

Spring 2007

## Appropriate Conduct: The Constitutionality of the Missouri Legislature's Appropriations for the State Family Planning Program

Jessica L. Conlon

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Jessica L. Conlon, *Appropriate Conduct: The Constitutionality of the Missouri Legislature's Appropriations for the State Family Planning Program*, 72 MO. L. REV. (2007)

Available at: <https://scholarship.law.missouri.edu/mlr/vol72/iss2/5>

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact [bassettcw@missouri.edu](mailto:bassettcw@missouri.edu).

# “Appropriate” Conduct: The Constitutionality of the Missouri Legislature’s Appropriations for the State Family Planning Program

## I. INTRODUCTION

Each year, approximately 7.4 million American women obtain contraceptive and reproductive health care from government-funded family planning programs.<sup>1</sup> According to the Alan Guttmacher Institute, these programs, which primarily serve women who are “young, unmarried, less-educated or poor,”<sup>2</sup> help 1.3 million women avoid unintended pregnancies<sup>3</sup> in an efficient use of taxpayer dollars.<sup>4</sup>

Despite the substantial benefits of family planning programs, they are not without their critics. Abortion opponents often challenge publicly-funded family planning programs because some organizations that provide family planning services also provide abortions.<sup>5</sup> Their concern is that, by funding family planning services in those organizations that also provide abortions,

---

1. Alan Guttmacher Institute, Media Center News Release, *Millions of U.S. Women Rely on Publicly Funded Family Planning Clinics for Their Reproductive Care*, <http://www.guttmacher.org/media/nr/2000/02/01/newsrelease3301.html> (last visited Nov. 15, 2006). Family Planning programs exist at both the state and federal level. *Id.* The federal family planning program, Title X, was created by President Nixon in 1970. *See* 42 U.S.C. §§ 300, 300a -4 (2000); 42 C.F.R. 59.5 (2000).

2. Alan Guttmacher Institute, *supra* note 1.

3. Alan Guttmacher Institute, *Fulfilling the Promise: Public Policy and U.S. Family Planning Clinics* (2000), [http://www.guttmacher.org/pubs/ftp\\_exec\\_sum.html](http://www.guttmacher.org/pubs/ftp_exec_sum.html) (last visited July 8, 2007).

4. *Id.* at 7. “For every public dollar spent on family planning services, three dollars are saved in Medicaid costs for pregnancy-related and newborn care.” *Id.* In Missouri, the state family planning program provided gynecological health services to over 30,000 low-income, uninsured Missouri women each year during its existence. Sue Hilton, *10 Clinics Close, 25 Forced to Reduce Hours Due to Loss of State Family Planning Funds Providers See Potential Health Care Crisis for Low-Income and Uninsured Women*, MO. FAMILY HEALTH COUNCIL, INC., June 1, 2004, [http://www.moalpha.org/docs/news/mfhc\\_pr060104.html](http://www.moalpha.org/docs/news/mfhc_pr060104.html); *see also* The Henry Kaiser Family Foundation, *State Politics & Policy: Missouri House, Senate Negotiators Agree on FY 2004 Spending Bill, Including Family Planning Cuts*, [http://www.kaisernet.org/daily\\_reports/rep\\_index.cfm?DR\\_ID=17604](http://www.kaisernet.org/daily_reports/rep_index.cfm?DR_ID=17604); *Planned Parenthood of Mid-Mo. & E. Kan. v. Dempsey*, 167 F.3d 458, 460 (8th Cir.1999); *Shipley v. Cates*, 200 S.W.3d 529, 531 (Mo. 2006) (en banc).

5. Rachel Benson Gold, *Efforts Renew to Deny Family Planning Funds to Agencies that Offer Abortions*, 5 THE GUTTMACHER REPORT ON PUBLIC POLICY 4 (2002), available at <http://www.guttmacher.org/pubs/tgr/05/1/gr050104.html>.

abortion services may indirectly receive a subsidy through shared administrative costs, employee salaries, and various other expenses.<sup>6</sup>

From the inception of Missouri's Family Planning Program until 1995, Planned Parenthood was an authorized recipient of these public funds.<sup>7</sup> While many of Planned Parenthood's 860 affiliates nationwide do, in fact, provide abortion services, the vast majority of its services are geared toward pregnancy and STD prevention and general sexual health.<sup>8</sup>

In 1996, the Missouri legislature attempted to pass appropriations legislation that would exclude Planned Parenthood from the program.<sup>9</sup> The exclusion of Planned Parenthood from the funding would have essentially ended the state's family planning program,<sup>10</sup> as Planned Parenthood served such a large portion of Missouri's market.<sup>11</sup> As a result, Planned Parenthood, acting in its own interest and on behalf of the state's low-income women, challenged the legislation.

6. *Dempsey*, 167 F.3d at 460.

Among the most commonly heard [arguments] are that even though public funds may not directly be used to perform abortions, they nonetheless "free up" private funds that may then be used; that family planning agencies that also provide abortions must have a vested interest in "funneling" women to their abortion service; and that taxpayers should not be required to pay for things they consider to be immoral. At bottom, however, the central argument, even if rarely expressed in so many words, is that by funding organizations that provide abortions, no matter for what other purpose, government somehow gives its imprimatur to abortion itself—and that imprimatur must be removed.

Gold, *supra* note 5.

7. *Planned Parenthood of Mid-Mo. & E. Kan., Inc. v. Ehlmann*, 137 F.3d 573, 575 (8th Cir. 1998).

8. Only nine percent of Planned Parenthood clients receive abortion services. Planned Parenthood, *Planned Parenthood by the Numbers*, <http://www.plannedparenthood.org/about-us/who-we-are/planned-parenthood-by-the-numbers.htm> (last visited Aug. 9, 2007). Of the 19 Missouri affiliates, only the St. Louis and Kansas City affiliates provide both abortion and family planning services. Planned Parenthood, <http://www.plannedparenthood.org/findCenterProcess.asp> (select MO from the drop-down list and follow link to search results) (showing 19 locations in Missouri).

9. *Dempsey*, 167 F.3d at 460; *Ehlmann*, 137 F.3d at 575.

10. Hilton, *supra* note 4.

11. *Planned Parenthood of Kansas and Mid-Missouri, Missouri Supreme Court Affirms Planned Parenthood's Position in Fight Over Family Planning Funds*, [http://www.ppkm.org/media\\_8\\_13\\_release.asp](http://www.ppkm.org/media_8_13_release.asp) (last visited Aug. 9, 2007). According to Susan Hilton, executive director of the Family Health Council of Missouri, in the years that Planned Parenthood was prohibited from participating in the program, Missouri could not spend all the funding it had set aside for family planning services "because of a dearth of providers." Gold, *supra* note 5, at 5. "No funds were allocated to serve 3,300 clients in the Kansas City area alone, because no provider stepped forward to bid on the funding." *Id.*

For nearly a decade, the three branches of Missouri's government have struggled with the language of the appropriations bills for the family planning program.<sup>12</sup> Although the debate began in the state legislature appropriations hearings, the struggle has been most public in the courts. The heart of the litigation began in 1998, when Planned Parenthood of Kansas and Mid-Missouri (PPKM) and Planned Parenthood of the St. Louis Region (PPSLR)<sup>13</sup> filed suit against Maureen Dempsey, then Director of the Department of Health.<sup>14</sup> It ostensibly ended in August 2006, when the Missouri Supreme Court ruled in favor of Ronald Cates, the current Director of the Department of Health and Senior Services,<sup>15</sup> and Planned Parenthood.<sup>16</sup> Much changed throughout the eight years of litigation – party names, department names, party postures – but the litigation itself resolved very little. This Summary will explicate the litigation from 1998 to present and discuss the political and practical implications of the legislative and judicial results that ultimately led to the demise of the family planning program.

## II. LEGAL BACKGROUND

### *A. The Appropriations Process and its Purpose*

Typically, the creation of a government funded program is a “bifurcated” process.<sup>17</sup> First, the legislature<sup>18</sup> promulgates substantive law delineat-

12. *Dempsey*, 167 F.3d at 460; *State v. Planned Parenthood of Kan. & Mid-Mo. (PPKM I)*, 37 S.W.3d 222 (Mo. 2001) (en banc); *State v. Planned Parenthood of Kan. & Mid-Mo. (PPKM II)*, 66 S.W.3d 16 (Mo. 2002) (en banc); *State ex rel. Planned Parenthood of Kan. & Mid-Mo. v. Kinder*, 79 S.W.3d 905 (Mo. 2002) (en banc); *ShIPLEY v. Cates*, 200 S.W.3d 529, 531 (Mo. 2006) (en banc).

13. This law summary will refer to the two affiliates collectively as Planned Parenthood.

14. *See Dempsey*, 167 F. 3d at 458.

