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

BRIEF OF AMICUS AMERICAN CIVIL LIBERTIES UNION OF MISSOURI IN SUPPORT OF RESPONDENTS FILED WITH CONSENT OF PARTIES

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INTEREST OF AMICUS AND AUTHORITY TO FILE

This brief is filed with consent of the parties.

The American Civil Liberties Union is a nationwide nonprofit, nonpartisan organization with 1.6 million members dedicated to the defense and promotion of the guarantees of individual rights and liberties embodied in the state and federal constitutions. The ACLU of Missouri is the statewide affiliate of the ACLU, with a longstanding interest in protecting the constitutional rights of individual Missourians vis-à-vis the state government. In particular, it has engaged in direct representation and filed amicus briefs in cases concerning constitutional limitations on the lawmaking power of the General Assembly. *See, e.g.*, *City of Normandy v. Greitens*, SC95624, 518 S.W.3d 183 (Mo. banc 2017); *Am. Civil Liberties Union of Mo. v. Ashcroft*, 577 S.W.3d 881, WD82880 (Mo. App. W.D. 2019); *Doe v. St. Louis Community College*, 526 S.W.3d 329, ED104574 (Mo. App. E.D. 2017); *Mangum v. State*, 521 S.W.3d 252, SD34571 (Mo. App. S.D. 2017). In these cases and others, the ACLU of Missouri has expressed its longstanding interest in ensuring that the laws of the State are *legitimate*—meaning that they do not invade rights reserved to individuals and have been subjected to the robust democratic process that the Missouri Constitution demands—which is what ensures that they truly represent the will of the people.

INTRODUCTION

The underlying issue is simple: there are statutes in effect; there is a process for amending those statutes; and the General Assembly did not follow it. Instead, it tried to shoehorn a statutory amendment into an appropriation act. Because that is explicitly prohibited by the Constitution, the offending language is meaningless. *See* Mo. Const. art. 3, § 23, art. 4, § 23; *State ex rel. Davis v. Smith*, 75 S.W.2d 828, 830 (Mo. 1934) ("If this appropriation bill had attempted to amend [a statute], it would have been void . . . .").

Furthermore, it is not just a matter of labels. Substantive laws and appropriations laws are not just differently titled expressions of the same legislative will. To the contrary, they represent distinct legislative functions—and, as such, the Constitution treats them differently in myriad ways. *See, e.g.*, Mo. Const. art. 3, § 22, 27; art. 4, §§ 23, 25, 26. The Constitution recognizes that appropriations bills are strictly limited in time and scope, so it excuses them from certain structural and procedural protections required of proposed changes to the substantive law. Essentially, the Constitution allows the legislature to streamline the appropriations process.

Because of that procedural streamlining, it has long been understood that General Assembly cannot use an appropriations bill to change the state's substantive law. *State ex rel. Hueller v. Thompson*, 289 S.W. 338, 340–41 (Mo. banc 1926) ("to inject general legislation of any sort into an appropriation act is repugnant to the Constitution"). But as Respondents note, admonishments from the courts have not stopped the General Assembly from trying. *See, e.g.*, *id.*; *Davis*, 75 S.W.2d at 830; *State ex rel. Gaines v. Canada*, 113 S.W.2d 783, 790 (Mo. banc 1937), *rev'd on other grounds*, 305 U.S. 337;

State ex rel. Igoe v. Bradford, 611 S.W.2d 343, 350 (Mo. App. W.D. 1980); *Rolla 31 Sch. Dist. v. State*, 837 S.W.2d 1, 4 (Mo. banc 1992) ("This constitutional limitation, which . . . limits appropriation bills to appropriations only, is still good law."). The free-floating "guidance" in Part 3 of HB 2011 is just another example of the legislature attempting to manipulate existing substantive law through the constitutionally prohibited misuse of the appropriations process. It does not have the force of law and cannot dictate the result in this case.

ARGUMENT

I. The Constitution recognizes that making substantive law and appropriating money are distinct legislative functions and limits them in different ways.

