No. SC87063

IN THE
SUPREME COURT OF MISSOURI

RONALD CATES and RICHARD DUNN, et al.

Appellants,

v.

DANIEL SHIPLEY,

Respondent.

On Appeal from the Circuit Court of Cole County, Missouri

The Honorable Werner A. Moentmann

APPELLANTS' BRIEF

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JURISDICTIONAL STATEMENT

This appeal involves the question of whether House Bill 10, § 10.705 (1999) and House Bill 1110 § 10.710 (2002), Missouri appropriation bills, include substantive legislation in violation of Art. III, Sec. 23 and Art. IV, Sec. 23 of the Missouri Constitution. Therefore, jurisdiction lies in the Missouri Supreme Court pursuant to Art. V, Section 3 of the Missouri Constitution.

STATEMENT OF FACTS

Daniel Shipley, a resident and taxpayer of the State of Missouri, sued Planned Parenthood of the St. Louis Region (PPSLR) and Planned Parenthood of Kansas and Mid-Missouri (PPKM) (collectively "Planned Parenthood"), both Missouri corporations that operate clinics in the St. Louis and Kansas City/mid-Missouri areas. L.F. 71. PPSLR is affiliated with Reproductive Health Services of Planned Parenthood of the St. Louis Region, a separately incorporated Missouri corporation that provides abortion services. PPKM is affiliated with Comprehensive Health of Planned Parenthood of Kansas and Mid-Missouri, Inc., a separately incorporated Missouri corporation that provides abortion services. L.F. 71-72.

Maureen Dempsey was Department Director at relevant times prior to 2002. Ronald Cates served as the Interim Director of the Department from January 2002 until January 2003. Richard Dunn was appointed Department Director in January 2003.[1] L.F. 80.

In June 1999, the Missouri Legislature appropriated funds to the Missouri Department of Health (the "Department") "[f]or the purpose of funding family planning services, pregnancy testing and follow-up services, provided that none of the funds appropriated herein may be expended to directly or indirectly subsidize abortion services or administrative expenses." The appropriation contained numerous additional restrictions, eligibility

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[1]The current Department Director, Julia M. Eckstein, did not administer any family planning funds at issue in this case.

requirements, and accounting procedures. This appropriation was contained in House Bill No. 10, Section 10.705. Section 10.705 became effective July 1, 1999, and was effective during the State's fiscal year 2000, which ran from July 1, 1999 to June 30, 2000. L.F. 72.

On July 13, 1999, the Department issued an "Invitation For Bid" for family planning contracts for fiscal year 2000, and Planned Parenthood contracted with the Department to provide family planning services for that fiscal year. L.F. 73.

In June 2002, the next appropriation for which Planned Parenthood received funds for family planning, the Missouri Legislature appropriated funds for the family planning program in House Bill 1110, Section 10.710 ("Section 10.710"), for fiscal year 2003. Section 10.710 was identical to Section 10.705 in all material respects. L.F. 73. For simplicity, reference to Section 10.710 shall apply to both appropriation bills.

On August 14, 2002, the Department issued an "Invitation For Bid" for family planning contracts for fiscal year 2003. Planned Parenthood subsequently executed contracts with the Department to provide family planning services for that fiscal year. L.F. 74.

Section 10.705 and Section 10.710 provide in part that:

> 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, an organization that receives these funds and its independent affiliate that provides abortion services may not share any of the following:

The same or similar name;

Medical or non-medical facilities, including but not limited to business offices, treatment, consultation, examination, and waiting rooms;

Expenses;

Employee wages or salaries; or

Equipment or supplies, including but not limited to computers, telephone systems, telecommunications equipment and office supplies.

Section 10.705 and 10.710 further provide in part:

An organization that receives these funds must maintain financial records that demonstrate strict compliance with this section and that demonstrate that its independent affiliate that provides abortion services receives no direct or indirect economic or marketing benefits from these funds.

L.F. 72.

Neither sections 10.705 nor 10.710 include a definition for the terms "share," "similar name," or "administrative expenses." L.F. 73. The terms "same or similar name" and "share" appear in appropriation language as part of a series of restrictions on the relationship between an eligible family planning services provider and an affiliated abortion services provider--specifically that the two organizations may not share the "same or similar name."

The Department issued invitations for bid and contracts that included the language of each appropriation bill, and additionally defined the terms "share" and "similar name." L.F. 110, 145. The Department's contracts made reference to the Missouri corporation statutes for a determination as to the meaning of "same or similar." L.F. 110, 145. The term "share" is defined in the contracts as prohibiting "services, employees, or equipment" that are paid for by the family planning contractor on behalf of the abortion provider affiliate without reimbursement. L.F. 110-111; 145.

Shipley filed suit in Cole County challenging the authority of the Department to define "same or similar name" and "share" in the contract language, as well as Planned Parenthood's eligibility to receive state appropriations for family planning services. L.F. 1. The trial court found in favor of Shipley, ordered Planned Parenthood to return the funding it received, and ordered that Shipley's attorney fees and litigation expenses be paid from the returned funds. L.F. 547, 638.

STANDARD OF REVIEW

The standard of review for a judge-tried case is governed by *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). The judgment of the trial court will be affirmed unless it is not supported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law. *Id.*

POINTS RELIED ON

I.

The trial court erred in failing to declare unconstitutional the service provider eligibility restrictions and administrative directives in House Bill 10, § 10.705 (1999), because those restrictions and directives violated the rule that legislation of a general character may not be included within an appropriation bill, in that the restrictions amend and supplement existing, non-appropriation law.

State ex rel. Hueller v. Thompson, 289 S.W. 338, 340 (Mo. banc 1926);

Akin v. Director of Revenue, 934 S.W.2d 295, 300-301 (Mo. banc 1996);

Carmack v. Director, Missouri Department of Agriculture, 945 S.W.2d 956 (Mo. banc 1997);

Hammerschmidt v. Boone County, 877 S.W.2d 98 (Mo. banc 1994);

§ 1.140, RSMo;

§ 188.205 RSMo;

§ 351.110, RSMo;

Chapter 188, RSMo;

Chapters 325 through 346, RSMo;

House Bill 10 (1999);

H.B. 10 § 10.622 (1993);

H.B. 20 § 20.685 (1997);

Mo. Const. Art. III § 1;

Mo. Const. Art. III, § 23;

Mo. Const. Art. IV, § 1;

Mo. Const. Art. IV, § 23;

Mo. Const. Art. IV, § 28.

II.

The trial judge erred in striking and invalidating the Department's definitions of the phrase "same or similar name" and the term "share" in contracts drafted by the Director to reflect various funding restrictions for family planning service providers (a) because the Director's definitions are entitled to deference in that the terms are not defined in the statute nor do they have an unambiguous meaning, and the Director is charged with implementation of the statute and with the responsibility for defining the terms; and (b) because the Director's definitions are consistent with the rules of statutory construction in that they are drawn from other statutes addressing similar problems and are consistent with apparent legislative intent and with the need to construe the statute so as not to exceed what is constitutionally permissible.