15. *ShIPLEY*, 200 S.W.3d at 531 (explaining the name has changed to the Department of Health and Senior Services). *See also* Missouri Department of Health and Senior Services, <http://www.dhss.mo.gov> (last visited Aug. 9, 2007).

16. *ShIPLEY*, 200 S.W.3d at 531. “This is the latest and, perhaps, the last battle over whether Planned Parenthood was eligible to receive state funds to provide family planning and related gynecological care to low-income women.” *Id.* The state agency and Planned Parenthood became co-defendants in 2002 when the Attorney General was prosecuting the state agency for its funding of the family planning program. *PPKM II*, 66 S.W.3d at 19. This was later determined to be a procedural error by the Missouri Supreme Court. *Id.*

17. Appellants’ Brief at 19, *ShIPLEY v. Cates*, 200 S.W.3d 529 (Mo. 2006) (en banc) (No. SC87063), 2006 WL 1287772.

18. “[A]ppropriations bills . . . by tradition originate in the House.” Missouri General Assembly, <http://www.house.state.mo.us/default.aspx?info=/info/howbill.htm> (last visited Aug. 9, 2007).

ing the objectives and framework of the program, and then it determines the amount to be spent on that program in the next fiscal year through an appropriations bill.<sup>19</sup>

Missouri's Constitution has two provisions regarding the appropriations process, both of which are designed to protect the two-part process. First, Article III, section 23 creates what has come to be known as the "single subject rule,"<sup>20</sup> which states in pertinent part that "[n]o bill shall contain more than one subject which shall be clearly expressed in its title, except . . . general appropriation bills, which may embrace the various subject and accounts for which moneys are appropriated."<sup>21</sup> The purpose of the single subject rule "is to have the title indicate the general contents of the act," and to ensure that "the contents of the act fairly relate to and have a natural connection" to one another and the general topic, as indicated by the title.<sup>22</sup> Without the Single Subject Rule, the legislature could group unrelated laws together under a title that could be misleading.<sup>23</sup>

The second constitutional provision governing appropriations bills, article IV, section 23, states that "[e]very appropriation law shall distinctly specify the amount and purpose of the appropriation without reference to any other law to fix the amount or purpose."<sup>24</sup> This provision is typically understood to mean that an appropriations bill cannot contain substantive legisla-

19. MO. CONST. art. III, § 23; MO. CONST. art. IV, § 23.

A bill may be introduced as a House bill, a Senate bill, or introduced in both houses simultaneously. Every bill must pass both the House and Senate in the same form in order to become law. The advantage of introducing a bill in both houses is that the idea receives greater exposure and the process of educating the legislature about the bill is expedited. If a bill reaches a stalemate on one side, having introduced the bill on the other side may present a strategic advantage. The disadvantage of introducing a bill on both sides is the necessity of presenting witnesses at twice as many hearings and, sometimes, a perception by the legislative committee that priority need not be given to a bill which has already been introduced and is in the process of being considered by the other body.

Catherine J. Barrie, *Demystifying the Legislative Process*, 50 J. MO. B. 197, 198-99 (1994). The purpose of this two part system is "to assure that program and financial matters are considered independently." *Andtus v. Sierra Club*, 442 U.S. 347, 361 (1979) (quoting House Budget Committee, *Congressional Control of Expenditures 19* (Comm. Print 1977)) (quotations omitted).

20. MO. CONST. art. III, § 23. *See also* State *ex rel.* Hueller v. Thompson, 289, S.W. 338, 341 (Mo. 1926) (en banc).

21. MO. CONST. art. III, § 23.

22. State *ex rel.* Niedermeyer v. Hackmann, 237 S.W. 742, 743 (Mo. 1922) (en banc).

23. "In addition to being single, the subject must be clearly expressed in the title; the title must not mislead as to the contents of the act." *Id.*

24. MO. CONST. art. IV, § 23.

tion.<sup>25</sup> By separating the lawmaking process from the funding process, the Missouri Constitution prevents the legislature from enacting or amending existing legislation by way of a spending bill.<sup>26</sup>

However, when a program is created by executive order instead of by substantive legislation, the legislature's appropriations power becomes particularly political – implicating separation of powers issues. “[T]he passage of appropriations bills is the means by which most agencies obtain the resources to discharge their responsibilities,” and without this funding an agency program, “no matter how compelling, is rather meaningless.”<sup>27</sup> When the executive branch and legislative branch do not share common objectives, the appropriations process can become contentious. The legislature can effectively end a program created by executive order by refusing to fund it.<sup>28</sup> Because the legislature did not approve the program through its own legislative process, it might disapprove of the program for which it is now expected to appropriate funding.<sup>29</sup> Legislative bodies, including the Missouri General Assembly, may use their appropriations power “to set the agenda for administrative action.”<sup>30</sup> This tension created by an executive order and its implementation is the scenario that sparked a decade of litigation over Missouri's Family Planning Program.

---

25. *Hueller*, 289 S.W. at 341.

26. *Id.* The Missouri Supreme Court has recognized that if this “practice of incorporating legislation of general character in an appropriation bill should be allowed, then all sorts of ill conceived, questionable, if not vicious, legislation could be proposed with the threat, too, that, if not assented to and passed, the appropriations would be defeated.” *Id.*

27. Alfred S. Neely IV, *Missouri Administrative Agencies: External Controls and Influences*, 20 MO. PRAC. § 4:3 (4th ed.) (West 2006).

28. Although the governor has some veto power in the appropriations process, the gubernatorial control is limited to reducing the rate at which the legislature spends in one fiscal year. *See* MO. CONST. art. IV, §§ 26-27. The governor cannot mandate or increase spending. *Id.*

29. Neely, *supra* note 27.

30. *Id.*

### B. Funding the Family Planning Program in Missouri

In 1993, Governor Mel Carnahan authorized<sup>31</sup> the Department of Health to provide family planning services to eligible,<sup>32</sup> low-income women.<sup>33</sup> The Missouri legislature appropriated funds to the Department of Health, who in turn contracted with qualified, non-profit clinics to provide gynecological services to low-income women.<sup>34</sup> Because the Family Planning Program needed to comply with section 188.205, which prohibited any appropriation of funds for abortion services,<sup>35</sup> the appropriations bills contained general language stipulating this limitation.

In 1995 and 1997 the Missouri legislature first attempted to prohibit abortion providers from receiving any family planning funding.<sup>36</sup> In 1998, after both bills were found unconstitutional,<sup>37</sup> the legislature passed another appropriations measure restricting abortion providers from receiving state

31. There is no documentation of the executive order because executive orders were not recorded in the Missouri Register until a 2002 amendment requiring that "all executive orders issued after said date shall be published in the Missouri Register." 2002 Mo. Laws S.B. 812, § 536.035.2. *But see* Planned Parenthood of Mid-Mo. & E. Kan. v. Dempsey, 167 F.3d 458, 460 (8th Cir.1999) (noting that the Missouri program for funding family planning began in 1993); Shipley v. Cates, 200 S.W.3d 529, 531 (Mo. 2006) (en banc) (stating that in the 1990's appropriations for family planning were made at the request of the governor); Jo Mannie, *Carnahan's Actions Earned Him the Support of His Core Groups of Backers: Some Backers Came Late to Carnahan's Camp*, ST. LOUIS POST-DISPATCH, Oct. 22, 2000, at A1 (explaining that Mel Carnahan "set up the first state-supported family-planning program").

32. Eligibility is determined by income and availability of medical coverage – either insurance or Medicaid. Typically eligible women are low-income and uninsured, but do not qualify for Medicaid.

33. Appellants' Brief, *supra* note 17, at 23.

34. State v. Planned Parenthood of Kan. & Mid-Mo. (PPKM I), 37 S.W.3d 222, 224 (Mo. 2001) (en banc).

35. "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." MO. REV. STAT. § 188.205 (2000). From 1993 until 1995, this language stipulated that the monies were to be used "[f]or family planning services, provided, however, that none of the expenditures made from this appropriation for family planning services shall be used to perform or actively promote abortion as a method of family planning, and further provided that none of these funds may be used for administrative purposes." Appellants' Brief, *supra* note 17, at 23-24.

