Case No. SC 87063

In the

SUPREME COURT OF MISSOURI

DANIEL R. SHIPLEY,

Plaintiff-Respondent,

v.

RONALD CATES, RICHARD DUNN, PLANNED PARENTHOOD OF KANSAS AND MID-MISSOURI, and PLANNED PARENTHOOD OF THE ST. LOUIS REGION,

Defendants-Appellants.

On Appeal from the Circuit Court of Cole County, Missouri

The Honorable Werner A. Moentmann

BRIEF OF RESPONDENT

Robert Nienhuis # 27493
Neal W. Settergren # 50721
GOLDSTEIN and PRICE, L.C.
One Memorial Drive, Suite 1000
St. Louis, MO 63102-2449
(314) 421-0710
Fax: (314) 421-2832
Lead Counsel for Respondent Daniel R. Shipley

John D. Landwehr
Cook, Vetter, Doerhoff & Landwehr
231 Madison Street
Jefferson City, MO 65101
(573) 635-7977
Fax (573) 635-7414
Co-counsel for Respondent Daniel R. Shipley

I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

III. JURISDICTIONAL STATEMENT

This action involves issues relating to whether certain Missouri appropriation statutes violate the Constitution of this State. Accordingly, this Court has exclusive appellate jurisdiction. Article V, § 3 of the Missouri Constitution.

IV. STANDARD OF REVIEW

This Court has established the following standard of review for bench-tried cases:

> "The standard of review of this bench-tried case is set out in *Murphy v. Carron*, 536 S.W.2d 30 (Mo. Banc 1976). The judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy*, 536 S.W.2d at 32. In a court-tried matter we accept as true the evidence and reasonable inferences in favor of the prevailing party and disregard the contrary evidence. *Gilmartin Bros., Inc. v. Kern*, 916 S.W.2d 324, 331 (Mo. App. 1995)."

State v. Entertainment Ventures I, Inc., 44 S.W.3d 383, 385 (Mo. 2001). "In a court tried case the judgment of the trial court is presumed to be correct and the appellant has the burden of demonstrating the incorrectness of the judgment." *Cave v. Cave*, 593 S.W.2d 592, 595 (Mo. Ct. App. 1979)(citations omitted). An appellate court must give "due regard to the superior opportunity of the trial court to judge the credibility of the witnesses." *Jensen v. Borton*, 734 S.W.2d 580, 584 (Mo. Ct. App. 1987).

Despite this deferential standard of review, the briefs submitted by Planned Parenthood and the Directors disregard the findings of the Circuit Court. Although Shipley agrees that this Court has *de novo* review of the legal issues in this case--whether Shipley has standing as a taxpayer and whether the statutes are constitutional--this appeal

also involves factual determinations that warrant this Court's deference under *Murphy*, 536 S.W.2d 30, and its progeny.

V. STATEMENT OF FACTS

Missouri law requires appellate courts to "accept as true the evidence and reasonable inferences in favor of the prevailing party [Shipley] and disregard the contrary evidence," *Entertainment Ventures I, Inc.*, 44 S.W.3d at 385. For that reason, Shipley cannot accept the Statement of Facts offered by the Director or Planned Parenthood as complete or accurate and, therefore, submits the following:

A. Introduction

Missouri's General Assembly appropriated funds to provide certain family planning services, but not abortion services, for fiscal years 2000 and 2003 ("the family planning appropriations"). L.F. at 548. Although Planned Parenthood of the St. Louis Region (PPSLR) and Planned Parenthood of Kansas and Mid-Missouri (PPKM)[1] did not qualify, the Directors of Missouri's Department of Health and Senior Services (the "Department")[2] misconstrued the appropriations, and awarded state funds to PPKM and PPSLR. *Id*. at 547-567. As a Missouri taxpayer, Daniel R. Shipley brought this action to stop Planned Parenthood from receiving funds unlawfully and obtain reimbursement to the State. *Id*. at 557.

Following a bench trial in December 2004, the Circuit Court for Cole County

[1] PPKM and PPSLR are sometimes jointly identified as "Planned Parenthood."
[2] Prior to 2000, the Department was known as the Department of Health.

concluded that Planned Parenthood was ineligible for numerous reasons, including that employees of Planned Parenthood perform abortions. *Id*. at 547-562. The Circuit Court, acting within its discretion and equitable powers, also ordered Planned Parenthood to repay the funds to the State. *Id*. at 557-558. Since Planned Parenthood had known of its "questionable" entitlement, the Circuit Court held it would be "inequitable not to require the repayment of said funds." *Id*. at 558.

Planned Parenthood and the Department have appealed raising several points. However, because the Circuit Court's factual findings and legal determinations are well-supported by the evidence and law, this Court should affirm the decision below.

B. The Parties

Shipley is a resident and taxpayer of the State of Missouri. *Id*. at 71.

PPSLR operates clinics in the St. Louis region that provide various health services. *Id*. PPSLR is affiliated with Reproductive Health Services of Planned Parenthood of the St. Louis Region ("Reproductive Health"). *Id*. Reproductive Health has no employees. Employees of PPSLR perform the actual abortion services. *Id*. at 77, 554.

PPKM operates clinics in the Kansas City area and mid-Missouri that provide various health services. *Id*. at 71. PPKM is affiliated with Comprehensive Health of Planned Parenthood of Kansas and Mid-Missouri ("Comprehensive Health"), which provides abortion services. *Id*. at 72.

As found by the Circuit Court, PPKM and PPSLR lack any meaningful independence or separation from their affiliated abortion providers. *Id*. at 555; Section VII.A.3, *infra*.

Maureen Dempsey, Ronald Cates, and Richard Dunn each served as Director of the Department during the relevant time periods. L.F. at 79-80, 548. The Director is the state official charged with complying with the family planning appropriations. The various Directors are collectively referred to herein as "Directors."

C. The Family Planning Appropriations

In June 1999, the General Assembly appropriated money to the Department for the purpose of funding family planning services, provided that none of the funds was expended, directly or indirectly, to subsidize abortion services or administrative expenses. *Id*. at 72. Since the Department did not perform family planning services itself, it contracted with private parties to provide the services. *Id*. at 73. To ensure that state family planning funds did not subsidize abortions, either directly or indirectly, the appropriations were conditioned on the following requirements:

> To ensure that the state does not lend its imprimatur to abortion services, and to ensure that an organization that provides abortion services does not receive a direct or indirect economic or marketing benefit from these funds, an organization that receives these funds and its independent affiliate that provides abortion services may not share any of the following:
>
> (a) The same or similar name;
>
> (b) Medical or non-medical facilities, including but not limited to business offices, treatment, consultation, examination, and waiting rooms;

(c) Expenses;

(d) Employee wages or salaries; or

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

Id. at 72, 87-99. The appropriation was identified as Section 10.705, and was effective during the fiscal year 2000, which ran from July 1, 1999 to June 30, 2000. *Id*. at 72. By this time, the Eighth Circuit already had ruled that it was constitutional for states to require that grantees of state funds be truly independent from an affiliated abortion provider. *Planned Parenthood v. Dempsey*, 167 F.3d 458 (8th Cir. 1999), *see infra*.

In June 2002, the General Assembly appropriated funds for fiscal year 2003 for family planning services, provided again, that no such funds, directly or indirectly, subsidized abortion services or administrative expenses. L.F. at 94. This legislation is contained in Section 10.710 of House Bill No. 1110. *Id*. Section 10.710 was effective during the fiscal year 2003, July 1, 2002 to June 30, 2003. Section 10.710 is identical in all pertinent respects to Section 10.705. Shipley will refer to Section 10.705 (1999) and Section 10.710 (2002) jointly as the "Statutes."

As set forth below, the Directors awarded PPKM and PPSLR state funds totaling $668,850, although both were ineligible under the plain language of the Statutes.

D. Planned Parenthood's dependent relationships with its affiliated abortion providers

Planned Parenthood is so inextricably linked with its affiliated abortion providers

that it fails to meet nearly every one of the Statutes' eligibility conditions. L.F. at 555. In reaching this conclusion, the Circuit Court found, in accordance with the testimony presented at trial, that PPKM and PPSLR have "mutual, cost-savings" relationships with their affiliated abortion providers. *Id*. PPKM and PPSLR share similar names, facilities, expenses, employee wages, and equipment with their affiliated abortion providers. *Id*. at 549. These factual findings, which are well-supported by the record, confirm the correctness of the Circuit Court's Judgment.

1. Abortions are performed by Planned Parenthood employees

Although Planned Parenthood's brief asserts that it is independent from its affiliated abortion providers, the testimony at trial and findings of the Circuit Court confirm otherwise. At trial, PPSLR's CEO, Paula Gianino, summed up the *lack* of independence between Planned Parenthood and its affiliated abortion providers when she testified regarding how abortions are performed. *See generally* T. at 35-94.

PPSLR and Reproductive Health both operate in the same building. T. at 53. Patients who call to obtain information about abortion services call the same phone number as a patient calling PPSLR. T. at 75-76. A patient seeking an abortion schedules an appointment through an employee of PPSLR. T. at 76-77. Patients obtaining an abortion park in the same parking lots as patients of PPSLR. T. at 57. *Employees of PPSLR perform the actual abortions because Reproductive Health has no employees*. T. at 74. Finally, all of the management decisions necessary for Reproductive Health to operate are made by PPSLR. T. at 85. In light of Ms. Gianino's testimony, the Circuit

Court correctly concluded: "employees of PPSLR perform the actual abortion services claimed to be provided by Reproductive Health… Women seeking and obtaining abortions from Reproductive Health deal exclusively with PPSLR employees through every step of the process." L.F. at 554. Accordingly, the Circuit Court found PPSLR's alleged independence from its affiliated abortion provider to be non-existent.

The situation is similar for PPKM and its affiliated abortion provider Comprehensive Health. PPKM's CEO, Peter Brownlie, confirmed in his testimony that PPKM "operates" its affiliated abortion provider. T. at 156-57.

2. Planned Parenthood shares similar names with its affiliated abortion providers

The Circuit Court made two key factual findings concerning the names under which Planned Parenthood and its affiliated abortion providers operate: (1) "**Planned Parenthood of Kansas and Mid-Missouri**" (PPKM) shares a similar name with its affiliated abortion provider "**Comprehensive Health of Planned Parenthood of Kansas and Mid-Missouri**" (Comprehensive Health) and "**Planned Parenthood of the St. Louis Region**" (PPSLR) shares a similar name with its affiliated abortion provider "**Reproductive Health Services of Planned Parenthood of the St. Louis Region**" (Reproductive Health).[3] L.F. at 550-553; (2) Reproductive Health and Comprehensive Health receive direct and indirect economic and marketing benefits from sharing similar names with PPKM and PPSLR. *Id*.

[3] Reproductive Health's name was intended to show its close association with Planned Parenthood. L.F. at 552.

3. Planned Parenthood shares facilities, expenses, employee wages, and equipment with its affiliated abortion providers

The Circuit Court made the following findings regarding Planned Parenthood's sharing of facilities, expenses, employee wages, and equipment with its affiliated abortion providers:

- They operate in the same buildings, L.F. at 553;
- They have a single management team, *Id*. at 553-54;
- They have the same phone number, *Id*. at 553;
- The staff and patrons of PPSLR and Reproductive Health use the same entrance, lobby, waiting area, security area, lunch room, restroom, locker room, and conference room, *Id*. at 554;
- PPSLR's lease agreement with its affiliated abortion provider describes various areas in their facility as "shared spaces." *Id*.;
- PPKM and PPSLR share expenses with their affiliated abortion providers, *Id*.;
- PPKM and PPSLR share utility services with their affiliated abortion providers, *Id*.;
- PPKM and PPSLR share employee wages or salaries with their affiliated abortion providers, *Id*.;
- PPKM and PPSLR share equipment and supplies with their affiliated abortion providers, *Id*. at 555;
- PPKM shares a computer server with Comprehensive Health, *Id*.

Based upon these and other factual findings, the Circuit Court concluded:

> "The Statutes require true financial independence and separation between fund recipients and their affiliated abortion providers, a condition that both PPKM and PPSLR fail to meet. Ms. Gianino

> testified that both PPSLR and Reproductive Health incur 'cost savings given the way the relationship exists.' Transcript, at 94. This sort of mutual, cost-saving relationship between a recipient of State family planning funds and its affiliated abortion provider is precisely what the plain language of the Statutes prohibits."

L.F. at 555.

E. The Department's erroneous alterations of the Statutes

The Directors "unilaterally" altered the Statutes' meaning to grant Planned Parenthood state funds unlawfully. *Id*. at 550-56. In documents titled a Request for Proposal and an Invitation for Bid, the Directors altered the Statutes' terms in ways that the Circuit Court concluded were improper and unauthorized. *Id*. 100-172, 550-56.

First, where the Statutes require that "an organization that receives these funds and its affiliated abortion provider may not share . . . the same or similar name," the Department unilaterally added "under applicable corporation statutes of Missouri or any other state in which the Contractor and affiliate are incorporated." *Id*. 110, 145, 552-553. The Circuit Court found that this change violated the Statutes' plain language because it permitted a grantee, like Planned Parenthood, to share a "similar name" with its affiliated abortion provider. *Id*. at 550-552.

Second, where the Statutes provide that:

> "the family planning recipient and its affiliated abortion provider may not share:
> (b) Medical or non-medical facilities, including but not limited to business offices, treatment, consultation, examination, and waiting rooms;
> (c) Expenses;
> (d) Employee wages or salaries; or

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

the Directors added:

> "Share" is defined as services, employees, or equipment that are provided or paid for by the family planning contractor on behalf of the independent affiliate that provides abortion services without payment or financial reimbursement from the independent affiliate who provides abortion services.

Id. at 110-111, 145. The Circuit Court found that this "contrived definition of 'share'" added by the Department also violated the Statutes' plain language. *Id*. at 555. This alteration allowed a grantee and its affiliated abortion provider to share all of the items that the Statutes specifically prohibit them from sharing, so long as the abortion provider gives the grantee "payment or financial reimbursement." *Id*.

As a result of these alterations, the Circuit Court concluded that the Statutes' plain language was violated by Planned Parenthood's receipt of state funds. PPSLR received $48,300 in State family planning funds for fiscal year 2000 and $243,750 for fiscal year 2003. PPKM received $120,600 for fiscal year 2000 and $256,200 for fiscal year 2003. *Id*. at 557. Accordingly, in violation of the Statutes, PPKM and PPSLR received state funds and thereby lent "the State's imprimatur, or official stamp of approval, to abortion services because of their close and mutually dependent relationship with their affiliated abortion providers." L.F. at 556.