The General Assembly's power to amend the substantive law is immense, bounded only by the rights reserved by Missourians and the powers allocated to the coequal branches of government. *See State ex rel. Danforth v. Merrell*, 530 S.W.2d 209, 213 (Mo. banc 1975). In recognition of the breadth of this power and in order to secure the rights of others vis-à-vis the legislature, the Constitution limits this legislative power in two ways: to be valid, legislature-initiated laws (1) must have been enacted through a certain *process* (for example, passage by both houses without amendment so fundamental as to change a bill's original purpose; all-or-nothing approval by the governor), and (2) must conform to a certain *structure* (for example, they must have a clear title and contain no more than one subject). *See, e.g.*, Mo. Const. art. 3, §§ 21, 23, 25, 31, & 40.

But the Constitution exempts general appropriations bills like HB 2011 from some of the procedural and structural requirements for substantive bills. That is because

appropriations bills are strictly limited in time and scope. *See State ex rel. Kansas City Symphony v. State*, 311 S.W.3d 272, 278 (Mo. App. W.D. 2010) (holding that appropriations can last no longer than two fiscal years and citing Mo. Const. art. 4, § 23 and § 28). For example, appropriations bills may be introduced later and vetoed line by line, and—perhaps most pertinent here—they are not bound by the single-subject rule so long as their multifarious topics embrace only "the various subjects and accounts for which moneys are appropriated." Mo. Const. art. 3, § 23. In other words, the Constitution sanctions a tradeoff between breadth and efficiency. This tradeoff makes sense when viewed alongside the legislature's imperative to exercise its appropriation power—nothing in the Constitution requires the General Assembly to exercise its statute-making power, but it *must* exercise its appropriations power at least every two years. Mo. Const. art. 3, §§ 23, 25. Streamlining this obligatory process is logical.

II. Missouri courts have long enforced constitutional limitations on the scope of appropriation acts, including that they cannot be used to amend substantive law or dictate "who shall not be compensated out of an appropriation."

Here, the General Assembly has attempted to have its cake and eat it too: to benefit from the procedural ease of enacting an appropriation law in order to effectuate an amendment to a pair of substantive statutes it no longer favors (RSMo. §§ 208.152 and 208.153).[1] This Court has repeatedly rejected similar attempts by predecessor Assemblies.

In 1926, this Court struck down a provision of an appropriations bill that attempted to set the salaries of certain state employees. *Hueller*, 289 S.W. at 341. The

[1] Amicus agrees with Respondents about the interpretation of those statutes.

Court reasoned that just because the legislature was empowered to set state salaries by *statute* did not mean that it could do so by *appropriation*:

> 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. . . . That the Legislature has the right by general statute to fix salaries is beyond question, but has it the right to do so by means of an appropriation act? We think not.

Id. at 340–41 (emphasis added). Indeed, the Court predicted dire consequences if the legislature were permitted to exercise these two functions simultaneously:

> As has been observed in well-reasoned cases, if 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. . . . Our Constitution is the one certain safeguard against such distracting possibilities and should be strictly followed.

Id. at 341. *See also Hammerschmidt v. Boone Cty.*, 877 S.W.2d 98, 101 (Mo. banc 1994) (pointing out that the single-subject rule [from which general appropriations bills are exempt] prevents logrolling and allows proposals to change the substantive law to be "better grasped and more intelligently discussed").

One of the "well-reasoned cases" cited by the *Hueller* Court as demonstrating one kind of "ill conceived, questionable, if not vicious" misuse of an appropriations act was *State ex rel. Tolerton v. Gordon*, 139 S.W. 403 (Mo. 1911), which is instructive here. In that case, the state's game and fish commissioner submitted invoices to the state officer then charged with doling out funds, requesting his monthly salary and reimbursement for feed. That state officer refused to pay the invoices because of language in that year's HB

1200, an omnibus appropriations bill that included the Missouri Fish and Game Department. The appropriation set aside $90,000 for the department, with certain portions allocated for the salaries of the commissioner and his deputies, and then listed a series of provisos relating to how much could be spent on office expenses, how many deputies could be employed, and finally this admonition:

> Provided, that none of the money herein appropriated in this section shall be available or paid so long as the present State Game and Fish Commissioner remains in this office or is in any wise connected with [that] office.

Id. at 405. (The majority party did not like the office holder.)