36. Planned Parenthood of Mid-Mo. & E. Kan., Inc. v. Ehlmann, 137 F.3d 573, 575 (8th Cir. 1998).

37. *Id.*; Planned Parenthood of Mid-Mo. & E. Kan., Inc. v. Dempsey, 167 F.3d 458, 460 (8th Cir. 1999).

funding for family planning services for the following fiscal year.<sup>38</sup> This appropriations measure generated all of the subsequent litigation on this issue.<sup>39</sup>

*C. House Bill section 10.715 and Planned Parenthood v. Dempsey*<sup>40</sup>

For fiscal year 1999, the Missouri General Assembly passed House Bill 1010, section 10.715, which restricted family planning funding from those entities that provided both abortion and family planning services.<sup>41</sup> The bill employed a three-tiered structure as a safeguard against any part of it failing for constitutional violations.<sup>42</sup> Specifically, the bill provided that, if any part of Tier I were to be “held invalid,” then the appropriations will be distributed in accordance with Tier II. Further, if both Tiers I and II are found to be invalid, then Tier III would be triggered as the relevant provision.<sup>43</sup> However, if Tier I has no defect, then the latter two provisions “shall have no effect.”<sup>44</sup> Planned Parenthood was excluded from funding under both Tiers II and III.<sup>45</sup>

Tier I did not automatically exclude Planned Parenthood, but it did present significant obstacles. In pertinent part, Tier I section 10.715 stated:

For the purpose of funding family planning services, pregnancy testing and follow-up services, provided that none of these funds may be expended for the purpose of performing, assisting or encouraging for abortion, and further provided that none of these funds may be expended to directly or indirectly subsidize abortion services or administrative expenses, as verified by independent audit. None of these funds may be paid or granted to organizations or affiliates of organizations which provide or promote abortions. None of the funds may be expended for directly referring for abortion, however nondirective counseling relating to the pregnancy may be provided and nothing in this section requires an agency receiving federal funds pursuant to Title X of the Public Health Services Act to refrain from performing any service required pursuant to Title X.<sup>46</sup>

Under Tier I, Planned Parenthood was unlikely to immediately qualify because the organization’s physical, fiscal, and administrative structures did

38. *Dempsey*, 167 F.3d at 461.

39. *Id.*

40. *Id.* at 458.

41. H.B. 1010, 89th Gen. Assem., 1st Reg. Sess. (Mo. 1998); *Dempsey*, 167 F.3d at 460-61 (where the court refers to the three sections as “tiers”).

42. *Dempsey*, 167 F.3d at 460.

43. Mo. H.B. 1010.

44. *Id.*

45. *Id.*

46. *Id.*; see also 42 C.F.R. § 59.5(a)(5) (2007).



not meet Tier I's stringent requirements.<sup>47</sup> In *Planned Parenthood v. Dempsey*, Planned Parenthood challenged the constitutionality of the bill and sought both preliminary and permanent injunctions to prevent the Department of Health from enforcing section 10.715.<sup>48</sup> Planned Parenthood asserted two constitutional arguments.<sup>49</sup> First, it stated that the bill premised the receipt of state funds on an unconstitutional condition by predicating funding on whether a program participant is an abortion provider.<sup>50</sup> Then, Planned Parenthood argued that the restrictions violated the organization's rights under "the Equal Protection Clause by discriminating against organizations that provide abortion services."<sup>51</sup> The District Court granted both injunctions, finding the language of the bill to violate the Equal Protection Clause.<sup>52</sup>

However, the Eighth Circuit Court of Appeals reversed and vacated the judgment.<sup>53</sup> In disposing of some of the threshold constitutional issues regarding these funds, the court relied heavily on the Supreme Court's analysis in *Rust v. Sullivan*.<sup>54</sup>

In *Rust*, the Supreme Court created an analysis that looked at all of the activities of funding recipients. The Court distinguished between activities that fell within the scope of the government-funded program and those activities outside of that scope.<sup>55</sup> Under the Court's analysis, if the legislation merely delineated the "proper scope of government-funded programs,"<sup>56</sup> then the restrictions placed on the funding would be constitutional. However, if the legislation interfered with or restricted "activities outside government programs,"<sup>57</sup> then the legislation would be unconstitutional.<sup>58</sup> Ultimately, the Court held that, while the government could not prevent access to abortion services, it did not have an obligation to fund abortions.<sup>59</sup> Thus, in *Rust*, the restrictions that prohibited any Title X funding from being applied to abortion

---

47. The organization eventually did make significant structural adjustments in an effort to comply with the appropriations legislation. Defendants-Appellants' Brief at 20-21, *Shipley v. Cates*, 200 S.W.3d 529 (Mo. 2006) (en banc) (No. SC87063), 2006 WL 1287776; *Shipley*, 200 S.W.3d at 536.

48. 167 F.3d 458 (8th Cir. 1999).

49. *Id.* at 461.

50. *See id.* at 460-61.

51. *Id.* at 464.

52. *Id.* at 460-61.

53. *Id.* at 465.

54. 500 U.S. 173 (1991). *Rust* is the seminal case deciding how much governments are able to control how government funds are used with respect to abortion services. *Dempsey*, 167 F.3d at 461-62.

55. *Id.* at 462 (citing *Rust*, 500 U.S. at 196-98).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Rust*, 500 U.S. at 198.

services were constitutional because the restrictions on funding did not restrict a woman's access to abortion services.<sup>60</sup>

Applying the *Rust* analysis in *Dempsey*, the Eighth Circuit eventually upheld section 10.715's legality.<sup>61</sup> First, though, the court had to resolve the issue of the statute's ambiguity.<sup>62</sup> The court began its analysis with the Tier I restriction because, if the court were able to determine the program's legality under Tier I, then it would be unnecessary to examine the two alternative provisions.<sup>63</sup> This provision prevented organizations that "provide or promote abortions" from receiving funding for their family planning services.<sup>64</sup> Finding this language ambiguous, the court attempted to find an application of the ambiguous statutory language<sup>65</sup> in a way that passed constitutional muster.<sup>66</sup>

Next, the court addressed Planned Parenthood's claim that the bill contained an unconstitutional condition in its grant of state funds.<sup>67</sup> The court recognized that the government cannot predicate funding "on the forfeiture of constitutional rights," by creating funding classifications that interfere with constitutional rights.<sup>68</sup> If a condition placed on the receipt of state funds interferes with constitutional rights, then the government would have to demonstrate that the condition is "necessary to promote a compelling governmental interest."<sup>69</sup> Under the *Rust* analysis, the State in *Dempsey* would have had to show that the conditions furthered a compelling interest. However, the court never reached this point in the analysis, because it did not find that the denial of funding constituted an interference with a constitutional right.<sup>70</sup>

According to *Rust*, "[a] refusal to fund the exercise of a constitutional right, without more, is not an infringement on that right."<sup>71</sup> Pursuant to this rule, it was constitutionally permissible for section 10.715 to stipulate that that the abortion affiliates are prohibited state appropriate funds, either "directly or indirectly."<sup>72</sup> However, the bill could not prevent the funds' recipients from "having any affiliation with the abortion service providers."<sup>73</sup> In making this distinction, the state legislature was merely "dictat[ing] the

60. *Id.* at 202.

61. *Dempsey*, 167 F.3d at 465.

62. *Id.* at 461.

63. *Id.* at 461-63; *see supra* notes 42-44 and corresponding text.

64. *Dempsey*, 167 F.3d at 461 (quoting H.B. 1010, 89th Gen. Assem., 1st Reg. Sess. (Mo. 1998)).

65. *Id.* at 463.

66. *Id.* at 465.

67. *Id.* at 461.

68. *Id.*

69. *Id.* (quoting *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969)) (emphasis omitted).

70. *Id.* at 461-63.

71. *Id.* at 461 (citing *Rust v. Sullivan*, 500 U.S. 173, 193 (1991)).

72. *Id.* at 463.

73. *Id.*

proper scope of government-funded programs,” and not “restrict[ing] protected grantee activities outside government programs.”<sup>74</sup> Thus, section 10.715 did not prohibit the family planning funding recipient from providing abortion services its affiliate provided, as long as the two affiliated organizations were legitimately independent.<sup>75</sup> For its definition of independent, the court again called upon *Rust*, stating that an independent abortion providing affiliate is one that is “separately incorporated, has separate facilities, and maintains adequate financial records to demonstrate that it receives no State family-planning funds.”<sup>76</sup> The court did not indicate whether Planned Parenthood met these requirements.<sup>77</sup>

The court quickly discarded Planned Parenthood’s equal protection claim, stating that “[a]ny constitutional right of clinics to provide abortion services . . . is derived directly from women’s constitutional right to choose abortion.”<sup>78</sup> There is no fundamental right for clinics to provide abortions; there is only the fundamental right of women to choose to terminate a pregnancy.<sup>79</sup> As the funding restrictions created by the appropriations bills did not prevent women from accessing abortion providers, these restrictions did not violate the fundamental rights of women.<sup>80</sup>

With its ruling, the Eighth Circuit sanctioned the state legislature’s ability to withhold funds from family planning providers, as long as the provider is not sufficiently independent from its abortion providing affiliate. However, the court was explicit in clarifying that the legislature must allow the funds’ recipient to maintain affiliations with abortion providers, so long as those affiliations are independent from the family planning service provider.<sup>81</sup> Although the court used this language to allow Planned Parenthood to participate in the Family Planning Program, the Missouri legislature used it to restrict their participation in the future.<sup>82</sup>

#### *D. House Bill section 10.705 and the State’s Claims against Planned Parenthood*

For fiscal year 2000, the Missouri legislature again crafted an appropriations bill that granted funding only to family planning affiliates who did not provide abortions. However, this bill, section 10.705, more narrowly defined

74. *Id.* at 462.