F. Prior litigation and judicial decisions involving these issues

The issues presented in this case are not new to the courts. The appropriations at issue have been addressed previously, to varying degrees, by: (a) the United States Court of Appeals for the Eighth Circuit in *Dempsey*,167 F.3d 458 (8th Cir. 1999), (b) twice by Cole County Circuit Court Judge Byron Kinder in Case No. CV 199-1010-CC, and (c) three separate times by this Court.[4]

1. The Eighth Circuit's 1999 decision in *Dempsey v. Planned Parenthood*

In *Dempsey*, 167 F.3d 458 (8th Cir. 1999), the court ruled that a 1998 predecessor to the Statutes was constitutional. The Eighth Circuit held that "a state may validly choose to fund family-planning services but not abortion services." *Id.* at 461-62. Family planning grantees may maintain an affiliation with an abortion service provider, "so long as the affiliated abortion service provider does not directly or indirectly receive State family planning funds." *Id.* at 463. The Eighth Circuit balanced these interests with abortion rights by approving an affiliation between the family planning grantee and an abortion provider, so long as the affiliated abortion provider is truly "independent" of the grantee. The court cautioned that:

> To remain truly "independent," however, any affiliate that provides abortion services must not be directly or indirectly subsidized by a section 10.715 grantee. . . No subsidy will exist if the affiliate that provides abortion services is separately incorporated, has separate facilities, and maintains adequate financial records to demonstrate that it receives no State family planning funds.

[4] Because the issues have been the subject of numerous prior briefs, Shipley's brief incorporates, in substantial part, several of the arguments raised in the State of Missouri's prior court filings in opposition to Planned Parenthood's arguments.

> This interpretation of [the relevant portion of the Statute] respects the State's valid policy decision to remove its imprimatur from abortion services and to encourage childbirth over abortion. By requiring abortion services to be provided through independent affiliates, [the relevant portion of the Statute] ensures that abortion service providers will not receive benefits in the form of marketing, fixed expenses, or State family-planning funds from Section 10.715 grantees.

Id. at 463-65. As set forth above, the Circuit Court concluded that Planned Parenthood failed to qualify under *Dempsey* because (1) it did not have separate facilities from its affiliated abortion providers and (2) its affiliated abortion providers benefitted from their "mutual, cost-savings" relationships with Planned Parenthood.

2. This Court's prior decisions

In June 1999, the State of Missouri filed suit in Cole County against PPSLR, PPKM, and Director Dempsey. (Plaintiff Shipley's Petition in this case is essentially verbatim to the Amended Petition filed by the State in 1999.) The State was represented by a Special Assistant Attorney General. On November 16, 1999, Circuit Judge Kinder ruled in favor of the State and against Planned Parenthood and the Director ordering, among other things, that Planned Parenthood return the state funds it had received wrongfully.

Planned Parenthood and the Director appealed Judge Kinder's Judgment to this Court. On January 31, 2001, this Court held that "seeking a declaratory judgment in state court can be viewed as an effective means of defending the constitutionality of the statute." *State of Missouri v. Planned Parenthood of Kansas and Mid-Missouri et al*, 37 S.W.3d 222, 226 (Mo. 2001). This Court did not review the merits of Judge Kinder's

decision, but instead remanded the case, because (1) the authority of the Special Assistant Attorney General to sue the Director of the Department of Health was unclear, and (2) Judge Kinder had not determined whether certain newly-enacted federal regulations affected his decision.

The Special Assistant Attorney General then dismissed without prejudice the State's claims against the Director. On May 30, 2001, Judge Kinder again enjoined Planned Parenthood from receiving family planning funds and again ordered Planned Parenthood to repay the funds it had received.

Planned Parenthood again appealed to this Court, which issued its second opinion on January 22, 2002. *State v. Planned Parenthood*, 66 S.W.3d 16 (Mo. 2002). This Court did not review the merits of Judge Kinder's ruling because the Attorney General had a conflict of interest, since his office was representing the State as plaintiff while his assistants were filing materials on behalf of the Director as a defendant. This Court ordered the Attorney General to choose between (1) alleging that the Director had acted illegally in awarding family planning funds to Planned Parenthood, or (2) dismissing the case.

Eventually, the State moved to dismiss the 1999 case without prejudice. On July 23, 2002, this Court ordered Judge Kinder to dismiss the case. *Planned Parenthood v. Kinder*, 79 S.W.3d 905 (Mo. 2002). This Court stated that "dismissal of the case at the behest of the attorney general, whether denominated with or without prejudice, is without prejudice to an action by a taxpayer." *Id.* at 906.

3. Shipley's Petition

Daniel R. Shipley filed suit after moving unsuccessfully to intervene in the 1999 litigation. As stated above, the Circuit Court, like Judge Kinder previously, determined that Planned Parenthood was ineligible to receive, and must return, state funds for family planning services. It also permitted Shipley to recover from Planned Parenthood out-of-pocket expenses for suing on behalf of all Missouri taxpayers.

VI. POINTS RELIED ON

A. Response to Planned Parenthood's Appeal

1. The Circuit Court correctly concluded that Shipley has standing because he is a Missouri taxpayer challenging the illegal payment of state funds

O'Reilly v. City of Hazelwood, 850 S.W.2d 96, 98 (Mo. 1993)

Eastern Missouri Laborers District Council v. St. Louis County, 781 S.W. 2d 43, 46-47 (Mo. 1989)

Planned Parenthood v. Kinder, 79 S.W.3d 905, 906-07 (Mo. 2002)

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

Mo. Rev. Stat.. § 188.220

Mo. Rev. Stat. § 188.205

Mo. Const. art. IV, § 28

2. The Circuit Court correctly found that the Statutes do not violate Article III, § 23 of Missouri's Constitution because they do not create or amend substantive legislation, but instead merely contain permissible conditions on the expenditure of state funds

Opponents of Prison Site, Inc. v. Carnahan, 994 S.W.2d 573 (Mo. Ct. App.

1999)

Rolla 31 School District v. State, 837 S.W.2d 1 (Mo. 1992)

State v. Weindorf, 361 S.W.2d 806 (Mo. 1962)

Graff v. Priest, 201 S.W.2d 945 (Mo. 1947)

Mo. Const. art. III, § 23

Mo. Const. art. IV, § 23

Mo. Rev. Stat. § 188.205

H.B. 10 § 10.705 (1999)

H.B. 1110 § 10.005 (2002)

3. The Circuit Court correctly declared that Planned Parenthood did not qualify to receive state funds and that the Directors' distortions of the Statutes were unlawful because they violated the Statutes' plain language and intent

Rust v. Sullivan, 500 U.S. 173 (1991)

Planned Parenthood v. Dempsey, 167 F.3d 458 (8th Cir. 1999)

Legal Aid Society of Hawaii v. Legal Services Corp., 145 F.3d 1017 (9th Cir. 1998)

Blue Springs Bowl v. Spradling, 551 S.W.2d 596 (Mo. 1977)

Mo. Rev. Stat. § 536.024

Mo. Rev. Stat. § 351.110(3)

Mo. Rev. Stat. § 349.035

4. The Circuit Court correctly ruled that the Statutes are constitutional because Rule 87 permits a party to seek a declaration that a statute is constitutional and such determination was necessary to the Circuit

Court's judgment. Remand is unnecessary because Planned Parenthood waived any constitutional challenge to the Statutes.

State v. Planned Parenthood of Kansas and Mid-Missouri, 37 S.W.3d 222 (Mo. 2001)

Missouri Department of Social Services v. Agi-Bloomfield Convalescent Center, Inc., 682 S.W.2d 166 (Mo. Ct. App. 1984)

City of Nevada v. Welty, 203 S.W.2d 459 (Mo. 1947)

Hollis v. Blevins, 926 S.W.2d 683 (Mo. 1996)

5. The Circuit Court did not err in requiring Planned Parenthood to repay the funds it received unlawfully because (a) to hold otherwise would violate Missouri's Constitution and (b) the Circuit Court found it would be inequitable to allow Planned Parenthood to retain the funds

Contel of Missouri v. Director of Revenue, 863 S.W.2d 928 (Mo. Ct. App. 1993)

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

Eastern Missouri Laborers District Council v. St. Louis County, 781 S.W. 2d 43, 46-47 (Mo. 1989)

Brown v. City of Fredericktown, 886 S.W.2d 747 (Mo. Ct. App. 1994)

Mo. Const. art. IV, § 28

B. Response to Directors' Appeal

1. The Circuit Court correctly found that the Statutes do not violate Article III, § 23 of Missouri's Constitution because they do not create or amend substantive legislation, but instead merely contain permissible conditions on the expenditure of state funds

Opponents of Prison Site, Inc. v. Carnahan, 994 S.W.2d 573 (Mo. Ct. App. 1999)

Rolla 31 School District v. State, 837 S.W.2d 1 (Mo. 1992)

State v. Weindorf, 361 S.W.2d 806 (Mo. 1962)

Graff v. Priest, 201 S.W.2d 945 (Mo. 1947)

Mo. Const. art. III, § 23

Mo. Const. art. IV, § 23

Mo. Rev. Stat.. § 188.205

H.B. 10 § 10.705 (1999)

H.B. 1110 § 10.005 (2002)

2. The Circuit Court correctly declared that Planned Parenthood did not qualify to receive state funds and that the Directors' distortions of the Statutes were unlawful because they violated the Statutes' plain language and intent

Rust v. Sullivan, 500 U.S. 173 (1991)

Planned Parenthood v. Dempsey, 167 F.3d 458 (8th Cir. 1999)

Legal Aid Society of Hawaii v. Legal Services Corp., 145 F.3d 1017 (9th Cir. 1998)

Blue Springs Bowl v. Spradling, 551 S.W.2d 596 (Mo. 1977)

Mo. Rev. Stat. § 536.024

Mo. Rev. Stat. § 351.110(3)

Mo. Rev. Stat. § 349.035

3. The Circuit Court did not err in permitting Shipley to recover his out-of-pocket expenses in connection with his recovery on behalf of the taxpayers of Missouri against Planned Parenthood

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

Feinberg v. Adolp K. Feinberg Hotel Trust, 922 S.W.2d 21 (Mo. Ct. App. 1996)

Lipic v. State, 93 S.W.3d 839 (Mo. Ct. App. 2002)

Temes v. Department of Social Services, 133 S.W.3d 552 (Mo. Ct. App. 2004)

VII. ARGUMENT

A. RESPONSE TO PLANNED PARENTHOOD'S APPEAL

1. The Circuit Court correctly concluded that Shipley has standing because he is a Missouri taxpayer challenging the illegal payment of state funds

Missouri taxpayers have standing to challenge government expenditures when "their taxes *went* or will go to public funds that *have been* or will be expended due to the challenged action." *O'Reilly v. City of Hazelwood*, 850 S.W.2d 96, 98 (Mo. 1993)(emphasis added) (*citing Eastern Missouri Laborers District Council v. St. Louis County*, 781 S.W. 2d 43, 46-47 (Mo. banc 1989)). This standard contemplates challenges to past *and* future expenditures. Shipley, a Missouri taxpayer has standing to challenge the legality of the state expenditures to Planned Parenthood.

During the prior litigation, this Court stated that "a taxpayer may bring a separate action" and that dismissal of the State's prior action was "without prejudice to an action by a taxpayer." *Planned Parenthood v. Kinder*, 79 S.W.3d 905, 906-07 (Mo. 2002). Accordingly, this Court already has endorsed Shipley's standing to assert his claims.

In *Eastern Missouri Laborers District Council v. St. Louis County*, 781 S.W. 2d 43, this Court ordered reinstatement of a taxpayer petition, that sought (1) an injunction against performance of two challenged government contracts and (2) an order "that the named individual defendants personally reimburse the County treasury for any payments

made under either contract." *Eastern Missouri Laborers*, 781 S.W. 2d at 44. Therefore, and contrary to Planned Parenthood's assertions, Missouri law does recognize the right of a taxpayer to pursue repayment of unlawfully received state funds.

Missouri law also recognizes the necessity of a remedy to rectify the wrong that occurs through the illegal expenditure of public funds. *Eastern Missouri Laborers*, 781 S.W. 2d at 47 ("Taxpayers must have some mechanism for enforcing the law"). When, in this instance, the money already has been paid, the only appropriate remedy is repayment of funds that were received wrongfully. *See also Fulton v. City of Lockwood*, 269 S.W.2d 1 (Mo. 1954) (contractor ordered to repay public funds because contract was unlawful due to public officials' failure to follow statutory provisions); *County of St. Francois v. Brookshire*, 302 S.W.2d 1 (Mo. 1957) (attorney required to repay public funds paid unlawfully). Absent repayment, the passage of time that inevitably occurs during the course of litigation would render meaningless a decision on the merits. On this point, the Supreme Court of California has explained the rationale for this rule of law as follows:

> "a right of action exists to recover moneys paid to a contractor for work and material furnished the public agency where they were furnished in contravention of a statute requiring competitive bidding. If, as we have seen, the contract is absolutely void as being in excess of the agency's power, the contractor acts at his peril, and he cannot recover payment for the work performed, it necessarily follows that <u>any payments made to him for the work are illegally made and may be recovered</u>. If that were not true the competitive bidding requirement would be completely nullified because the agency could have the work done, pay the charges therefor, and the taxpayers would be helpless to compel observance of the law. The only event preventing that result in any case would be whether some taxpayer acted soon enough to forestall the payment by injunction proceedings. The effective operation and enforcement of the public policy declared in the statute cannot be dependent upon such an uncertainty. The temptation on the part of officials and the persons contracting with the agency desiring to

> evade the law would be to act quickly and secretly in order that the taxpayers would be caught off guard. Such a condition is manifestly undesirable."

Miller v. McKinnon, 124 P.2d 34, 38 (Cal. 1942). Similarly here, a Missouri taxpayer should not be denied the right to enforce the law merely because an injunction was not obtained quickly enough to prevent illegal payments in the first place.

For additional authority in accord with Missouri law allowing taxpayers to obtain for the State recovery of wrongfully paid public funds, *see, e.g.*, *Neacy v. Drew*, 187 N.W. 218 (Wisc. 1922). In *Neacy*, taxpayers recovered public funds that had been illegally paid to a contractor. The Supreme Court of Wisconsin held that a taxpayer's suit "should be favored by the courts" because "they protect all taxpayers from illegal acts." *See also Thomson v. Call*, 699 P.2d 316 (Cal. 1985) (taxpayers were entitled to recover public funds that were unlawfully received even though fraud was not involved); *Thompson v. Voldahl*, 188 N.W.2d 377 (Iowa 1971) (taxpayers were entitled to recover funds paid by county to third-party on a public contract subsequently declared void).