This Court acknowledged that the General Assembly could abolish that office or refuse to make an appropriation to that department altogether. But that did not resolve the issue. The question remained: "whether the Legislature may by a proviso to an appropriation act single out one citizen of this state and deny to him a right and privilege accorded to all others, without clashing with constitutional guaranties." *Id.* at 407. Ultimately the Court said it had "no doubt" the proviso was void, condemning it as unconstitutional special law, and pointing out that:

> It may be added that if a proviso such as that under consideration, by which the right to salary for service in office is denied to one or more persons of a class, can be upheld, then the possibilities of such legislation are at once suggested. In times of high partisan feeling there would be no restraint upon the power of the dominant party to attach to every appropriation for the salaries and expenses of state officers, whether executive or judicial, a proviso making the funds so appropriated unavailable to pay the salaries or expenses of any person of opposite political party allegiance; and those thus discriminated against would be without redress.

Id. at 408. The Court went on: "The Legislature has the undoubted power to make or to refuse to make an appropriation authorized by the Constitution, and it has the power to create or abolish an office when unrestrained by constitutional limitations, but **it has not the power to say who shall not be compensated out of an appropriation for the payment for official services rendered**." *Id*. at 410 (emphasis added).

Here, of course, Respondents are not public office holders. But they are nonetheless rendering official services pursuant to an agreement entered into under validly enacted state statutes. The General Assembly's attempt to use the "guidance" in HB 2011 to "say who shall not be compensated out of an appropriation" is something it had no power to do. And indeed, the *Hueller* Court inductively recognized that it was not just the salaries of public office holders at stake, but "all sorts of ill conceived" amendments to the substantive law that could be injected into appropriations acts. *Hueller* ultimately made general what *Tolerton* had confronted specifically.

Since then, this Court and the court of appeals have repeatedly reiterated the interrelated fundamental principles that (1) directing that agencies *not* to pay certain entities that would otherwise get paid *is* amending substantive law; and (2) the legislature cannot use appropriations bills to amend substantive law. *See Rebman v. Parson*, 576 S.W.3d 605, 610 (Mo. banc 2019) (holding that legislature could not indirectly use appropriation to compel executive branch to terminate ALJ and quoting *Tolerton* for the proposition that the legislature "has not the power to say who shall not be compensated

out of an appropriation");[2] *State ex rel. Gaines v. Canada*, 113 S.W.2d 783, 790 (Mo. banc 1937) (where there was a statute authorizing a university to pay tuition for "negro residents of Missouri" to attend college in a neighboring state, appropriations-act proviso limiting that university's authority to pay only any amount greater than Mizzou tuition was "unconstitutional and void" for attempting to amend general legislation through appropriations), *rev'd on other grounds by Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938);[3] *Davis*, 75 S.W.2d at 830; *Opponents of Prison Site, Inc. v. Carnahan*, 994 S.W.2d 573, 580 (Mo. App. W.D. 1999) ("a general appropriation bill, containing appropriation for numerous unrelated state activities, cannot amend substantive legislation because such an amendment would violate" Mo. Const. art. 3, § 23);[4] *State ex*

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[2] This case appears with a red flag on Westlaw and the characterization that it was "modified and superseded on rehearing," but the modification was merely the removal of a footnote that incorrectly described a procedural fact. *See* Mtn. to Modify (Apr. 26. 2019); Mtn. Sustained (June 25, 2019), Docket of SC97307. The case is good law.

[3] Contrary to what Appellants say, the Supreme Court of the United States recognized this holding interpreting state law ("the state court found that . . . there was an adequate appropriation to meet the full tuition fees") and did not gainsay it, but rather found it "beside the point" given the student's federal constitutional rights. 305 U.S. at 349.

[4] Appellants rely heavily on *Opponents of Prison Site*. Although the general principles animating the decision remain good law, the case is not factually on all fours. In that case, there was no substantive law *prohibiting* the legislature from building a state prison in Bonne Terre. To the contrary, there was a substantive law specifically *authorizing* the lease of property in Bonne Terre to a developer for the purpose of "constructing a facility for the use of the department of corrections." *Id.* at 580. That is not the case here, where the disputed guidance *does* contradict RSMo. §§ 208.152 and 208.153. It is more like *Tolerton* and *Gaines* than *Opponents of Prison Site*.