Foremost-McKesson, Inc. v. Davis, 488 S.W.2d 193, 197 (Mo. 1972);

Heavy Constructors Ass'n of Greater Kansas City Area v. Division of Labor Standards, 993 S.W.2d 569, 571 (Mo.App. W.D. 1999)*;*

Pen-Yan Inv., Inc. v. Boyd Kansas City, Inc.,

952 S.W.2d 299, 303 (Mo.App. W.D. 1997)*;*

Abrams v. Ohio Pacific Exp., 819 S.W.2d 338, 340 (Mo. banc 1991)*;*

H.B. 10 § 10.705(1999).

III.

The trial judge erred in granting Shipley's motion to amend the judgment to include an award to Shipley of his attorney fees and expenses to be paid from the funds returned to the state by Planned Parenthood because neither attorney fees nor costs and expenses may be awarded against the state absent express statutory authority, in that the funds that Planned Parenthood is required to refund to the state, and from which the trial court ordered attorney fees and expenses to be paid, are state funds.

Lett v. City of St. Louis, 24 S.W.3d 157 (Mo. App. E.D. 2000);

Client Services, Inc. v. Missouri Coordinating Bd. for Higher Educ.,

30 S.W.3d 194 (Mo. App. E.D. 2000) ;

Lipic v. Missouri Dept. of Social Svcs. 93 S.W.3d 839 (Mo. App. E.D. 2002) ;

Baumli v. Howard County, 660 S.W.2d 702 (Mo. banc 1983).

ARGUMENT

I.

The trial court erred in failing to declare unconstitutional the service provider eligibility restrictions and administrative directives in House Bill 10, § 10.705 (1999), and House Bill 1110, § 10.710 (2002) because those restrictions and directives violated the rule that legislation of a general character may not be included within an appropriation bill, in that the restrictions amend and supplement existing, non-appropriation law.

A. There is a longstanding rule of constitutional dimension that the legislature can neither amend nor enact general laws in appropriations bills.

The American system of government has long recognized a bifurcation of legislation, in which individual programs must be endorsed twice. First, they are authorized, through specific legislation that sets for the parameters of and qualifications for the program. Second, they are funded, through legislation that establishes an amount--usually fixed -- that can be spent on the program in any fiscal year. This bifurcation is maintained "to ensure that program and financial matters are considered independently of one another." *Andrus v. Sierra Club*, 442 U.S. 347, 361 (U.S. 1979). It means that at times the legislature creates programs but fails to fund them -- an exercise that may seem pointless, but that is an important part of protecting public funds.

Missouri adds constitutional specificity and authority to that bifurcation. That comes from two constitutional provisions. Though they appear in different Articles of the Missouri constitution, they address the same concern: the preservation of the bifurcation system under which the legislature often must act twice to accomplish one goal. Both set forth what must or may be found in an appropriations bill. Neither permits what occurred here.

But where, as here, the legislature does not establish a program through general legislation, it is to be presumed that the legislature intends to leave to the executive branch of government (the Department) the details of the program design, operation and oversight. *See e.g., State ex rel. Hueller v. Thompson*, 289 S.W. 338, 340 (Mo. banc 1926). The family planning appropriations bills passed in the years 1993 through 1996 would tend to support this proposition: None of those bills contained any program suggestions, restrictions, definitions, enforcement schemes or other details. Section 10.705 does all of these things, and is therefore an unconstitutional encroachment on the executive branch of government, and is an attempt to establish general substantive law in an appropriations bill.

1. Appropriations bills can contain only appropriations and the "subjects and accounts for which moneys are appropriated."

Missouri's constitutional limit on the scope of legislation is plain and brief:

> 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 subjects and accounts for which moneys are appropriated.

Missouri Constitution, Art. III, § 23. *See Rolla 31 Sch. Dist. V. State*, 837 S.W.2d 1 (Mo. banc 1992).

This court has consistently enforced the "single subject" rule. *E.g.*, *State ex rel. Hueller v. Thompson*, 289 S.W. 338, 340 (Mo. banc 1926); *Opponents of Prison Site, Inc. v. Carnahan*, 994 S.W.2d 573, 580 (Mo. App. W.D. 1999); *Rolla 31 Sch. Dist. V. State*, 837 S.W.2d 1, 4 (Mo. banc 1992); *Stroh Brewerry Co. v. State of Missouri*, 954 S.W.2d 323 (Mo. banc 1997); *Carmack v. Director, Missouri Department of Agriculture*, 945 S.W.2d 956 (Mo. banc 1997); *Hammerschmidt v. Boone County*, 877 S.W.2d 98 (Mo. banc 1994); and *Missouri Health Care Association v. Attorney General*, 953 S.W.2d 617 (Mo. banc 1997). In each of these cases, the analysis begins with an examination of the language of the title of the bill followed by consideration of whether "all provisions of the bill 'fairly relate to the same subject, have natural connection therewith or are incidents or means to accomplish its purpose.'" *Id*. at 622 (quoting *Westin Crown Plaza Hotel Co. v . King*, 664 S.W.2d 2,6 (Mo. banc 1984). The rationale for this rule is apparent: By limiting general legislation to a single subject, the governor may veto nonmeritorious legislation without also vetoing meritorious legislation. *Hammerschmidt*, 877 S.W.2d at 102.

This appeal differs from all those cited above. It deals not with the general ban on multiple subjects, but with the scope of the exception for "general appropriation bills." Unlike some cases, *see Heinkel v. Toberman*, 226 S.W.2d 1012, 1013 (Mo. banc 1950), the bills at issue in the case at bar were clearly appropriations bills. Instead it addresses the

meaning of the phrase, "the various subjects and accounts for which moneys are appropriated."

2. Appropriations bills cannot contain general legislation.

Article III, § 23, discussed above, is not the only place where the Constitution of Missouri identifies what or must be in an appropriations bill (*i.e.*, appropriations, subjects, and accounts). Article IV, § 23, completes the same picture by defining requirements for an appropriations law: "Every appropriation law shall distinctly specify the amount and purpose of the appropriation without reference to any other law to fix the amount or purpose." This Court has consistently held that this section precludes the legislature from placing in an appropriations bill legislation of a "general character." *State ex rel. Davis v. Smith*, 75 S.W.2d 828, 830 (Mo. 1934). As early as 1926 the Missouri Supreme Court made the matter quite explicit in explaining that,

> the ***sole purpose [of an appropriation bill] is to set aside money for specified purposes***. . . . [I]f the practice of incorporating legislation of a general character in an appropriation bill should be allowed, then all sorts of ill conceived, questionable, if not vicious, legislation could be proposed with the threat, too, that, if not assented to and passed, the appropriations would be defeated.