Shipley also has standing pursuant to Missouri Statute, V.A.M.S. § 188.220, which provides:

> "Any taxpayer of this state or its political subdivisions shall have standing to bring suit in a circuit of proper venue to enforce the provisions of 188.200 to 188.215."

One of the provisions included in this grant of standing is §188.205. It bars the expenditure of public funds for performing or assisting an abortion not necessary to save the life of the mother, or for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life. Because Shipley's suit involves payment of

state funds to PPSLR and PPKM, entities that are intertwined with their affiliated abortion providers and whose employees actually perform abortions, Shipley has standing pursuant to § 188.220 as well.

Taxpayer standing also draws support from Article IV, § 28 of the Missouri Constitution which prohibits the executive branch from withdrawing or paying money from the state treasury except in strict compliance with an appropriation. *State v. Weatherby*, 129 S.W.2d 887 (Mo. 1939) (attorney required to return state funds paid without a valid appropriation). In the absence of a taxpayer's right to recover, on behalf of the State, funds that were improperly dispensed, the funds would be appropriated in a manner contrary to their stated purpose, in direct violation of the Missouri Constitution.[5] Taxpayers would be left without a remedy to enforce the law, in violation of *Eastern Missouri Laborers*, 781 S.W.2d 43, since the executive branch cannot be expected to seek recovery of funds that the executive branch itself unlawfully dispensed.

Planned Parenthood contends that taxpayer standing does not extend to these circumstances, but has argued just the opposite in the past. Planned Parenthood objected to the standing of the State, not a taxpayer, to bring the prior court action. *See* Supreme Court Brief filed by Planned Parenthood in *State of Missouri v. Dempsey, et al*., Case No. SC82226 (reply brief filed August 16, 2000). Planned Parenthood contended that the State lacked standing because taxpayer standing "allows the people to act for themselves." *Id*. at 9. Moreover, in opposing an injunction in the prior litigation,

[5] This issue is discussed in more detail in Section VII.A.5, *infra*, where Planned Parenthood asserts it was inequitable to require it to repay the funds.

Planned Parenthood repeatedly acknowledged its liability to repay family planning funds if the Circuit Court determined that it was not eligible to receive them:

> "There is nothing more basic in law than the proposition that there is neither irreparable injury nor lack of an adequate remedy at law when the only harm would be the payment of money, which clearly can be recovered if, in fact, the plaintiff succeeds on the merits of its claims."
>
> "If plaintiff were to prevail it would have a legal remedy that would allow it to recover any funds that, arguendo, were paid wrongfully."

Supreme Court Brief of the State of Missouri in Appeal No. 82226 at 85-86 (quoting Planned Parenthood's opposition to the State's Motion for Temporary Restraining Order in the 1999 case)(citations omitted).

Now that Shipley has acted on behalf of Missouri taxpayers to recoup the funds Planned Parenthood received unlawfully, Planned Parenthood has reversed its position to argue that Shipley also lacks standing. Were Planned Parenthood to be believed, there would be no one who could protect the State and its taxpayers from Planned Parenthood's improper receipt of public funds. This cannot be the law.

In advocating this novel theory, Planned Parenthood ignores controlling Missouri authorities and instead cites four cases from other states--a 1929 Oregon case, a 1927 Massachusetts case, a 1978 Texas case, and a 1978 South Dakota case--that offer it no support. The Oregon case, *Young v. Gard*, 277 P. 1005 (Or. 1929), supports Shipley:

> "It is settled by the great weight of authority that, where an unlawful expenditure of money has been made by the officers of a city or county, and the proper authorities refused to compel its restitution, a taxpayer may bring a suit on behalf of himself, and others similarly situated, to recover the amount for the benefit of the municipality."

Id. at 1008. The Massachusetts and South Dakota cases interpret statutes which have no bearing here. Finally, the Texas case involved a violation of the Texas Constitution, which prohibits donations to private corporations. None of these cases supports Planned Parenthood's position.

Planned Parenthood next complains about "delay" in the filing of Shipley's suit. First, there never has been any allegation that this suit was not filed timely. Second, Planned Parenthood has been fully aware of its "questionable" receipt of state funds since at least 1999, when they were first received. L.F. at 557-58. In the prior litigation, Circuit Judge Kinder also ordered Planned Parenthood to repay funds it had obtained illegally. Accordingly, the suggestion that a claim to return these funds unfairly surprised Planned Parenthood (and therefore it should not have to repay the money) is disingenuous. Finally, the delay argument has no bearing on Shipley's standing.

The last argument Planned Parenthood raises about standing is that private contractors "will surely" be deterred from doing business with the State if taxpayers are permitted to recoup state funds that have been paid illegally. Planned Parenthood cites no evidence to support this speculation. Moreover, Missouri law already cautions entities that contract with agents of the State [such as the Directors] that they are charged with knowledge of the agent's authority, and whether the contract is within the agent's authority. *Aetna Ins. Co. v. O'Malley*, 124 S.W.2d 1164 (Mo. 1938).

In *Aetna*, the superintendent of insurance, a state officer, contracted with attorneys to seek restitution from certain insurance companies as a result of a reduction in state insurance rates. When the attorneys sought to recover their fees, this Court addressed the

issue of whether the superintendent had the authority to employ them. In denying the attorneys' claims, this Court stated:

> "All persons dealing with such officers are charged with knowledge of the extent of their authority and are bound, at their peril, to ascertain whether the contemplated contract is within the power conferred. Such power must be exercised in manner and form as directed by the Legislature."
> ***
> "The doctrine of estoppel, when invoked against the state, has only a limited application, even when an unauthorized contract on its behalf has been performed, and thereby the state has received a benefit, and so it is held that a state cannot by estoppel become bound by the unauthorized contracts of its officers; nor is a state bound by an implied contract made by a state officer where such officer had no authority to make an express one."

Id. at 1166-67 (citations omitted). *See also State v. Leggett*, 359 S.W.2d 790, 799 (Mo. 1962)(finding a contract with the state invalid and denying recovery "under any theory of estoppel or otherwise"). Because the statutory conditions for payment of state funds were not met by Planned Parenthood, the Directors lacked authority to enter into the contracts. In the absence of taxpayer standing, Missourians would lack a remedy to cure the Directors' illegal payments to Planned Parenthood.

Moreover, since Planned Parenthood recognized from the outset the dubious legal grounds for its receipt of the money, its claim of unfairness rings false. The trial judge concluded that equity required repayment. L.F. at 557-58. While Planned Parenthood regrets that outcome, the weighing of equities in a particular case is a matter best left to the discretion of the trial judge. *Wexelman v. Donnelly*, 782 S.W.2d 72, 76 (Mo. Ct. App. 1989) ("It is the function of the trial court to 'balance the equities' and we will not

substitute our judgment for his."). In any event, this argument (like Planned Parenthood's prior argument about delay) bears no relationship to Shipley's standing.

2. The Circuit Court correctly found that the Statutes do not violate Article III, § 23 of Missouri's Constitution because they do not create or amend substantive legislation, but instead merely contain permissible conditions on the expenditure of state funds

In its second point, Planned Parenthood argues that the Statutes violate Article III, § 23 of the Missouri Constitution. The Circuit Court rejected this argument, concluding that the Statutes are permissible appropriations that do not conflict with or amend existing law or include legislation of a general character. L.F. at 557. This finding is fully supported by the law and should be affirmed.

a. Statutes are presumed to be constitutional

This Court's review of this point is governed by the following legal standard:

> "A statute has a presumption of constitutionality. The party challenging the constitutionality of a statute must plead facts in support of the attack, and the burden of proof is on the party attacking the statute. Finally, we note that we are to resolve all doubt in favor of the act's validity, and in so doing we are allowed to make every reasonable intendment to sustain the constitutionality of the statute."

Westin Crown Plaza Hotel Co. v. King, 664 S.W.2d 2, 5 (Mo. 1984)(citations omitted). The burden Planned Parenthood faces here is formidable. *Reproductive Health v. Nixon*, --S.W.3d --, 2006 WL 463575 (Mo. 2006)("The Court will not invalidate a statute unless it clearly and undoubtedly contravenes the constitution and plainly and palpably affronts fundamental law embodied in the constitution.")(citations omitted); *Smith v. Coffey*, 37

S.W.3d 797 (Mo. 2001)(same).

b. Article III, § 23 of the Missouri Constitution; challenges are disfavored

Article III, § 23 of the Missouri Constitution states:

> "No bill shall contain more than one subject which shall be clearly expressed in its title, except bills enacted under the third exception in section 37 of this article and general appropriations bills, which may embrace the various subject and accounts for which moneys are appropriated."

Challenges to statutes under Article III, § 23 are not favored. In *Hammerschmidt v. Boone County*, 877 S.W.2d 98 (Mo. 1994), in the context of a statutory challenge based on Article III, § 23, this Court held as follows:

> "an act of the legislature approved by the governor carries with it a strong presumption of constitutionality. This Court will resolve doubts in favor of the procedural and substantive validity of an act of the legislature. Attacks against legislative action founded on constitutionally imposed procedural limitations are not favored; we ascribe to the General Assembly the same good and praiseworthy motivations as inform our decision-making processes. Therefore, this Court interprets procedural limitations liberally and will uphold the constitutionality of a statute against such an attack unless the act clearly and undoubtedly violates the constitutional limitation."

Id. at 102.

In *Hammerschmidt*, this Court identified five purposes behind Article III, § 23: (1) to facilitate orderly legislative procedure so the issues can be better grasped, (2) to prevent "logrolling," the practice of combining unrelated amendments in a single bill, (3) to defeat surprise within the legislative process, (4) to assure that people are fairly apprised of the bills being considered, and (5) to maintain an appropriate check by the

governor over legislative action. None of these considerations is raised by Planned Parenthood's arguments.

c. *The Eligibility Conditions in the Statutes are Constitutional Restrictions Specifying the Purpose of the Appropriations*

The purpose of an appropriation bill "is to set aside moneys for specified purposes." *Hueller v. Thompson*, 289 S.W. 338, 340 (Mo. 1926). Article IV, § 23 of the Missouri Constitution provides, in pertinent part, that "[e]very appropriation law shall distinctly specify the amount and purpose of the appropriation…" (emphasis added). *See also State v. Merrell*, 530 S.W.2d 209, 213 (Mo. 1975). The General Assembly stated the purposes of the appropriations in the Statutes: namely, to set aside funds for various family planning services, but *excluding* any direct or indirect subsidization of abortion services or administrative expenses.

The power to place conditions or restrictions on an appropriation is inherent in a legislature's power to spend. *Cirone v. Cory*, 234 Cal.Rptr. 749, 756 (Cal. Ct. App. 1987) ("Legislature can attach to its appropriations whatever terms and conditions it chooses so long as they are constitutionally permissible"); *State v. Carruthers*, 759 P.2d 1380, 1385 (N.M. 1988)(same); *Henry v. Edwards*, 346 So.2d 153 (La. 1977)(same); *Welden v. Ray*, 229 N.W.2d 706 (Iowa 1975)(same).

The Statutes' conditions help describe the purpose of the appropriations and clarify what constitutes a direct or indirect subsidy of abortion services or administrative expenses. Such limitations help ensure that the appropriated funds will be spent in accordance with the General Assembly's purpose. Surely the General Assembly cannot

be faulted for specifying the purpose of the appropriations in sufficient detail to try to ensure that the State's funds are spent properly.

Planned Parenthood cites no authority that precludes the General Assembly from specifying how funds appropriated for family planning services must be spent.

d. The Statutes Do Not Amend § 188.205

Claiming the Statutes change existing law and, therefore, violate Article III, § 23, Planned Parenthood contends that the Statutes conflict in two ways with another Missouri statute, § 188.205. However, because the Statutes do not amend § 188.205 or any other existing law, this point fails.

Section 188.205, R.S.Mo., provides:

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

Planned Parenthood argues that the Statutes amend § 188.205 because: (1) § 188.205 purportedly "focuses only on limiting the uses to which public funds are put," while § 10.710 imposes elaborate restrictions on the activities of program participants; and (2) the Statutes, unlike § 188.205, do not allow public funds to be expended for abortions necessary to save a mother's life or for abortion referrals when the mother's life is in danger. These arguments are erroneous.

Planned Parenthood's reasoning is flawed because it disregards the fundamental fact that the Statutes merely appropriate and condition the use of

certain state funds for a single year, consistent with existing law, rather than change the general laws of this State in any way.

i. The Statutes do not alter State policy

The Statutes do not restrict or interfere with the relationship between a family planning organization and an affiliated abortion provider. Instead, they simply place lawful conditions on the expenditure of state funds used for family planning. The Statutes provide that if a family planning organization is not independent from its affiliated abortion provider, it cannot receive state family planning funds. This follows the policy stated in § 188.205. Both enunciate a clear and legal prohibition against spending public funds for abortions. § 188.205 states the policy broadly for all public funds; the Statutes reiterate the same policy for a specific appropriation. Therefore, the Statutes do not amend § 188.205 in any way, but instead, reflect its guiding principle.

ii. The Statutes do not prohibit public funds from being spent to perform abortions necessary to save a mother's life

The Statutes do not prohibit the use of non-family planning public funds to perform an abortion necessary to save a mother's life. As stated above, the Statutes relate solely to appropriations of family planning funds. While the Statutes do place conditions on how the *particular* appropriated money may be spent, they do not *prohibit* the spending of other public funds in any way. Furthermore, § 188.205 does not affirmatively entitle Planned Parenthood (or any other organization) to receive public funds, even to perform abortions necessary to save a mother's life. § 188.205 does not

even require the General Assembly to fund abortions necessary to save a mother's life. Instead, § 188.205 only ensures that public funds are *never* spent to perform, or counsel a woman to have, an abortion that is not necessary to save her life.

Because the Statutes do not amend § 188.205 or any other law, they do not violate Article III, § 23. *See Rolla 31 School Dist. v. State*, 837 S.W.2d at 4-5 (appropriation did not violate Article III, § 23 when it was consistent and did not directly amend any general statutes); *Opponents of Prison Site, Inc. v. Carnahan*, 994 S.W.2d at 580 ("[T]he appropriation bills in question here did not violate the State Constitution to the extent they reflected the General Assembly's selection of the Bonne Terre prison site in that they did not amend any substantive laws in regard thereto"); *State v. Ludwig*, 322 S.W.2d 841 (Mo. 1959) (statute did not violate Article III, § 23 where it had "but one object and dealt with but one general subject, fairly indicated by its title").

