IN THE SUPREME COURT OF MISSOURI

No. SC98020

PLANNED PARENTHOOD OF THE ST. LOUIS REGION and REPRODUCTIVE HEALTH SERVICES OF PLANNED PARENTHOOD OF THE ST. LOUIS REGION,

RESPONDENTS,

VS.

MISSOURI DEPARTMENT OF SOCIAL SERVICES, MO HEALTHNET DIVISION, and MISSOURI MEDICAID AUDIT AND COMPLIANCE UNIT,

APPELLANTS.

Appeal from the Circuit Court of the City of St. Louis
The Honorable David L. Dowd, Circuit Judge

RESPONDENTS' BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES iv
INTRODUCTION 1
STATEMENT OF FACTS 2
STANDARD OF REVIEW 4
ARGUMENT 5
I. HB 2011 Violates Article IV, § 23 of the Constitution by Relying on a Reference to § 188.015, RSMo to Fix its Purpose (Response to the State's Point I) 6
A. Section 11.800 is Not an Independent Appropriation; It is an Unconstitutional Reference to Current Law to Fix the Purpose of Appropriations in Part 1 7
1. Appropriations, by definition, must set aside an amount of money greater than zero 7
2. Section 11.800's statutory cross reference impermissibly fixes the purpose of the appropriations in HB 2011 9
3. Whether an appropriations bill can ever cross-reference a statute is not before the Court 12
4. The State's interpretation of Article IV, § 23 is at odds with its plain language 12
B. Article IV, § 23 is More Specific than Article III, § 21 13
C. The Attorney General Opinions on Which the State Relies are Neither Binding Nor Persuasive 14
D. The State's Interpretation Would Impermissibly Render the Statutory Cross-Reference Mere Surplusage 15
II. Section 11.800 Violates Article III, § 23 of the Constitution and Longstanding Missouri Case Law by Amending General Statutes (Response to the State's Point II) 16

A. Existing Substantive Law Required the State to Pay Planned Parenthood for Physician and Family Planning Services It Provides to MO HealthNet Beneficiaries.....18

1. Section 208.152, RSMo Requires the State to Make Payments on Behalf of MO HealthNet Beneficiaries for Family Planning Services.....18
2. Section 208.153, RSMo Requires the State to Allow MO HealthNet Beneficiaries to Obtain Services from Any Provider with a MO HealthNet Participation Agreement.....19
3. Together, §§ 208.152 and 208.153 Require the State to Reimburse Any Provider with a Participation Agreement for Physician and Family Planning Services It Provides to MO HealthNet Beneficiaries.....20

B. Section 11.800 is Unconstitutional Substantive Legislation.. 22

1. *Rolla 31* Does Not Alter the Analysis Because there is an Unambiguous Conflict Between HB 2011 and Chapter 208 23
2. *Opponents of Prison Site* is Inapposite Because it Has Nothing in Common with this Case 24
3. That MO HealthNet Beneficiaries Can Still Obtain Services from Other Providers Is irrelevant 25
4. *State ex rel. Kansas City Symphony v. State* Does Not Control this Case..... 26

C. The Circuit Court Applied the Correct Legal Standard in Analyzing Whether Section 11.800 is Substantive Legislation..... 28

III. If the Court is Hesitant About Declaring HB 2011 Unconstitutional, there is an Alternative, Constitutional Reading of Section 11.800 Available (Alternative Basis to Affirm)..... 29

1. Doubtful Legislative Enactments Must be Harmonized with the Constitution 29
2. There is a Reason the Legislature Characterized Section 11.800 as Guidance Rather than an Appropriation or the Purpose of an Appropriation 31

CONCLUSION 34

CERTIFICATE OF SERVICE AND COMPLIANCE 36

TABLE OF AUTHORITIES

Cases

Allcorn v. Allcorn, 241 S.W.2d 806 (Mo. App. 1951) 31
Anderson ex rel. Anderson v. Ken Kauffman & Sons Excavating, LLC, 248 S.W.3d 101 (Mo. App. 2008) 21
Bateman v. Rinehart, 391 S.W.3d 441 (Mo. banc 2013) 15, 29, 30
Blaske v. Smith & Entzeroth, Inc., 821 S.W.2d 822 (Mo. banc 1991) 6, 29, 31
Brady v. Curators of Univ. of Mo., 213 S.W.3d 101 (Mo. App. 2006) 14
Business Men's Assur. Co. of Am. v. Graham, 984 S.W.2d 501 (Mo. banc 1999) 6
City of Cabool v. Mo. State Bd. of Mediation, 689 S.W.2d 51 (Mo. banc 1985) 4
City of Jefferson v. Mo. Dep't of Nat. Res., 916 S.W.2d 794 (Mo. banc 1996) 8
Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 24
Fort Zumwalt Sch. Dist. v. State, 896 S.W.2d 918 (Mo. banc 1995) 8
Frye v. Levy, 440 S.W.3d 405 (Mo. banc 2014) 10
Knight v. Carnahan, 282, S.W.3d 9 (Mo. App. 2009) 28
McNeil-Terry v. Roling, 142 S.W.3d 828 (Mo. App. 2004) 27
Mo. Ass'n of Club Execs., Inc. v. State, 208 S.W.3d 885 (Mo. banc 2006) 11
Opponents of Prison Site, Inc. v. Carnahan, 994 S.W.3d 573 (Mo. App. 1999) ..... *passim*
Psychare Mgmt., Inc. v. Dep't of Soc. Servs., Div. of Med. Servs., 980 S.W.2d 311 (Mo. banc 1998) 4, 5
Rebman v. Parson, 576 S.W.3d 605 (Mo. banc 2019) 1
Rizzo v. State, 189 S.W.3d 576 (Mo. banc 2006) 11
Rolla 31 Sch. Dist. v. State, 837 S.W.2d 1 (Mo. banc 1992) ..... *passim*
St. Louis Cty. v. Prestige Travel, Inc., 244 S.W.3d 708 (Mo. banc 2011) 13
State ex inf. Danforth v. Merrell, 530 S.W.2d 209 (Mo. banc 1975) 14
State ex rel. Davis v. Smith, 75 S.W.2d 828 (Mo. banc 1934) 18
State ex rel. Gaines v. Canada, 113 S.W.2d 783 (Mo. banc. 1937) 18

State ex rel. Hueller v. Thompson, 289 S.W. 338 (Mo. banc 1926).....*passim*
State ex rel. Igoe v. Bradford, 611 S.W.2d 343 (Mo. App. 1980).....18
State ex rel. K.C. Symphony v. State, 311 S.W.3d 272 (Mo. App. 2010)..... 26
State ex rel. McClellan v. Godfrey, 519 S.W.2d 4 (Mo. banc 1975) 30, 34
State ex rel. Nothum v. Walsh, 380 S.W.3d 557 (Mo. banc 2012) 30
State ex rel. Proctor v. Messina, 320 S.W.3d 145 (Mo. banc 2010) 32
State v. Graham, 149 S.W.3d 465 (Mo. banc 2004).....10
State v. Moore, 303 S.W.3d 515 (Mo. banc 2010) 19
Stroh Brewery Co. v. State, 954 S.W.2d 323 (Mo. banc 1997)..... 11
Turner v. Sch. Dist. of Clayton, 318 S.W.3d 660 (Mo. banc 2010) 28
United States v. Price, 361 U.S. 304 (1960) 24
Veal v. City of St. Louis, 289 S.W.2d 7 (Mo. 1956).....30, 31

Statutes

§ 188.015, RSMo.....*passim*
§ 208.152, RSMo .....*passim*
§ 208.153, RSMo .....*passim*
§ 208.156, RSMo 21
§ 536.087, RSMo 29
§ 536.140, RSMo 5

Other Authorities

Black's Law Dictionary (10th ed. 2014).....7
Webster's New World College Dictionary (5th ed. 2014) 10, 12, 13, 32

Constitutional Provisions

Mo. Const. art. III, § 21.....13
Mo. Const. art. III, § 23 .....*passim*
Mo. Const. art. IV, § 23.....*passim*
Mo. Const. art. IV, § 28 26

INTRODUCTION

The appropriations bill before the Court—House Bill 2011—violates two independent constitutional restrictions on the legislature's appropriation authority. First, Article IV, § 23 requires an appropriations bill to "distinctly specify the amount and purpose of the appropriation ***without reference to any other law*** to fix the amount or purpose." (emphasis added). House Bill 2011 does not comply with that requirement. It explicitly references another statute (§ 188.015, RSMo) to fix the purpose of its appropriations: to provide money to MO HealthNet to pay for medical services, so long as those medical services are not provided by an "abortion facility" within the meaning of the statute (which excludes hospitals, even though they provide abortions).