State ex rel. Hueller v. Thompson, 289 S.W. 338, 340-341 (Mo. banc 1926) (emphasis supplied). In *Hueller*, the Court also harkened back to the "single subject" rule, observing

that appropriations bills are to be pure, *i.e.*, that "the lawmaker is not directed to expect or look for anything else in an appropriation bill except appropriations." *Id*. at 341.[2]

The legislative power of the General Assembly is all but absolute except where otherwise restricted by the Missouri Constitution. Mo. Const. Art. III § 1; *State ex rel. Farmers' Elec. Coop., Inc. v. State Envtl. Improvement Auth.*, 518 S.W.2d 68, 72 (Mo. banc 1975). The legislature is free to appropriate money or not to appropriate money largely as it deems fit. *State ex rel. Tolerton v. Gordon*, 139 S.W. 403, 407 (Mo. 1911). And it is largely free to create programs and impose restrictions as it deems fit. But is it not free to

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[2]Missouri Attorneys General through the years have also opined that the Constitution prohibits general legislation in an appropriations bill. See Attorney General Opinion No. 61-1979 (Ashcroft to Bockenkamp) (The General Assembly would act in violation of the Constitution if it accepted the Governor's budget recommendation which changed the statutory duties of the Mental Health Commission); Attorney General Opinion No. 212-1974 (Danforth to Bond) (The General Assembly's attempt to set the number of employees in various departments by specifying the number of "FTE's" per Department is an unconstitutional attempt to legislate by appropriation. The language is severable such that the funds may be expended without restriction as to the number of "FTE"). The questions presented in these opinions point out the mischief that may be raised were this court to open the door to amending or enacting substantive legislation in an appropriations bill.

mix the two -- to tear down the wall between appropriations and general legislation, and deprive the public of the protection that comes from including substantive rules in the general laws (*e.g.*, having them published in the Revised Statutes) and from ensuring separate votes on the authorization of programs and on their funding.

B. Section 10.705 exceeds the scope of an appropriations bill permitted by the Missouri Constitution.

1. History of the family planning program

The Department has contracted with public and private agencies to provide comprehensive family planning services since 1993. The agencies provide services to low-income women and men who are not receiving Medicaid benefits. The services include but are not limited to pregnancy testing, breast and pelvic exams, screening for cancers of the reproductive system, testing and treatment for sexually transmitted diseases and HIV infections, and screening for sexual abuse. Under the contracts, payment is made after services are rendered; the providers are reimbursed by the State for each eligible patient.

The legislature has never established a family planning program. But every year from 1993 until 2003, the legislature has appropriated funds for the family planning program administered by the Department. Each such appropriation included a proviso prohibiting use of the funds to pay for abortion services and certain abortion related services and activities. Typical of the language found in these early appropriations follows:

> For family planning services, provided, however, that none of the expenditures made from this appropriation for family planning services shall be used to perform or

actively promote abortion as a method of family planning, and further provided that none of these funds may be used for administrative purposes.

H.B. 10 § 10.622 (1993). *C.f.* § 188.205 RSMo (prohibiting use of public funds to perform or assist an abortion, or to counsel or encourage an abortion).

In 1997, in H.B. 20 § 20.685 (1997), the appropriation language changed significantly:

> For the purpose of funding family planning services, pregnancy testing and follow-up services, provided that none of these funds may be expended for the purpose of performing, assisting or encouraging for abortion, and further provided that none of these funds may be expended to directly or indirectly subsidize abortion services or administrative expenses, as verified by independent audit. None of these funds may be paid or granted to organizations or affiliates of organizations which provide or promote abortions. None of the funds may be expended for directly referring for abortion, however nondirective counseling relating to the pregnancy may be provided and nothing in this section requires an agency receiving federal funds pursuant to Title X of the Public Health Services Act to refrain from performing any service required pursuant to Title X, regulations adopted pursuant to Title X or the Title X Program Guidelines for Project Grants for Family Planning Services as published by the U.S. Department of Health and Human Services in order to remain eligible to receive Title X funds, to be eligible to receive state funds pursuant to this section.

The following year's appropriation contained identical language. This section added for those fiscal years the requirement of an independent audit and an exclusion from participation of certain classifications of *providers* (not services or service recipients).

The appropriations of 1999 and 2002, the bills at issue,[3] retain much of the language of their predecessors, and continue restrictions on program provider eligibility, setting forth program monitoring details (including enforcement directives) and some general program parameters. The details of these restrictions and directives do not relate to or affect the amount of the appropriation or the accounts to which the appropriation is made.

It is against this historical backdrop, and in the context of the limitations on appropriations bills discussed above, that House Bills at issue here must be evaluated. Those bills, like all other appropriation bills, describe the purpose plainly:

> AN ACT to appropriate money for the expenses, grants, refunds, and distributions of [various departments], 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.

House Bill 10 (1999). Following this description, the bill goes on to specify in a number of separate sections each account or subject for which funds are appropriated and the specific

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[3]Both House Bills at issue here are identical in all pertinent parts. Reference to House Bill 10, § 10.705 (1999) shall also refer to House Bill 1110, § 10.715 (2002).

amounts that are appropriated. *See* House Bill 10, §§ 10.005 to 10.765 (1999). Each of these sections states to which department, division, or office the appropriation is made, sets forth the amount allocated, and, with the exception of § 10.705, briefly describes the purpose or purposes of the grant. On a typical page of the Session Laws 1999 and 2003 appear between three and seven sections of appropriations. Section 10.705 spans approximately three full pages.

Section 10.705 begins by allocating funding in language very similar to that found in every other appropriations bill: "For the purpose of funding family planning services, pregnancy testing and follow-up services[.]" § 10.705.1. Like other appropriations bills, § 10.705 specifies an amount. And in a fashion similar to counterpart family planning appropriation bills passed in 1993 and 1994, § 10.705 prohibits the use of appropriated funds "to directly or indirectly subsidize abortion services or administrative expenses." *Id*.

But then § 10.705 goes on. It leaves the realm of embracing the various subjects and accounts for which moneys are appropriated and purports to amend existing law and to regulate various programming details that are unrelated to the amount and purpose of an appropriation. As discussed below, the remaining language of § 10.705 cannot be reconciled with existing language in general laws. If it were given force and effect, then, it would amend those laws. That step is constitutionally infirm.

2. Section 10.705 amends Missouri statute § 188.205 relating to the use of public funds for abortion services.

Section 10.705 acts, first, as an amendment to § 188.205. That is evident from both a comparison of the language of the appropriation bill and the general statute, and by an analysis of each when read together. Though both pieces of legislation are similar in scope and intent, when read closely they are shown to be inconsistent -- and thus constitute a species of the legislation that the court cautioned against in *Hueller*. *Hueller*, 289 S.W. at 341.

Section § 188.205 is entitled "Use of public funds prohibited, when." It draws a line around state officials' authority with regard to payments that may be used to assist with or counsel regarding an abortion:

> 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.

Section 10.705.1, addressing the same subject, moves that line:

> None of these funds may be paid or granted to an organization or an affiliate of an organization that provides abortion services. An organization that receives these funds may not display or distribute marketing materials about abortion services to patients. An otherwise qualified organization shall not be disqualified from receipt of these funds because of its affiliation with an organization that provides abortion services, provided that the affiliated organization that provides abortion services is independent as determined by the conditions set forth in this section. 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, an organization that receives these funds and its independent affiliate that provides abortion services may not share any of the following...

