged Dictionary (1913). Applying this dictionary definition, are the names impermissible if they "hav[e] a general likeness," or only if they are "[e]xactly corresponding?"

Dictionary definitions may be a workable solution to defining ambiguous terms in some contexts, but not here. They do not provide the kind of objective standards required by Shuttlesworth and Forsyth County. They invite arbitrary enforcement, a clear problem in a First Amendment context, such as the regulation of names.

The lower court's interpretation and application of the "similar names" restriction is a perfect example of exactly what cases such as Shuttlesworth and Forsyth County seek to prevent. Planned Parenthood names differ from their abortion affiliates' names by far

more than one word. Really, all they have in common is the presence of the words, "Planned Parenthood," in both sets of names. Yet, that was the crux of the lower court's concern. The lower court's judgment makes note of the testimony of the chief executive of PPSLR, that the words "Planned Parenthood" were in the abortion affiliate's name so that patients would know that it operated under the medical standards of Planned Parenthood. The lower court indicated that this demonstrated that the restrictions had been violated because it showed that the abortion affiliates "received direct and indirect economic and marketing benefits from sharing a similar name with [Planned Parenthood] and from [Planned Parenthood's] receipt of State family planning funds." L.F. at 552, ¶ 15, citing Tr. at 35, 38.

Putting aside that this finding rests on a flawed reading of the restrictions,[15] it is a

[15] The reasoning is flawed because it conflates two separate restrictions. The "similar names" restriction was not enacted to prevent an economic or marketing benefit; it was enacted to avoid "lending the state's imprimatur." H.B. 10 §10.705, L.F. at 89; H.B. 1110, §10.710, L.F. at 95. Thus, it was error to find Planned Parenthood ineligible under the restrictions, even if true, for achieving an economic or marketing benefit from similar names.

Moreover, as explained in the text, supra, at 41-43, the conclusion that the abortion affiliates received economic and marketing benefits from Planned Parenthood's receipt of program funds is also wrong, because Dempsey makes clear that the state can achieve this interest only by insuring that there is no

graphic illustration of the inadequacy of dictionary definitions in this context. Relying on dictionary definitions allowed the lower court to conclude that names are "similar" solely because of the presence of the words "Planned Parenthood," a debatable proposition given that there are so many other distinguishing words ("Comprehensive Health," "Reproductive Health Services"). The Director's interpretation, by comparison, avoided these concerns by imposing the same objective standard already employed by the Missouri Secretary of State for the issuance of a certificate of incorporation. Moreover, it is clear from Justice Blackmun's concurring opinion in Taxation With Representation that at least this level of "similarity" must be tolerated: to allow two entities to be publicly identified with each other – specifically, for the public to know that the abortion affiliates are providing a constitutionally protected service on behalf of Planned Parenthood.

Several lines of authority make clear the solution that is available to the Legislature in these circumstances. In FCC v. League of Women Voters, 468 U.S. 364 (1984), the Supreme Court was considering the constitutionality of a ban on editorializing by broadcast outlets that received public broadcasting funding. The Court declared the ban unconstitutional. In doing so, the Court recognized that the government must allow

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subsidization of the abortion affiliate, and that "[n]o subsidy will exist if the affiliate that provides abortion services is separately incorporated, has separate facilities, and maintains adequate financial records to demonstrate that it receives no State family-planning funds." 167 F.3d at 463.

the broadcasters to broadcast both their publicly funded programming and their separately funded editorials from the same facilities, 468 U.S. at 399-400, but that the government could require the broadcasters to publish disclaimers so that the public would not be left with the impression that the editorials were funded by the government. 468 U.S. at 395. See also, Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 769 (1995) (same analysis applied to religious displays on public property).