75. *Id.* at 463.

76. *Id.* (citing *Rust*, 500 U.S. at 180-81).

77. *Id.* at 463-64.

78. *Id.* at 464.

79. *Id.*

80. *Id.* (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 884-85 (1992)).

81. *Id.* at 463. “No subsidy will exist if the affiliate that provides abortion services is separately incorporated, has separate facilities, and maintains adequate financial records to demonstrate that it receives no State family-planning funds.” *Id.*

82. *Compare id.* with H.B.10, 90th Gen. Assem., 2d Reg. Sess. (Mo. 1999).

the requirements for independence that the affiliated family planning and abortion providers were required to maintain in order to receive family planning funding.<sup>83</sup> For a family planning affiliate to qualify for State funds, a bill required that the abortion providing affiliate

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.<sup>84</sup>

Additionally, the bill required that the abortion providing affiliate be separately incorporated from any entity receiving family planning funds.<sup>85</sup> To ensure compliance with these regulations, the bill required an audit of family planning recipients every three years, and “at least annually” for a recipient who is affiliated with an abortion services provider.<sup>86</sup> However, the statute stipulated that no part of the legislation could prevent a Title X recipient “from performing any service that must or shall be provided pursuant to Title X.”<sup>87</sup>

Despite Planned Parenthood’s existing structural provisions, this new language posed serious logistical obstacles for Planned Parenthood.<sup>88</sup> To illustrate, the St. Louis affiliates are both located in a three-story building on Forest Park Boulevard in St. Louis.<sup>89</sup> A health services clinic and an abortion services clinic – called Planned Parenthood of the St. Louis Region (PPSLR) and Reproductive Health Services (RHS), respectively – are located in this

---

83. H.B. 10.705, 90th Gen Assem., 2d Reg Sess. (Mo. 1999)

84. H.B. 10, 90th Gen. Assem., 2d Reg. Sess. (Mo. 1999).

85. *Id.*

86. *Id.*

87. *Id.*

88. Defendants-Appellants’ Brief, *supra* note 47, at 18-19.

89. *Id.* at 18; Brief of Respondent the State of Missouri at 5, *State v. Planned Parenthood of Kan. & Mid-Mo. (PPKM I)*, 37 S.W.3d 222 (Mo. 2001) (en banc) (No. SC82226), 2000 WL 34548582.

building.<sup>90</sup> The two service providers have maintained different names and areas in the building.<sup>91</sup> Additionally, “the clinical employees work either entirely and exclusively in Planned Parenthood’s health clinics, or entirely and exclusively in the clinics of the abortion affiliates.”<sup>92</sup> However, the two affiliates do share some of the amenities, such as the security system, lobby, elevator, and staff lunch room.<sup>93</sup>

Although Planned Parenthood had already implemented several structural changes in a move toward compliance,<sup>94</sup> a strict interpretation of the statutory language required further restructuring of the affiliates’ association.<sup>95</sup> However, Maureen Dempsey, then Director of the Department of Health, did not interpret the appropriation’s language to exclude Planned Parenthood.<sup>96</sup> In 1999, she extended the family planning services contract with Planned Parenthood, but the parties amended the contract to conform to the new state legislation.<sup>97</sup> Despite the extended contracts, Planned Parenthood still brought suit in federal district court against the state, with Dempsey as the named party, in order to enjoin the enforcement of these restrictions.<sup>98</sup>

At the Missouri Legislature’s behest,<sup>99</sup> Attorney General Jay Nixon appointed Jordan Cherrick as the Special Assistant Attorney General (SAAG) and authorized him to intervene in the federal action on behalf of Dempsey and to defend the constitutionality of section 10.705.<sup>100</sup> The SAAG’s motion to intervene was granted. Rather than just acting as defense counsel in federal district court, instead the SAAG initiated his own suit in state court on behalf of the state.<sup>101</sup> It is this state action, *State v. Planned Parenthood of Kansas & Mid-Missouri (PPKM I)*,<sup>102</sup> that spawned the next seven years of litigation.<sup>103</sup>

90. Defendants-Appellants’ Brief, *supra* note 47, at 18-19.

91. *Id.*

92. *Id.* at 19-20. PPKM is similarly structured and faced comparable obstacles. *Id.* at 18.

93. *Id.* at 18-19. The state contested that this shared space and equipment violated the independence requirement for receiving funding. Brief of Respondent the State of Missouri, *supra* note 89, at 19.

94. *Id.* at 20; *Shipley v. Cates*, 200 S.W.3d 529, 536 (Mo. 2006) (en banc).

95. Brief of Respondent the State of Missouri, *supra* note 89, at 6-11 (describing the organizational structure of PPKM and PPSLR and how they fail to meet requirements of the appropriation bill). *Id.* at 14-15 (revealing that the State desired PP to take further measures to ensure the independence of the affiliates).

96. *State v. Planned Parenthood of Kan. & Mid-Mo. (PPKM I)*, 37 S.W.3d 222, 224 (Mo. 2001); Brief of Appellant Maureen Dempsey at 44-45, *PPKM I*, 37 S.W.3d 222 (No. SC82226), 2000 WL 34548581.

97. *PPKM I*, 37 S.W.3d at 224.

98. *Id.* at 224 & n.1.

99. *Id.* at 224.

100. *Id.*

101. *Id.*

102. 37 S.W.3d 222.

103. The litigation ended with *Shipley*. See *supra* note 16.

After the SAAG's filing, Planned Parenthood filed two motions, one in federal court and the second in state court.<sup>104</sup> In federal court, Planned Parenthood moved for the court to "abstain and stay the federal case until the state case had been resolved," which the court granted.<sup>105</sup> In the state court motion, Planned Parenthood moved to have Maureen Dempsey, against whom the federal action was brought, joined "as a necessary party defendant to the action."<sup>106</sup> Neither Dempsey nor the SAAG objected to the joinder.<sup>107</sup>

In *PPKM I*, the SAAG requested declarations that "section 10.705 is constitutional under the United States Constitution and the Missouri Constitution," that "section 10.705 did not incorporate any Missouri corporations statutes concerning 'same' or 'similar' name," and that "planned parenthood was ineligible to receive state family planning funds under section 10.705."<sup>108</sup> Additionally, the SAAG requested an injunction preventing Planned Parenthood's receipt of family planning funds, as well as restitution for funds received.<sup>109</sup>

Shortly after the joinder, the Attorney General wrote the SAAG regarding the scope of his appointment as SAAG and suggested that, in filing the state suit, he had exceeded the scope of his authority.<sup>110</sup> A few weeks later, Attorney General Jay Nixon rescinded Mr. Cherrick's first appointment and then reappointed him as SAAG.<sup>111</sup> This time, however, the Attorney General specifically detailed the scope of Cherrick's authority.<sup>112</sup> Cherrick was authorized to pursue the state action "on behalf of the State of Missouri, against planned parenthood challenging Planned Parenthood's right to receive family planning funds under House Bill 10, [section] 10.705 and to defend the constitutionality of House Bill 10, [section] 10.705."<sup>113</sup> The Attorney General explicitly forbade Cherrick from taking any "action against the director or any other state official in state court."<sup>114</sup> None of the claims against Dempsey were ever dropped.<sup>115</sup>

It is presumed that "state courts . . . will respect a litigant's reservation of his federal claims for decision by the federal courts,"<sup>116</sup> which was what Planned Parenthood likely intended when it requested the federal court ab-

104. *PPKM I*, 37 S.W.3d at 225.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 224-25.

109. *Id.* at 225.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* (quoting letter from the Attorney General to Cherrick).

114. *Id.* (quoting letter from the Attorney General to Cherrick).