House Bill 2011 also violates the Constitution's single-subject requirement. Mo. Const. art. III, § 23. While appropriations bills can "embrace the various subjects and accounts for which moneys are appropriated," *id.*, they *cannot* constitutionally include or amend general laws in the process of appropriating funds. This has been settled law for the last century. *State ex rel. Hueller v. Thompson*, 289 S.W. 338, 341 (Mo. banc 1926). House Bill 2011 nevertheless went beyond the subjects and accounts for which moneys are appropriated and amended existing law by altering the State's statutory obligation to pay for medical services rendered by any provider a MO HealthNet chooses to see. That revision of the general law cannot constitutionally be accomplished in an appropriations bill.

The State's defense of House Bill 2011 relies heavily on the high degree of deference this Court ordinarily affords the legislature when it comes to procedural guardrails the Constitution places around its authority. But that deference is not endless. Indeed, just this year, this Court struck language in an appropriations bill because it plainly violated the Constitution's separation of powers provisions. *Rebman v. Parson*, 576 S.W.3d 605 (Mo. banc 2019). While this case involves different constitutional limitations, the legislature's disregard for them is equally clear. This Court should affirm the Circuit Court's judgment.

STATEMENT OF FACTS

Respondents Planned Parenthood of the St. Louis Region and Reproductive Health Services of Planned Parenthood (collectively "Planned Parenthood") are dissatisfied with the statement of facts submitted by the State. It covers procedural aspects of the case but largely omits the facts found below. Rule 84.04(f).

Missouri's Medicaid program is known as MO HealthNet. D17:P2. Its purpose is to make payments on behalf of eligible beneficiaries for services rendered by providers who have valid agreements with the State. D27:P3. Planned Parenthood is one such provider, with valid and current MO HealthNet provider agreements. D15-16.

Each year, the legislature funds MO HealthNet through an appropriations bill. For Fiscal Year 2019, that appropriations bill was designated House Bill 2011 ("HB 2011"). Among other things, it appropriated funds to reimburse those who provide physician and family planning services to MO HealthNet beneficiaries. D7:P27-28; A26-27. In fact, HB 2011 appropriated nearly $400 million to pay for physician and family planning services. *Id.*

Historically, Planned Parenthood billed MO HealthNet for those physician and family planning services, and the State paid those bills. D3:P173; D4:P168. That changed in Fiscal Year 2019.

The State's Pre-emptive Denial of Planned Parenthood's Claims

Despite the explicit appropriation of funds to reimburse providers who participate in the MO HealthNet program, the State contends it cannot pay Planned Parenthood for providing physician and family planning services in Fiscal Year 2019. And it has not. D3:174; D4:P169. It notified Planned Parenthood that, due to the State's interpretation of certain language in HB 2011, any and all claims Planned Parenthood submitted for Fiscal Year 2019 would be denied. D6.

The State initially claimed these denials were mandated by both Sections 11.715 and 11.800 of HB 2011. D4:P169; D3:P174. However, the State later

abandoned any reliance on Section 11.715, and now instead claims that only Section 11.800 supports its decision. *See* State's Br. at 29-30.

House Bill 2011

HB 2011 is divided into three "Parts," which in turn contain various sections. Section 11.000 describes the structure of the bill:

> ***Each appropriation*** in this act ***shall consist of the item or items in each section of Part 1*** of this act, for the amount and purpose and from the fund designated in each section of Part 1, ***as well as all additional clarifications of purpose in Part 2*** of this act that make reference by section to said item or items in Part 1. ***Any clarification of purpose in Part 2 shall state the section or sections in Part 1 to which it attaches and shall, together with the language of said section(s) in Part 1, form the complete statement of purpose of the appropriation***. As such, the provisions of Part 2 of this act shall not be severed from Part 1, and if any clarification of purpose in Part 2 is for any reason held to be invalid, such decision shall invalidate all of the appropriations in this act of which said clarification of purpose is a part.

D7:P2-3; A1-2 (emphasis added).

Section 11.000 further explains Part 3 of HB 2011. "Part 3 of this act ***shall consist of guidance*** to the Department of Social Services in implementing the appropriations found in Part 1 and Part 2 of this act." D7:P3; A2 (emphasis added). Part 3 consists of only one section: Section 11.800. That section provides – "In reference to all sections in Part 1 and Part 2 of this act: No funds shall be expended to any abortion facility as defined in Section 188.015, RSMo, or any affiliate or associate thereof." It contains no appropriation amounts. D7:P41; A40.

Although Section 11.800 purports to provide "guidance" concerning "abortion facilities," that term is not defined anywhere in HB 2011. Instead, Part 3 refers to a definition in § 188.015. Subsection 2 of § 188.015 defines an abortion facility as: "a clinic, physician's office, or any other place or facility in which abortions are performed or induced other than a hospital." Relying on this

language, the State concluded it could not pay Planned Parenthood because it performs abortions and is not a hospital.[1]

Planned Parenthood's Challenge

Upon notification from the State that it would not be paid for providing services to MO HealthNet beneficiaries, Planned Parenthood timely appealed to the Administrative Hearing Commission ("AHC"). D3:P4-58; D4:P1-56. Planned Parenthood and the State filed cross-motions for summary decision. Although the AHC ruled in the State's favor, it acknowledged that it lacked authority to reach the constitutional issues raised by Planned Parenthood's appeal. D3:P175; D4:P170.

Planned Parenthood then appealed to the Circuit Court for the City of St. Louis, where its constitutional claims could be considered. D5. The Circuit Court concluded the State could not rely on the language in Part 3 to deny payment to Planned Parenthood because that language is unconstitutional. D17. This appeal followed.

STANDARD OF REVIEW

Because this case originated as a contested case in the AHC, this Court reviews the decision of the AHC, not the Circuit Court. *City of Cabool v. Mo. State Bd. of Mediation*, 689 S.W.2d 51, 53 (Mo. banc 1985). The Court does not "determine the weight of the evidence or substitute its discretion for that of the administrative body; the Court's function is to determine primarily whether competent and substantial evidence upon the whole record supports the decision, whether the decision is arbitrary, capricious, or unreasonable, and whether the commission abused its discretion." *Psychare Mgmt., Inc. v. Dep't of Soc. Servs., Div. of Med. Servs.*, 980 S.W.2d 311, 312 (Mo. banc 1998). The Court's review

[1] Reproductive Health Services of Planned Parenthood of the St. Louis Region is the only abortion provider in the State of Missouri. However, Reproductive Health Services of Planned Parenthood of the St. Louis Region does not "expect reimbursement for abortion services or abortion counseling other than for exceptions required by federal law." D3:P175. Planned Parenthood of the St. Louis Region does not provide abortion services. D17:P2.

extends to whether the underlying agency action violates the Constitution. § 536.140.2(1), RSMo. Questions of law, including the constitutionality of HB 2011, "are matters for the independent judgment of this Court." *Psychare Mgmt.*, 980 S.W.2d at 312. Here, the issues are all questions of law to be reviewed anew.

ARGUMENT

The AHC correctly determined it had no authority to address Planned Parenthood's constitutional claims. But the Circuit Court did have authority and correctly concluded the language in Section 11.800 of HB 2011—on which the State relied to preemptively deny Planned Parenthood reimbursement for any Medicaid claims in fiscal year 2019—is unconstitutional.

Section 11.800 violates Article IV, § 23's command to "specify the amount and purpose of [an] appropriation without reference to any other law to fix the amount or purpose," because it expressly references another statute—§ 188.015, RSMo—to identify those providers the State is now prohibited from reimbursing for otherwise covered services. The purpose of this statutory cross-reference was to specify that hospital providers who perform abortions were not to be defunded—only Planned Parenthood was.

The Circuit Court was also correct that Section 11.800 separately violates Article III, § 23 and longstanding case law because it is an appropriation measure that amends existing general law. Sections 208.152 and 208.153, RSMo, require the State to pay for physician and family planning services on behalf of MO HealthNet beneficiaries, regardless of the provider of those services. Section 208.153 permits beneficiaries to receive care from any provider with a valid agreement (which Planned Parenthood has), and § 208.152 obligates the State to pay for that care. Section 11.800 effectively amends these statutes to exclude certain providers ("abortion facilities") from the scope of the State's statutory payment obligation. For these reasons, the Court should affirm the Circuit Court's judgment, reversing the decision of the Administrative Hearing Commission.