Just looking at the language quoted, one would be hard-pressed to determine which of these is the appropriation bill and which is the general statute. Both speak of "funds" and both make a series of pronouncements about the use of funds. But § 10.705 includes pronouncements about family planning service *providers* and the services they offer, *organizations* affiliated with such providers and the relationship between the two and ultimately a declaration of the *policy* of the state of Missouri with respect to abortion services. Someone aware of the admonition from *Hueller* (289 S.W. 338 at 341) that a lawmaker is not to find anything other than appropriations in an appropriation bill, would have to conclude that neither of these pieces of legislation are from appropriations bills. That would be wrong, of course. At the very least, § 10.705 has run far afield from embracing the subjects and accounts of appropriation, the only proper content of an appropriations bill.

Both of these provisions are addressed to similar ends--the prohibition of the use of public funds for abortion services. But § 10.705 moves even further by not only prohibiting the use of public funds (i.e., family planning funds) for abortion services, but also limiting the scope of the exception for the life of the mother that appears in the general statute. According to § 10.705, that exception now has an exception: State funds cannot be spent on abortion counseling even when the life of the mother is at stake. Any doubt as to the intent

or effect of this provision is resolved where this section declares openly that its provisions are designed "[t]o ensure that the state does not lend its imprimatur to abortion services." *Id*. The reach and effect of § 188.205 is thus drastically altered by § 10.705.

Section 10.705 explicitly removes from the family planning program all providers that perform abortions and many providers that maintain a meaningful affiliation with an abortion services organization. In short, the state is denying participation in the family planning program to any organization that would provide a service such as a medically necessary abortion to save the life of the mother. Then, § 10.705 adds to this the exclusion of groups that are affiliated with such an organization, thereby effectively maintaining a blockade to such services by the people who need them.

This kind of maneuvering is similar to the acts that were struck down in *Tolerton*, 139 S.W. at 408-409. There, the General Assembly attempted the removal of a state official from office by denying payment of his salary in an appropriations bill. Analogizing to the capture of a city by maintaining a blockade of its supplies, the Court held that cutting off the compensation to the official was an interference with his right to continue in office. *Id*. In § 10.705, the General Assembly not only fails to provide an exception for abortions for the life of the mother, it blocks all providers of that service from having any meaningful connection with the family planning program. And by setting forth in essence the entire text of § 188.205 ***except*** that portion providing the exception for the life and health of the mother, the General Assembly has attempted to supersede the general statute in favor of the

provisions in the appropriation bill. This effects nothing less than an unconstitutional amendment of § 188.205.

But this is not the only conflict between § 188.205 and § 10.705. Again, from a simple comparison of the two provisions, § 10.705 explicitly declares a new public policy for the state, very different from that expressed in the general statute. The restrictions listed in § 10.705 that are applicable to family planning service providers are represented to have the following purpose: "[t]o ensure that the state does not lend its imprimatur to abortion services[.]" *Id*. Nowhere in the general statutes does such a policy reveal itself. In fact, the state has already lent its imprimatur to a narrower policy, one that permits funding for abortions necessary to save the life of the mother. Therefore, the expressed intention in § 10.705 to remove in wholesale fashion the state's imprimatur from abortion services is in direct conflict with existing statutory law that declares openly that the state is not willing to go that far. The state could have chosen to completely remove itself and its imprimatur from any abortion related services by declaring that no public funds may be so used in any respect. The General Assembly has not done this by statute and may not do it through an appropriations bill.

Additionally, § 10.705 delivers a sweeping mandate with respect to the use of public funds on abortions and promoting abortions. Not only does § 10.705 restrict the use of *state* funds, it explicitly restricts the sharing of *any* funds, whether public or private, between the abortion provider and its affiliate. Again, reading this rationale together with the rest of subsection 1, it is plain that every effort has been made to sever any connection, however

tenuous, between state funds and abortion related services and any person or organization associated with such activities in any tangible way.

A somewhat similar mechanism was under consideration in *State ex rel. Gaines v. Canada*, 113 S.W.2d 783 (Mo. banc 1938), *cert. granted* , reversed on other grounds. 305 U.S. 676 (1938) . There, a general statute granted to a state university the authority to make certain tuition disbursements. An appropriation bill attempted to limit that authority to something less than a full tuition amount. Though the appropriation bill did not explicitly prohibit the university from making tuition disbursements altogether, it did attempt to limit the amount and, according to the court, the appropriation bill unconstitutionally amended the general statute. 113 S.W.2d. at 790.

Each of the effects described above violates clearly established and long-standing principles of Missouri's constitutional law: An appropriation bill may not amend, repeal, or enact substantive legislation. To the extent that § 10.705 does, it is unconstitutional.

3. Section 10.705 amends Missouri statute 351.110 relating to the naming of Missouri corporations.

Though § 10.705 makes it necessary for one dealing with abortions and family planning services to look for something in an appropriation bill other than appropriations, at least § 10.705 and § 188.205 both on their face deal with abortions. The same cannot be said for the next area of law upon which § 10.705 treads, Missouri's corporations law. Section § 351.110 regulates the naming of corporations. Section 10.705 amends that law by prohibiting a family planning provider from having the same or similar name as its independent affiliate that provides abortion services. In pertinent part, this portion of § 10.705 provides:

> To ensure that the state does not lend its imprimatur to abortion services ... an organization that receives these funds and its independent affiliate that provides abortion services may not share any of the following:
>
> (a) The same or similar name; ..
>
> ...
>
> An independent affiliate that provides abortion services must be separately incorporated from any organization that receives these funds.
>
> Section 351.110 RSMo includes the following provisions:
>
> The corporate name:
> ...

(3) Shall be distinguishable from the name of any domestic corporation existing under any law of this state or any foreign corporation authorized to transact business in this state[.] ... If the name is the same, a word shall be added to make such name distinguishable from the name of such other corporation[.]

From a plain inspection of the language of these two sections, it is apparent that § 10.705 not only refers to Missouri's corporation laws, but in fact changes the rules.

Both sections address permissible corporation names, although the appropriations bill is clearly attempting to regulate only the names of corporations that seek Missouri's reimbursement for family planning services. Nevertheless, the rules applicable to corporations are in some ways suspended or changed when those corporations participate in the state's family planning program.

For example, it is commonly held that a name is distinguishable if it is not misleading to the public, such that a person exercising ordinary intelligence will not mistake one entity for the other. *State ex rel. Hutchison v. Magrath*, 5 S.W. 29, 31 (Mo. 1887). Thus, though Missouri corporation law prohibits two corporations of the same name, it does not bar similar ones. Section 10.705 seeks to impose a different requirement on the naming of corporations when such organizations choose to participate as providers of family planning under state contract. Effectively, then, § 10.705 amends § 351.110 in that one class of corporation – abortion services affiliates – are prohibited from having a name to which they would be otherwise entitled, and what constitutes a distinguishable name may also be subject to

separate regulation. Such an outcome would be an impermissible substantive amendment to the corporate statutes by means of an appropriations bill.

4. Section 10.705 enacts new rules governing family planning service providers that participate in the state's family planning program, and new rules establishing the details of the family planning program itself.