115. *Id.*

116. *England v. La. Bd. of Med. Exam'rs*, 375 U.S. 411, 422 n.12 (1964)).

stention.<sup>117</sup> If the circuit court had acted according to this presumption, it would not have ruled on the constitutional issues raised. However, Judge Byron Kinder heard the case in the Cole County circuit court<sup>118</sup> and ruled in favor of the State, upholding the legality of section 10.705, under both the United States and Missouri Constitutions, despite this issue having been preserved for federal court.<sup>119</sup> Consequently, Planned Parenthood was ineligible to receive state family planning funds, as it was in violation of section 10.705's maintenance requirements for affiliated organizations.<sup>120</sup> Furthermore, the circuit court enjoined both the Director from appropriating funds to Planned Parenthood and Planned Parenthood from receiving family planning funds. Finally, the court ordered repayment of all funds received under section 10.705.<sup>121</sup>

After Planned Parenthood appealed, the Missouri Supreme Court was presented with several compelling issues, but the court was most preoccupied with, "serious issues concerning justiciability and state sovereignty."<sup>122</sup> The court felt that it could not progress into examining the substantive issues before determining the "threshold issue of what authority the attorney general actually has granted the SAAG to pursue the claims brought against Maureen Dempsey."<sup>123</sup> Despite the Attorney General's prohibition of a suit against Dempsey, the court found that, because the Attorney General never objected to the action against Dempsey, the evidence was contradictory.<sup>124</sup> Thus, the court vacated the ruling against Dempsey and remanded to the circuit court, with directions for that court to order the Attorney General to further specify the SAAG's authority.<sup>125</sup>

With respect to Planned Parenthood, the Court found that all the claims were within the scope of the SAAG's authorization.<sup>126</sup> However, the court still vacated the lower court's ruling and remanded with directions for the

---

117. Appellants Planned Parenthood of Kansas & Missouri & Planned Parenthood of the St. Louis Region's Opening Brief at 48, *PPKM I*, 37 S.W.3d 222 (No. SC82226), 2000 WL 34548580 (asserting that "when a federal plaintiff makes such an 'England' reservation, the Supreme Court expressed 'confiden[ce] that state courts . . . will respect a litigant's reservation of his federal claims for decision by the federal courts.'" (quoting *England v. La. Bd. of Med. Exam'rs*, 375 U.S. 411, 421 n.12 (1964))).

118. Brief of Appellant Maureen Dempsey, *supra* note 96, at 1.

119. *PPKM I*, 37 S.W.3d at 225.

120. *Id.*

121. *Id.*

122. *Id.* at 226.

123. *Id.*

124. *Id.* at 226-27.

125. *Id.* at 228.

126. *Id.* at 227.

lower court to re-examine the appropriation's requirements and ensure that they did not contravene other federal statutory requirements.<sup>127</sup>

On remand, the situation was "in a more awkward condition than before."<sup>128</sup> Prior to the remanded proceedings, the Attorney General had authorized the SAAG to pursue the same claims against Planned Parenthood only.<sup>129</sup> Although the SAAG amended his pleadings on remand to name only Planned Parenthood affiliates as defendant parties, Dempsey, through an assistant attorney general, filed a responsive pleading raising the same arguments as Planned Parenthood regarding the correctness of her statutory interpretation and constitutionality of the statute.<sup>130</sup> However, on remand, Judge Kinder upheld, for a second time, the constitutionality of the statute and determined that the contracts between Planned Parenthood and the Director were valid.<sup>131</sup>

On appeal from this remand, in *State v. Planned Parenthood of Kansas & Mid-Missouri (PPKM II)*, the Supreme Court was again prevented from examining the substantive issues raised by the parties because of thorny procedural issues.<sup>132</sup> The court called the situation "awkward" because the Attorney General was arguing by proxy for both parties – the assistant attorney general for the Director as a defendant and the SAAG for the State as a plaintiff.<sup>133</sup> Although appropriate for the Attorney General to appoint assistants to represent him, the Attorney General's appointments in this case resulted in his office adopting inconsistent positions in the same case.<sup>134</sup> Beyond this conflict of interest, the court also disapproved of having the Attorney General controlling both sides of the litigation for policy reasons.<sup>135</sup>

---

127. *Id.* at 227-28. The court explained the SAAG's request for a declaration of the appropriation statute's constitutionality was unnecessary because the statute guaranteed that a family planning funds recipient who is also a Title X grantee will not have to violate Title X in order to comply with the appropriations statute. *Id.* at 227. However, the court could not proceed to analyze whether compliance with the appropriations statute would force Planned Parenthood to violate Title X because Title X had published new guidelines prior to this lawsuit on which several of the parties' claims rested. *Id.*; H.B. 10, 90th Gen. Assem., 2d Reg. Sess. (Mo. 1999) (specifying compliance with Title X); *see also* 42 C.F.R. 59.5(a)(5).

128. *State v. Planned Parenthood of Kan. & Mid-Mo. (PPKM II)*, 66 S.W.3d 16, 19 (Mo. 2002) (en banc).

129. *Id.* at 18.

130. *Id.* at 18-19.

131. *Id.* at 19.

132. *Id.* at 20.

133. *Id.* at 19.

134. *Id.*

135. "For the attorney general to represent two opposing sides in the same litigation involving the validity of state contracts is, at best, confusing to the public, which relies on the attorney general to vigorously enforce the constitution and laws of this state." *Id.* at 19-20. "At worst, allowing the attorney general, under the guise of neu-



Reluctantly, the court reversed and remanded the matter for a second time, as it was unwilling to further delay the federal litigation that had been pending for over two years.<sup>136</sup> In its consideration of this pending federal matter and the constitutional issue involved, the court emphasized that “a full and fair consideration of the substantive issues in the case” could not occur without exacting the procedural requirements.<sup>137</sup> The court remanded with instructions for the Attorney General to either pursue the action against the Director or to dismiss the case.<sup>138</sup>

Thus, the case took its third turn in front of Judge Kinder in state circuit court.<sup>139</sup> However, on this second remand, the Attorney General – presumably feeling overly embroiled in this matter – filed a motion to dismiss with prejudice all claims.<sup>140</sup> This dismissal would end all state action regarding section 10.705 and would allow the federal action to progress. However, Judge Kinder refused the Attorney General’s motion.<sup>141</sup> Instead, he appointed a “special master” to investigate “conflict of interest” issues.<sup>142</sup> After the special master filed his report, “the attorney general filed an amended motion to dismiss with prejudice, or in the alternative, without prejudice.”<sup>143</sup>

To further complicate matters, a taxpayer sought to intervene in the case at the trial level, which could have potentially prevented the cases dismissal.<sup>144</sup> However, before Judge Kinder ruled on the amended motion, the Supreme Court issued sua sponte a writ of mandamus in *State ex rel. Planned Parenthood of Kansas & Mid-Missouri*,<sup>145</sup> ordering the Judge to grant the dismissal without prejudice “or to show cause why he should not do so.”<sup>146</sup> Judge Kinder responded and presumably raised some concerns regarding the necessity of the taxpayer’s intervention.<sup>147</sup> The court found that the taxpayer only had standing for permissive intervention and could “bring a separate action, independent of the attorney general.”<sup>148</sup> Thus, the writ was made absolute and Judge Kinder was ordered to dismiss the cause.<sup>149</sup> Amazingly, at

---

trality, to control both sides of any lawsuit undermines and contorts the adversarial system.” *Id.* at 20.

136. *Id.*

137. *Id.* at 20-21.

138. *Id.* at 20.

139. *State ex rel. Planned Parenthood of Kan. & Mid-Mo. v. Kinder*, 79 S.W.3d 905, 906 (Mo. 2002) (en banc).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* See also *Shipley v. Cates*, 200 S.W.3d 529, 532 (Mo. 2006) (en banc).

145. *Kinder*, 79 S.W.3d at 906.

146. *Id.* (quotations omitted).

147. *Id.* at 907.

148. *Id.*

149. *Id.*

the close of this July 2002 decision, the litigation regarding the appropriations bill was only half over.

### III. RECENT DEVELOPMENTS

After his request to intervene was denied by the Missouri Supreme Court's writ of mandamus in *Kinder*,<sup>150</sup> Daniel Shipley, a taxpayer from St. Charles, Missouri,<sup>151</sup> brought an independent taxpayer suit<sup>152</sup> against Ronald Cates, the Director of the Department of Health and Senior Services.<sup>153</sup> Shipley sought declarations

(1) that the appropriations statutes do not violate the Missouri or United States Constitutions, (2) that the appropriations statutes are unambiguous and that the department's interpretations of "share" and "same or similar" name are invalid, and (3) that the Planned Parenthood entities have not qualified and do not currently qualify for receipt of state family planning funds.<sup>154</sup>

Additionally, Shipley sought injunctive relief to prohibit Planned Parenthood "from applying for or obtaining state family planning funds" and to prohibit Cates from entering into contracts that were "contrary to the express language of the appropriations statutes."<sup>155</sup> Shipley later amended his petition to include a prayer requiring Planned Parenthood to repay the State for all family planning funds received since 1999.<sup>156</sup>

Most of these claims had been previously raised and argued in the three suits to which the State was a party. However, none of the issues were ever resolved with any finality, as a result of the procedural issues raised and the Attorney General's eventual dismissal of all claims.<sup>157</sup> When Shipley's case was filed, the resolution of these issues was still important because the Family Planning Program was currently active.<sup>158</sup> For the third time, the state circuit court entered judgments against the director of the Department of Health and Planned Parenthood.<sup>159</sup> The court upheld the constitutionality of

150. *Id.*

151. Press Release, Planned Parenthood of Kansas and Mid-Missouri, Missouri Supreme Court Affirms Planned Parenthood's Position in Fight over Family Planning Funds, [http://www.ppkm.org/media\\_8\\_13\\_release.asp](http://www.ppkm.org/media_8_13_release.asp) (last visited Aug. 9, 2007).