Should the Court see a need to avoid the constitutional issues, there is another path. Under the doctrine of constitutional avoidance, if a legislative enactment is subject to two or more constructions, one of which raises substantial constitutional difficulties, courts will adopt the interpretation that avoids the problem. *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822 (Mo. banc 1991). This Court "is primarily concerned with the correctness of the trial court's result, not the route taken by the trial court to reach that result." *Business Men's Assur. Co. of Am. v. Graham*, 984 S.W.2d 501, 506 (Mo. banc 1999). It can affirm a judgment "if cognizable under any theory." *Id.*

Planned Parenthood has consistently argued that HB 2011 can be read so as not to amend substantive law and not bar the State from paying it for medical services rendered to MO HealthNet beneficiaries. As discussed in Section III, *infra*, this Court could interpret the appropriations bill as not restricting funding, affirm the Circuit Court's judgment reversing the AHC's decision, and enter judgment for Planned Parenthood without the need to declare portions of HB 2011 unconstitutional.

I. HB 2011 Violates Article IV, § 23 of the Constitution by Relying on a Reference to § 188.015, RSMo to Fix its Purpose (Response to the State's Point I).

For purposes of the constitutional analysis, Planned Parenthood assumes the State is interpreting its appropriations language correctly. *But see* Section III *infra*. No one disputes that Section 11.800 references another statute. The issue for this Court is why it does so. The State asks this Court to reject the Circuit Court's conclusion that the purpose of the reference is to fix the purpose of the appropriations in HB 2011. To do so, the Court would have to accept the State's unreasonably strained interpretation of Article IV, § 23, which is at odds with the plain text.

Article IV, § 23 requires "[e]very appropriation law [to] distinctly specify the amount and purpose of the appropriation without reference to any other law to fix the amount or purpose." There are several references to the amounts and purposes

of the appropriations in HB 2011. Part 1 appropriates various amounts to the Department of Social Services for various purposes. D7:P27-28. Part 2 then provides additional restrictions and carve-outs regarding the use of the amounts appropriated in Part 1. D7:P39-41. Section 11.000 announces that Parts 1 and 2 "form the complete statement of purpose" for each appropriation. D7:P2. According to the unambiguous language of the bill itself, Part 3 is not part of "the complete statement of purpose" for the appropriation (even though the State's brief now argues it is simply a purpose statement).

The State asks the Court to ignore what the legislature wrote in Section 11.000 and treat Part 3 as if it is both an appropriation and a statement of purpose. State's Br. at 13-15. As discussed in Section II *infra*, Part 3 is neither – it is instead the legislature's unconstitutional effort to amend existing statutes in Chapter 208.

But, for the sake of argument, even if this Court accepts the State's invitation to ignore the words of the bill, Part 3 still unconstitutionally references § 188.015 to fix the amount or purpose of the appropriations made in Parts 1 and 2 of HB 2011, as the Circuit Court concluded.

A. Section 11.800 is Not an Independent Appropriation; It is an Unconstitutional Reference to Current Law to Fix the Purpose of Appropriations in Part 1.

The State does not analyze Part 3's relationship to Parts 1 and 2. *See* State's Br. at 13-19. Instead, the State's argument proceeds from the wholly untenable position that Section 11.800 is *itself* an appropriation – an appropriation of zero dollars. *See id.* at 14-15 ("The 'amount' and 'purpose' of the appropriation in Section 11.800 of House Bill 2011 are apparent from the face of the bill.") This does not comport with the structure of HB 2011 or common sense.

1. Appropriations, by definition, must set aside an amount of money greater than zero.

An appropriation is "a legislative body's . . . act of setting aside a sum of money for a specific purpose." *Black's Law Dictionary* at 123 (10th ed. 2014). Section 11.800 does not set aside any sum of money for any purpose; unlike other

sections of the bill, there are no dollar amounts associated with Section 11.800. If Section 11.800 is effective at all, it is as a restriction or carve-out from *all* of the appropriations made in Part 1 of HB 2011. Relevant here, the State interprets Section 11.800 to place limitations on funds appropriated in Section 11.455 for "physician services and related services including, but not limited to, clinic . . . and family planning services under the MO HealthNet fee-for service program." D27:P27-28; A26-27.

The State's argument that "the 'amount' of appropriated funds [in Section 11.800] is zero dollars," State's Br. at 15, relies on a through-the-looking-glass approach to statutory interpretation.[2] It is directly contrary to the meaning of the word appropriation (setting aside funds) and a fundamental distortion of how a lawful appropriations process works.

Consistent with the normal meaning of the word "appropriation," Article IV, § 23 requires appropriations bills to distinctly appropriate a specified amount of funds for a specified purpose. Until such appropriation is made, there are simply no funds available for a government agency's use. *See City of Jefferson v. Mo. Dep't of Nat. Resources*, 916 S.W.2d 794, 796 (Mo. banc 1996); *Fort Zumwalt Sch. Dist. v. State*, 896 S.W.2d 918, 922 (Mo. banc 1995).

In other words, until the legislature appropriates money, the funds available for any particular purpose in each fiscal year is necessarily $0. *Fort Zumwalt*, 896 S.W.2d at 922. The legislature does not need – and it would be a waste of legislative effort – to appropriate "zero dollars." That is the status quo until an appropriation is made. Here, the legislature set aside and appropriated funds for physician and family planning services in one part of HB 2011 and then attempted to eliminate Planned Parenthood's eligibility to be reimbursed for those services in another.

[2] "'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean – neither more nor less.'" Lewis Carroll, *Through the Looking Glass* (1872).

The latter section is fundamentally not an appropriation. That is likely why the legislature did not characterize it as one in Section 11.000 of HB 2011.

2. Section 11.800's statutory cross reference impermissibly fixes the purpose of the appropriations in HB 2011.

The Circuit Court rejected the State's argument and correctly concluded that Section 11.800 unconstitutionally references § 188.015 to fix the purpose of the appropriations in Part 1.

In Section 11.455, the legislature appropriated almost $400 million to the MO HealthNet Division as follows:

> For the purpose of funding physician services and related services including, but not limited to, clinic and podiatry services, telemedicine services, physician-sponsored services and fees, laboratory and x-ray services, asthma related services, and family planning services under the MO HealthNet fee-for-service program . . . .

D7:P27-28; A26-27. This section broadly appropriated funds to the MO HealthNet Division to pay for physician and family planning services through its fee-for-service program. Section 11.455 says nothing about the identity of the provider, and does not restrict the appropriation based on specific services a provider (or its affiliates) happens to provide. Without further language, Planned Parenthood is eligible to be paid from these funds as it has always been. *See* D3:P175; D4:P168.

Section 11.800 modifies Section 11.455, such that *some* providers are no longer eligible to be paid for services provided to MO HealthNet beneficiaries. Which providers? Abortion facilities. But, rather than define an abortion facility (or simply identify Planned Parenthood), Section 11.800 instead cross-references § 188.015 to identify which providers cannot be paid.

The reason the legislature referred to § 188.015 is simple: to make clear that hospitals (which provide abortions) are not abortion facilities and still eligible to be paid. The State contends the purpose of Section 11.800 is clear without the reference to § 188.015. State's Br. at 13-15. Yet, rather than explain how one can understand what Section 11.800 accomplishes without reading § 188.015, the State

simply asserts that Section 11.800's purpose was to prevent payment to abortion facilities. *Id.* This simply begs the question – what *is* an abortion facility? The cross-reference to § 188.015 plainly fixes the purpose of the appropriations in Part of HB 2011: to make money available to pay for medical services provided to MO HealthNet beneficiaries, so long as services are not provided by an abortion facility, which does not include a hospital.

The State's argument would require this Court to ignore well-established rules of construction and find the reference to 188.015 is mere surplusage. *See, e.g.*, *State v. Graham*, 149 S.W.3d 465, 467 (Mo. banc 2004). But it is not surplusage at all. Absent the reference to § 188.015, Section 11.800 would read: "No funds shall be expended to any abortion facility, or any affiliate thereof." The legislature obviously believed it was necessary to define an "abortion facility," and the Court must consider that definition. "Statutes are enforced as they are written, not as they might have been written." *Frye v. Levy*, 440 S.W.3d 405, 420 (Mo. banc 2014).

Section 188.015 defines "abortion facility" as "a clinic, physician's office, or any other place or facility in which abortions are performed or induced ***other than a hospital***." The legislature inserted this cross-reference because without it "abortion facility" could have any number of meanings. It could have the same meaning ascribed to it by § 188.015. Or, it could have that meaning but also include hospitals. Alternatively, it could mean a facility that does *nothing but* perform abortions, rather than a clinic or office where some abortions are performed.

