Missouri Medicaid Expansion Legal Memo

EXECUTIVE SUMMARY

After several failed attempts to expand Medicaid through action by the General Assembly, proponents sought to place a constitutional amendment ("the Amendment") on the ballot that purports to mandate expansion. Several court decisions allowed the Amendment to be placed on the ballot only after determining that the Amendment does not mandate any particular appropriation or displace the General Assembly's and Governor's constitutionally protected roles in the appropriations process. The Amendment narrowly passed in the August 2020 election. The enactment of the Amendment, however, is only the beginning of the decision-making process as to whether Missouri will expand its Medicaid program. The General Assembly and Governor unquestionably retain their constitutional duty to determine whether Medicaid expansion is appropriate and in line with the State's constitutionally enshrined commitment to fiscal responsibility. If the General Assembly or Governor believes that Medicaid expansion conflicts with these commitments or would divert scarce funds from other important priorities, they retain their constitutional duty to decline to fund Medicaid expansion.

I. Background on Medicaid and Missouri's Expansion Amendment

A. Medicaid & the Affordable Care Act

Enacted in 1965, Medicaid offers federal funding to States to assist low-income individuals and families in obtaining medical care. *See 42* U.S.C. §1396a(a)(10); *Nat. Fed. of Indep. Businesses v. Sebelius,* 567 U.S. 519, 541-42 (2012). To receive that federal funding, States must comply with federal criteria governing matters such as who receives care and what services are provided at what cost. *Id.* Since 1982, every State has participated in Medicaid. Although the federal government contributes financial support for each State's Medicaid program, the States remain responsible for a significant share of the program costs. Today, Medicaid is often the single largest expenditure of state governments; it consumes more than 30% of state budgets nationwide. *See* Nicholas Horton, *How Medicaid Is Consuming State Budgets,* Found. for Gov't Accountability (Oct. 29, 2019), bit.ly/38F0ypP. Those expenditures have risen sharply in recent years, and have increasingly crowded out States' ability to finance other important priorities like public education. *Id.*

To qualify for federal assistance under the Medicaid program, a State must submit to the federal government a "state plan" for "medical assistance," 42 U.S.C. §1396a(a), that contains

a comprehensive statement describing the nature and scope of the State's Medicaid program. 42 C.F.R. §430.10. The State Plan must be approved by the federal Centers for Medicare and Medicaid Services (CMS) before taking effect. 42 U.S.C. §1396a; 42 C.F.R. §430.10. Similarly, to make a change to its existing Medicaid program, a State must prepare a State Plan Amendment (SPA) and obtain CMS approval. 42 C.F.R. §430.12.

The Patient Protection and Affordable Care Act of 2010 ("ACA") expanded the scope of the Medicaid program and dramatically increased the number of individuals the States must cover. For example, the ACA required state programs to provide Medicaid coverage to adults with incomes up to 133% of the federal poverty level, even though at the time the statute was enacted many States covered adults with children only at lower income levels and did not cover childless adults at all. See §1396a(a)(10)(A)(i)(VIII). The ACA increased federal funding to cover the States' costs in expanding Medicaid coverage, although States would also bear a portion of the expansion costs. §1396d(y)(1). If a State did not comply with the new coverage requirements, it would lose not only the federal funding for the expansion, but all of its Medicaid funds. §1396c.

In *NFIB v. Sebelius*, a 7-2 majority of the Supreme Court declared the ACA's mandatory Medicaid expansion provisions to be unconstitutional. The Court found the ACA's threat of a State losing all of its preexisting Medicaid funding if it did not expand the program to be "a gun to the head" that "leaves the States with no real option but to acquiesce in the Medicaid expansion." 567 U.S. at 581-82. The Court concluded that the expanded coverage mandated by the ACA was an entirely "new health care program" that involved not just "car[ing] for the neediest among us," but rather "an element of a comprehensive national plan to provide universal health insurance coverage." *Id.* at 583. To remedy the ACA's unconstitutional coercion of States, the Court held that "the Secretary cannot apply [the ACA] to withdraw existing Medicaid funds for failure to comply with the requirements set out in the expansion." *Id.* at 585.

The core holding of *NFIB* was to make the Medicaid expansion under the ACA truly optional. States that chose to expand would receive additional federal funding as set forth in the ACA, but those that chose not to expand would not risk the loss of existing funding. The ACA encouraged States to expand Medicaid by offering 100% federal funding of the expansion between 2014 and 2016. *See* §1396d(y)(1). The federal share of funding for the expansion would then decrease to 95% in 2017, 94% in 2018, 93% in 2019, and 90% in 2020 and thereafter. *Id.*

Notwithstanding this additional federal support, the States that have chosen to expand their Medicaid programs have faced skyrocketing expenditures on the expansion group—often 50% or more above the initial projections. *See* Brian Blase, Sam Adolphsen & Grace-Marie Turner, *Why States Should Not Expand Medicaid,* Foundation for Government Accountability & Galen Institute (Oct. 6, 2020), https://bit.ly/3q0C3cF. In California alone, the number of new Medicaid enrollees following the expansion was nearly *triple* what was initially projected.