152. "Any taxpayer of this state or its political subdivisions shall have standing to bring suit in a circuit court of proper venue to enforce the provisions of sections 188.200 to 188.215." MO. REV. STAT. § 188.220 (2000).

153. *Shipley v. Cates*, 200 S.W.3d 529 (Mo. 2006) (en banc).

154. *Id.* at 533.

155. *Id.*

156. *Id.*

157. *State ex rel. Planned Parenthood of Kan. & Mid-Mo. v. Kinder*, 79 S.W.3d 905, 906 (Mo. 2002) (en banc).

158. *Shipley*, 200 S.W.3d at 532, 534.

159. *Id.* at 532.

the appropriations restrictions, enjoined Planned Parenthood from receiving family planning funds and the director from distributing funds “in violation of the appropriations statutes,” and ordered restitution of the funds Planned Parenthood had received, plus interest.<sup>160</sup>

On appeal to the Missouri Supreme Court, the parties submitted briefs regarding the constitutionality of the appropriations bills, the interpretations of the specific language contained in section 10.705, Planned Parenthood’s eligibility to receive the funds, and the appropriateness of the order for restitution. However, the Missouri Supreme Court only addressed and ruled on the order that Planned Parenthood repay the funds with interest.<sup>161</sup> The year after Shipley first brought this suit, the Missouri legislature voted to end all funding for the state’s Family Planning Program.<sup>162</sup> The Supreme Court found that this change rendered the requests for declaratory and injunctive relief moot. The court stated that since “[t]here is, quite simply, nothing left to enjoin,” and “[t]he parties to these contracts – the state and Planned Parenthood – no longer have a relationship,” the court had nothing to decide with respect to these matters.<sup>163</sup>

The court then turned its attention to the issue of restitution, which it analyzed using rules of contract and administrative law and concluded that restitution was not an appropriate remedy.<sup>164</sup> The court explained that under a government contract, restitution is only appropriate when (1) the contract was void from the beginning or (2) the contract was illegal and the government was a victim of “unfairness, fraud, bad faith, or collusion and it would not be inequitable to require a refund.”<sup>165</sup> The court concluded that, as long as the director had the authority to contract, then the contract was not void. However, Shipley never “challenged the Director’s legal authority to contract with third parties for the provision of family planning services.”<sup>166</sup> He only challenged “the director’s interpretation of the appropriations” language.<sup>167</sup> Therefore, Shipley had failed to raise a proper claim for restitution.

Second, the court concluded that, because Planned Parenthood had no duty to ensure that the director understood the statutory language,<sup>168</sup> the contract was not illegal or entered into as a result of bad faith.<sup>169</sup> In fact, the court

160. *Id.* at 533. Later, the court amended its judgment requiring Planned Parenthood to “pay Shipley’s attorney’s fees and litigation expenses from the returned funds.” *Id.*

161. *Id.* at 534.

162. The Henry J. Kaiser Family Foundation, *supra* note 4; *Shipley*, 200 S.W.3d at 531-32.

163. *Shipley*, 200 S.W.3d at 534.

164. *Id.* at 535.

165. *Id.* at 534.

166. *Id.*

167. *Id.* at 534-35.

168. *Id.* at 535.

169. *Id.* at 536.

found the record to show “that Planned Parenthood took numerous measures to comply with the contract provisions, including reorganizing corporate structures.”<sup>170</sup> Furthermore, the court declared that it would be inequitable to order repayment for services Planned Parenthood rendered under the contract.<sup>171</sup> The court concluded that the contract between Planned Parenthood and the Department met none of the requirements for restitution and reversed the judgment of the lower court with respect to this one count.<sup>172</sup>

This ruling was critical, in that it prevented Planned Parenthood from having to pay over \$900,000 in restitution and interest,<sup>173</sup> but also because it halted the litigation against Planned Parenthood. However, it did little to resolve any of the substantive issues raised in the eight years of litigation, and these issues promise to arise again, and likely, soon.

#### IV. DISCUSSION

After years of litigation over the constitutionality of this appropriations bill, it is stunning that the Missouri courts were never able to definitively determine the bill’s constitutionality.<sup>174</sup> The Missouri Supreme Court never ruled on the merits of the parties’ constitutional arguments out of deference to the federal court’s intent to hear these arguments.<sup>175</sup> Furthermore, until *Shipley*, the procedural errors prevented the court from ever reaching any of the substantive matters.<sup>176</sup> At that point, although the federal action had been dismissed, the family program had also ended, so a discussion of its funding was moot.<sup>177</sup> For those concerned with the answer, the resolution in *Shipley* is somewhat dissatisfying.

Accordingly, for interested parties an evaluation of the substantive issues is still relevant. First, although the Supreme Court did not rule on the constitutional issues, it was not silent on them either.<sup>178</sup> In *Shipley*, the Court found that there was only one issue that was relevant – the matter of restitu-

---

170. *Id.*

171. *Id.* at 535.

172. The Court was split 4-3 in favor of Planned Parenthood. *Id.* at 537 (Limbaugh, J., dissenting).

173. *Missouri Supreme Court Rules in Favor of Planned Parenthood Affiliates*, MED. NEWS TODAY, Aug. 14, 2006, <http://www.medicalnewstoday.com/medicalnews.php?newsid=49372> (last visited Nov. 16, 2006).

174. *Shipley*, 200 S.W.3d at 534.

175. *State v. Planned Parenthood of Kan. & Mid-Mo. (PPKM II)*, 66 S.W.3d 16, 20-21 (Mo. 2002) (en banc) (where the court notes the federal court’s jurisdiction over the constitutional claims).

176. *Id.* at 20.

177. *Shipley*, 200 S.W.3d at 534.

178. *Id.* at 536-37.

tion.<sup>179</sup> Instead of simply ruling on the appropriateness of that remedy, the court also reversed the lower court's declarations that the appropriations were constitutional and that Planned Parenthood was ineligible for the program.<sup>180</sup> Furthermore, the court favorably mentioned Planned Parenthood's efforts to comply with appropriations in the past.<sup>181</sup> While the mindset of the Justices is unknown, this discussion will examine the arguments that may have been persuasive.

Additionally, the court's reaction to the constitutional arguments may be pertinent again soon. With the changing political winds, family planning programs may make a comeback. In fact, as recently as January 2006, a bipartisan proposal was introduced that would have restored the state family planning program.<sup>182</sup> If the family planning program is ever reinstated, opposition is likely to resurface as well. This discussion will attempt to measure the strength and merit of the parties' arguments by examining past Missouri decisions, as well as rulings on similar issues in other jurisdictions, and assess the best arguments' potential for success.

#### A. Evaluation of the Constitutional Arguments

In *ShIPLEY*, the main constitutional issue was whether the state legislature had included substantive legislation in an appropriations bill.<sup>183</sup> Specifically, Planned Parenthood and the Attorney General argued that the language imposed new restrictions on participants, amounting to an amendment of substantive legislation,<sup>184</sup> while the SAAG and *ShIPLEY* maintained that the appropriation merely delineated the intended scope of the funds.<sup>185</sup>

According to the SAAG, the threshold issue regarding an appropriations bill's constitutionality is to determine if the asserted violation reaches the required level of violation.<sup>186</sup> Because an act is presumed constitutional,<sup>187</sup> in order for it to be found unconstitutional, the act "must clearly and undoubtedly violate a constitutional procedural limitation."<sup>188</sup> Although the "pre-

179. *Id.* at 534.

180. *Id.* at 536-37.

181. *Id.* at 533.

182. The Henry J. Kaiser Family Foundation, *Kaiser Daily Women's Health Policy*, Jan. 26, 2006,

[http://www.kaisernet.org/daily\\_reports/rep\\_index.cfm?hint=2&DR\\_ID=35004](http://www.kaisernet.org/daily_reports/rep_index.cfm?hint=2&DR_ID=35004) (last visited Aug. 9, 2007). See *supra* Part II.D for a discussion of the issue.

183. Appellants' Brief, *supra* note 17, at 18; Defendants-Appellants' Brief, *supra* note 47, at 30; Brief of Respondent the State of Missouri, *supra* note 89, at 70-71.

184. H.B. 10, 90th Gen. Assem., 2d Reg. Sess. (Mo. 1999); Appellants' Brief, *supra* note 17, at 18; Defendants-Appellants' Brief, *supra* note 47, at 30.

185. Brief of Respondent the State of Missouri, *supra* note 89, at 71-72.

186. *Id.* at 71.

187. *Id.* at 70.

188. *Id.* at 71.

sumption of constitutionality”<sup>189</sup> is fairly difficult to overcome,<sup>190</sup> the detailed restrictions contained in the appropriations bill arguably met the level for violation.