Because the Statutes do not conflict with or amend any law, but instead provide clear directions regarding how certain appropriations should be spent consistent with existing law, they do not violate Article III, § 23 of the Missouri Constitution.

e. The Statutes do not include legislation of a general character

Planned Parenthood's next claims the Statutes include legislation of a general character in violation of Article III, § 23. On this issue, Planned Parenthood faces the same fundamental problem as in the preceding section. Namely, the Statutes do not establish or alter any preexisting rights and do not forbid any conduct. Instead, they merely specify how certain state funds must be spent.

Moreover, the Statutes do not force anyone, including Planned Parenthood, to alter its conduct in any way. The Statutes' conditions apply only to parties who voluntarily seek family planning funds under that specific appropriation. Planned Parenthood was free to ignore the Statutes. The only consequence of such a decision would have been that Planned Parenthood would not have received state funds under that appropriation. The Eighth Circuit Court of Appeals previously has ruled in *Dempsey*, 167 F.3d 458, that Missouri can constitutionally require recipients of state family planning funds (including Planned Parenthood) to comply with conditions for the receipt of those funds, including *true independence* from affiliated abortion providers. Planned Parenthood failed to meet this condition because of its "mutual, cost-saving" relationships with its affiliated abortion providers. L.F. at 555.

As discussed above, Article IV, § 23 of the Missouri Constitution requires an appropriations statute to "distinctly specify the amount and purpose of the appropriation." Accordingly, the General Assembly should not be faulted for specifying how state funds should be spent for family planning services. In an analogous case, a Maryland appellate court ruled that its legislature did not violate Maryland's constitutional prohibition against including general legislation in the state's Budget Bill (i.e., an appropriation bill), by including restrictions that prohibited spending appropriated funds for abortions for Medicaid patients except under certain situations. *Bayne v. Secretary of State*, 392 A.2d 67 (Md. 1978). The court held:

> "The General Assembly's authority…necessarily includes the authority to condition or limit the use of money appropriated, or the use of the facility for which the money is appropriated,

> provided the condition or limitation is directly related to the expenditure of the sum appropriated, does not, in essence, amend either substantive legislation or administrative rules adopted pursuant to legislative mandate, and is effective only during the fiscal year for which the appropriation is made. The conditions here meet this test. … *They do not constitute an amendment of substantive legislation or administrative rules adopted pursuant to a legislative mandate*…"

Id. at 74.

Planned Parenthood's argument that the Statutes violate the constitutional prohibition against including general legislation in appropriations bills resembles the argument rejected by the court in *Bayne*. The conditions in the Statutes are directly related to the expenditure of the sum appropriated, do not amend or conflict with any general statute, and are effective only during a single fiscal year. Accordingly, the Statutes do not include legislation of a general character in violation of Article III, § 23. *See also South Dakota Education Assoc. v. Barnett*, 582 N.W.2d 386, 391-92 (S.D. 1998); *Brown v. Firestone*, 382 So.2d 654, 663 (Fla. 1980).

f. The Statutes' titles do not violate the Missouri Constitution

The final argument raised by Planned Parenthood on this point is that the titles of the Statutes violate Article III, § 23 because they do not give adequate notice to interested parties of the Statutes' content. In a single paragraph Planned Parenthood offers no support or persuasive rationale for its position.

The Title to the 1999 Statute, H.B. 10 § 10.705 is:

> "To appropriate money for the expenses, grants, refunds, and distributions of the Department of Mental Health, the Board of Public Buildings, the Department of Health, and the several divisions and programs thereof and

> the Missouri Health Facilities Review Committee to be expended only as provided in Article IV, Section 28 of the Constitution of Missouri for the period beginning July 1, 1999 and ending June 30, 2000."

L.F. at 87. Similarly, the Title to the 2002 Statute, H.B. 1110 § 10.005 is:

> "To appropriate money for the expenses, grants, refunds, and distributions of the Department of Mental Health, the Board of Public Buildings, the Department of Health and Senior Services, and the several divisions and program thereof, the Missouri Health Facilities Review Committee and the Commission for the Senior Rx Program to be expended only as provided in Article IV, Section 28 of the Constitution of Missouri, for the period beginning July 1, 2002 and ending June 30, 2003."

L.F. at 93.

Under Missouri law, the only question is whether the single subject of the bill is clearly expressed in its title. *State v. Weindorf*, 361 S.W.2d 806 (Mo. 1962). To answer such questions, courts liberally construe Article III, § 23. *Id*. at 809. "In order to satisfy the provision's requirements the title of a statute needs only to indicate the general contents of the act, and if the contents fairly relate to and have a natural connection with the subject expressed in the title they are within the purview of the title." *Id*. (citations omitted). *See also Graff v. Priest*, 201 S.W.2d 945 (Mo. 1947) ("The *general subject matter* of the act is the regulation of the drinking and consumption of intoxicating liquor and that subject is clearly expressed in the title. The act is therefore not void under this section").

Here, the titles of the Statutes state their "general contents" or "general subject matters," that they concern appropriations to the Department. Because the Statutes are clearly appropriations, which include various permissible conditions, there is no constitutional violation.

g. If the Eligibility Conditions are Unconstitutional, then the Court should rule the Statutes invalid in their entirety, because severance of the eligibility conditions would contravene legislative intent

If this Court finds the Statutes violate Article III, § 23, which Shipley denies, then the Statutes should be declared invalid in their entirety. Without valid family planning appropriations, there were no funds that the Directors lawfully could give to Planned Parenthood. *See Fort Zumwalt School Dist. v. State*, 896 S.W.2d 918, 922 (Mo. 1995) ("Absent an appropriation by the General Assembly approved by the Governor, . . . the constitution forbids any expenditure of state revenues").

Severance analysis begins with legislative intent. *Akin v. Director of Revenue*, 934 S.W.2d 295, 300-01 (Mo. 1996). The clear legislative intent of the Statutes was to provide funds for family planning only if no possible benefits from these funds could flow to abortion providers. The General Assembly did not intend to allow for an appropriation if the eligibility conditions were held invalid. Accordingly, if all of the eligibility conditions of the Statutes were severed or otherwise eliminated, the Statutes would be transformed so that they no longer would express the legislative intent.

Without the challenged eligibility requirements, no valid appropriation would exist and, consequently, there would be no funds that the Directors lawfully could give to any provider of family planning services. *Fort Zumwalt School Dist*., 896 S.W.2d at 922. Repayment of the funds to the State, as ordered below, would remain the proper outcome.

3. The Circuit Court correctly declared that Planned Parenthood did not qualify to receive state funds and that the Director's distortions of the Statutes were unlawful because they violated the Statutes' plain

language and intent

To qualify for funds under the Statutes, grantees cannot share similar names, facilities, wages, expenses, or equipment with an affiliated abortion provider. Applying the plain and ordinary meaning of the Statutes' terms, the Circuit Court concluded that Planned Parenthood shared all of these prohibited items with affiliated abortion providers and was, therefore, ineligible. Among other things, the Circuit Court found that "employees of PPSLR perform the actual abortion services claimed to be provided by Reproductive Health." L.F. at 554. Planned Parenthood claims that the Director's contrary "interpretation" of the Statutes was (a) owed deference and (b) does not create constitutional problems, but the Circuit Court's findings were correct and lawful in all respects and, therefore, should be affirmed.

a. The Circuit Court owed no deference to the Directors' distortions of the Statutes

Planned Parenthood argues the Directors' "interpretation" of the Statutes was owed deference, but Missouri law required the Circuit Court independently to review the meaning of the Statutes:

> "[W]here an administrative decision is clearly based upon an agency's interpretation or application of the law, the agency's conclusion of law and any decision based thereon become a matter for the ***independent*** judgment of the reviewing court and are subject to correction where erroneous. The exercise of such independent judicial judgment…is not constrained by pronouncements of administrative agencies."

Gulf Transport Co. v. Public Service Commission, 658 S.W.2d 448, 453 (Mo. Ct. App. 1983)(emphasis added)(citations omitted). *See also Daily Record Co. v. James*, 629

S.W.2d 348, 351 (Mo. 1982)(“Administrative agency decisions based on the agency’s interpretation of law ‘are matters for the independent judgment of the reviewing court….’”)(citing *St. Louis County v. State Tax Commission*, 562 S.W.2d 334 (Mo. 1978)).

The refusal of Missouri courts to defer to an agency’s interpretation on a question of statutory construction is necessitated, in part, to prevent agencies from rewriting statutes under the guise of interpretation, which is precisely what the Directors did here. *Blue Springs Bowl v. Spradling*, 551 S.W.2d 596, 600 (Mo. 1977) ("The plain and unambiguous language of the statute cannot be made ambiguous by administrative interpretation and thereby given a meaning which is different from that expressed in clear and unambiguous language in the statute.").

Unlike the cases cited by Planned Parenthood, which hold that agencies are entitled to deference when they have properly exercised rule-making authority, the Directors i were not exercising rule-making authority, let alone doing it properly. Exercising rule-making authority involves, among other things, filing proposed rules with the Secretary of State and the Joint Committee on Administrative Rules. *See, e.g.*, V.A.M.S. § 536.024; *Greenbriar Hills Country Club v. Director of Revenue*, 47 S.W.3d 346, 357 (Mo. 2001) (rule-making procedures involve notice, publication, and public comment). Rather than follow rule-making procedures, the Directors, in the words of the Circuit Court, “unilaterally” established their “contrived definitions” for the contracts. L.F. 555. The impropriety of the Directors’ conduct was so obvious that it became the subject of a hearing held by the Senate Administration Committee. *Id*. at 230-31.

Accordingly, Planned Parenthood's cases regarding judicial deference to agency rule-making are irrelevant.

Even if the Directors had followed rule-making procedures in establishing their alterations of the Statutes--which they did not do-- regulations and rules cannot change statutory intent. Since the Directors' "contrived definitions" are nothing more than an attempted end-run around the clear language of the Statutes and the legislative intent, the Circuit Court properly rejected them. L.F. at 555 ("The Directors lacked authority to alter unilaterally the Statutes' meaning by inserting this contrived definition of 'share'…even if any deference were otherwise owed, the Directors' actions were in direct conflict with the statutory language and cannot stand.")(*citing Blue Springs Bowl*, 551 S.W.2d at 600)).

For these reasons, no deference was owed to the Director's distortions. Deference is owed, however, to the factual findings of the Circuit Court, which Planned Parenthood and the Director disregard throughout their briefs. *Murphy v. Carron*, 536 S.W.2d 30.

b. The Circuit Court's interpretation of "share" was proper

Planned Parenthood criticizes the Circuit Court for applying a "plain and ordinary meaning" to the word "share." Everyone agrees that "share" is not defined in the Statutes. Accordingly, Missouri law required the Circuit Court to give "share" its "plain and ordinary meaning as found in the dictionary…." *Asbury v. Lombardi*, 846 S.W.2d 196, 201 (Mo. 1993)(citations omitted). Planned Parenthood cites *Abrams v. Ohio Pacific Express*, 819 S.W.2d 338 (Mo. 1991) , but *Abrams* supports Shipley's position that dictionaries supply the meaning of undefined statutory terms. *Id.* at 340. Not

surprisingly, Planned Parenthood fails to cite any dictionary that supports the Director's "contrived definition." L.F. at 555.

Citing Webster's New World Dictionary, the Circuit Court stated that "share" means "to receive, use, experience, enjoy, endure, etc. in common with another or others." *Id*. at 553. The Circuit Court noted that a Missouri appellate court previously had defined "share" to mean "to partake of or enjoy with others; to have a portion of or to participate in." *Id*. at 554 (*citing Ragsdale v. Tom-Boy, Inc.*, 317 S.W.2d 679, 686 (Mo. Ct. App. 1958)). Based upon these established definitions and the facts adduced at trial, the Circuit Court found that Planned Parenthood "shares" (i) facilities, (ii) expenses, (iii) employee wages, and (iv) equipment, among other things, with affiliated abortion providers and, therefore, was ineligible to receive state funds.

i. Planned Parenthood shares facilities with affiliated abortion providers

Planned Parenthood shares facilities with affiliated abortion providers. A "facility" is a "building, special room, etc. that facilitates or makes possible some activity." Webster's New World Dictionary, 2d college ed. (1982). *See also* Webster's Third New International Dictionary (1986) (defining "facility" as "something (as a hospital, machinery, plumbing) that is built, constructed, installed, or established to perform some particular function or to serve or facilitate some particular end"); *Hadel v. Bd. of Educ. of Sch. Dist. of Springfield*, 990 S.W.2d 107, 115 (Mo. Ct. App. 1999) ("'Facility' means 'something (as a hospital) that is built.'").

Planned Parenthood and its affiliated abortion providers share the same buildings,

which Planned Parenthood owns.[6] L.F. at 75-78. PPSLR and Reproductive Health both use, occupy, and share the Planned Parenthood building (a "facility") in St. Louis. *Id*. PPKM and Comprehensive Health both use, occupy, and share the Planned Parenthood building (also a "facility") in Overland Park, Kansas. *Id*. PPSLR and Reproductive Health also share and jointly use portions of the Planned Parenthood facility, including the entrance, the lobby (including the rest room), waiting area, security area (including the metal detector and the security "mantrap"), lunch room, rest room, locker room, conference rooms, and parking area. *Id*. The lease agreement between PPSLR and Reproductive Health describes these areas as "shared spaces." *Id*. at 180, 554. Thus, even PPSLR's own lease with Reproductive Health verifies the unambiguous and well-understood meaning of the term "share." Accordingly, the Circuit Court correctly concluded that Planned Parenthood "shares" facilities with its affiliated abortion providers.

One condition states lawfully can impose on grantees of state funds is that they have "separate facilities" from affiliated abortion providers. *Dempsey,* 167 F.3d at 463. The Circuit Court found as a fact that Planned Parenthood did not have "separate facilities" from affiliated abortion providers, as required by the plain language of the

[6] This is not to say that a recipient and its affiliated abortion provider would always share "facilities" within the meaning of the Statutes if they occupied space in the same building. If, for example, they leased separate spaces in a building owned by an unrelated person or entity and containing other unrelated tenants, then their presence would not constitute an impermissible sharing of "facilities" if no economic benefits flowed between them as a result. However, in this case, the buildings used by Planned Parenthood and its affiliated abortion providers are owned by Planned Parenthood. There was an impermissible sharing of "facilities" because economic benefits flowed between them as a result of their joint occupancy.