The last of these three interpretations is likely what the term would mean going by the plain-language definition of "facility," which means "a building, special room, etc. that is built or designed for some activity," *Webster's New World College Dictionary* at 519 (5th ed. 2014), or "something (such as a hospital) that is built, installed, or established to serve a particular purpose," *Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/facility. The fact that the legislature cross-referenced a statute to give the term something other

than its plain-language meaning demonstrates that the cross-reference was meant to fix the purpose of the appropriations in HB 2011. The legislature, by contrast, was apparently concerned that without the reference to § 188.015, an undefined reference to an "abortion facility" would extend the funding restriction to hospitals that perform abortions, thereby denying funds to them and their affiliates (a substantial portion of medical providers in the state).

The bottom line is that reading Section 11.800 without the reference to § 188.015 might lead one to conclude there will be no funding to any facility that performs abortions, including hospitals. Some legislators might strongly support that result. But it is not what happens when the cross-reference is added. As a direct result of the reference to § 188.015, Section 11.800 still allows funding for hospitals that perform abortions (and their affiliates). One could not know that without looking up § 188.015.[3]

If a legislator or member of the public wants to understand the purpose of an appropriation, he or she should be able to simply read the bill without having to cross-reference other statutes. The desire to prevent surprise and fairly apprise legislators and the public of matters in legislation animates many of Missouri's constitutional restrictions on legislative power. *See Missouri Ass'n of Club Executives, Inc. v. State*, 208 S.W.3d 885, 888 (Mo. banc 2006); *Stroh Brewery Co. v. State*, 954 S.W.2d 323, 325-26 (Mo. banc 1997); *Rizzo v. State*, 189 S.W.3d 576, 578-79 (Mo. banc 2006). HB 2011's reference of other law to fix the purpose of its appropriations could mislead legislators and the public, and it violates the Missouri Constitution.

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[3] The State believes it is somehow relevant that "Providers [Planned Parenthood] do not assert that *they* were confused about Section 11.800's purpose." State's Br. at 15. It is not. The reason Planned Parenthood was not confused about Section 11.800's purpose is because it contains a cross-reference to a statute expressly defining an "abortion facility" such that the restriction applies only to Planned Parenthood.

3. Whether an appropriations bill can ever cross-reference a statute is not before the Court.

Next, the State sets up a straw man never addressed by the Circuit Court. The State complains that Article IV, § 23 should not be read to bar *all* statutory cross-references in appropriations bills. State's Br. at 15-16. That is not being argued here.

Perhaps there are circumstances in which the legislature can cross-reference a statute without using that cross-reference to "fix [an appropriation's] amount or purpose." But any such circumstances are neither present nor at issue in this case.[4] As the Circuit Court ably articulated, *this* statutory cross-reference was undoubtedly used to fix the purpose of the appropriations in HB 2011. While other hypotheticals might pose analytical difficulty, the situation here isn't a close call.

4. The State's interpretation of Article IV, § 23 is at odds with its plain language.

The State also contends Article IV, § 23 "simply bars the use of a statutory reference *in lieu of* stating the appropriation's amount and purpose." State's Br. at 15. There appears to be no case law meaningfully interpreting Article IV, § 23. But the State's interpretation ignores the Constitution's plain language. Article IV, § 23 says an appropriation bill shall "distinctly specify" the amount and purpose of the appropriation without reference to any other law to "fix" the amount or purpose.

"Distinct" means "clearly perceived or marked off; clear; plain," or "well-defined; unmistakable; definite." *Webster's New World College Dictionary* at 426

[4] A cursory review of HB 2011 shows several instances where a cross-reference to a statute simply announces that the legislature is appropriating as envisioned by statute. *See, e.g.*, Section 11.005 (A2) (explaining an appropriation is an annual salary adjustment "in accordance with Section 105.005"). But it also reveals several instances where the cross-references are suspect. *See, e.g.*, Section 11.305 (A21-22) ("[N]on-exempt state employees identified by Section 105.393 will be paid first with any remaining funds to be used to pay overtime to any other state employees."). The State's observation that the legislature frequently references other statutes does not make all such references legal. It simply illustrates the need for this Court to address the restrictions imposed by Article IV, § 23.

(5th ed. 2014). "Specify" means to "mention, describe, or define in detail; state definitely." *Id.* at 1395. And, as the State's own brief notes, the word "fix" means to "settle on: determine, define." State's Br. at 14. As such, Article IV, § 23 commands the legislature to clearly and unmistakably describe the purpose of an appropriation in detail without reference to any other statute to determine or define that clear and unmistakable purpose. By requiring readers to consult § 188.015 to determine what an abortion facility is—and thus to whom payments are prohibited—Section 11.800 flunked this requirement.

For this reason, the State's complaint that the Circuit Court improperly assessed whether a reader could "completely know or fully understand" the purpose of HB 2011 without consulting § 188.015 is misplaced. *See* State's Br. at 16-19; D17:P18. The State's position seems to be that an appropriations bill is sufficient so long as a reader can glean the general "gist" of an appropriation's purpose from the bill itself. *Id.* But that is plainly not what Article IV, § 23 requires. Appropriations bills must "distinctly specify" the purpose of an appropriation. If a person cannot read HB 2011 and completely know or fully understand the purpose of its appropriations, then the bill failed to clearly and unmistakably describe the purpose of the appropriations in detail.

B. Article IV, § 23 is More Specific than Article III, § 21.

For the same reason, the Court should reject the State's attempt to read Article IV, § 23 in the same manner as Article III, § 21's prohibition on amending a bill's original purpose. While these two constitutional provisions are aimed at similar evils, they are written far differently. Article III, § 21 prohibits the legislature from amending a bill's "original purpose," which the courts typically construe quite broadly. *See, e.g.*, *St. Louis Cty. v. Prestige Travel, Inc.*, 244 S.W.3d 708, 715 (Mo. banc 2011) (bill's purpose was "regulating taxes"). A bill's original purpose need not be stated anywhere. *Id.* And, under Article III, § 21, the original purpose is simply the general purpose, not the details through which purpose is manifested. *Id.*

Appropriations bills are a subset of all bills, so they must stick to their original purpose (in this case, HB 2011's purpose was "to appropriate money for the expenses, grants and distributions of the Department of Social Services"). But they must also comply with the requirements of Article IV, § 23. That provision expressly requires the legislature to *distinctly specify* the purpose of an appropriation, and thus commands the legislature to provide quite a bit more detail than does Article III, § 21.[5] This is further illustrated by the fact that Article IV, § 23 is directed toward *appropriations* rather than *bills*. The purpose of every appropriations bill is the same: "to set aside moneys for specified purposes." *Hueller*, 289 S.W. at 340-41. It is the details about the various appropriations to which Article IV, § 23 speaks.

C. The Attorney General Opinions on Which the State Relies are Neither Binding Nor Persuasive.

The State relies extensively on prior Attorney General opinions, one of which cites constitutional provisions of *other states*, to support the proposition that legislative appropriations can be "open-ended." *See* State's Br. at 16-17. Attorney General opinions are not binding on this Court under the best of circumstances. *See, e.g.*, *Brady v. Curators of Univ. of Mo.*, 213 S.W.3d 101, 108 (Mo. App. 2006). And they are certainly not relevant when they rely on other states' constitutions to address matters that are not at issue in this litigation.

Moreover, one of the cited opinions actually supports Planned Parenthood. The State notes that Opinion 23-1985 "discourage[s] 'descent into minute detail'

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[5] Not every appropriation requires much detail. Often, it is sufficient for the legislature to simply identify broad categories such as "personal service" or "operations" to which money is being assigned. *See State ex inf. Danforth v. Merrell*, 530 S.W.2d 209, 213 (Mo. banc 1975); A3 (Sections 11.015 and 11.020). Further "subpurposes" may be provided as well. *Danforth*, 530 S.W.2d at, 213. But, where—as here—the legislature decides to micromanage precisely how the executive branch is to use funds what things it *cannot* spend funds on, Article IV, § 23 obligates the legislature to clearly specify those details without reference to other laws.

when establishing the purpose of the appropriation." State's Br. at 17. The *reason* the Attorney General discouraged this practice is because it typically constitutes improper substantive legislation of the same ilk as Section 11.800:

> In the precise situation you present it seems likely that even an express and clear negative expression of legislative direction in an appropriation measure which is otherwise sufficient to permit such expenditures ***may be construed as invalid substantive legislation***. From the prior opinions of this office which we have enclosed it can further be concluded that a descent into minute detail ***could be construed as substantive legislation and prohibited as such*** or, depending upon the circumstances, may constitute a violation of the separation of powers clause in Article II, Section 1, Missouri Constitution.

Att'y Gen. Op. 23-1985, at 3-4 (emphasis added); A61-62. That issue is the subject of Section II, *infra*.