Next, § 10.705 ventures away from appropriations by setting forth a system of family planning service provider classifications and then establishing which among these providers may participate in the program. Concluding this scheme are special rules of oversight applicable only to certain kinds of providers (those affiliated with abortion providers). The shift from a discussion of *services* to service *providers*, joined with a process of oversight of those providers is perhaps the most distant departure from setting forth appropriations and their subjects.

With regard to family planning service providers, § 10.705 includes, in part, these provisions:

> An organization that receives these funds may not directly refer patients who seek abortion services to any organization that provides abortion services, including its own independent affiliate. ... None of these funds may be paid or granted to an organization or an affiliate of an organization that provides abortion services. ... [A]n organization that receives these funds and its independent affiliate that provides abortion services may not share any of the following:
>
> (a) The same or similar name;

(b) Medical or non-medical facilities, including but not limited to business offices, treatment, consultation, examination, and waiting rooms;

(c) Expenses;

(d) Employee wages or salaries; or

(e) Equipment or supplies, including but not limited to computers, telephone systems, telecommunications equipment and office supplies.

An organization that receives these funds must maintain financial records that demonstrate strict compliance with this section and that demonstrate that its independent affiliate that provides abortion services receives no direct or indirect economic or marketing benefit from these funds. An independent audit shall be conducted at least once every three years to ensure compliance with this section. If the organization is an affiliate of an organization which provides abortion services, the independent audit shall be conducted at least annually.

Inserted in what otherwise really is "an act to appropriate money for the expenses, grants, refunds, and distributions of [various departments]," the above quoted provisions in § 10.705 take furthest from the realm of appropriations. There, § 10.705 establishes rights of participation among contractors classified according to this section, sets forth special duties of contractors that seek to provide family planning services but which are associated with abortion providers, and establishes special oversight provisions for such providers. In doing so, it attempts to impose detailed statutory requirements on a program developed and previously run under agency discretion.

First, where the agency previously ran the program, § 10.705 classified service providers into at least five groups: (1) those service providers that provide abortion and abortion related services; (2) those service providers that do not provide abortion and abortion related services; (3) those service providers that do not provide abortion and abortion related services but have an "impermissible" affiliation with an entity that provides abortion and abortion related services; (4) those service providers that do not provide abortion and abortion related services, but have a permissible affiliation with an entity that provides abortion; and (5) those service providers that do not provide abortion and abortion related services, but engage in other activities that may lead a program beneficiary to consider abortion as an option.

Second, where the agency did not differentiate among providers, § 10.705 draws a new line; some service providers are permitted to participate in the family planning program and some are not.

Third, where the agency previously imposed the same requirements on all providers, § 10.705 establishes two levels of oversight: Those organizations affiliated with abortion providers are subjected to heightened record keeping requirements and three times as much external scrutiny in the form of audits.

In all these respects, the language of this portion of § 10.705 is not in any instance directed towards amounts to be appropriated, services to be purchased, or other provisions related to the granting of money. It is, in essence, entirely new substantive legislation.

In addition to the classification of service providers, § 10.705 seeks to define the various details of the family planning program itself, venturing into matters of program design. In this regard, § 10.705 provides as follows:

> Abortion services include performing, assisting with, or directly referring for abortions, or encouraging or counseling patients to have abortions. Family planning services are preconception services that limit or enhance fertility, including contraception methods, the management of infertility, preconception counseling, education, and general reproductive health care. Follow-up services are services that supplement initial consultations for family planning services and pregnancy testing but do not include pregnancy or childbirth care. Nondirective counseling is defined as providing patients with a list of health care and social service providers that provide pregnancy, prenatal, delivery, infant care, foster care, adoption, alternative to abortion and abortion services and nondirective, non-marketing information in regard to such providers. Such list may categorize the providers by the service or services they provide. An organization that receives these funds may not directly refer patients who seek abortion services to any organization that provides abortion services, including its own independent affiliate. Nondirective counseling relating to pregnancy may be provided.

Standing alone, this series of definitions might at best appear to be efforts to specify the purpose of the funds, or at worst merely surplus. But when read in conjunction with the remaining provisions of the first subsection, i's actual function serves to bolster the overall

effort to further interfere with the longstanding agency program, here by requiring the agency to deny any organization that has any meaningful connection to abortion services the opportunity to participate in providing family planning services. Again, that is a "purpose" unconnected to the function of an appropriations bill. This is because the structure of § 10.705 is designed to (1) prevent public funds from subsidizing abortions and (2) prevent entities that have any meaningful connection to an abortion service provider from receiving any benefit of any kind from family planning funds. Because these dual purposes are so closely connected in the bill, any permissible use of definitions for appropriation purposes (if indeed that is what they are for) is tainted by the impermissible efforts at substantively legislating general rules about the entitlement of certain family planing service providers to participate in the program. In that regard, these definitions or service parameters are statutory provisions of general law and are therefore misplaced in an appropriations bill.

Additionally, it is the function of the executive department of government to administer and enforce the law. Mo. Const. Art. IV, § 1; *State Auditor v. Joint Committee on Legislative Research*, 956 S.W.2d 228, 231 (Mo. banc 1997). The determination as to whether a particular family planning program provider is qualified to properly deliver the services for which they seek state reimbursement and whether such providers are in compliance with Missouri law is a function of the executive department of government. The General Assembly has not enacted statutes to define even the most general parameters of a family planning services program. By general law, a family planning program could have been established for which funds would later be appropriated. Qualifications could have

been established for family planning service providers just as such requirements are established for other care givers. *See generally* Chapters 325 through 346, RSMo. Chapter 188 RSMo. governs the regulation of abortions, but nowhere in Missouri statutory law is there established a family planning program to be administered by the Department. In the absence of such general law, it is to be presumed that the legislature intends to leave to the Department the details of the program design, operation and oversight. *See e.g., State ex rel. Hueller v. Thompson*, 289 S.W. 338, 340 (Mo. banc 1926) (concluding that the intent of the legislature in not establishing salary levels by general law was to leave the matter to the discretion of the administrative board, and an appropriations bill that attempted to fix salaries was an unconstitutional injection of general legislation in an appropriation bill).

Here, as in *Hueller*, the General Assembly must be presumed to have left to the discretion of the Department the details and administration of the family planning program. Indeed, the bills passed in the years 1993 through 1996 would tend to support that proposition: None of those bills contained any program suggestions, restrictions, definitions, enforcement schemes or other details that would ordinarily be left to the sound discretion of the executive branch. To the extent § 10.705 does any of these things, it is an unconstitutional encroachment on the executive branch of government. However, it is most plainly an attempt to establish general substantive law in an appropriation bill.

C. The unconstitutional provisions of § 10.705 are severable.

The only provision of § 10.705 that could be constitutionally placed within an appropriations bill was the very first one: "For the purpose of funding family planning

services, pregnancy testing and follow-up services[.]" The proper remedy for the remaining, unconstitutional provisions is severance.

In Missouri there is a strong presumption in favor of severance that is codified in statute and recognized by the Missouri courts. Missouri's statutory doctrine of severance requires unconstitutional provisions of a law to be stricken and the remainder allowed to stand if possible:

> The provisions of every statute are severable. If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid unless the court finds the valid provisions of the statute are so essentially and inseparably connected with, and so dependant upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

§ 1.140, RSMo. (1994).