Statutes.

The Circuit Court's factual finding that Planned Parenthood shares facilities with affiliated abortion providers is, by itself, a sufficient basis upon which to affirm the judgment of the Circuit Court because: (a) states may constitutionally require grantees to have separate facilities from affiliated abortion providers, *Dempsey*, 167 F.3d 458, (b) the Statutes contain this requirement, and (c) the Circuit Court found that Planned Parenthood did not have separate facilities, which finding was amply supported by the evidence. *McCreary v. McCreary*, 954 S.W.2d 433 (Mo. Ct. App. 1997) ("Because the trial court is in the best position to weigh all the evidence and render a judgment based on the evidence, the judgment is to be affirmed under any reasonable theory supported by the evidence.").

ii. Planned Parenthood shares expenses with its affiliated abortion providers

Planned Parenthood also shares expenses with affiliated abortion providers. PPSLR shares electricity, gas, water, sprinkler, alarm, telephone, and other utility services with Reproductive Health. L.F. at 77, 554-555. Similarly, Comprehensive Health reimburses PPKM for water, electricity, heat, and other utility charges. *Id*.

iii. Planned Parenthood shares employee wages and salaries with affiliated abortion providers

Planned Parenthood shares employee wages and salaries with its affiliated abortion providers. Reproductive Health has no employees, no CEO, and no CFO. *Id*. at 77. Instead, employees of Planned Parenthood perform the actual abortion services

claimed to be provided by Reproductive Health. *Id*. at 554. Employees of PPSLR also manage Reproductive Health. *Id*. at 77-78. Similarly, Comprehensive Health has no CEO or CFO. *Id*. at 79. PPKM's CEO Peter Brownlie testified that PPKM "operates" Comprehensive Health. *Id*. PPKM also admitted that Comprehensive Health and PPKM are both operated by the same chief executive and management team. *Id*. at 80. The same employees who operate Planned Parenthood also operate the affiliated abortion providers. At least one key employee of Planned Parenthood does not even keep track of the amount of time he spends working on matters for the affiliated abortion provider. *Id*. at 554 (citing transcript at 74-75).

Accordingly, the Circuit Court's finding that Planned Parenthood "shares" wages and salaries with its affiliated abortion providers is fully supported by the evidence.

iv. Planned Parenthood Shares Equipment and Supplies with Affiliated Abortion Providers

Planned Parenthood shares equipment and supplies with its affiliated abortion providers. Reproductive Health owns no equipment and has no physical assets. L.F. at 78. Instead, Reproductive Health uses PPSLR's equipment, including computers. *Id*. at 77-78. PPSLR and Reproductive Health also share the same telephone system and number, (314) 531-7526. *Id*. at 77. PPKM admits that it shares a server for its computer systems and a utility meter with Comprehensive Health. *Id*. at 79-80.

c. The Directors' distortion of the statutory term "share"

Unable to challenge the factual findings as against the weight of the evidence,

Planned Parenthood instead argues that the Circuit Court should have accepted the Directors' interpretation of the word "share." However, no deference was owed to the Directors and, in any event, their distortions contradict the Statutes' plain meaning and legislative intent. *Id*. at 555.

The "definition" of "share" unilaterally inserted by the Directors into the contracts was: "services, employees, or equipment that are provided or paid for by the family planning contractor on behalf of the independent affiliate that provides abortion services *without* payment or financial reimbursement from the independent affiliate who provides abortion services." *Id*. at 110-11, 145. Nothing in the Statutes allows a fund recipient to be reimbursed by an affiliated abortion provider. To the contrary, the Statutes require true financial independence and separation.

The only effect of the Directors' "definition" of "share" was to preclude outright gifts from a recipient of state funds to an affiliated abortion provider. This "contrived definition"--to quote the Circuit Court--ignores the plain meaning of "share." *Id*. at 555. Contrary to the Directors' contention, sharing and giving gifts are distinct. Individuals "share" items even though each contributes to the cost of the item. A driver and a passenger "share" the car even if the passenger reimburses the driver for some of the gas. Similarly, persons who own a condominium "share" the condominium even though each pays for his or her own interest in and use of the condominium. Contrary to Planned Parenthood's position, reimbursement does not negate sharing.

In addition to violating the plain meaning of "share," the Directors' "contrived definition" also contravenes legislative intent. The Directors apparently recognized the

economic benefit that would flow from fund recipients to their affiliated abortion providers if the fund recipients were permitted to give gifts to abortion providers. The General Assembly, however, sought to prohibit more than just the benefits from gifts. The General Assembly prohibited all economic benefits, including the sharing of certain assets and expenses, to ensure that no direct or indirect economic or marketing benefits from state family planning funds would flow to abortion providers.

Planned Parenthood and affiliated abortion providers, realize "cost savings given the way the relationship exists." *Id*. at 556. Planned Parenthood is "so interrelated with their affiliated abortions" that its receipt of state funds subsidizes the affiliated abortion providers. *Id*. at 556. (quoting testimony of Paula Gianino at T. 94). In other words, sharing facilities, expenses, employees, and equipment, among other things, saves the affiliated abortion providers money. L.F. at 555 (citing transcript at 94). Abortion providers receive an economic benefit, or subsidy, from Planned Parenthood by (i) using Planned Parenthood's equipment instead of purchasing their own equipment, (ii) paying only a portion of fixed expenses incurred in operating a facility jointly occupied with Planned Parenthood (and owned by Planned Parenthood), and (iii) paying only a portion of the wages and salaries for shared employees. By providing these economic benefits to its affiliated abortion providers, Planned Parenthood effectively used state funds to subsidize abortion services, in clear violation of the Statutes.

The Legislature expressly rejected an amendment offered by Senator Maxwell to § 10.705 (1999) that would have allowed "sharing" of expenses, employee wages or salaries, equipment, and supplies so long as the affiliated abortion provider reimbursed

the grantee. L.F. at 228-281; *see also* Journal of the Missouri Senate, Monday, April 19, 1999. By rejecting Senator Maxwell's amendment, the Legislature confirmed that "share" can not be defined as advocated by the Directors and Planned Parenthood. *L & R Distributing, Inc. v. Missouri Dept. of Revenue*, 529 S.W.2d 375, 379 (Mo. 1975) (rejecting amendment "clearly shows the legislature's view of its own intent.")

d. The Circuit Court's interpretation of "similar name" was proper in all respects

Planned Parenthood next challenges the Circuit Court's conclusion regarding the statutory prohibition against grantees sharing a "similar name" with an affiliated abortion provider. The Circuit Court, citing Webster's Third New International Dictionary (1986), defined "similar" as "having characteristics in common: very much alike."[7] The Circuit Court also noted that *State v. Harris*, 705 S.W.2d 544, 549 (Mo. App Ct. E.D. 1986), defined "similar" as "nearly corresponding; resembling in many respects; somewhat alike; have general likeness." Applying these definitions, the Circuit Court found that "**Planned Parenthood of Kansas and Mid-Missouri**" (PPKM) shares a similar name with its affiliated abortion provider "**Comprehensive Health of Planned Parenthood of Kansas and Mid-Missouri**" (Comprehensive Health), and "**Planned Parenthood of the St. Louis Region**" (PPSLR) shares a similar name with its affiliated abortion provider "**Reproductive Health Services of Planned Parenthood of the St. Louis Region**"

[7] Missouri Courts consistently have relied on Webster 's Third New International Dictionary to ascertain the plain and ordinary meaning of undefined words in statutes. *See Hemever v. KRCG-TV*, 6 S.W.3d 880, 881 (Mo. 1999); *Turley v. Turley*, 5 S.W.3d 162, 165 (Mo. 1999).

(Reproductive Health). L.F. at 550. This result is not surprising since the affiliated abortion providers merely add the words "Comprehensive Health of" and "Reproductive Health Services of" before the exact, full names of PPKM and PPSLR, respectively.

The affiliated abortion providers receive economic and marketing benefits by sharing similar names with PPKM and PPSLR. L.F. at 82. The trademarked and well-known name "Planned Parenthood" offers substantial marketing value to abortion providers. *Id*. Ms. Gianino testified that Reproductive Health's name emphasizes its close association with Planned Parenthood so that clients know that Reproductive Health operates under the same medical standards. L.F. at 552 (citing Gianino trial testimony at 35). Persons receiving services at a "Planned Parenthood" entity will recognize and view favorably the name of a "Planned Parenthood" abortion provider. Therefore, contrary to the explicit language and purpose of the Statutes, Planned Parenthood's receipt of state family planning funds benefits Planned Parenthood's affiliated abortion providers. This result cannot withstand judicial scrutiny under the clear terms of the Statutes.

e. The Directors' distortion of "similar name"

The Directors "defined" the term "similar name" by reference to Missouri's corporation statutes. They argue that if the Missouri Secretary of State registers the formal corporate names of both the grantee and the affiliated abortion provider, then they do not share the "same or similar name;" but that is not what the Statutes require. *Blue Springs Bowl v. Spradling*, 551 S.W.2d at 600 ("The plain and unambiguous language of the statute cannot be made ambiguous by administrative interpretation and thereby given

a meaning which is different from that expressed in clear and unambiguous language in the statute.").

Planned Parenthood contends that the "Director was obligated to interpret the appropriations" in conjunction with Missouri's corporation statutes "in pari materia." Planned Parenthood Brief at 51. However, the "in pari materia" principle only applies when statutes "relate to the same matter or subject." *State v. Gallagher*, 816 S.W.2d 194 (Mo. 1991). Since Missouri's corporation statutes and the family planning appropriations do not involve the same matter or subject, the "in pari materia" principle is irrelevant.

The Directors' "definition" of "similar name," based on corporation statutes, fails to give any effect or meaning to the word "similar" in the Statutes. Missouri's corporation statutes provide:

> The corporate name:
>
> ***
>
> (3) Shall be distinguishable from the name of any domestic corporation existing under any law of this state or any foreign corporation authorized to transact business in this state, or any limited partnership or limited liability company existing or transacting business in this state under Chapter 347, RSMo, and Chapter 359, RSMo, or a name the exclusive right to which is, at the time, reserved in the manner provided in this Chapter, Chapter 347, RSMo, or Chapter 359, RSMo…. *If the name is the same, a word shall be added to make such name distinguishable from the name of such other corporation, limited liability company… or limited partnership.*

R.S.Mo. § 351.110(3) (emphasis added). Thus, Missouri's corporation statutes only prohibit corporations from having the *same* names; they permit corporations to have *similar* names. A proposed name of a new corporation is acceptable if merely one word is added to a name belonging to an existing corporation. Therefore, the Directors'

reliance on corporation statutes renders the word “similar” meaningless and violates the fundamental rule of statutory construction that every word of a legislative enactment must be given meaning. *See*, *e.g*., *Spradlin*, 982 S.W.2d at 262 (“[t]raditional rules of statutory construction require every word of a legislative enactment be given meaning.”).

The Directors’ interpretation also violates this rule in another manner. Subsection 1 of the Statutes requires that "[a]n independent affiliate that provides abortion services must be separately incorporated from any organization that receives these funds." To be separately incorporated, an independent affiliate must comply with Missouri's corporation statutes, including the requirement of selecting an eligible corporate name. *See* R.S.Mo. §§ 349.035 and 351.110. Accordingly, a separate and independent provision of the Statutes already requires compliance with Missouri's corporation statutes regarding corporate names. The separate provision of the Statutes that precludes a fund recipient from sharing "the same or similar name" with its affiliated abortion provider would, therefore, be redundant and meaningless under the Directors’ interpretation. Accordingly, the Directors’ position runs afoul of well-established canons of statutory construction in at least two key ways and was properly rejected by the Circuit Court.

Because PPKM and PPSLR share similar names with affiliated abortion providers, they are barred under the clear terms of the Statutes from receiving state funds.

f. The Circuit Court’s conclusions do not render the Statutes in violation of the U.S. Constitution

Planned Parenthood next contends that the Circuit Court’s conclusions cause the Statutes to violate the U.S. Constitution. The irony of this constitutional argument should

not go unnoticed since, in their very next point (#4), Planned Parenthood states they have not raised any federal constitutional issues, but have reserved them to be litigated at some later time. While Shipley vigorously disputes Planned Parenthood's reservation of federal claims, the Circuit Court's conclusions are well within the constitutional framework established in *Rust v. Sullivan*, 500 U.S. 173 (1991).

i. Planned Parenthood waived its argument that the Circuit Court's interpretation of the Statutes violates the U.S. Constitution.

"Constitutional issues are waived unless raised at the earliest possible opportunity consistent with orderly procedure." *Hollis v. Blevins*, 926 S.W.2d 683 (Mo. 1996). Planned Parenthood did not plead or present evidence that the interpretation advocated by Shipley (and previously adopted by Judge Kinder) would render the Statutes unconstitutional as applied to it. The reason constitutional issues must be raised at the earliest opportunity is "to permit the trial court an opportunity to fairly identify and rule on the issue." *See also Land Clearance v. Kansas University Endowment*, 805 S.W.2d 173 (Mo. 1991). Because Planned Parenthood failed to plead or present evidence at trial in support of its "as applied" challenge to the Statutes' constitutionality, this issue has been waived. Planned Parenthood's waiver of its constitutional challenges is discussed in more detail in Shipley's response to Point 4, *infra.*

ii. The Circuit Court's interpretation of "Share" accords with the U.S. Constitution

In *Rust v. Sullivan*, 500 U.S. 173, the Supreme Court considered the constitutionality of federal regulations that limit the ability of fund recipients to engage in

abortion-related activities. *Id.* at 177-78. The regulations imposed three principal conditions on projects funded by federal money: the project (1) could not provide counseling concerning the use of abortion as a method of family planning or provide for referral for abortion as a method of family planning, (2) could not engage in activities that encourage, promote or advocate abortions as a method of family planning, and (3) had to be physically and financially separate from prohibited abortion activities. "Mere bookkeeping separation [of government funds] from other monies was not sufficient." *Id.* 179-180.

In upholding the validity of the regulations, the Supreme Court held:

> "the government may 'make a value judgment favoring childbirth over abortion, and … implement that judgment by the allocation of public funds.'"
>
> * * *
>
> "[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."
>
> * * *
>
> "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy."
>
> * * *
>
> "[W]hen the Government appropriates public funds to establish a program it is entitled to define the limits of that program."
>
> * * *
>
> "Congress has merely refused to fund such [abortion related] activities out of the public fisc and the Secretary has simply required a certain degree of separation from the Title X project in order to ensure the integrity of the federally funded program."