D. The State's Interpretation Would Impermissibly Render the Statutory Cross-Reference Mere Surplusage.

Finally, the State cannot convincingly explain how the Circuit Court was incorrect when it concluded the State's position would impermissibly render Section 11.800's reference to § 188.015 mere surplusage. *See Bateman v. Rinehart*, 391 S.W.3d 441, 446 (Mo. banc 2013). The State says that the cross-reference does not fix the purpose of the appropriation; it simply "provides more detailed guidance about the appropriation's implementation." State's Br. at 19. But if the legislature had complied with Article IV, § 23's requirement to distinctly specify the purpose of the appropriation, "more detailed guidance" would not be necessary. Moreover, Section 11.800 is *itself* "guidance" about how to implement Parts 1 and 2 of HB 2011. A2. It should be unnecessary to glean further guidance from an entirely different statute.

In any event, Section 11.800's cross reference has nothing to do with the "implementation" of the appropriations in Part 1 of HB 2011. It was specifically intended to fix the purpose of those appropriations: that they be used to make

payments under the MO HealthNet fee-for-service program, so long as they are not made to "abortion facilities," which do not include hospitals or their affiliates.

For all these reasons, the Circuit Court correctly concluded that Section 11.800 of HB 2011 violates Article IV, § 23. Its judgment should be affirmed.

II. Section 11.800 Violates Article III, § 23 of the Constitution and Longstanding Missouri Case Law by Amending General Statutes (Response to the State's Point II).

The State also takes issue with the Circuit Court's conclusion that, as interpreted and applied by the State, Section 11.800 violates Article III, § 23 of the Constitution by amending §§ 208.152 and 208.153, RSMo. The State's analysis largely boils down to its attempt to shoehorn this case into the facts of two prior cases: *Rolla 31 School District v. State*, 837 S.W.2d 1 (Mo. banc 1992), and *Opponents of Prison Site, Inc. v. Carnahan*, 994 S.W.3d 573 (Mo. App. 1999). As discussed below, however, Section 11.800 is not remotely comparable to the circumstances in those cases.

As an initial matter, however, Planned Parenthood recognizes that if the Court concludes HB 2011 violates Article IV, § 23 by cross-referencing § 188.015 to fix the amount or purpose of the bill's appropriations, it might be inclined to affirm the judgment below without reaching the question of whether the bill also impermissibly amends substantive law in violation of Article III, § 23. Planned Parenthood respectfully suggests the Court should reach and resolve both issues now.

The legislature attempts to modify general law in appropriations bills with increasing frequency. A perusal of *this* bill reveals multiple instances of the legislature doing things other than appropriating funds. *See, e.g.*, A39 (Section 11.705: "No funds shall be expended in furtherance of provider rates greater than 101.5% of the rate in effect on January 1, 2018.").[6] And, the legislature has made

[6] The Attorney General has previously agreed this is inappropriate. Att'y Gen. Op. 23-1985; A61 ("[E]ven assuming the legislature in a particular appropriation did intend to set certain personnel positions and salaries, such would constitute

clear it will continue enacting appropriations bills designed to prohibit payment to Planned Parenthood without the cross-reference to § 188.015.

Its Fiscal Year 2020 appropriations bill contains a nearly identical Section 11.930, which simply imports the definition of "abortion facility" from § 188.015 rather than cross-referencing it. *See* House Bill 11 (2019); A106. The State again denied Planned Parenthood reimbursement for Fiscal Year 2020 claims based on that bill, which is the subject of four cases presently before the AHC. Planned Parenthood recognizes the Fiscal Year 2020 bill is not at issue in this case. But it presents an identical issue under Article III, § 23. If the Court does not address that issue now, it will inevitably return.

Turning to the merits, Article III, § 23 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 subjects and accounts for which moneys are appropriated.

Mo. Const. art. III, § 23.

While an appropriations bill can address multiple subjects in the sense that it can permissibly allocate money for a variety of purposes, it cannot do anything else. "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." *Hueller*, 289 S.W. at 340-41. The reason for this is straightforward: "[I]f the practice of incorporating legislation of 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." *Id.* at 341.

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general legislation in an appropriation bill and would be prohibited by Article III, Section 23, Missouri Constitution.").

Since *Hueller*, Missouri courts have repeatedly reaffirmed that an appropriations bill cannot amend existing legislation. *Rolla 31 Sch. Dist.*, 837 S.W.2d at 4 (confirming principle that appropriations bills cannot amend substantive legislation "is still good law"); *State ex rel. Gaines v. Canada*, 113 S.W.2d 783 (Mo. banc. 1937) ("[Statutes] cannot be repealed or amended except by subsequent general legislation. Legislation of a general character cannot be included in an appropriation bill."); *State ex rel. Davis v. Smith*, 75 S.W.2d 828, 830 (Mo. banc 1934) ("If this appropriation bill had attempted to amend [an existing statute], it would have been void in that it would have violated section 28 of article 4 of the Constitution which provides that no bill shall contain more than one subject which shall be clearly expressed in its title."); *Opponents of Prison Site, Inc.*, 994 S.W.3d at 580 ("[A] general appropriation bill, containing appropriation for numerous unrelated state activities, cannot amend substantive legislation . . . ."); *State ex rel. Igoe v. Bradford*, 611 S.W.2d 343, 350 (Mo. App. 1980) ("Appropriations of money for payment of state obligations and the amendment of a general statute are entirely different and separate subjects for legislative action."). The State does not dispute that this is the law.

A. Existing Substantive Law Required the State to Pay Planned Parenthood for Physician and Family Planning Services It Provides to MO HealthNet Beneficiaries.

Missouri's Medicaid statutes are found in Chapter 208. To understand why Section 11.800 violates Article III, § 23, one must first understand the Medicaid statutes, what the State is required to pay for, and to whom it is required to make such payments. When these provisions are properly understood, it becomes apparent why HB 2011 is unconstitutional.

1. Section 208.152, RSMo Requires the State to Make Payments on Behalf of MO HealthNet Beneficiaries for Family Planning Services.

Section 208.152 governs what the State must pay for under the MO HealthNet program. It provides:

> MO HealthNet payments ***shall be made*** on behalf of those eligible needy persons . . . who are unable to provide for it in whole or in part, with any payments to be made on the basis of the reasonable cost of the care or reasonable charge for the services as defined and determined by the MO HealthNet division, unless otherwise hereinafter provided, for the following[.]"

§ 208.152.1, RSMo (emphasis added).

The statute then goes on to identify those medical services for which MO HealthNet payments "shall be made." Relevant here, MO HealthNet payments shall be made for "[p]hysicians' services, whether furnished in the office, home, hospital, ***or elsewhere***." § 208.152.1(6), RSMo (emphasis added). Payments shall also be made to providers on behalf of MO HealthNet beneficiaries for:

> [f]amily planning as defined by federal rules and regulations; provided, however, that such family planning services shall not include abortions unless such abortions are certified in writing by a physician to the MO HealthNet agency that, in the physician's professional judgment, the life of the mother would be endangered if the fetus were carried to term.

§ 208.152.1(12), RSMo.

These provisions must be given their plain meaning. *State v. Moore*, 303 S.W.3d 515, 520 (Mo. banc 2010). Section 208.152 is clear and unambiguous: it requires the State to pay for physician services (regardless of where they are provided) and for family planning services (except abortions) obtained by MO HealthNet beneficiaries. The State has never offered any alternative interpretation.

2. <u>Section 208.153, RSMo Requires the State to Allow MO HealthNet Beneficiaries to Obtain Services from Any Provider with a MO HealthNet Participation Agreement</u>.

Section 208.153 complements section 208.152 and specifies, among other things, from whom MO HealthNet beneficiaries are entitled to receive care (and thus to whom the payments required by § 208.152 must be made). It states, in relevant part: "Any person entitled to MO HealthNet benefits may obtain it (sic) from any provider of services with which an agreement is in effect under this

section and which undertakes to provide the services, as authorized by the MO HealthNet division." § 208.153.1, RSMo.

This provision must likewise be given its plain and ordinary meaning. *Moore*, 303 S.W.3d at 520. And, like section 208.152, it is unambiguous. It requires that the State allow MO HealthNet beneficiaries to obtain any medical services covered under the MO HealthNet program from any provider who has an agreement with the State to provide such services. It is undisputed that Planned Parenthood had (and still has) such provider agreements with the State. The State never terminated those agreements. *See* D15-16.

Indeed, while Planned Parenthood claimed in the AHC that the State unlawfully sanctioned it by effectively suspending its provider numbers (effectively ending its participation in the program), the State disagreed. It argued (and the AHC concluded) that the State merely rendered Planned Parenthood's provider numbers "administratively inactive." *See* D3:P174; D4:P169; D17:P21-22. The State claims to have taken its action not for any contractual reason, but based solely on the lack of appropriations to pay for Planned Parenthood's services. *See* D3:P186-187; D4:P181-182. It did not claim the lack of appropriation resulted in Planned Parenthood not having a valid participation agreement. As such, there is no dispute that Planned Parenthood satisfies the requirement of section 208.153 to have "an agreement in effect" with MO HealthNet.