B. Failed Attempts to Expand Medicaid in Missouri

Following the decision in NFIB, Governor Jay Nixon pushed the General Assembly to expand Medicaid in Missouri.[1] The process was contentious, largely because of the massive costs the State would incur as the federal government's subsidies declined over time. The General Assembly overwhelmingly rejected Medicaid expansion, with many legislators citing the cost as prohibitive.[2] In particular, several legislators emphasized that expansion would potentially crowd out funding for education.[3]

As things stood in 2019, the General Assembly continued to overwhelmingly oppose Medicaid expansion—particularly given estimates that the State would have to contribute $200 million annually to cover its 10% supplement on top of the federal funding. And, as noted above, the *actual* cost of expansion has inevitably dwarfed the initial projections in the States that chose to expand their programs.

C. The Medicaid Expansion Amendment

Unable to secure Medicaid expansion through the normal legislative process, proponents of the expansion sought to circumvent that process. Proponents sought to place on the August 2020 ballot an initiative calling for a constitutional Amendment that provides:

> Be it resolved by the people of the State of Missouri that the Constitution be amended:
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> Article IV of the Constitution is revised by adding one new section to be known as Article IV, Section 36(c) to read as follows:
>
> Section 36(c).
>
> 1. Notwithstanding any provision of law to the contrary, beginning July 1, 2021, individuals nineteen years of age or older and under sixty-five years of age who qualify for MO HealthNet services under 42 U.S.C. Section 1396a(a)(10)(A)(i)(VIII) and as set forth in 42 C.F.R. 435.119, and who have income at or below one hundred thirty-three percent of the federal poverty level plus five percent of the applicable family size as determined under 42 U.S.C. Section 1396a(c)(14) and as set forth in 42 C.F.R. 435.603, shall be eligible for medical assistance under MO HealthNet and shall receive coverage for the health benefits service package.
> 2. For purposes of this section, "health benefits service package" shall mean benefits covered by the MO HealthNet program as determined by the department of social services to meet the benchmark or benchmark-equivalent coverage requirement under 42 U.S.C. Section 1396a(k)(1) and any implementing regulations.
> 3. No later than March 1, 2021, the Department of Social Services and the MO HealthNet Division shall submit all state plan amendments necessary to implement this section to the United States Department of Health and Human Services, Centers for Medicare and Medicaid Services.
> 4. The Department of Social Services and the MO HealthNet Division shall take all actions necessary to maximize federal financial participation in funding medical assistance pursuant to this section.

5. No greater or additional burdens or restrictions on eligibility or enrollment standards, methodologies, or practices shall be imposed on persons eligible for MO HealthNet services pursuant to this section than on any other population eligible for medical assistance.

6. All references to federal or state statutes, regulations or rules in this section shall be to the version of those statutes, regulations or rules that existed on January 1, 2019.

Notably, the proposal did *not* create any revenue source to fund the State's portion of the massive cost of Medicaid expansion. The Missouri State Auditor prepared a Fiscal Note Summary finding that the "overall estimated general revenue cost for implementation of this proposal is estimated to exceed $200 million." Missouri State Auditor's Office, Fiscal Note 20-063 (May 23, 2019).

Before being placed on the ballot, the proposed amendment was challenged in court on the ground that it attempted to appropriate money by initiative in contravention of Article III, section 51 of Missouri's Constitution, which provides that an initiative "shall not be used for the appropriation of money other than of new revenues created and provided for thereby." In short, proponents cannot use an initiative to fund a new program unless the initiative *also* includes a mechanism of raising the necessary revenue.