Thus, here, where the Legislature also sought to avoid, "lend[ing] its imprimatur to abortion services," H.B. 10 § 10.705, L.F. at 89; H.B. 1110, § 10.710; L.F. at 94, it is clear that the Legislature cannot impose the kind of "similar names" restriction endorsed by the lower court. That would infringe on Planned Parenthood's First Amendment rights. The Legislature can require disclaimers, to avoid confusion in the eyes of the public but the concern about confusion cannot be a basis for more extreme restrictions. Indeed, that is the conclusion reached by the federal district court in Velazquez in the context of the LSC's concern that the public would think it was funding activities that, in fact, it was not funding. 349 F. Supp. 2d at 607-609.

Thus, as with the "share" restriction, the Director's interpretation of "similar names" must be upheld. It may not be as extreme as the taxpayer or the lower court or even the Legislature may have preferred. But it is reasonable and entitled to deference; it establishes an objective standard; and it avoids all of the constitutional problems that would be raised by going so far as to prevent clear public association of Planned Parenthood and its abortion affiliates.

The Director implemented the legislative intent to the full extent permissible under Dempsey, and consistently with other statutes *in pari materia*. Her interpretation of the terms "share" and "similar names" ensured that State funds were not subsidizing abortion services; and her interpretation avoided the constitutional problems of imposing more Draconian separation requirements. Given all of these considerations, it can hardly be said that the Director's construction has "no reasonable relationship" to the legislative intent. Foremost-McKesson, 488 S.W.2d at 197. Therefore, it should be upheld.

B. The Lower Court's Separate Conclusion That Planned Parenthood and the Abortion Affiliates "Were So Interrelated" That The Receipt of State Funds Subsidized and Lent the State's Imprimatur Are Wrong.[16]

The lower court separately found that, regardless of the Director's interpretations of "share" and "similar," the Planned Parenthood defendants were ineligible for the program because they were so interrelated with their abortion affiliates that "receipt of State funds subsidized" the abortion affiliates; and "[p]aying State funds to them would lend the State's imprimatur . . . to abortion services." L.F. at 56 ¶¶ 31, 32.

[16] As noted above, footnote 5, supra, the lower court made findings that Planned Parenthood made direct referrals, and distributed marketing materials; but, these are matters never claimed by the taxpayer, nor litigated at all. Thus, there is nothing in the record to support them, and they should be vacated.

This reasoning is flawed for all of the reasons discussed above. Under Dempsey, Sanchez and Velazquez, the State can insure that its funds not subsidize abortion services by requiring separate corporations, separate facilities, and financial records to demonstrate that the abortion affiliates do not receive State funds. Cost savings, however, must be allowed. See, supra, at 44-45. The Director imposed these requirements, and Planned Parenthood complied with them.

As well, as explained above, see, supra, at 49-50, 54-55, to avoid lending its imprimatur, the State can require Planned Parenthood to make disclaimers but the State cannot prevent Planned Parenthood and its abortion affiliates from having names that allow the public to recognize their association with each other.

Thus, the lower court's conclusions are no more sustainable when they claim to be accepting the Director's interpretations of "share" and "similar names." They still result in an application of the restrictions that raise constitutional concerns. Therefore, they must be rejected and the Director's application of the restrictions sustained.

POINT IV

THE TRIAL COURT ERRED IN ADJUDICATING THE TAXPAYER'S CLAIM THAT THE RESTRICTIONS DO NOT VIOLATE THE UNITED STATES CONSTITUTION, BECAUSE THAT WAS A NON-JUSTICIABLE CLAIM, IN THAT THE DEFENDANTS MADE NO CLAIM THAT THE RESTRICTIONS AS IMPLEMENTED VIOLATED THEIR CONSTITUTIONAL RIGHTS, BUT HAD CONDITIONALLY RESERVED SUCH A CLAIM PENDING THE OUTCOME OF THE CHALLENGE TO THE IMPLEMENTATION OF THE RESTRICTIONS.

The lower court found that nothing in the appropriations violates the United States Constitution, stating only that, "no defendant had met the high burden of proof required to prove otherwise." L.F. at 558, ¶ 37. This holding must be vacated because, in fact, this issue was never "joined" or litigated below.