3. Together, §§ 208.152 and 208.153 Require the State to Reimburse Any Provider with a Participation Agreement for Physician and Family Planning Services It Provides to MO HealthNet Beneficiaries.

Sections 208.152 and 208.153 are interlocking provisions. Together, they require the State to make payments on behalf of MO HealthNet beneficiaries for physician and family planning services to any provider from which such beneficiaries obtain those services, so long as the provider has an agreement with MO HealthNet. Section 208.152 requires the State to make payments on behalf of beneficiaries. Obviously, those payments must be made *to* someone. There can be

no payment without a payee. Section 208.153 specifies who the payee is: any provider who provides covered services to a MO HealthNet beneficiary and has an agreement with the State.

This is all common sense. It is thus unsurprising that the State attempts to avoid any discussion of who is to receive payment under the statutes. Instead, it argues §§ 208.152 and 208.153 require the State "to make payments on behalf of eligible participants for certain categories of services, not on behalf of Medicaid providers." State's Br. 26. Obviously, this is true. But it simply sidesteps the question of who must receive those payments. The simple fact that someone must receive money in order for there to be a payment wholly undermines the State's position.

Courts read statutes relating to the same subject matter in *pari materia* and construe them harmoniously. *Anderson ex rel. Anderson v. Ken Kauffman & Sons Excavating, LLC*, 248 S.W.3d 101, 107 (Mo. App. 2008). Applied to §§ 208.152 and 208.153, this principle leads inexorably to the conclusion that the State is required to pay eligible providers for covered services they provide to MO HealthNet beneficiaries. Reading these statutes as the State urges would render the obligation to make payments meaningless.

This common-sense reading is confirmed by § 208.156, RSMo. That provision makes plain that providers have a right to be paid because it grants them the right to a hearing when they are not:

> Any person authorized under section 208.153 to provide services for which benefit payments are authorized under section 208.152 whose claim for reimbursement for such services is denied or is not acted upon with reasonable promptness shall be entitled to a hearing before the administration hearing commission pursuant to the provisions of chapter 621.

§ 208.156.2, RSMo. There would be no reason for such a provision to exist if the statutes did not give providers a right to be paid. If the matter was purely contractual, the remedy would be a breach of contract action in the circuit court,

not a statutory action at the AHC.[7] To be sure, Planned Parenthood's participation agreements affect the terms on which it is paid and (potentially) the amount of payment. But the right to payment is statutory.

Ultimately, it doesn't matter whether §§ 208.152 and 208.153 are characterized as giving providers a "right" to be paid or whether 208.156 gives them a statutory right to appeal payments for which they had no right in the first place. Those statutes clearly obligate the State to make payments on behalf of MO HealthNet beneficiaries when those beneficiaries obtain a covered service from a provider that has an agreement with MO HealthNet. Thus, regardless of whether the statutes confer a right on Planned Parenthood, Section 11.800 of HB 2011 violates Article III, § 23 if it changes the law such that the State is no longer obligated to make payments on behalf of beneficiaries to any provider with a valid participation agreement. For the reasons discussed below, the Circuit Court correctly concluded that this is just what Section 11.800 does.

B. Section 11.800 is Unconstitutional Substantive Legislation.

The Circuit Court concluded that Section 11.800 amends §§ 208.152 and 208.153, such that the State no longer has a legal obligation to make payments to certain providers. It explained that Section 11.800 amends those statutes "by limiting which providers eligible participants may go to for services and have their bill paid by the MO HealthNet." D17:P21. It similarly reasoned that Section 11.800 amends § 208.152 "by requiring [the State] to ***reimburse providers*** for services rendered to eligible individuals, ***unless*** the provider performs abortions, counsels women to have abortions, or is an affiliate or associate thereof," but is not a hospital. *Id.* (emphasis added). These conclusions were correct.

[7] The State's letter informing Planned Parenthood of the pre-emptive denial of its Fiscal Year 2019 claims expressly advised Planned Parenthood that it had the right to appeal that decision. *See* D6. That notice is inconsistent with the State's current position that the statutes do not give providers a right to payment.

1. *Rolla 31* Does Not Alter the Analysis Because there is an Unambiguous Conflict Between HB 2011 and Chapter 208.

The State advances a series of unpersuasive attacks on the Circuit Court's reasoning. First, relying on *Rolla 31*, the State contends that "when reading a statute, the General Assembly's guidance in an appropriation bill constitutes 'strong evidence of the legislature's intention in adopting the general statute.'" State's Br. at 21. This contention fundamentally misconstrues what occurred in *Rolla 31*, which did not mention—and had absolutely nothing to do with—the legislature's attempt to insert "guidance" into an appropriations bill.

In that case, the legislature enacted several statutes in 1990 that required school districts to provide special education services to preschoolers. 837 S.W.2d at 1. Those statutes also contained provisions regarding how these services were to be funded. *Id.* at 2-3. Among other things, the statutes provided that funds had to be allocated to the program through a separate appropriation from the one used to fund the school foundation program and could not be funded through a "reallocation" of funds. *Id.* Thereafter, the legislature appropriated funds to the new program. *Id.* at 3. The plaintiffs challenged the method the legislature used to appropriate funds on the basis that it violated the statutory restrictions on funding methodology. *Id.*

This Court rejected that challenge. It reasoned that Article III, § 23 applies only "to resolve a conflict between [a] general statute and an appropriation when it attempts to amend the general legislation." *Id.* at 4. It further explained that "[i]f the conflict between two statutes is less than direct, e.g., an ambiguity in the general statute, then such a conflict may be resolved by relying upon the appropriation as strong evidence of the legislature's intention in adopting the general statute." *Id.*

There was no direct conflict in *Rolla 31* because, as this Court noted, there was "an inherent ambiguity in section 162.700.5 when it purports to prohibit funding the preschool special education program by a '*reallocation* of money

appropriated for the public school foundation program,'" since "monies from the School Foundation Program had been used to fund a similar voluntary program in prior years." *Id.* at 5. Under those circumstances, this Court was willing to treat the legislature's decision about how to apply the funding methodology contained in general legislation *it had just enacted in the last legislative session* as strong evidence of its intent in enacting that legislation.

The holding in *Rolla 31* does not aid the State for two reasons. First, the logic in that case applies only when the general legislation is ambiguous. That's not the case here. Sections 208.152 and 208.153 are clear and unambiguous. They unquestionably require the State to pay providers with participation agreements for physician and family planning services they provide to MO HealthNet beneficiaries without reference to whether those providers are (or are affiliated with) an "abortion facility."

Second, *Rolla 31* treated the legislature's appropriation actions as a clarification of an ambiguous funding methodology contained in a statute it had just enacted. But §§ 208.152 and 208.153 have nothing to do with appropriation methodology. Nor do they have to do with the identity of providers (the thing Section 11.800 purports to provide "guidance" about). Perhaps more importantly, §§ 208.152 and 208.153 were enacted in 1967. The relevant language in them has been in place since *at least* 1990. As such, the 2018 session of the General Assembly was in no position to "clarify" anything about them. *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." (quoting *United States v. Price*, 361 U.S. 304 (1960))).

2. *Opponents of Prison Site* is Inapposite Because it Has Nothing in Common with this Case.

The State also relies on *Opponents of Prison Site* to bolster its claim that the legislature can provide "guidance" through an appropriations bill. But that case is even further from the mark. The primary issues in *Opponents* were: (1) whether

the legislature was required to select the site for the Bonne Terre prison, or whether the governor could do so, and, (2) if the legislature had to select the site, whether it had to do so through substantive legislation. 994 S.W.3d at 577-80.

The court of appeals first concluded some "legislative action" was necessary to select the site because the legislature had not statutorily delegated site selection to the governor. *Id.* at 579. The court then turned to the meaning of the term "legislative action" in §§ 21.455 and 21.465, RSMo. It concluded "legislative action" included the legislature's power to appropriate, not just its power to enact substantive legislation. *Id.* at 579-80. As such, it concluded the legislature could select the site for the prison by appropriating funds for the purpose of building a prison at a particular site, as opposed to some other site it might have selected. *Id.*

The plaintiffs nevertheless complained this was improper because selecting a prison site somehow amounted to "substantive legislation" or an amendment of existing law. *Id.* at 580. The court flatly rejected this argument because it could locate no authority requiring site selection to occur through substantive legislation and the selection of Bonne Terre did not amend any existing statutes. *Id.* As this recitation of facts makes clear, *Opponents* is simply irrelevant to the issues here.