Furthermore, in *Opponents of Prison Site*, the dispute centered on the import of the appropriation. Here, instead, the disputed language is not even within the MO HealthNet appropriation but rather tacked on the end, in a separate section, subordinated in meaning by the text of HB 2011 itself. Even if the pre-existing state statutes were

rel. Igoe v. Bradford, 611 S.W.2d 343, 350 (Mo. App. W.D. 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.").

III. The guidance is also void because it is a free-floating recommendation divorced from an actual appropriation.

That it attempts to amend the substantive law is not the only legal deficiency in the language the State relies upon to justify nonpayment here. There is an additional issue that renders the language without force of law: the language is not even part of the MO HealthNet appropriation in dispute. Instead, it is a free-floating recommendation labeled "Guidance" and appearing in a separate part of a general appropriations act. Even if the guidance were not an *amendment* of the substantive law but rather merely a *clarification* thereof,[5] it would fare no better. There is nothing in Missouri law that allows free-floating language in an appropriations act to "clarify" a preexisting substantive law. *See Doe v. St. Louis Comm. College*, 526 S.W.3d 329, 342 (Mo. App. E.D. 2017) ("there is no precedent for using the preamble of a legislative enactment to clarify the meaning of a completely different [law], especially where, as in this case, the law containing the preamble was enacted after the [law] it purports to clarify"); *see also Igoe*, 611 S.W.3d at

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ambiguous, there is simply nothing in Missouri law that allows the legislature to clarify them by means of a *postscript to a later-enacted appropriations bill*—a kind of legislative statement not even contemplated by the Constitution.

[5] Because MO HealthNet previously did reimburse Respondent PPSLR and now—because of the guidance—does not, the argument that the State does not believe it to have effected a change to the substantive law strains credulity.

349–51 (holding that where a substantive statute had raised the maximum salary for certain state officers but not directed they be paid such, officers were not entitled to rely on later appropriation bill allocating that maximum to clarify the meaning of that substantive statute).[6]

Part 3 of HB 2011 may be a post-amble rather than a preamble, but it is just as divorced from the text of the actual relevant appropriation. Indeed, HB 2011 itself recognizes that only the first two parts of that act comprise the "purpose" of any given appropriation:

> 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.

See HB 2011, Part 1, § 11.000.

As explained *supra*, the Constitution limits appropriations acts to appropriations. Mo. Const. art. 3, § 23 ("subjects and accounts for which moneys are appropriated"); art. 4, § 23 ("amount and purpose of the appropriation"). As Part 1 lays out the amounts, and Parts 1 and 2 together "form the complete statement of purpose," it necessarily follows that Part 3 does something other than stating an amount and/or purpose. Even if it were otherwise lawful, that alone leaves the guidance without any force of law. *See Hueller*,

[6] Indeed, even when a law is ambiguous, a court reads it together only with other laws on the *same subject*. *See Doe*, 526 S.W.3d at 342–43. How a state program is operated or a state obligation carried out is a distinct subject from what funds are allocated to it. *Id.* at 343; *Gaines*, 113 S.W.2d at 790; *Igoe*, 611 S.W.2d at 350 ("Appropriations of money for payment of state obligations and the amendment of a general statute are entirely different and separate subjects for legislative action").

289 S.W. at 341 ("the lawmaker is not directed to expect or look for anything else in an appropriation bill except appropriations").

CONCLUSION

Fundamentally, this is not a case about abortion but rather constitutional limitations on legislative power. As this Court has held, those limitations are "the one certain safeguard" against legislative attempts to amend the substantive law through appropriations and, as such, "should be strictly followed." *Hueller*, 289 S.W. at 341; *see also* Mo. Const. art. 3, § 23; art. 4, § 23. Because the "guidance" contained in the appropriations act HB 2011, Part 3, § 11.80 unconstitutionally attempts to amend the substantive laws of the State and dictate who shall not be compensated out of an appropriation, the Court should affirm the circuit court and hold that it does not have the force of law and cannot dictate the outcome in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned hereby certifies that on November 20, 2019, the foregoing amicus brief was filed electronically and served automatically on counsel for all parties.

The undersigned further certifies that pursuant to Rule 84.06(c), this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06; (3) contains 3,568 words, as determined using the word-count feature of Microsoft Office Word. Finally, the undersigned certifies the electronically filed brief was scanned and found to be virus-free.

/s/ Anthony E. Rothert