The Missouri Supreme Court has recognized that courts are "required to sever unconstitutional provisions of a statute where possible." *Carmack v. Director, Mo. Dept. of Agriculture,* 945 S.W.2d 956, 961 (Mo. banc 1997); *Hammerschmidt v. Boone County*, 877 S.W.2d 8, 103 (Mo. banc 1994). "Statutes . . . should be upheld to the fullest extent possible." *National Solid Waste v. Director, Dept. of Natural Resources*, 964 S.W.2d 818, 822 (Mo. banc 1998) (where court could not sever offending language without rendering the

statute meaningless, the court restricted the statute to its valid application). Courts must presume that the legislature intended to give effect to the parts of the statute that are valid. *Akin v. Director of Revenue*, 934 S.W.2d 295, 300-301 (Mo. banc 1996).

By enacting § 1.140, RSMo, the legislature evidenced its intent that invalid provisions of a statute generally be severable. This affirmative expression of general legislative intent can only be overcome if the legislature makes clear in a specific enactment that the statute at issue is an exception from the general rule. As to the particular statute in question, § 10.705, the legislature clearly indicated its willingness to sever those provisions that may be found invalid. "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 of this section shall be enforced." H.B. 10 § 10.705.2 (1999).

Not only is the intent of the legislature expressly set forth in the bill, it is entirely consistent with the history of public funding of family planning services in Missouri. As set forth earlier, Missouri has provided funds for family planning services in each of the last seven years. The prohibition on the use of public funds to perform, assist or encourage abortion as a family planning option has existed since 1986. § 188.205 (1994). The failure of the eligibility restrictions appearing in § 10.705 does not make lawful the use of public funds to perform, assist, or encourage abortions. Severing the eligibility restrictions leaves the basic purpose of the appropriation intact and leaves the policy of the state to encourage childbirth unaltered. Therefore, if the eligibility restrictions are unconstitutional, the remainder of the bill should continue to stand.

* * *

Unlike general, substantive legislation, a general appropriation bill is permitted to contain more than one subject as part of its function to authorize funds to be drawn from the state treasury to the various divisions of state government. This exception is a limited exception and an appropriation bill must still be directed towards identification of the purpose and amount of the various appropriations. This means that while such a bill may appropriate funds for a variety of accounts in a single bill, it may not contain substantive legislation. Section 10.705 appropriates funds to the Department for family planning programs, but then goes much farther to change existing statutes and to establish new rules, none of which are connected to the appropriation of state funds. To the extent § 10.705 does this, it is unconstitutional and those provisions must be stricken from the bill in accordance with Missouri law and legislative intent.

II.

The trial judge erred in striking and invalidating the Department's definitions of the phrase "same or similar name" and the term "share" in contracts drafted by the Director to reflect various funding restrictions for family planning service providers (a) because the Director's definitions are entitled to deference in that the terms are not defined in the statute nor do they have an unambiguous meaning, and the Director is charged with implementation of the statute and with the responsibility for defining the terms; and (b) because the Director's definitions are consistent with the rules of statutory construction in that they are drawn from other statutes addressing similar problems and are consistent with apparent legislative intent and with the need to construe the statute so as not to exceed what is constitutionally permissible.

Critical to properly contracting under the substantive law the General Assembly placed in the appropriations bill the terms "similar" and "share, the definitions of which were left unexplained in § 10.705. It was up to the Department to define those terms, rather than leave them ambiguous and subject to private interpretation by those seeking or obtaining contracts with the Department to provide family planning services.

The circuit court erred when it struck the Director's definitions, thus eliminating the deference this Court has consistently required for such statutory interpretation by state agencies. In the circuit court's view, "similar" and "share" were unambiguous. That is

wrong; their dictionary definitions provide too little guidance to enable the Director to contract pursuant to the restrictions in § 10.705.

A. The family planning service contract amendments.

As § 10.705 contemplated, on June 25, 1999, the Department entered into amended contracts with family planning providers for fiscal year 2000. The Department's new contract had to address the changes made in the language of § 10.705 from the previous year's bill. The contracts for fiscal year 2000 incorporated these changes.

In amending the contracts, the Director did two things: (1) It included the entire text of § 10.705.1; and (2) included definitions of two phrases from the bill that were not defined in the bill but that the Director concluded required definition. The Director defined the term "similar" within the context of corporation names as between the family planning provider and its independent affiliate that provides abortion services, and the term "share" with respect to its use describing the prohibited details of the relationships between such providers. That portion of the bill that includes these terms appears below:

> 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, an organization that receives these funds and its independent affiliate that provides abortion services may not *share* any of the following:
>
> (a) The same or *similar* name

(b)Medical or non-medical facilities, including but not limited to business, offices, treatment, consultation, examination, and waiting rooms;

(c) Expenses;

(d) Employee wages or salaries; or

(e) Equipment or supplies, including but not limited to computers, telephone systems, telecommunications equipment and office supplies.

An independent affiliate that provides abortion services must be separately incorporated from any organization that receives these funds.

Section 10.705.1 (emphasis supplied).

To prevent the contractors from giving their own varying interpretation to the terms "same or similar name" and "share," left undefined by the legislature, the Director included the following definitions in the contract:

> To ensure that an organization that provides abortion services does not receive a direct or indirect economic or marketing benefit from these funds, an organization that receives these funds and its independent affiliate that provides abortion services may not share any of the following:

> The same or similar name under applicable corporation statutes of Missouri or any other state in which the Contractor and affiliate are incorporated;
>
> . . . .
>
> "Share" is defined as services, employees, or equipment that are provided or paid for by the family planning contractor on behalf of the independent affiliate that provides abortion services without payment or financial reimbursement from the independent affiliate who provides abortion services. This will ensure that none of the state family planning funds may go directly or indirectly to the independent affiliate that provides abortion services.

(L.F. Vol. I, pp. 27-28).

This Court has held that "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. 1972); *see also, Heavy Constructors Ass'n of Greater Kansas City Area v. Division of Labor Standards*, 993 S.W.2d 569, 571 (Mo.App. W.D. 1999). The burden is upon those challenging the agency's interpretation to show that it bears no reasonable relationship to the legislative objective. *Id.* In other words, the agency's interpretation must be sustained unless it is unreasonable and plainly inconsistent with the

underlying statute. *Pen-Yan Inv., Inc. v. Boyd Kansas City, Inc.*, 952 S.W.2d 299, 303 (Mo.App. W.D. 1997).