3. That MO HealthNet Beneficiaries Can Still Obtain Services from Other Providers Is irrelevant.

The State also halfheartedly suggests Section 11.800 does not amend §§ 208.152 and 208.153 because "MO HealthNet payments will still be made on behalf of eligible participants for approved services" and beneficiaries "are still able to receive all approved services, including physicians' services and family planning services." State's Br. at 22. But this argument ignores that, prior to enactment of HB 2011, those statutes required the State to pay for physician and family planning services whenever a beneficiary received care from *any* provider the beneficiary chooses, so long as it has a participation agreement with MO HealthNet. Under Section 11.800 and its successor appropriations bills, that is no longer true.

The legislature had the option to appropriate money for family planning and physician services or not. It also has the authority to amend §§ 208.152 and 208.153 or not. What it cannot do is amend those statutory sections in an appropriations bill. If funds are set aside for family planning and physician services—which they were here—sections 208.152 and 208.153 require those funds to be paid over to the provider of a beneficiary's choice for those services.

4. *State ex rel. Kansas City Symphony v. State* Does Not Control this Case.

In a last-ditch effort to salvage Section 11.800, the State argues that each legislature is free to appropriate funds as it sees fit and cannot have its hands tied by prior legislatures. State's Br. at 27-28. Citing *State ex rel. Kansas City Symphony v. State*, 311 S.W.3d 272 (Mo. App. 2010), it claims HB 2011 does not actually amend substantive law, and instead merely declines to appropriate funds for medical services provided at "abortion facilities." The Court should reject this analytical sleight of hand.

In *Kansas City Symphony*, the legislature had enacted a general statute to provide tax revenue to the Missouri Arts Council Trust Fund. *Id.* at 274. As subsequently amended, the general statute appeared to require the State to transfer certain funds each year, irrespective of whether there was a sufficient appropriation. *Id.* After concluding the statutory scheme as a whole *did* subject the funding obligation to the appropriation of sufficient funds, the court of appeals went on to conclude that if the statute *had* operated as the plaintiffs contended, it would have violated Article III, § 36 of the Constitution, which prohibits expenditure of funds except as permitted by appropriations. *Id.* at 277-78; *see also* Mo. Const. art. IV, § 28. Thus, while the legislature is free to enact general laws mandating funding, actual disbursements are always subject to appropriation of funds by future legislatures. *Kansas City Symphony*, 311 S.W.3d at 278.

That holding is generally uncontroversial.[8] But the proposition the State seeks to extrapolate from it is anything but. Here, the legislature did not decline to appropriate sufficient funding to the MO HealthNet Division for physician and family planning services. To the contrary, it appropriated nearly $400 million for that purpose. Instead, the legislature attempted to use "guidance" about how the funds were to be spent to require the State to pay for physician and family planning services when a MO HealthNet beneficiary receives them at a hospital or an outpatient clinic that does not perform abortions, but not when a beneficiary receives them at an "abortion facility" or an affiliate thereof (*i.e.*, at Planned Parenthood).

This runs headlong into conflict with §§ 208.152 and 208.153, which require the State to reimburse any provider with a participation agreement (as Planned Parenthood has) when it provides physician and family planning services to a beneficiary. Section 11.800 creates a direct and irreconcilable conflict that results in an amendment of those statutes in violation of Article III, § 23. Those statutes are about *who* gets paid and *what services* they are paid for, not *how much* they get paid. Had the legislature simply appropriated insufficient funds or chosen not to fund those services *in toto*, such that the State was required to reduce payments to *all* providers with participation agreements, *Kansas City Symphony* might be relevant. The State could appropriate funding in an appropriations bill, or it could amend the substantive statutes in a separate bill. But it cannot do both in the same bill, and the judgment should be affirmed.

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[8] There are, however, sometimes external legal restrictions on the legislature's ability to simply refuse to appropriate funds to meet obligations it has created. Most notably, federal law and the Supremacy Clause of the U.S. Constitution restrict the legislature's ability to wholly defund the provision of Medicaid benefits the State has committed to provide. *See McNeil-Terry v. Roling*, 142 S.W.3d 828 (Mo. App. 2004) (concluding legislature could not, through an appropriations bill, decline to provide funding for adult dental benefits it had previously committed to provide).

C. The Circuit Court Applied the Correct Legal Standard in Analyzing Whether Section 11.800 is Substantive Legislation.

The State appears to contend the Circuit Court applied the wrong legal standard when it concluded Section 11.800 "effectively" amends §§ 208.152 and 208.153. *See* State's Br. at 22-23. Again citing *Rolla 31*, it suggests that "effectively amending" substantive law is not the same as "directly amending" it. *Id.* This is simply semantics. The Circuit Court's selection of words reflects nothing more than the fact that Section 11.800 does not *expressly* purport to amend substantive law.

If that were the standard, the legislature could freely use appropriations bills to amend substantive law so long as it did so *sub silentio*. But that is not the standard. If it were, Article III, § 23 would be toothless as applied to appropriations bills. For all the reasons discussed above, Section 11.800 of HB 2011 clearly and undoubtedly amends §§ 208.152 and 208.153.

Perhaps the State meant to argue the Circuit Court was finding a repeal by implication and that such a finding is disfavored. *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 667 (Mo. banc 2010). That would have been a better argument, but it would still fail. It is well established that when two legislative enactments are "so contrary or irreconcilable . . . that only one of the two statutes can stand in force," there has been a repeal by implication. *Knight v. Carnahan*, 282, S.W.3d 9, 19 (Mo. App. 2009). Here, the substantive statutes require payment on a beneficiary's behalf to the provider of the beneficiary's choice. HB 2011, however, changes the law so that payment will be withheld if the beneficiary's choice is an abortion provider or even an affiliate thereof. The two cannot both stand in force.[9]

[9] The State argues it does not rely on Section 11.715 as a basis for denying payment to Planned Parenthood (State's Point III). Although the State has not relied on Section 11.715 in this litigation, it initially did so in the denial letter it sent Planned Parenthood. D6:P2-4. Because the State admits Section 11.715 is not a basis for denying payment, it cannot later utilize that provision to deny Planned Parenthood MO HealthNet funding if Planned Parenthood prevails. And, to the extent the State ever attempts to do so, Section 11.715 violates Article III, § 23 in the same fashion

III. If the Court is Hesitant About Declaring HB 2011 Unconstitutional, there is an Alternative, Constitutional Reading of Section 11.800 Available (Alternative Basis to Affirm).

For all the reasons discussed above, the Circuit Court correctly concluded Section 11.800 of HB 2011 violates multiple provisions of the Constitution. The legislature's practice of attempting to amend substantive law through "guidance" and preambles in appropriations bills has proliferated in recent years. Indeed, the legislature included similar "guidance" in the appropriations bill governing MO HealthNet for Fiscal Year 2020. *See* A63-64, 106. Because this is a recurring issue and there is little question that Part 3 of HB 2011 is unconstitutional, this Court should so hold.

But, if the Court is at all hesitant about declaring HB 2011 unconstitutional, there is an alternative basis to affirm. The Court can avoid declaring a statute unconstitutional when a case can be resolved on other grounds. *See Blaske*, 821 S.W.2d 822. This is particularly true when a case depends on the interpretation of a statute and a textually viable alternative reading of the statute that does not create a constitutional problem is available. *Id.* Such an interpretation of HB 2011 exists.

1. Doubtful Legislative Enactments Must be Harmonized with the Constitution.

The overarching purpose of statutory interpretation is to ascertain and effectuate legislative intent. *Bateman*, 391 S.W.3d at 446. Planned Parenthood acknowledges that, given the current makeup of the General Assembly, it was almost certainly the *subjective* intent of many in the legislature to deny funding to Planned Parenthood. But, as discussed below, this Court ordinarily ascertains

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as Section 11.800. The State further argues the Circuit Court erred in taxing costs against the State (State's Point IV). There is statutory authority to award costs to Planned Parenthood. § 536.087, RSMo. Even if this were not the case, the State provides no reason for this Court to reverse the entire judgment (rather than simply removing the award of costs).

legislative intent from the plain meaning of the words the legislature used, not the subjective thoughts harbored by some unknowable portion of its members. That approach to statutory interpretation is even more sensible in the context of appropriations bills, which fund a wide array of programs and can be difficult for a legislator to vote against. *Cf. Hueller*, 289 S.W. at 341.