Id. at 192-94, 198 (citations omitted). In rejecting a First Amendment argument, similar

to the argument raised by Planned Parenthood here, the Court also noted that grantees are "in no way compelled to operate a Title X project; to avoid the force of the regulations, it can simply decline the subsidy." *Id.* at 199, n. 5. The same is true here.

Like the regulations in *Rust*,[8] the Statutes require a "certain degree of separation" between a grantee of state funds and an affiliated abortion provider, but do not compel activity because Planned Parenthood and others are free to ignore the Statutes entirely. *Id.* at 198. However, in order to receive state funds, the grantee must abide by the lawful conditions placed on the use of such funds. Here, the Circuit Court found as a fact that Planned Parenthood lacked the true independence and separation required by the Statutes as a condition for receiving the funds. There is nothing unconstitutional about Missouri's statutory scheme or the Circuit Court's factual determinations. *See also Legal Aid Society of Hawaii v. Legal Services Corp.*, 145 F.3d 1017 (9th Cir. 1998) (upholding regulations requiring that recipients of government funds maintain physical and financial separation from unrestricted organizations).

iii. The *Sanchez* and *Velazquez* decisions do not support Planned Parenthood's appeal

Planned Parenthood cites a district court decision from New York, *Velazquez*, and a Fifth Circuit decision, *Sanchez*, to support its argument that the Circuit Court's interpretation of the Statutes raises federal constitutional problems. Neither helps its position. First, Planned Parenthood presented no evidence that the interpretation of the

[8] In *Rust*, the regulations related to Title X "programs." The Court explicitly recognized that a legislature could avoid First Amendment problems in conditioning grants by permitting organizations to create affiliates to perform non-subsidized activities.

Statutes advocated by Shipley (and previously adopted by Judge Kinder and now Judge Moentmann) was unconstitutional as applied it. Second, the two cases Planned Parenthood cites are neither controlling nor persuasive authority to reverse the Circuit Court. In contrast to *Sanchez* and *Velazquez*, which are easily distinguished from the present case, *Dempsey*, 167 F.3d 458, is directly on point and should be followed.

In *Sanchez*, 403 F.3d 324, the Fifth Circuit considered whether a district court abused its discretion by granting an injunction to Planned Parenthood of Houston and Southeast Texas regarding the enforcement of a Texas statute. *Id.* at 328-29. The issue was whether Texas could require Planned Parenthood (a grantee of federal funds distributed by Texas) to pledge that it "would perform no elective abortion procedures and that it would not contract with or provide funds to individuals or entities for the performance of abortions." *Id.* at 328. The district court reasoned that the statute "could not be interpreted to allow [Planned Parenthood] effectively to continue receiving federal funds by creating independent 'affiliates'--that is, legal entities separate from those performing abortions." *Id.* at 329. Therefore, the district court concluded that Planned Parenthood was entitled to the injunction because it had demonstrated a likelihood of success on its claims that the statute was preempted by federal law and, therefore, unconstitutional.

On appeal, the Fifth Circuit reversed, holding that the Texas statute could be applied constitutionally by allowing Planned Parenthood to create affiliates. Citing the Supreme Court's in *Rust*, the Fifth Circuit noted that Texas "may require physical and financial separation of abortion activities and family planning services without violating

the plain language of Title X." *Id.* at 340. Accordingly, the decision in *Sanchez* supports the Statutes here which also require physical and financial separation, conditions Planned Parenthood failed to meet as determined by the Circuit Court.[9]

Notably, *Sanchez* distinguished the Eighth Circuit's decision on the grounds that it "did not address federal preemption issues." *Id.* at 342. Therefore, under its own reasoning, *Sanchez* is distinguishable from the present case (and *Dempsey*), which involve only state funds, not federal funds. To the extent, if any, that *Sanchez* departs from *Dempsey*, this Court should follow *Dempsey*, which applied the Supreme Court's precedent in *Rust*, 500 U.S. 173, to a factual scenario that is directly on point.

Velazquez, 349 F.Supp.2d 566, is likewise unpersuasive. *Velazquez* involved an "as applied" First Amendment challenge to certain separation requirements on federal funds to a legal services program. The program claimed that the requirements imposed an unconstitutional burden on its ability to create affiliates to engage in the restricted activities. *Id.* at 574. The district court noted "[w]hether physical and financial separation exists is determined on a case-by-case basis, considering the totality of the circumstances." *Id.* at 578. It also recognized that "when the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." *Id.* at 589 (citations omitted).

The fact-dependent inquiry advocated in *Velazquez* is of no benefit to Planned

[9] *Sanchez* notes that separate facilities may be a "relatively empty formalism," but Planned Parenthood has not fulfilled even that requirement.

Parenthood in this case. First, Planned Parenthood failed to present evidence that the Statutes imposed an undue burden on its First Amendment rights. Planned Parenthood's brief relies on unsupported and unfounded speculation instead of evidence presented to the Circuit Court. *See* Planned Parenthood's Brief at 46-55. Second, the facts found by the Circuit Court destroy Planned Parenthood's assertion of sufficient physical and financial separation from its affiliated abortion providers. The Circuit Court concluded that Planned Parenthood employees performed all of the abortion-related services claimed to be provided by Reproductive Health, and Planned Parenthood lacks any meaningful financial independence or physical separateness from affiliated abortion providers. L.F. at 547-562. Finally, Planned Parenthood presented no evidence concerning the use of disclaimers or other methods of "preventing the appearance that the federal government was funding restricted activities," deemed essential by the court in *Velazquez*, 349 F.Supp.2d at 607-08.

iv. The Circuit Court's interpretation of "similar name" does not raise constitutional problems

Planned Parenthood claims that the Circuit Court's interpretation of "similar name" violates the U.S. Constitution. Again, it did not plead or present evidence to support this argument. Therefore, it cannot be a basis for reversal. *Hollis*, 926 S.W.2d 683; *Land Clearance*, 805 S.W.2d 173.

Despite the lack of evidence, Planned Parenthood argues that the Circuit Court's interpretation of "similar name" unconstitutionally interferes with its ability to associate with its affiliated abortion providers. Planned Parenthood relies on a concurring opinion

by Justice Blackmun in *Regan v. Taxation with Representation*, 461 U.S. 540 (1983) and raises several hypothetical scenarios for which it claims the Circuit Court's interpretation is too subjective to be applied constitutionally.

Numerous errors undermine Planned Parenthood's arguments. First, courts decide specific cases presented to them, not hypothetical ones. *City of Jackson v. Heritage Savings and Loan Assoc.*, 639 S.W.2d 142 (Mo. Ct. App. 1982). The Circuit Court concluded, as a fact, that Planned Parenthood shared similar names with affiliated abortion providers. It did not describe how different names must be in every instance to avoid sharing, but it was not the Circuit Court's function to decide every hypothetical future dispute. *Id.* at 146 ("it is not the province of the courts to render advisory opinions on abstract or hypothetical questions of law arising from differences of opinion of the law."). Second, Planned Parenthood's reliance on a concurring opinion in *Regan* is misplaced. The majority opinion in *Regan*, by Justice Rehnquist, not the concurring opinion by Justice Blackmun, states the law. Justice Rehnquist's opinion states that an organization receiving public funds "would, of course, have to ensure that [it] did not subsidize [its affiliate] organization; otherwise, public funds might be spent on an activity Congress chose not to subsidize." *Id.* at 544. Expending public funds on an activity the legislature chose not to subsidize is precisely what happened through Planned Parenthood's receipt of state funds, coupled with its active participation in services and cost-savings to its affiliated abortion providers. Therefore, *Regan* lends no support to Planned Parenthood; rather, it supports affirmance of the Circuit Court's ruling.

Missouri has a legitimate interest to ensure that its funds "are not spent on an

activity that Missouri has chosen not to subsidize." *Dempsey*, 167 F.3d at 463. In serving this interest, the state may make certain that the public knows its funds are not being spent to subsidize abortions and abortion providers. *See, e.g., FCC v. League of Women Voters*, 468 U.S. 364, 395 (1984) ("[T]he Government certainly has a substantial interest in ensuring that the audiences of noncommercial stations will not be led to think that the broadcaster's editorials reflect the official view of the government...."). When patients enter Planned Parenthood, a grantee of state funds, to get an abortion from Planned Parenthood employees, this interest is violated.

h. In addition to violating the "share" and "similar name" conditions, Planned Parenthood's receipt of state funds unlawfully gives the State's official stamp of approval, or imprimatur, to abortion providers

In addition to violating the Statutes' prohibitions against sharing similar names, facilities, expenses, employee wages, and equipment with affiliated abortion providers, Planned Parenthood was so "interrelated" with affiliated abortion providers that its receipt of state funds subsidized its affiliated abortion providers and lent the State's imprimatur to abortion services. L.F. at 556. The Statutes provide: "none of these funds appropriated herein may be expended to directly or indirectly subsidize abortion services or administrative expenses." On this topic, the Circuit Court found:

> "PPSLR and PPKM advanced their mission of providing access to abortion services by, among other things, operating their affiliated abortion provider in nearly every way possible. Transcript, 34, 156. The Statutes require true independence between fund recipients and any affiliated abortion providers so that State funds do not directly or indirectly subsidize abortion services. PPSLR and PPKM failed to meet this requirement.

> Therefore, even if this Court were to adopt the contrived meanings of "share" and "similar name" advocated by the Directors, which it declines to do, PPKM and PPSLR would still be ineligible to receive State funds under the Statutes. Paying State funds to them would lend the State's imprimatur, or official stamp of approval, to abortion services because of their close and mutually dependent relationship with their affiliated providers."

L.F. at 556. Accordingly, apart from the dispute regarding whether the Directors' "contrived definitions" were proper, the Circuit Court concluded that Planned Parenthood's receipt of state funds impermissibly lent the State's imprimatur, or official stamp of approval, to abortion services. This factual determination is supported by the evidence set forth above, including, among other things, that Planned Parenthood employees perform the actual abortion services. L.F. at 554.

4. The Circuit Court correctly ruled that the Statutes are constitutional because Rule 87 permits a party to seek a declaration that a statute is constitutional and such determination was necessary to the Circuit Court's judgment. Remand is unnecessary because Planned Parenthood waived any constitutional challenge to the Statutes

a. A justiciable controversy existed

Rule 87 may be used to seek a declaration that a statute is constitutional. *State v. Planned Parenthood of Kansas and Mid-Missouri,* 37 S.W.3d 222 (Mo. 2001) ("Planned Parenthood I"); *Missouri Department of Social Services v. Agi-Bloomfield Convalescent Center, Inc.,* 682 S.W.2d 166 (Mo. Ct. App. 1984). *Planned Parenthood I* is directly on point. Like Shipley, the State in that case sought a declaration that the Statutes were constitutional and that Planned Parenthood was ineligible to receive family planning funds. Writing for this Court, Chief Justice Price stated: "Seeking a declaratory judgment

in state court can be viewed as an effective means of defending the constitutionality of the statute." 37 S.W.3d at 226.

Similarly, in *Missouri Department of Social Services v. Agi-Bloomfield Convalescent Center, Inc., supra,* the Department of Social Services sought a declaration that regulations it promulgated were constitutional. The Court held that the department's petition to affirm the constitutional validity of its regulations presented a justiciable controversy. *See also City of Nevada v. Welty,* 203 S.W.2d 459 (Mo. 1947) (City of Nevada filed a declaratory judgment suit to confirm that an ordinance that defendant's stock pens were a nuisance was constitutional. This Court affirmed the trial court's decision upholding the validity of the ordinance).

Shipley's Petition sought a declaration that the Statutes did not violate the United States or Missouri Constitutions. Planned Parenthood previously had challenged the constitutionality of Section 10.705. L.F. at 80, ¶ 70. In a section of its Answer entitled "Reservation of Additional Affirmative Defenses To The Petition and Cross-Claims Against Defendant Dunn," Planned Parenthood purports to "reserve the claims that any construction and application of the appropriations restrictions different than the construction and application promulgated and enforced by Defendant Dunn violate rights secured to PPKM and PPSLR and their patients by the United States Constitution and the Missouri Constitution." L.F. at 67, ¶ 81.[10] Thus, as in *Planned Parenthood I, Missouri Department of Social Services* and *City of Nevada,* where threatened or potential

[10] Whether Planned Parenthood can legally preserve unspecified constitutional challenges to the Statutes, or was required to raise them in the trial court else they be waived, is discussed in Section b below.

constitutional challenges presented justiciable controversies, so too did the protracted history of litigation concerning the constitutional validity of the Statutes and the assertion of a Cross-Claim against the Directors present a justiciable controversy here.

Moreover, a determination that the Statutes were constitutional necessarily occurred since the Circuit Court's judgment depends in part on whether the law passes constitutional muster. *See In re Estate of McCluney*, 871 S.W.2d 657 (Mo. Ct. App. 1994) (trial court was required to determine the validity of a statute in order to decide the ultimate legal issue between the parties). Shipley asserted that the Directors' interpretation of the appropriations law was incorrect. He sought and obtained a judgment that compelled Planned Parenthood to repay the family planning funds it improperly had received. Plainly, if the Statutes were unconstitutional, the necessary foundation for the Circuit Court's judgment would disintegrate. As such, the Circuit Court was compelled to resolve whether the Statutes were constitutional to render the judgment it entered.

The cases Planned Parenthood cites are inapposite. *Commonwealth Ins. Agency v. Arnold*, 389 S.W.2d 803 (Mo. 1965) was a declaratory judgment action concerning coverage under an errors and omissions insurance policy. Commonwealth, an insurance broker, was sued by its customer for allegedly breaching its contract to renew insurance policies. The customer's petition sought recovery under numerous theories. Some of the theories, if successful, were covered by Commonwealth's errors and omissions policy; some were not. The court held that Commonwealth's declaratory judgment action was not ripe until the basis upon which its customer recovered, if at all, was established since a declaration that one policy exclusion was inapplicable could not exclude the possibility

that other exclusions might bar coverage. In contrast, a necessary element of Shipley's right to the relief he sought was the constitutionality of the Statutes, which Planned Parenthood has alleged are unconstitutional, L.F. at 80, ¶ 70.