There was significant support for the proposition that the appropriations bill violated Article III, section 23 and Article IV, section 24 of the Missouri Constitution. Because the “sole purpose [of an appropriations bill] is to set aside money for specified purposes”<sup>191</sup> an appropriations bill that exceeds this purpose by amending substantive legislation or existing law is unconstitutional.<sup>192</sup> Section 10.705 exceeded the appropriation’s purpose by attempting to regulate the function and services of Family Planning Program participants. According to Planned Parenthood, not only did the 1999 bill attempt to “legislate what services may or may not be provided by an entity that receives the appropriated funds,”<sup>193</sup> it also “regulate[d] in minute detail the relationship between” the funds recipient and its affiliated abortion providers.<sup>194</sup>

Specifically, section 10.705 included new requirements for participants in the program by classifying and defining participant organizations on the basis of their services and corporate structure.<sup>195</sup> The bill then applied these newly created definitions to declare certain participants ineligible funding recipients.<sup>196</sup> To enforce these new regulations, the bill created two standards of supervision for those service providers that were allowed to participate in the program:<sup>197</sup> heightened level of scrutiny for those who are affiliated with abortion providers,<sup>198</sup> and another less stringent review for those funding

189. *Id.* at 70.

190. *Doe v. Phillips*, 194 S.W.3d 833, 841 (Mo. 2006) (en banc) (stating that party must show that statute must “clearly contravenes some constitutional provision” in order for the court to review its constitutionality).

191. Appellants’ Brief, *supra* note 17, at 20-21; Defendants-Appellants’ Brief, *supra* note 47, at 31, 33-34.

192. MO. REV. STAT. § 188.205 (2000).

193. Defendants-Appellants’ Brief, *supra* note 47, at 33.

194. *Id.*

195. H.B. 10, 90th Gen. Assem., 2d Reg. Sess. (Mo. 1999). For example, the appropriations give detailed lists of what constitutes abortion and non-abortion services:

Abortion services include performing, assisting with, or directly referring for abortions, or encouraging or counseling patients to have abortions. Family planning services are preconception services that limit or enhance fertility, including contraception methods, the management of infertility, preconception counseling, education, and general reproductive health care.

*Id.* This appropriation also included specific limitations to the affiliates’ relations. *Id.*

196. “None of these funds may be paid or granted to an organization or an affiliate of an organization that provides abortion services.” *Id.*

197. Appellants’ Brief, *supra* note 17, at 36.

198. “If the organization is an affiliate of an organization which provides abortion services, the independent audit shall be conducted at least annually.” *Id.* at 35.

recipients that are not affiliated with abortion providers.<sup>199</sup> Through these detailed categories and oversight mandates, the bill restructured the Family Planning Program. As the Attorney General pointed out, “alone, this series of definitions might at best appear to be efforts to specify the purpose of the funds, or at worst merely surplus. But when read in conjunction with the remaining provisions,”<sup>200</sup> the categorized list contributed to the bill’s ulterior agenda, which was “to further interfere with the longstanding agency program.”<sup>201</sup> None of these new regulations related to the only valid purpose of appropriations legislation, which is to allocate funding for specific government functions and programs.

Aside from imposing new regulations on the program participants, the appropriation’s language violated Article III, section 23 of the Missouri constitution, because the appropriation amended section 188.205.<sup>202</sup> When determining if an appropriations bill has exceeded more than one subject, the courts look to whether the bill changes substantive law.<sup>203</sup> Although section 188.205 prohibited government funding “for the purpose of performing or assisting an abortion . . . or for the purpose of encouraging or counseling a woman to have an abortion,”<sup>204</sup> it allowed funding for care concerning the life of the woman.<sup>205</sup> The SAAG maintained that the appropriation (section 10.705) did not amend Missouri’s exception for the life of the woman in section 188.205<sup>206</sup> because section 10.705 regulated only the monies appropriated for Family Planning Services, while section 188.205 restricted all spending on abortion services.<sup>207</sup>

This analysis is incomplete because the two pieces of legislation differ in scope. Section 10.705 does not contain an exception for preserving the life of a woman, while section 188.205 does contain this exception. Therefore, section 10.705 stands as a broader prohibition on publicly funded abortions. Altering the scope of the public funds prohibition in 10.705<sup>208</sup> changes Missouri’s policy to value the life of the fetus over the life of the woman – or at

199. “An independent audit shall be conducted at least once every three years to ensure compliance with this section.” H.B. 10, 90th Gen. Assem., 2d Reg. Sess. (Mo. 1999).

200. Appellants’ Brief, *supra* note 17, at 37.

201. *Id.* at 37-38.

202. *See supra* note 35.

203. Opponents of Prison Site, Inc. v. Carnahan, 994 S.W.2d 573, 580 (Mo. Ct. App. 1999) (explaining that “a general appropriation bill . . . cannot amend substantive legislation because such an amendment would violate” article III section 23).

204. MO. REV. STAT. § 188.205 (2000) (language with exceptions for life of woman omitted).

205. *Id.*

206. Brief of Respondent the State of Missouri, *supra* note 89, at 72-73.

207. *Id.*

208. Compare H.B. 10, 90th Gen. Assem., 2d Reg. Sess. (Mo. 1999) with MO. REV. STAT. § 188.205.

least to value the life of a fetus over the life of a poor woman.<sup>209</sup> A policy shift of this sort can be made only through substantive legislation because “an appropriation that contravenes general statutory law is unenforceable.”<sup>210</sup>

The SAAG asserted that the appropriations bills merely “set forth the purpose of the funds appropriated in [section] 10.705,” as required by law, and that they did not exceed their scope.<sup>211</sup> He explained that the contested language of section 10.705 simply “elaborate[d] the purpose of the appropriation.”<sup>212</sup> To elaborate upon a law’s meaning exceeds the scope of an appropriation, whose “sole purpose is to set aside moneys for specified purposes.”<sup>213</sup>

The SAAG also emphasized the voluntary nature of the family planning program. The SAAG explained that, “[u]nlike legislation of a general character, [section] 10.705 does not establish or alter any preexisting rights and does not proscribe any conduct.”<sup>214</sup> He reasoned that, since funding recipients choose to participate in the Family Planning Program, the restrictions and duties that the program imposes on participants are completely voluntary.<sup>215</sup> According to this reasoning, no rights are violated with the appropriations bill because it only imposes regulations on those entities who elect to receive funding. It does not change the meaning of section 188.205. However, the fact that the appropriation does not infringe on rights is not dispositive of its propriety. Section 10.705 can still change substantive law without violating anyone’s rights.

An interesting aspect of this last argument is that it is the inverse of Planned Parenthood’s position. The SAAG asserted that, because Section 188.205 never allocated funds, 10.705 did nothing to change it. Because the two pieces of legislation have separate functions, their meanings should be examined separately as well.<sup>216</sup> According to the SAAG, section 10.705 does not add or subtract anything from that statute; it merely interprets it for funding of family planning services.<sup>217</sup> Like the SAAG, Planned Parenthood and the Attorney General argued that the appropriations bills and substantive statutes serve two different purposes. However, instead of reading appropriations language into substantive legislation, Planned Parenthood and the Attorney General argued that an appropriations bill created substantive legislation. They did not argue that section 188.205 contained promises of funding, but

209. The majority of women who have to rely on state funding for their reproductive health are poor. *See supra* note 2.

210. *Rolla 31 Sch. Dist. v. State*, 837 S.W.2d 1, 4 (Mo. 1992) (en banc).

211. Brief of Respondent the State of Missouri, *supra* note 89, at 71.

212. *Id.* at 71-72.

213. *State ex rel. Hueller v. Thompson*, 289 S.W. 338, 340-41 (Mo. 1926). There should be nothing “else in an appropriation bill except appropriations.” *Id.*

214. Brief of Respondent the State of Missouri, *supra* note 89, at 75.

215. *Id.* at 75-76.

216. *Id.* at 72-73.

217. *Id.*



that section 10.705, an appropriations bill, imposed restrictions on statutory functions that went beyond the scope of an appropriations bill.

### *B. Alternative Arguments: Never Raised*

It is noteworthy that none of the parties directly invoked the analytical framework created in *Rust*,<sup>218</sup> since the state was able to defend the scope of its earlier appropriation, section 10.715, this precedent in *Dempsey*.<sup>219</sup> *Rust* established that it is constitutional for a legislative body to choose which portions of government programs to fund.<sup>220</sup> However, it cannot restrict the activities of funding recipients outside the scope of the program.<sup>221</sup> This was the rule that the court applied in *Dempsey* when it validated restrictions imposed on funds' recipients but allowed Planned Parenthood to receive funding as long as it maintained independence between its abortion providing affiliates and family planning affiliates.<sup>222</sup> Because neither party was satisfied with this ruling – as Planned Parenthood was forced to comply with restrictions and the legislature did not achieve its goal of eliminating Planned Parenthood from the program – they may have decided not to rely on this analysis. Furthermore, unlike *Dempsey*, which asserted equal protection and unconstitutional conditions,<sup>223</sup> the constitutional arguments here concern only the state constitution's provisions regarding the appropriations processes.<sup>224</sup> Thus, had the SAAG relied on the ruling in *Rust*, it may have been implicitly admitting that the appropriations bills do, in fact, contain substantive legislation.