In considering the meaning of language in a statute, the intent of the general assembly is to be given effect. *Laws v. Secretary of State*, 895 S.W.2d 43, 46 (Mo.App. W.D. 1995) *citing, A.M.G. v. Missouri Div. of Family Services*, 660 S.W.2d 370, 372 (Mo. App. E.D. 1983). Because Missouri does not record debates on bills or publish committee reports, legislative intent must be found in the words of the statute. *Blue Springs Bowl v. Spradling*, 551 S.W.2d 596, 601 (Mo. banc 1977). When determining legislative intent, non-technical words and phrases within a statute "are given their plain and ordinary meaning as found in the dictionary." *Laws*, 895 S.W.2d at 46. *See also, Columbia Athletic Club v. Director of Revenue*, 961 S.W.2d 806, 809 (Mo. banc 1998). If the words used by the legislature are subject to only one meaning, then legislative intent can be easily discerned and there is no need to apply rules of construction. *Abrams v. Ohio Pacific Exp.*, 819 S.W.2d 338, 340 (Mo. banc 1991). But, when a word has multiple interpretations, courts employ tools of statutory construction to clarify meaning. *Id.*

B. The terms are ambiguous as they are used in § 10.705.

1. "Similar"

The term "same" is unambiguous; "similar" is not. According to Webster's Third New International Dictionary, "similar" means "having characteristics in common: very much alike." It is thus something less than "same." But the word does not say how much less. It is plain that such a definition refers to some quantity of commonality, however that quantity is not precisely defined. Determining how many characteristics must be in common before two objects, such as corporate names, are considered "similar" is purely speculative. As illustrated by the definition of "similar," two names may be much alike, but nevertheless not "similar" because they are not "very" much alike. Therefore, "alike" would appear to fall somewhat short of the threshold for "similar." However it is approached, the word "similar" is susceptible to multiple interpretations.

2. "Share"

The word "share" is equally unclear. "Share" is defined by Webster's Third New International Dictionary as "to divide and distribute in portions." From its dictionary definition, "share" encompasses events where something identifiable is distributed to another without expectation that it will be returned. However, the definition does not clearly address those circumstances where something is distributed and then fully reimbursed. Failing to account for all possible applications of the term "share" leaves it open to interpretation.

3. Legislative record

As demonstrated by the ambiguities in the dictionary definitions of "share" and "similar," the need for interpretation by the Director was inevitable because definitions for the terms were omitted from § 10.705. If the legislature had intended to exclude any definition of the term "share," including the Director's definition, such exclusionary language would have appeared in the text of the appropriations bill. No exclusions were made. By omitting a definition of so imprecise a word, the legislature should be presumed to have left to the discretion of the appropriate member of the executive branch of government responsibility to establish its meaning within the context of executing the law. *State ex rel. Hueller v. Thompson,* 289 S.W. 338, 340 (Mo. banc 1926).

C. Rules of statutory constructions must be used to determine legislative intent.

The reasonableness of the Director's definitions are measured by the rules of statutory construction. First, courts presume that the legislature was aware of the existing statutes and judicial declarations of law when enacting statutes pertaining to the same subject and will also presume that the general assembly enacted legislation in accord with the law as declared by the courts." *White v. American Republic Ins. Co.,* 799 S.W.2d 183, 188 (Mo.App. S.D. 1990). Legislative intent can also be found by tracing the historical development of a statute, that includes the previous changes made to the statute and changes in legislative policies. *State ex rel Lebeau v. Kelly*, 697 S.W.2d 312, 314 (Mo.App. E.D. 1985). Moreover, when interpreting a statute, it is always necessary to consider all statutes "involving similar or

related subject matter when such statutes shed light upon [the] meaning of the statute being construed." *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 200 (Mo. banc 1991). Most importantly though is ensuring that a statute is interpreted and applied constitutionally.

1. Statutory terms must be construed to avoid the effect of unconstitutionality.

First and foremost, any interpretation of this language must be harmonized with plainly applicable principles of United States constitutional law. The recent case, *Planned Parenthood of Mid-Missouri and Eastern Kansas, Inc. v. Dempsey,* 167 F.3d 458 (8th Cir. 1999) dealt directly with the contours of permissible restrictions on the right of association (specifically, corporate "affiliation") where an appropriations bill attempted to exclude family planning providers from participation solely on the basis of their affiliation with an abortion services provider. In *Dempsey*, the State described the underlying rationale of the appropriation bill at issue that attempted to exclude affiliates of abortion providers from receiving family planning funds as an effort to prevent abortion providing organizations from receiving an indirect "*benefit*" from state family planning funds. *Id*. at 460.

Analyzing the case, the Eighth Circuit makes clear that a grantee organization has the right to engage in protected conduct through affiliates. *Id*. at 463. Further, any regulation that does not allow a grantee organization to exercise their constitutional rights through affiliate organizations is unconstitutional. *Id.* However, a law may require that an affiliate be truly independent of the grantee so that there is no *"subsidy"* flowing from the grantee to the affiliate organization:

> To remain truly "independent," any affiliate that provides abortion services must *not be directly or indirectly subsidized* by a § 10.715 grantee. This will ensure that State funds are not spent on an activity that Missouri has chosen not to subsidize. *See Regan Taxation With Representation of Washington*, 461 U.S. 540, 544, 103 S.Ct. 1997 (1983). *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. See Rust v. Sullivan*, 500 U.S. 173, 180-81, 111 S.Ct. 1759 (1991) (requiring abortion services to be physically and financially separate from government- funded program); *Regan*, 461 U.S. at 544 n. 6, 103 S.Ct. 1997 (requiring affiliate to be separately incorporated and to not receive any government funds); *Legal Aid Soc. of Hawaii v. Legal Services Corp.*, 145 F.3d 1017, 1025 (9th Cir. 1998) (upholding regulations requiring affiliates to be separately incorporated and to remain physically and financially independent).

Id. (emphasis supplied).

Here, the Director is confronted with both a clearly established constitutional right of family planning providers to affiliate with organizations that perform abortions and abortion related services and the mandate of § 10.705 to ensure that no "benefit" flows to such an organization from state funds. The Director's interpretation of the word "share" permits the right to "affiliate" to continue to have some tangible meaning while guarding against

"benefits" flowing from the state funds themselves. Nowhere does the Director's contract permit state funds to be used to purchase items for the abortion providing affiliate, with or without reimbursement. The funding restriction is against any flow of funds, *not just funds that come from the state*, to the abortion providing affiliate without reimbursement. Such a definition fully respects the lawful restrictions against state funds flowing through a family planning program to subsidize an abortion providing organization while not reading it so broadly as to render meaningless the benefits of lawful affiliation The words of a statute susceptible to two or more constructions will require that interpretation that will avoid the effect of unconstitutionality. This is so even though it may be necessary to disregard the more usual meaning of the language employed." *State ex inf. McKittrick v. American Colony Ins. Co.*, 80 S.W.2d 876, 883 (Mo. 1934); *see also, M & P Enterprises, Inc. v. Transamerica Financial Services*, 944 S.W.2d 154, 159 (Mo. banc 1997). For the Director to have read the term "benefit" as broadly as possible would have been to interpret the word to have the unconstitutional effect of excluding the permissible affiliation under *Dempsey*.

Additionally, all financial relationships are subject to verification through independent audit. H.B. 10 § 10.705.1 (1999). Though the Eighth Circuit did not set forth specific restrictions like those found in § 10.705, because § 10.705 came on the heels of the preceding case, the Director was required to interpret the undefined term of § 10.705 in the context of the court's directive.