The taxpayer claimed that the restrictions did not violate the U.S. Constitution. L.F. at 31. However, Planned Parenthood's answer made clear that Planned Parenthood did not claim that the restrictions, as implemented by the Director, violated the United States Constitution. To the contrary, Planned Parenthood believed the Director's interpretation avoided constitutional issues. L.F. at 63-64, ¶¶ 34-38. Thus, the taxpayer's claim that the restrictions did not violate the United States Constitution was non-justiciable due to a lack of a case or controversy. Commonwealth Ins. Agency v. Arnold, 389 S.W.2d 803, 806 (Mo. 1965); Tintera v. Planned Indus. Expansion Auth., 459

S.W.2d 356, 358 (Mo. 1970) ("[d]eclaratory judgment is not available to adjudicate hypothetical or speculative situations . . . ."); State ex. rel. City of Crestwood v. Lohman, 895 S.W.2d 22 (Mo. Ct. App.1994) (finding no justiciable controversy where defendant did not take position on constitutionality of statute at issue).

Planned Parenthood did, however, conditionally reserve a claim—pending a final determination of whether the Director's interpretation would be upheld and, if not, what interpretation would be applied—that the restrictions could be unconstitutional. L.F. at 67 ¶ 81. Planned Parenthood could not litigate that issue until there was a final determination of a new interpretation, if any. Thus, if this Court upholds the lower court rulings, this case must be remanded to the lower court for further proceedings on the reserved claim of whether the restrictions—on their face or as applied to Planned Parenthood—violate Planned Parenthood's rights under the United States Constitution. See,Velazquez 349 F. Supp 2d at 598 (noting that in Velazquez v. LSC, 164 F.3d 757 (2d Cir 1999), the Second Circuit Court of Appeals made clear the right to bring as applied challenge to restrictions such as are at issue here.) It was error for the lower court to peremptorily decide the issue of the constitutionality, under the United States Constitution, of the restrictions, especially with no explanation for why it was doing so. Therefore, that ruling should be vacated.

If this Court vacates the lower court's judgment for any of the other reasons addressed in this brief, then there need be no further proceedings on Planned Parenthood's conditional affirmative defense and cross-claim. However, if this Court affirms the lower court's judgment, then this matter should be remanded to allow Planned

Parenthood to litigate its claim that the appropriations restrictions, as newly interpreted and as applied to Planned Parenthood, violate their rights under the United States Constitution.

POINT V

THE TRIAL COURT ERRED IN ORDERING PLANNED PARENTHOOD TO REPAY FUNDS ALREADY RECEIVED, BECAUSE THE DIRECTOR HAD LEGAL AUTHORITY TO ENTER INTO THE CONTRACTS, PLANNED PARENTHOOD WAS ENTITLED TO RELY ON HER CONSTRUCTION OF THE STATUTORY TERMS, AND IT WOULD BE INEQUITABLE TO REQUIRE REPAYMENT, 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, AND PLANNED PARENTHOOD COMPLIED WITH ALL OF THE TERMS OF THE CONTRACT AND PROVIDED ALL OF THE SERVICES FOR WHICH IT WAS REIMBURSED

The trial court ordered Planned Parenthood to repay the State funds received by Planned Parenthood under the F.Y. 2000 and F.Y. 2003 contracts. These were funds paid to Planned Parenthood for services indisputably rendered by Planned Parenthood. Moreover, there is no serious question but that Planned Parenthood was in compliance with the contract, and that the Director had the authority to enter into the contract. Under

these circumstances, even if Planned Parenthood is found ineligible for the program because the Director misconstrued undefined terms in the appropriations, there is no legal authority and it is inequitable to order that the funds be repaid.

This Court has consistently held that persons entering into contracts with agents of the State are charged with knowledge of the authority of the agent, and whether the contract is within the agent's authority. See e.g., Aetna Ins. Co. v. O'Malley, 124 S.W.2d 1164, 1166 (Mo. banc 1938). Here, there is no question that the Director had the authority to enter into contracts for the provision of family planning services.