However, it seems that the *Rust* analysis may have served Planned Parenthood and the Attorney General well. Although the circuit court in *Dempsey* relied on *Rust* to uphold the restrictions in section 10.715, when it listed the requirements for an affiliate to be “truly independent,” it did not include the “same or similar name” requirement, which became one of the more contested portions of the appropriation.<sup>225</sup> The *Dempsey* court emphasized the importance of the affiliates being “physically and financially” separate,<sup>226</sup> which may have been difficult for Planned Parenthood to achieve, but it never mandated the stringent division between the affiliates that section

---

218. *Rust v. Sullivan*, 500 U.S. 173, 199 (1991).

219. *Planned Parenthood of Mid-Mo. & E. Kan., Inc. v. Dempsey*, 167 F.3d 458, 462 (8th Cir. 1999).

220. See *supra* text accompanying notes 55-77.

221. *Rust*, 500 U.S. at 197.

222. *Dempsey*, 167 F.3d at 464.

223. See *id.* at 461.

224. *Shipley v. Cates*, 200 S.W.3d 529, 531 (Mo. 2006).

225. See *State v. Planned Parenthood of Kan. & Mid-Mo. (PPKM I)*, 37 S.W.3d 222, 224-25 (Mo. 2001).

226. 167 F.3d at 462.

10.705 required.<sup>227</sup> Furthermore, Planned Parenthood may have been able to assert that the very fact that the *Rust* analysis is applicable to the appropriations statute indicates that the bill contains substantive legislation and exceeds the purpose of an appropriations bill.

### C. Other Jurisdictions

Not only does a comparison of the parties' arguments reveal that the appropriations legislation would have been found unconstitutional, but the lack of similar appropriations bills in other jurisdictions is an indication that these tactics have failed to pass constitutional muster, and may have been persuasive to the Missouri court. States such as California, Texas, and Maryland have all confronted the legality of restricting government funding for abortion-related services through appropriations bills. In 1985, the California courts confronted the very same appropriations issue as the Missouri courts did with section 10.705.<sup>228</sup>

In *Planned Parenthood Affiliates v. Swoap*, the court found that the language of an appropriations bill unconstitutionally amended existing legislation that governed its state family planning program.<sup>229</sup> The court stated: "Even if we were to agree with respondents that section 33.35 'simply clarifies' funding arrangements for abortion and other services authorized under the Family Planning Act we would nonetheless be compelled to conclude that it impermissibly amends that Act within the meaning of the single subject rule." The California court was responding to precisely the same argument the SAAG asserted,<sup>230</sup> and it found that even clarification exceeds the purpose of an appropriation.<sup>231</sup> The court proceeded to invalidate the appropriation on other grounds as well, explaining that even if the appropriation were "construed objectively, [it] does not simply clarify the Family Planning Act; quite the contrary, its prohibition on the granting of family planning funds 'to any group, clinic, or organization which performs, promotes, or advertises abortions' is a manifest restriction of activities authorized under the family planning act."<sup>232</sup> If the Missouri Supreme Court were to follow a similar analysis, the appropriation would likely have been unconstitutional for the same reasons.

227. H.B. 10, 90th Gen. Assem., 2d Reg. Sess. (Mo. 1999) (requiring the affiliates to maintain separate "[e]quipment or supplies, including but not limited to computers, telephone systems, telecommunications equipment and office supplies").

228. *Planned Parenthood Affiliates v. Swoap*, 173 Cal. App. 3d 1187, 1191, 1197-98 (1985).

229. *Id.* at 1201.

230. Brief of Respondent the State of Missouri, *supra* note 89, at 73.

231. *Swoap*, 173 Cal. App. 3d at 1200.

232. *Id.* at 1200-01.

In a 1998 case, *Patterson v. Planned Parenthood*,<sup>233</sup> the Texas Supreme Court was presented with a similar restriction contained in an appropriations bill. There, however, the restriction barred family planning program participants from dispensing birth control to minors. The court dismissed the controversy for lack of ripeness, as no injury had occurred.<sup>234</sup> Although this was perceived as a loss for Planned Parenthood, it showed the court's unwillingness to rule on the constitutionality of the appropriation's language and to prevent subsequent litigation should the claim ripen.

A 1978 case from Maryland, *Bayne v. Secretary of State*,<sup>235</sup> is one of the very few cases that directly held that a restriction on funding of a family planning program contained in an appropriations bill constitutional. In *Bayne*, the court found that the restrictions contained in the appropriations bill "directly related to the expenditure of the sum appropriated," and "do not amend substantive legislation or duly adopted administrative rules."<sup>236</sup>

The Maryland appropriations bill is distinguishable from section 10.705 in that the Maryland bill only prohibited using public funds for actually performing an abortion. The Maryland bill contains four significant exceptions:

1. Where continuation of the pregnancy is likely to result in the death of the woman; or
2. Where there is a risk that continuation of the pregnancy would have a detrimental effect on the health of the woman; or
3. Where there is a risk of the birth of the child with permanent physical deformity, genetic defect or mental retardation; or
4. Where medical procedures are necessary for a victim of rape, sexual offense or incest, when the rape, sexual offense or incest has been reported to a law enforcement agency or to a public or private health or social agency.<sup>237</sup>

These exceptions assured that the bill would remain consistent with Maryland policy at the time, unlike Missouri's appropriations bill, enacted nearly twenty years later.<sup>238</sup>

These three cases illustrate what the outcome would likely have been had the Missouri Supreme Court ruled on the constitutional issue. First, it is important to note that two of the three cases are quite dated – suggesting the ineffectiveness of using the appropriations process to restrict publicly funded abortions. Additionally, the only court that declared the bill constitutional was the 1978 case in Maryland, and the bill at issue was far less restrictive than

233. 971 S.W.2d 439 (Tex. 1998).

234. *Id.* at 444.

235. 392 A.2d 67 (Md. 1978).

236. *Id.* at 75.

237. *Id.* at 69.

238. *Id.*

Missouri's. Furthermore, the other "loss" for Planned Parenthood was in *Patterson*, where the Texas court refused to rule on the bill for lack of ripeness. In *Patterson*, the court did not find that no constitutional issue existed, just that it had not arisen yet.

As demonstrated by the above arguments, the Missouri appropriations bill is arguably – and it seems more probable than not – unconstitutional. Additionally, the bills, which must be renewed from year to year, are highly inefficient. Why, then, would the Missouri legislature take this approach? The answer seems to be that this appropriation strategy was the path of least resistance. When a program is created through executive order, there is a presumption that the legislature will leave the details of the program to the executive branch.<sup>239</sup> However, the legislature retains significant control over the program through its granting of funding – or not. Although the governor has line item veto power for appropriations measures, the governor can only remove the provision to which he objects and attach a written objection.<sup>240</sup> Thus, in this case, although Governor Carnahan objected to the legislature's appropriations provisions, his only option was to sign the bills or to eliminate funding completely for the program he created.<sup>241</sup> In essence, the legislature backed the Governor into a corner.

## V. CONCLUSION

It is precisely this type of political manipulation that an evaluation of the legislative process and the litigation that arose from it could help prevent in the future. Although the program is not in effect today, someday, Missouri may have a legislature that intends to fund low-income women's access to gynecological health care. If we do, the supporters of the program will undoubtedly face challenges.

The most poignant lessons of the litigation may not be the objectives that *were* accomplished, but those that were *not*. Although Planned Parenthood was not able to have the appropriation declared unconstitutional, neither were the SAAG and Shipley able to have it declared constitutional.<sup>242</sup> Even though there is not an active state family planning program today, Planned Parenthood was not declared ineligible for participating in it.<sup>243</sup> With reinvigorated interest in family planning funding, it bodes well for Planned Par-

---

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

240. "The governor may object to one or more items or portions of items of appropriation of money in any bill presented to him, while approving other portions of the bill. On signing it he shall append to the bill a statement of the items or portions of items to which he objects and such items or portions shall not take effect." MO. CONST. art. IV, § 26.

241. *Planned Parenthood of Mid-Mo. & E. Kan., Inc. v. Ehlmann*, 137 F.3d 573, 575 (8th Cir. 1998).

242. *Shipley v. Cates*, 200 S.W.3d 529, 534 (Mo. 2006).

243. *Id.* at 536-37.

enthood and for Missouri women that Planned Parenthood has not been barred from participation, yet. Should these matters arise again in the future, perhaps the parties and the Missouri courts will be better equipped to argue and answer the substantive issues.

JESSICA L. CONLON