Against this backdrop of well-established rules, the Director had several sources of law and judicial declarations to consider in arriving at a proper and permissible interpretation of this ambiguous language in § 10.705.

2. A statute must be read consistently with other statutes of related subject matter.

In interpreting the meaning of a statute, the Director, like a court, must read it in conjunction with other statutes of the same or related subject matter. *Farmers' Elec. Co-op., Inc. v. Missouri Dept. of Corrections*, 977 S.W.2d 266, 270 (Mo. 1998). In regard to corporate names, the Director naturally looked to the Missouri corporation statutes because they provided both a rational and accountable way to operationalize the phrase "same or similar name," and served as a source within Missouri law that indicated legislative intent in regard to the phrase. *See generally White v. American Republic Ins. Co*., 799 S.W.2d 183, 188 (Mo.App. S.D. 1990).

Although Missouri corporation laws require that names be "distinguishable" as compared to the prohibition of § 10.705 that disqualifies providers with "similar" names, the Director's use of the Missouri corporation laws as guidance in the naming of family planning corporations and their affiliates is reasonable and not in conflict with § 10.705. Therefore, the trial judge erred in failing to find that the Director's interpretation of the matter of corporate names was sufficiently reasonable to overcome the "plainly inconsistent" standard set forth in *Foremost-McKesson, Inc. v. Davis*, 488 S.W.2d 193 (Mo. 1972) and *Pen-Yan Inv., Inc. v. Boyd Kansas City, Inc*., 952 S.W.2d 299 (Mo.App. W.D. 1997).

* * *

The trial judge erroneously applied the law in failing to respect the ordinary function of the executive branch of government to interpret, apply and enforce the laws. Whether or not reasonable people would disagree on the most appropriate definitions of these terms, there was never a showing that the Director's definitions for Department contracts were unreasonable or plainly inconsistent with the underlying statute. Therefore, it was error for the trial judge to consider the eligibility of the Planned Parenthood entities under any terms other than those set forth in the contracts as drafted by the Director. Accordingly, this Court should remand the issue of the compliance of the two Planned Parenthood entitles for consideration under the Department contract terms if this Court finds the provisions of § 10.705 to be permissible under the Missouri Constitution.

III.

The trial judge erred in granting Shipley's motion to amend the judgment to include an award to Shipley of his attorney fees and expenses to be paid from the funds returned to the state by Planned Parenthood because neither attorney fees nor costs and expenses may be awarded against the state absent express statutory authority, in that the funds that Planned Parenthood is required to refund to the state, and from which the trial court ordered attorney fees and expenses to be paid, are state funds.

The entire basis for the circuit court's order is that Planned Parenthood improperly received state funds. If that is right, those funds retain their character as state funds. And subtracting Shipley's attorney fees and litigation expenses from those funds is tantamount to an order that the state pay those sums.

It is long established that attorney fees and expenses may not be awarded against the state. *Client Services, Inc. v. Missouri Coordinating Bd. for Higher Educ*., 30 S.W.3d 194, 195 (Mo. App. E.D. 2000) (and cases cited therein). *See also, Baumli v. Howard County*, 660 S.W.2d 702, 705 (Mo. banc 1983); *In Interest of K.P.B.*, 642 S.W.2d 643, 645 (Mo. banc 1982); *Labor's Educ. and Political Club Indep. v. Danforth*, 561 S.W.2d 339, 350 (Mo. banc 1977); *Missouri Hosp. Ass'n v. Air Conservation Comm'n*, 900 S.W.2d 263, 267 (Mo.App.1995) (all cited in *Client Serivces*); *See also Lipic v. Missouri Dept. of Social Svcs*. 93 S.W.3d 839 (Mo. App. E.D. 2002) ("Absent statutory authority, costs, including attorney fees, cannot be recovered from the State, *its agencies, or its officials*." (emphasis supplied).

Further, the fact that the present case involves a declaratory judgment action does not give Plaintiff the right to invoke the attorney fee provisions of the Declaratory Judgment Act (Chapter 537, RSMo). While that Act provides for an award of attorney fees and costs (§ 537.100), there is no express authority for making such an award against the state. *Baumli v. Howard County*, 660 S.W.2d 702 (Mo. banc 1983); *see also Client Services*, 30 S.W.3d at 195.

Here, the trial court awarded Shipley his attorney fees and expenses to be paid from state funds recovered from Planned Parenthood, concluding that the order requiring that the funds be paid back to the state created a "common benefit" from which fees and costs could be recovered, citing *Lett v. City of St. Louis*, 24 S.W.3d 157 (Mo. App. E.D. 2000). L.F. 639. But the funds paid back to the state by Planned Parenthood did not create a "common benefit," nor does the decision in *Lett* create an exception to the rule that attorney fees and litigation expenses may not be awarded against the state absent express statutory authority.

The common benefit doctrine is not an express statute authorizing an award of fees against the state. The one and only case relied on below did not hold that the common benefit doctrine was an exception to the rule that fees may not be awarded against the state absent a statute. In fact, *Lett* was not a case against the state, but one against the City of St. Louis, Missouri. *Lett*, 24 S.W.3d 157. Further, *Lett* did not involve the recovery of funds paid by the city and then refunded to the city. *Lett* involved funds paid by specific,

identifiable taxpayers, and the recovered funds were ostensibly to be paid back to specific taxpayers.[4]

The common benefit doctrine is an exception to the "American Rule," under which parties must ordinarily bear their own attorney fees. Missouri courts adhere to that rule; attorney fees may be awarded only where they are provided for by statute or contract, where very unusual circumstances exist such that equity demands a balance of benefits, or where the attorney's fees are incurred because of involvement in collateral litigation. *Id.* at 162. The common benefit doctrine falls under the "balance of benefit" exception to the American Rule.

While the common benefit doctrine may be an exception to the American Rule on awarding attorney fees, no Missouri case has held that it is an exception to the rule that fees, expenses, and costs may not be taxed against the state in the absence of an express statute

Here, the trial court reasoned that the return to the state of public funds created a benefit to taxpayers–arguably every citizen in the state. The court did not find that taxpayers in general, or any set of specific taxpayers were due a refund, or that an identifiable group of taxpayers would realize a tax savings. In sum, it generalized that funds returned to the state would amount to a benefit for all, and equity demands that fees be paid from such funds.

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[4]In *Lett*, the court denied the award of fees, finding that the plaintiffs did not prevail on appeal and did not create a common benefit.

The ultimate result of this reasoning is plain: If the state realizes any benefit from litigation, it would be subject to attorney fee and litigation expense liability on a balance of the equities under the common benefit doctrine, with no express statute authorizing such an award.

The common benefit doctrine is an exception to the American Rule on attorney fees. It is not, and should not be, an exception to the rule requiring an express statute to award fees and expenses against the state.

CONCLUSION

The judgment of the trial court erroneously declared and erroneously applied the law, and accordingly, the judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND OF COMPLIANCE

The undersigned hereby certifies that on this 6th day of February, 2006, two true and correct copies of the foregoing brief, and one disk containing the foregoing brief, were mailed postage prepaid to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 12,599 words. The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

_____
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