However, there is no authority for charging a private party with responsibility for the correctness of the executive's legal analysis of the undefined terms of the statute which she is charged with implementing. See, Sparks v. Jasper County, 112 S.W. 265, 269-70 (Mo. banc 1908) ("The law is that where there has been a complete performance of the contract on both sides, and it is fair and reasonable in fact, there can be no recovery of the consideration by the [government] where it retains and enjoys the benefits of the contract, and where it cannot or will not restore the property acquired by the contract, even though the contract be one which the law denounces as illegal.")

Especially under these circumstances, it would be inequitable to compel repayment of funds received for services provided under a contract that was within the authority of the Director See also, Polk Tp., Sullivan County. v. Spencer, 259 S.W.2d 804, 807 (Mo. 1953) (restitution denied because no unjust enrichment of party that provided services and no loss to government); Witmer v. Nichols, 8 S.W.2d 63, 65-66 (Mo. 1928) (restitution denied on equitable grounds); Inhabitants of the Village of Schell

City v. L.M. Rumsey Mfg. Co., 1890 WL 1768 *3 (Mo. Ct. App. Feb. 17, 1890) (same). Hillside Securities Co. v. Minter, 254 S.W. 188, 191 (Mo. banc 1923) ("[C]onceding for argument's sake the contracts were illegal in their inception, yet it would be unjust and inequitable to permit the county to retain the bridges and at the same time recover back the money paid therefore."); City-Wide Asphalt Co., Inc. v. City of Independence, 546 S.W.2d 493, (Mo. Ct. App. 1976).

The lower court held that, "it would be inequitable not to require the repayment of said funds," L.F. at 558, ¶ 35, essentially because Planned Parenthood was aware of the "questionable legality of said funds," in light of the prior litigation. Id. While there was undeniably a challenge to the Director's interpretations, by a "Special Assistant Attorney General" purporting to be acting on behalf of "the State," the judgment to which the lower court refers was vacated, twice, by this Court. State v. Planned Parenthood of Kansas and Mid-Missouri, et al., 37 S.W.3d 222 (Mo. banc 2001); State v. Planned Parenthood of Kansas and Mid-Missouri, et al., 66 S.W.3d 16 (Mo. banc 2002). Eventually that litigation was discontinued**.** A vacated judgment and a discontinued lawsuit cannot be deemed notice to the prevailing party that there was merit to the losing party's claim.

Moreover, if the lower court's logic is to be followed, that would mean that anytime anyone raises a question about the legality of a government contract—even where the allegation is not a challenge to the executive's power to enter into the contract, nor a claim of fraud; but a claim that undefined statutory terms have been improperly interpreted—private parties would be at risk, even years later, after the contracts have

been fully completed, to repay all funds received if it is determined that the executive official misinterpreted the undefined language. This would be a significant deterrent on private parties doing business with the State.

The undeniable facts are that the taxpayer waited years to file his lawsuit, and even longer to make a claim for repayment. During that time, Planned Parenthood complied with the law as it was implemented, delivered the services called for under the contract, and there is no claim of fraud—just an ill-founded disagreement over how the Director interpreted undefined statutory terms. Under these circumstances, it would be plainly inequitable to order Planned Parenthood to repay the funds received for the services rendered.

Accordingly, even if this Court agrees that Planned Parenthood was not eligible under the appropriations' restrictions, it should vacate that portion of the trial court order that requires Planned Parenthood to repay funds received under that appropriation.

CONCLUSION

For the reasons set forth in this brief, this Court should rule that the taxpayer lacked standing; that the restrictions violate the Missouri Constitution; that the Director's interpretation and implementation of the restrictions was legal; that the taxpayer's claim for a declaration that the restrictions do not violate the United States Constitution is not justiciable; and that it would be inequitable to require Planned Parenthood to repay the funds it received as reimbursement for providing services under the family planning program. This Court should vacate the judgment of the trial court, order that the Amended Petition be dismissed, and award Planned Parenthood its costs.

Dated: February 3, 2006

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 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 14, 273 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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CERTIFICATE OF SERVICE

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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