Tintera v. Planned Industrial Expansion Authority, 459 S.W.2d 356 (Mo. 1970) presented a constitutional challenge to proposed activities of an industrial development authority created by the City of St. Louis. The authority planned to acquire real estate for redevelopment. State law provided an *ad valorem* tax exemption if the exemption was approved by three-fourths of the local governing body. The Board of Aldermen of the City of St. Louis had not voted to grant the tax exemption to the authority. The court held that no justiciable controversy existed because Tintera would not suffer any harm until the Board of Aldermen approved the exemption. In this case, Shipley, as a taxpayer, has suffered harm since Planned Parenthood already has received family planning funds when it did not satisfy the Statutes.

State ex rel City of Crestwood v. Lohman, 895 S.W.2d 22 (Mo. Ct. App. 1994) does not aide Planned Parenthood either. Unlike this situation in which Planned Parenthood previously has alleged the Statutes were unconstitutional, L.F. at 80, ¶ 70, and maintains the right to do so in the future if the Directors' interpretation is rejected, L.F at 67, ¶ 81, the Board of Elections Commissioners specifically took no position on the constitutionality of the statue involved in *Lohman*.

b. Planned Parenthood has waived any constitutional challenge to the Statutes

Planned Parenthood's principal concern in Point IV is not justiciability, but its claimed right to do what it purposefully chose not to do in the trial court, present a facial or as applied constitutional challenge to the Statutes. This concern is understandable since Planned Parenthood waived its right to dispute the constitutionality of the appropriations law by failing to do so in a timely fashion below.

A constitutional question is waived unless it is raised at the earliest possible opportunity consistent with good pleading and orderly procedure, *Hollis v. Blevins,* 926 S.W.2d 683 (Mo. 1996) (failure to challenge constitutionality of statute that provided for joint and several liability until after judgment waived constitutional challenge to it); *City of Chesterfield v. Director of Revenue,* 811 S.W.2d 375, 378 (Mo. 1991) (failure to mention specific provision of Missouri Constitution allegedly violated by state statute until appellant's brief waived constitutional issue). To properly raise and preserve a constitutional issue, a party must raise the issue at the first available opportunity, identify the article and section of the constitution claimed to have been violated, plead facts that demonstrate the violation and preserve the issue throughout the proceeding for appellate review. *City of St. Louis v. Butler,* 219 S.W.2d 372, 376 (Mo. 1949); *accord Gray v. City of Florissant,* 588 S.W.2d 722, 724 (Mo. Ct. App. 1979).

Planned Parenthood has ignored all of these requirements. Plainly, it was familiar with possible constitutional challenges to the Statutes. The complaint it filed in the

Western District of Missouri (*See* Appendix to this brief[11]) alleges a number of purported constitutional violations, but its answer in this case does not plead any of them.

Planned Parenthood's contention that it could not litigate the constitutionality of the Statutes until the trial court determined whether the Directors' interpretation was correct is simply wrong. Rule 55.10 provides that "[a] party may set forth two or more statements of a …defense alternatively or hypothetically…. A party may also state as many separate … defenses as the party has regardless of consistency and whether based on legal or equitable grounds." Nothing prevented Planned Parenthood from asserting that the Directors' interpretation of the Statutes was correct and arguing, alternatively, that if the trial court concluded otherwise, the law violated the same constitutional provisions Planned Parenthood advanced in its complaint filed in the Western District of Missouri. The cross-claim it filed in this case sought to do what Missouri law does not permit, reserve constitutional questions for a later day.[12]

Planned Parenthood hardly could be surprised that the trial court rejected the Directors' construction of the law. The same trial court had reach the same result in another case in which Planned Parenthood was a party. Knowing that, Planned

[11] The complaint was Exhibit 13 to the Stipulation of Facts which is part of the Legal File. L.F. at 80, ¶70, but the Complaint was not attached with the Stipulation of Facts as part of the Legal File.

[12] *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461 (1964) is inapplicable here. *England* permits federal constitutional issues raised in federal court to be preserved and later litigated in federal court when the federal court abstains pending resolution of questions of state law that may affect or make unnecessary decisions on the constitutional claims. In this instance, Planned Parenthood had dismissed the complaint it filed in federal court challenging Section 10.705. L.F. at 81, ¶78. As such, constitutional claims, if any, were required to be raised and litigated in the Circuit Court.

Parenthood consciously chose not to press constitutional claims in the same Circuit Court that had previously rejected them. Its litigation tactics do not permit it to evade longstanding rules designed to ensure orderly procedure in the courts of this State. If this Court affirms the Circuit Court's judgment, as Shipley argues, remand to permit Planned Parenthood belatedly to litigate possible constitutional claims would be unnecessary since it has waived such claims.

5. The Circuit Court did not err in requiring Planned Parenthood to repay the funds it received unlawfully because (a) to hold otherwise would violate Missouri's Constitution and (b) the Circuit Court found it would be inequitable to allow Planned Parenthood to retain the funds

Planned Parenthood's fifth and final point is that the Circuit Court erroneously required it to repay the state funds it received unlawfully. In this point, Planned Parenthood argues that the Circuit Court's weighing of equities to reach its judgment is subject to reversal. Although this point is plainly within the deferential standard of appellate review set forth in *Murphy v. Carron*, 536 S.W.2d 30, Planned Parenthood overlooks this essential rule of law. The weighing of equities is a matter best left to the discretion of the trial judge and, therefore, the Judgment should be affirmed.

In its closely related first point, Planned Parenthood argues that Shipley, a Missouri taxpayer, lacks standing to recoup state funds paid unlawfully. In its fifth point, Planned Parenthood assumes that standing is satisfied, but contests the result for many of the same reasons already articulated in its discussion of Point 1. Accordingly, for purposes of brevity, Shipley incorporates his response to Point 1 as if set forth specifically herein.

The Circuit Court held that the Missouri Constitution "as well as the background [of this case] does not support said Defendants position and further finds that it would be inequitable not to require the repayment of said funds." L.F. at 557-58. Each of these reasons draws ample support from the evidence and the law.

First, Article IV, § 28 of Missouri's Constitution prohibits the executive branch from withdrawing or paying money from the state treasury except in strict compliance with an appropriation. To permit Planned Parenthood to keep funds that it received in violation of the appropriations would violate the Missouri Constitution. In addition to violating Article IV, § 28, such a result would run afoul of Article III, § 39(4), which states that "[t]he general assembly shall not have power: . . . (4) To pay or to authorize the payment of any claim against the state or any county or municipal corporation of the state under any agreement or contract made without express authority of law." Because the contracts that the Directors issued to Planned Parenthood lacked legal authorization, the State was not constitutionally permitted to make payments to Planned Parenthood.

Second, the Circuit Court found that Planned Parenthood recognized "the questionable legality of payment of said funds to them." L.F. at 558. Planned Parenthood was adjudged liable to repay such amounts in the previous state court litigation as well. Although those judgments were vacated on other grounds, Planned Parenthood acknowledged that repayment was the legal remedy for its wrongful receipt of State funds:

> "If plaintiff were to prevail it would have a legal remedy that would allow it to recover any funds that, arguendo, were paid wrongfully."

Supreme Court Brief of the State on Missouri in Appeal No. 82226 at 85-86 (quoting Planned Parenthood's opposition to the State's Motion for Temporary Restraining Order in the 1999 case) (citations omitted). Therefore, the Circuit Court's weighing of equities to determine that repayment was an appropriate remedy should not be disturbed on appeal.

Planned Parenthood's attempt to hide behind its contracts with the Directors to evade repayment is not persuasive. Planned Parenthood--whose employees were performing abortions--had every reason to know that its receipt of state funds was wrongful from the outset. Moreover, and contrary to Planned Parenthood's assertions, the Directors lacked authority to enter contracts that violated the Statutes. In Missouri, parties who enter contracts with agents of the State [such as the Directors] are charged with knowledge of the agent's authority, and whether the contract is within the agent's authority. *Aetna Ins. Co. v. O'Malley*, 124 S.W.2d 1164 (Mo. 1938) (*see supra*, Point 1).

In *Contel of Missouri v. Director of Revenue*, 863 S.W.2d 928 (Mo. Ct. App. 1993), the Director of Revenue sought retroactive enforcement of tax assessments. Contel argued that the Director had advised it in writing that the tax was not applicable. The court rejected this argument: "taxpayers have no vested right to rely upon an erroneous interpretation of the statute exempting them from taxation." *Id.* at 931. Like the taxpayer in *Contel*, Planned Parenthood had no right to rely upon the Directors' erroneous interpretation of the Statutes. *See also Brown v. City of Frederickstown*, 886 S.W.2d 747 (Mo. Ct. App. 1994) (estoppel is "rarely applied" to governmental entities and requires a showing of "manifest injustice").

For all of the foregoing reasons, the Circuit Court's decision to require repayment to the State of the funds in question should not be disturbed on appeal.

B. RESPONSE TO THE DIRECTORS' APPEAL

1. The Circuit Court correctly found that the Statutes do not violate Article III, § 23 of Missouri's Constitution because they do not create or amend substantive legislation, but instead merely contain permissible conditions on the expenditure of State funds

In its first point, the Directors contend that the Statutes violate Article III, § 23 of the Missouri Constitution. With two exceptions, discussed below, this point reiterates arguments advanced by Planned Parenthood in Point Two of its brief, which Shipley has responded to above. Therefore, for brevity, Shipley incorporates his response to Planned Parenthood's second point as if set forth fully herein.

The Director's first additional topic (not already raised by Planned Parenthood in its second point) is that the Statutes unconstitutionally amend V.A.M.S. § 351.110 relating to the naming of Missouri corporations. Directors' Brief at 32-34. The Directors contend that the Statutes amend § 351.110 because they prohibit a grantee from having a similar name as an affiliated abortion provider. *Id*. This argument is flawed because the Statutes do not impose any *general* restrictions regarding the name of an affiliated abortion provider. Instead, they simply place lawful conditions on the expenditure of state funds used for family planning. Under § 351.110, the affiliated abortion providers may have a name that is similar to Planned Parenthood. It is only when Planned Parenthood voluntarily chooses to seek state funds under the Statutes that it must comply with the Statutes' lawful conditions. *Rust*, 500 U.S. at 199, n.5 ("By accepting Title X

funds, a recipient voluntarily consents to any restrictions placed on any matching funds or grant-related income. Potential grant recipients can choose between accepting Title X funds--subject to the Government's conditions that they provide matching funds and forgo abortion counseling and referral in the Title X project--or declining the subsidy and financing their own unsubsidized program. We have never held that the Government violates the First Amendment simply by offering that choice."). The Statutes do not amend § 351.110 and, therefore, there is no constitutional violation in this regard.

The Directors' second additional argument is that the Statutes enact new rules regarding the details of the family planning program that should have been left to the executive branch. Directors' Brief at 23-26, 34-40. The "facts" set forth by the Directors regarding how the agency previously ran the program are unsupported by any citation to the legal file or the transcript. *Id.* Since the Directors presented no evidence or witnesses at trial (T. at 184), they should not now be permitted to raise for the first time on appeal new factual theories that they choose to ignore at trial. *Hunter v. Hunter*, 614 S.W.2d 277, 278 (Mo. Ct. App. 1981) ("appellate court will review a case only upon the theory tried and a party will be held on appeal to his theory at trial.")

In any event, the Statutes do not unconstitutionally encroach on the executive department's function to administer and enforce the law. To the contrary, the legislature is permitted to appropriate funds with conditions on how the funds must be spent. *Cirone*, 234 Cal.Rptr. at 756; *Carruthers*, 759 P.2d at 1385; *Henry*, 346 So.2d 153; *Welden v. Ray*, 229 N.W.2d 706. Even the Directors' Brief concedes that the legislature is free to "impose restrictions as it deems fit." Directors' Brief at 22. Moreover, it is the

judiciary's responsibility to interpret the law and declare when the executive department improperly disregards the legislature's directives, as occurred here. Accordingly, the Directors' contention that the Statutes unconstitutionally infringe on the power of the executive branch is meritless.

2. The Circuit Court correctly declared that Planned Parenthood did not qualify to receive state funds and that the Director's distortions of the Statutes were unlawful and violated the Statute's plain language and intent

The Directors contend that the Circuit Court erred in rejecting the Director's "contrived definitions" and applying the plain and ordinary meaning of the Statutes to conclude Planned Parenthood was ineligible to receive state funds. With two exceptions, discussed below, this point reiterates the arguments advanced by Planned Parenthood in Point Three of its Brief, which Shipley has responded to above. Therefore, for brevity, Shipley incorporates his response to Planned Parenthood's third point as if set forth fully herein.

The Directors argue that determining "how many characteristics must be in common before two objects, such as corporate names, are considered 'similar' is purely speculative." Directors' Brief at 50. However, whether two things are "similar" is a question of fact, which judges and juries routinely decide based on the unique facts and circumstances of each case. *General Finance Loan Co. v. General Loan Co.*, 163 F.2d 709 (8th Cir. 1947) (under Missouri law, whether names are too "similar" to cause confusion is a question of fact); *Cleo Syrup Corp. v. Coca-Cola Co.*, 139 F.2d 416 (8th Cir. 1943)(same); *Muffet v. Smelansky*, 158 S.W.2d 168 (Mo. Ct. App. 1942)(same).

Judge Moentmann concluded, after hearing all of the evidence at trial, that Planned Parenthood shared similar names with its affiliated abortion providers.[13] Such a conclusion is not speculation. Although the Directors contend that "similar" is not an objective enough standard to be applied fairly, "[a]nyone who works with words for a living knows that there are few bright lines." *National Right to Life Political Action Committee v. Lamb*, 202 F.Supp.2d 995 (W.D. Mo. 2000). Moreover, the mere fact that an alleged "bright line" test might be applied easier is not a permissible reason to eliminate the plain meaning and legislative intent of a statute, as the Directors did.

Second, the Directors claim that, under *Hueller*, 289 S.W. 338 (1926), "the Legislature should be presumed to have left to the discretion of the appropriate member of the executive branch of government responsibility to establish [the Statutes'] meaning within the context of executing the law." Directors' Brief at 51 (underline added). *Hueller* does not support this assertion. In *Hueller*, the Court considered whether the Board of Permanent Government had authority to appoint an assistant commissioner and fix his compensation. 289 S.W.3d at 339-340. In concluding such authority existed, the Court cited to legislation appropriating $185,930 "in lump sum to meet the contingent expenses of the board, including the salaries of 'engineers, firemen, assistant commissioner, watchmen, janitors, matrons, helpers and assistants as may be deemed necessary by the Board." *Id.* at 340.