The Court ascertains legislative intent "through reference to the plain and ordinary meaning of the statutory language." *Bateman*, 391 S.W.3d at 446. Where the language of a statute is clear, there is nothing to interpret. *Id.* "It is a fundamental rule of statutory construction that sections and acts in pari materia, and all parts thereof, should be construed together, and compared with each other." *Veal v. City of St. Louis*, 289 S.W.2d 7, 12 (Mo. 1956).

The Court presumes "every word, sentence or clause in a statute has effect, and the legislature did not insert superfluous language." *Bateman*, 391 S.W.3d at 446. Yet, the Court also presumes "the Legislature d[oes] not intend to violate the organic law of the state." *State ex rel. McClellan v. Godfrey*, 519 S.W.2d 4, 8 (Mo. banc 1975). "Acts of the Legislature and provisions of the Constitution must be read together, and so harmonized as to give effect to both when this can be reasonably and consistently done." *Id.* at 9. To accomplish this harmonization, "doubtful words of a statute will be enlarged, restricted, supplied, or even stricken out to conform to the true intent to the lawmakers." *Id.*

The Court further presumes the legislature knows the law. *State ex rel. Nothum v. Walsh*, 380 S.W.3d 557, 576 (Mo. banc 2012). Accordingly, the legislature must be presumed to know that §§ 208.152 and 208.153 require the State to (1) allow MO HealthNet beneficiaries to receive care from any provider that has an agreement with the State and (2) reimburse such providers for those services. The legislature must also be presumed to know Article III, § 23 of the Constitution prohibits it from amending those statutes through an appropriations bill. *Rolla 31 Sch. Dist.*, 837 S.W.2d at 4. Ultimately, "if one interpretation of a statute results in the statute being constitutional while another interpretation

would cause it to be unconstitutional, the constitutional interpretation is presumed to have been intended." *Blaske*, 821 S.W.2d at 838-39.

2. There is a Reason the Legislature Characterized Section 11.800 as Guidance Rather than an Appropriation or the Purpose of an Appropriation.

Here, the relevant question is what the legislature intended when it added Section 11.800 to HB 2011. In order to answer that question, the Court must read all parts of HB 2011 together. *Veal*, 289 S.W.2d at 12. The legislature explained how the three "Parts" of HB 2011 fit together in Section 11.000. D7:P2-3; A1-2. That explanation makes clear that Part 3 is *not* an appropriation or the purpose of an appropriation because HB 2011's appropriations and the purposes therefore consist "solely" of the provisions in Parts 1 and 2.[10] *Id.*

The legislature carefully chose to characterize Part 3 (which consists solely of Section 11.800) as "guidance" rather than an appropriation or the purpose of an appropriation. Thus, from an interpretation standpoint, the question reduces to what the legislature meant when it characterized Part 3 as "guidance."

The State contends that "guidance," when coming from a person or body of authority, means to "direct in a way" or "to regulate and manage: direct or supervise esp. toward some desirable end, course, way or development." *See* D14:P16 (quoting *Webster's Third New International Dictionary* at 1009 (1986)). In support, it cites *Allcorn v. Allcorn*, 241 S.W.2d 806, 811 (Mo. App. 1951), which interpreted the word "guiding"—in the context of a stipulation regarding alimony—to mean to "direct, regulate, or order." Thus, it claims, the word guidance constitutes a mandate from the legislature to the Department of Social Services. The AHC and Circuit Court agreed.

[10] In Sections I and II *supra*, Planned Parenthood accepted the State's assumption that Part 3 of HB 2011 is an appropriation or the purpose of an appropriation. But the legislature stated in no uncertain terms that Part 3 is neither of those things. The fact that Part 3 is expressly labeled something other than an appropriation or the purpose of an appropriation is indicative of its doubtful constitutionality.

That is certainly one possible interpretation of "guidance" in Section 11.800. But the guidance-as-order interpretation runs right into the constitutional prohibitions contained in Article III, § 23 and Article IV, § 23. Accepting that interpretation leads inevitably to a declaration that Part 3 of HB 2011 is unconstitutional and must be severed from the rest of the bill. Planned Parenthood is fine with that outcome.

But the Court may want to interpret the word "guidance" so as to harmonize it with constitutional limitations on the legislature's power. "The meaning of a term can vary depending on the context of its use." *State ex rel. Proctor v. Messina*, 320 S.W.3d 145, 155 (Mo. banc 2010). The context here is that the plain language of HB 2011 states that the appropriations being made and the purposes of those appropriations are set forth exclusively in Parts 1 and 2. D7:P2-3; A1-2. The legislature deemed Part 2 to be an irreplaceable part of the bill, and thus designated it as non-severable. It did not do the same with Part 3 (again, signaling legislative doubts about its validity). Because HB 2011 unambiguously states that Part 3 is neither an appropriation nor the purpose of an appropriation, context suggests that "guidance" means something *other than* a binding command as to how funds are to be spent.

This is an admittedly odd way for the legislature to have drafted an appropriations bill. But it is also understandable in light of the fact that the legislature is presumed to know the law. The legislature *did* know the law. And it knew that it could not amend substantive legislation through an appropriations bill. So, rather than doing so, it designated Part 3 as "guidance." Guidance does not always mean to "direct" or "order." It can also mean "advice or assistance." *Webster's New World College Dictionary* at 644 (5th ed. 2014). Read in harmony with the constitutional restrictions discussed in Sections I and II, *supra*, Part 3 is simply advice, or a suggestion, to the Department of Social Services, to be followed *when permitted by existing law* and to be disregarded when not.

This case involves the interaction between Section 11.800 and §§ 208.152 and 208.153, which obligate the State to pay for physician and family planning services when a MO HealthNet beneficiary obtains them from a provider with an agreement. But Part 1 of HB 2011 appropriates funds for numerous Department of Social Services programs. It is possible the Department could permissibly follow the guidance in Section 11.800 in administering some of those other programs. But it cannot constitutionally follow that guidance with respect to the programs and services at issue in this case. The guidance in Section 11.800 might also have become significant with respect to physician and family planning services had the legislature enacted emergency legislation during the fiscal year amending Chapter 208, such that the Department could lawfully follow the guidance in this context.

The State emphasized below that Section 11.800 uses the word "shall." And so it does. But that does not change the fact that Section 11.800 as a whole is designated as guidance and not an appropriation or the purpose of an appropriation. Section 11.800 shall be followed when the Department can do so lawfully. It shall not be followed when the Department cannot.

The State similarly argued that Section 11.800 constitutes a mandate because it contains the same "No funds shall be expended" language as is found in Section 11.715, and "[n]o one contends that Part 2 is not obligatory." D14:P17. Its thesis is that it would be impermissible to read the same language two different ways in the same bill. But, again, context matters. There is a fundamental distinction between Section 11.715 and Section 11.800 – the former appears in Part 2 (which HB 2011 states is a core part of the appropriations being made and is not characterized as "guidance"), while the latter appears in Part 3 (which is not designated as part of the appropriations being made and *is* characterized as "guidance"). As a result of these very different designations (which the legislature itself provided), it is permissible to treat the two sections differently.

Finally, the State argues that accepting this interpretation of Section 11.800 would impermissibly render it mere surplusage. That is incorrect, for the reasons

discussed above. But, even if the State were correct, there is merely a presumption against reading words as surplusage (albeit a strong one). That presumption must sometimes yield to the rule against reading a statute in a manner that renders it unconstitutional. *State ex rel. McClellan*, 519 S.W.2d at 8.

Planned Parenthood acknowledges the Court will likely harbor some skepticism about treating Part 3 of HB 2011 in the manner suggested. It would be odd. But then again, HB 2011 is odd. The legislature undoubtedly drafted it that way because what it was attempting to do was amend substantive legislation, not appropriate funds. This resulted in the unusual language before the Court. In the final analysis, that language is either an unconstitutional amendment of substantive law that must be severed, or it is guidance the Department is barred from following where, as here, it conflicts with Chapter 208. Either way, Planned Parenthood is entitled to payment.

CONCLUSION

The State presents no serious reason to question the Circuit Court's conclusion that Section 11.800 violates both Article III, § 23 and Article IV, § 23 of the Constitution. The Court should affirm on that basis. But, if the Court is hesitant about declaring Part 3 of HB 2011 unconstitutional and severing it, the Court can avoid the constitutional issues presented by simply giving the words the legislature used their plain meaning and treating Section 11.800 as "guidance," rather than a directive to ignore longstanding statutes. Whichever path the Court chooses, the judgment of the Circuit Court (reversing the judgment of the Administrative Hearing Commission) should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was served electronically via the Court's electronic filing system on November 20, 2019, to all counsel of record.

I also certify that the foregoing brief complies with the limitations in Rule No. 84.06(b) and that the brief contains 12,750 words.

/s/Charles W. Hatfield