Hueller is a far cry from the circumstances here. The General Assembly did not

[13] The Directors make an analogous argument regarding the word "share," but that argument fails for the same reasons. Directors' Brief at 50.

expressly give discretion to the executive branch to spend the family planning appropriations as they deem necessary. To the contrary, the Statutes contain explicit conditions on how the funds must be spent. Because Shipley believed the executive branch abrogated its duty to follow the dictates of the legislature in spending these funds, he filed this action seeking a declaration of the meaning of the Statutes. Because Courts, and not the executive, declare the law, there is no presumption that the executive branch was acting within its discretion in establishing its "contrived definitions" to nullify the Statutes' plain meaning and legislative intent.

3. The Circuit Court correctly allowed Shipley to recover his out-of-pocket expenses in connection with his recovery on behalf of the taxpayers of Missouri against Planned Parenthood

The Circuit Court did not err in awarding Shipley, out of the funds paid by Planned Parenthood, the amount of $105,752.01 to reimburse him for his out-of-pocket expenses, including attorneys' fees, incurred in the successful prosecution of this case. L.F. at 639. The Directors have waived any argument that attorney fees should not be awarded because they failed to raise an objection to Shipley's request for attorney fees before or during trial. Their argument against Shipley's recovery of attorney fees must fail in any event because fees and costs were awarded against Planned Parenthood, not against the State. Moreover, the trial court properly exercised its broad discretion in determining that Shipley is entitled to recoup his out-of-pocket expenses for recovering funds from Planned Parenthood on behalf of the State and its taxpayers based on *Lett v. City of St. Louis*, 24 S.W.3d 157, 162 (Mo. Ct. App. 2000) and "the common benefit doctrine." *Feinberg v. Adolph K. Feinberg Hotel Trust*, 922 S.W.2d 21, 26 (Mo. Ct. App.

1996) (in an equity case the award of attorney fees is left to the broad discretion of trial court).

a. The Directors waived any objection to the Circuit Court's award of attorney fees to Shipley

The Directors' argument that the Circuit Court erred in granting Shipley's Motion to Amend the Judgment to include an award to Shipley of his attorney fees and expenses (from funds paid by Planned Parenthood) ignores the fact that the only issue raised by Shipley's Motion was the specific *amount* of fees and costs to be recovered. At the time Shipley's Motion to Amend was filed, the trial court already had ruled – without any opposition from the Directors – that Shipley was entitled to recover his attorney fees and other out-of-pocket expenses from the funds to be returned by Planned Parenthood. No argument was made in response to Shipley's Motion to Amend (or in this Court) that the *amount* of the attorney fees sought and awarded to Shipley is unreasonable.

The Directors have waived any argument that attorney fees should not be awarded. Shipley made clear at trial (T. at 221) and in his pre-trial brief that he was seeking to recover fees from any funds recovered from Planned Parenthood. The Directors failed to raise any argument in opposition to the request for attorney fees prior to the Court's entry of Judgment, despite the fact they were fully aware this relief was being sought:

> Not to claim a right is to invite an error and an appellant should not be allowed to nullify a trial on a ground caused by him. Before and during the trial, an appellant has an unrestrained right to raise and claim and preserve for review anything he desires. He must rest on and is bound by the record he himself so makes. It is unfair to the orderly administration of justice – as affecting the other party to the suit, litigants having other cases before

> the court, and the courts as agencies of justice – to permit any other procedure.

Atlantic Brewing Co. v. William J. Brennan Grocery, 79 F.2d 45, 47 (8th Cir. 1935) (emphasis added). The Directors cannot now complain about the Circuit Court's ruling on this issue. *Sheehan v. Northwestern Mutual Life Ins. Co.,* 103 S.W.3d 121 (Mo. Ct. App. 2002) (party waived objection by failing to raise it to the trial judge at the proper time); *Atlantic Brewing Co. v. William J. Brennan Grocery*, *supra*, at 48 (where party failed to present issue during trial, reviewing court foreclosed from considering issue regarded it as "having been waived in the trial court"). Accordingly, the Directors' argument that Shipley cannot recover his attorney fees has been waived and should not be considered.

b. Attorney fees and costs have been awarded against Planned Parenthood, not the State of Missouri

Even if it had not been waived, the Directors' argument would fail because attorney fees and costs have not been awarded against the State. The Directors cite several cases in which the State or a state agency was the named defendant from which an award for attorney fees was sought (*see* cases cited at pp. 57-58 of Directors' Brief); but here the State is not a named party and attorney fees and costs have not been awarded against the State. The payment of attorney fees to Shipley is to be made by Planned Parenthood. With regard to costs, the trial court's Judgment states: "[C]osts are hereby taxed against the Defendants Planned Parenthood of Kansas and Mid-Missouri, and Planned Parenthood of St. Louis Region." Accordingly, unlike the cases cited by the

Directors, in which attorney fee awards were sought directly from the State, Shipley's attorney fees will be paid by Planned Parenthood.

c. Shipley's award of costs and fees should be affirmed

The Circuit Court determined that Shipley was permitted to recoup his out-of-pocket expenses, including attorney fees, for recovering funds from Planned Parenthood on behalf of the State and its taxpayers, relying on *Lett v. City of St. Louis*, 24 S.W.3d 157, 162 (Mo. Ct. App. 2000) and "the common benefit doctrine." *Lett* recognized that "common benefit" is one of two recognized exceptions to the American rule that litigants bear their own attorney fees:

> Attorney's fees may be awarded to a successful litigant only where they are provided for by statute or by contract, where very unusual circumstances exist so it may be said equity demands a balance of benefits, or where the attorney's fees are incurred because of involvement in collateral litigation. *Southern Missouri Dist. Council of Assemblies of God v. Hendricks,* 807 S.W.2d 141, 149 (Mo.App. 1991). The balancing of the benefits incorporates two related doctrines. *Feinberg v. Adolf K. Feinberg Hotel Trust*, 922 S.W.2d 21, 26 (Mo.App.E.D. 1996). First, the common fund doctrine permits a trial court to require non-litigants to contribute their proportionate part of the counsel fees when a litigant successfully creates, increases, or preserves a fund in which the non-litigants were entitled to share. *Id.* Second, the common benefit doctrine permits recovery of attorney's fees when a successful litigant benefits a group of other individuals similarly situated. *Id.*

Lett, supra, at 162 (underline added).

The Directors contend *Lett* is not controlling because it involved the City of St. Louis as a defendant and not the State. However, the State is not a defendant in the present case either and the State has not been ordered to pay any judgment, fees, or costs. Moreover, the fact that the City of St. Louis was named as a defendant in *Lett* does not

foreclose the possibility it, as well as the City's Collector of Revenue (the other named defendant in *Lett*), were not or could not be considered an agency or agent of the State for purposes of the attorney fees issue. In *Smith v. State*, 152 S.W.3d 275 (Mo. 2005), this Court agreed that for purposes of determining entitlement to coverage under the State Legal Expense Fund, St. Louis City police officers are officers of the State and the St. Louis Board of Police Commissioners performs a "state function." One of the duties of the City Collector of Revenue, as defined by Missouri statute, is to "collect the *state* taxes in the limits of said city. . . ". V.A.M.S. 52.220 (1998).

The Directors acknowledge the common benefit doctrine is an exception to the "American Rule" regarding attorney fees, but argue *Lett* does not create an exception to the rule that attorney fees may not be awarded against the State absent express statutory authority. They contend no Missouri case has so held. However, in *Lipic v. State*, 93 S.W.3d 839 (Mo. Ct. App. 2002), a case cited by the Directors, in which the State was a named defendant and the party against whom attorney fees were sought, the Missouri Court of Appeals acknowledged that Missouri courts have "approved awards of attorney fees, even absent statutory or contractual authorization, <u>in order to balance the benefits</u> in cases involving 'very unusual circumstances.'" 93 S.W.3d at 843 (underline added).

Lipic was recently cited in *Temes v. Department of Social Services,* 133 S.W.3d 552 (Mo. Ct. App. 2004), a case that also involved a state agency and a request for attorney fees, in which the Missouri Court of Appeals noted that "unusual circumstances" (i.e. a balance of benefits) is, in addition to statutory authorization, a recognized exception to the American Rule. 133 S.W.3d at 554. Accordingly, the most recent case

cited by the Directors acknowledges that in certain situations an award for attorney fees can be granted against the State even absent statutory authority based on the common benefit doctrine.

Shipley did not seek or realize any personal gain, and his successful efforts to recoup funds substantially benefit Missouri taxpayers. Where suit has been brought for purposes other than individual gain and it benefits a group or trust as a whole, Missouri courts often recognize that payment of attorney fees is warranted to "balance the benefits." *See, e.g., Jesser v. Mayfair Hotel, Inc.,* 360 S.W.2d 652 (Mo. 1962) (plaintiffs' attorneys' fees charged against trust where result of plaintiffs' action was to preserve and keep the trust estate intact); *Feinberg v. Adolph K. Feinberg Hotel Trust,* 922 S.W.2d 21 (Mo. Ct. App. 1996) (trial court did not abuse its discretion in ordering trust to pay attorney's fees to income beneficiary where she successfully protected trust as a whole from trustees' breach of their fiduciary duties); *In re Estate of Chrisman,* 723 S.W.2d 484 (Mo. Ct. App. 1986) (abuse of discretion to deny recovery of attorney fees and expenses to remainderman's attorneys where resulting benefit to the estate as a whole is obvious); *In re Estate of Murray*, 682 S.W.2d 857 (Mo. Ct. App. 1984) (substantial evidence supported award of attorney fees under "equitable balancing of the benefits" where beneficiary sought attorney fees from estate following successful action to remove personal representative which resulted in benefit to the estate as a whole); *McMullin v. Klein*, 468 S.W.2d 657 (Mo. Ct. App. 1971) (inequitable to allow defendant in will contest case to receive benefit of plaintiff's efforts, which resulted in receipt of over

$33,000 which defendant otherwise would not have received, without some contribution to a reasonable attorney's fee).

The Directors contend that, because the funds to be paid by Planned Parenthood are to be paid to the State rather than an identifiable group of taxpayers, the funds do not create a "common benefit." They are badly mistaken. The trial court's Judgment clearly recognized that Shipley's efforts in successfully recouping state funds inured to the benefit of all Missouri taxpayers. While the benefit to each taxpayer cannot be precisely measured, the State is receiving in excess of $600,000 (plus interest) it would not have received but for Shipley's prosecution of this case. Allowing recovery of attorney fees directly from the funds that were recovered from Planned Parenthood under these circumstances "is an especially appropriate manner of equitably sharing the cost of litigation." *Feinberg v. Adolph K. Feinberg Hotel Trust*, 922 S.W.2d 21, 26 (Mo. Ct. App. 1996). *See also McMullin v. Klein*, 468 S.W.2d 657 (Mo. Ct. App. 1971) wherein the court determined it would be *inequitable* to allow defendant to receive benefit of plaintiff's efforts (receipt of over $33,000 which defendant otherwise would not have received) without some contribution to a fair and reasonable attorney's fee.

Missouri taxpayers like Shipley should be encouraged to pursue a case such as this where (1) the State previously filed suit and acknowledged the funds were paid to Planned Parenthood improperly but later dismissed the case, (b) a single Missouri taxpayer assumed the financial risk of prosecuting the case to a successful completion, and (c) the legal issues involved were numerous and complex. If attorney fees are not

allowed simply because the funds recovered are going to the State, then suits like this would not only be discouraged, they would rarely, if ever, be brought.

Courts in other states have recognized the value of encouraging taxpayers like Shipley to pursue cases seeking to redress illegal actions on the part of public officials:

> The plaintiff in this action cannot possibly gain any personal advantage from a final success achieved. He appears as a taxpayer, for the benefit of taxpayers. * * * An action of this nature by a taxpayer, begun in good faith, is stamped not only with a desire highly equitable in its nature, designed to promote the public welfare but is indicative of an altruistic motive, redounding to the credit of the person resorting thereto, for it can readily be seen that such actions involve not only a sacrifice of material means, but oftentimes hold the moving party up to public criticism and censure. To commence and prosecute such an action in good faith requires not only moral courage, but a high degree of civic interest and pride. Therefore, we say that, if litigation is at all favored by the courts, it is in an action of this nature, brought by a private citizen for a public interest.

Neacy v. Drew, 187 N.W. 218 (Wis. 1922) (underline added). *See also, Carlson v. City of Faith*, 67 N.W.2d 149 (S.D. 1955) (allowing recovery of attorney fees based on statutory authority the purpose of which was to make the taxpayer who initiated suit whole and avoid imposing on him the penalty of personally paying his attorney fees in an action brought on behalf of all other taxpayers to redress a public wrong); *Horner v. Chamber of Commerce of City of Burlington*, 72 S.E.2d 21 (N.C. 1952) (when citizen, at hazard of having to bear expenses of litigation in the event of an adverse decision, successfully prosecutes a taxpayers' action and recovers for the public moneys otherwise lost, the beneficiary agency, as trustee for all the rest of the taxpayers, may be required on principles of equity and natural justice to contribute from the funds collected the reasonable value of the attorney's services).

Like the private citizens, in these cases, who served the public interest with no possibility of personal gain, Shipley should not be saddled with the expense of conferring a benefit upon the State and its taxpayers. The award of attorney's fees in favor of Shipley and against Planned Parenthood should be affirmed.

VIII. Conclusion

For all of the foregoing reasons, Shipley respectfully requests that the Court affirm the judgment of the Circuit Court in all respects.

Respectfully submitted,

Robert Nienhuis # 27493
Neal W. Settergren # 50721
GOLDSTEIN and PRICE, L.C.
One Memorial Drive, Suite 1000
St. Louis, MO 63102-2449
(314) 421-0710
Fax: (314) 421-2832

and

John D. Landwehr #29587
Cook, Vetter, Doerhoff & Landwehr
231 Madison Street
Jefferson City, MO 65101
(573) 635-7977
Fax: (573) 635-7414

Counsel for Respondent Shipley

Certificate of Service and of Compliance

The undersigned hereby certifies that on this 20th day of March, 2006, two true and correct copies of the foregoing brief, and one disk containing the foregoing brief, were mailed postage prepaid to:

Joel Anderson
Assistant Attorney General
P.O. Box 899
221 W. High Street
6th Floor, Broadway Office Building
Jefferson City, MO 65101

Roger Evans
Planned Parenthood Legal Defense
Planned Parenthood Federation of America
434 West 33rd Street
New York, NY 10001

Arthur A. Benson
Arthur Benson & Associates
4006 Central Avenue
Kansas City, MO 64171

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b) and that the brief contains 22,372 words according to Microsoft software. The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief has been scanned for viruses and is virus-free

_____