The courts upheld the proposal by applying the principle that they "must attempt to harmonize all provisions of the initiative's proposal with the constitution ... rather than creat[e] an irreconcilable conflict." *Cady v. Ashcroft*, 606 S.W.3d 659, 665 (Mo. Ct. App. 2020). **The Missouri Court of Appeals held that the proposal did not conflict with the Constitution's prohibition of appropriation by initiative because "[t]here are no words on the face of the Proposed Measure that appropriate funds."** *Id.* at 667. The court further held that the proposal did not alter the Constitution's ordinary appropriation or budgetary provisions:

> [T]he Proposed Measure does not use the phrase "stand appropriated" or any similar phrase that indicates an appropriation of existing funds or directs the legislature to appropriate such funds. The forecasts as to costs of the Proposed Measure go to what the Proposed Measure will or may do if approved by the voters and put into operation, not to whether the Proposed Measure is properly put before the voters. Funding for the Missouri Medicaid program, MO HealthNet, is appropriated annually by the General Assembly. **The Proposed Measure does not direct or restrict the General Assembly's ability to change the amount of appropriations for the MO HealthNet program or to increase or decrease funding for the program based on health-care-related costs.**
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> ....
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> [T]he Proposed Measure neither purported to appropriate existing funds nor implicated the Governor's role in the appropriation process. The circuit court also properly treated the Proposed Measure as an amendment to MO HealthNet's eligibility criteria, subject to the legislature's appropriation power.

Id. at 668, 670-71.

In light of this court opinion, the proposal was allowed to be included on the August 2020 midterm ballot and was approved by a margin of 53.25% to 46.75%.

II. The General Assembly and Governor Have No Obligation to Provide Funding for Medicaid Expansion.

A. The Amendment does not alter Missouri's separation of powers.

Missouri's Constitution implements a robust separation of powers between the three branches of government. *See* Const. art. II §1 ("The powers of government shall be divided into three distinct departments—the legislative, executive and judicial."). This division of powers "rests on history's bitter assurance that persons or groups of persons are not to be trusted with unbridled power" and "is not meant to promote efficiency but to preclude the exercise of arbitrary power." *State Auditor v. Joint Comm. on Legislative Research*, 956 S.W.2d 228, 231 (Mo. 1997), *as modified on denial of reh'g* (Nov. 25, 1997).

This careful separation of powers is designed in part to address the dangers to liberty stemming from irresponsible spending. The Constitution sets out a "complex but logical" budgeting process that allows the General Assembly and Governor to ensure the State lives within its means. *Missouri Health Care Ass'n v. Holden*, 89 S.W.3d 504, 507-08 (Mo. 2002). Put simply, "the constitution does not permit the state to spend money it does not have." *Id.* at 506-07. The Constitution implements "[t]he people of Missouri's vital interest in government living within its means," *State ex rel. Sikeston R-VI Sch. Dist. v. Ashcroft,* 828 S.W.2d 372, 374-75 (Mo. 1992), by vesting the power of appropriation solely with the Assembly, art. III, §36, prohibiting executive officers from withdrawing funds or incurring obligations absent an appropriation, art. IV §28, vesting a line item veto power in the Governor, art. IV §26, allowing the Governor to reduce expenditures below the appropriated amount when actual revenue is less than expected, art. IV §27, and carefully restricting the General Assembly's capacity to incur debt, art. III §37; *see also State ex inf. Danforth v. Merrell,* 530 S.W.2d 209, 213 (Mo. 1975) (the meaning of these provisions "is clear: money may not be withdrawn from the state treasury for any purpose other than that specified in an appropriation law").

The Constitution also explicitly prevents the circumvention of these provisions by prohibiting appropriation through the initiative process. See art. III §51 ("The initiative shall not be used for the appropriation of money other than of new revenues created and provided for thereby."). As the Missouri Supreme Court has explained, "the dangerous business of making appropriations by initiative, without regard to other constitutional requirements, or even attempting to set forth the full text of the many constitutional requirements which would be abrogated or rendered nugatory, is generally condemned." *State ex rel. Sessions v. Bartle,* 359 S.W.2d 716, 718 (Mo. 1962) (quoting Constitutional Convention of 1943-44 File No. 4, at 6). Indeed, it would pose a grave danger to the public if proponents could seek to spend public funds through ballot initiatives while keeping voters in the dark about the tax increases or offsetting spending cuts that would inevitably be needed to finance this new spending.

The Amendment regarding Medicaid expansion does not—and could not—evade the constitutional separation of powers or the appropriation process. Indeed, the Missouri courts allowed the Amendment on the ballot only after finding that it *did not* appropriate money or alter the General Assembly's and Governor's constitutionally protected roles in the appropriations process. *Cady,* 606 S.W.3d at 665 ("[T]he Proposed Measure neither purported to appropriate

existing funds nor implicated the Governor's role in the appropriation process. The circuit court also properly treated the Proposed Measure as an amendment to MO HealthNet's eligibility criteria, subject to the legislature's appropriation power."); *see also Cady v. Missouri Secretary of State,* No. 20AC-CC00209, 2020 WL 5093610, at *3 (Mo. Cir. June 04, 2020) ("[T]here is no language in the Initiative that appropriates existing funds or directs the legislature to do so. ... The Initiative does nothing to change how the General Assembly appropriates funds. ... The Initiative does nothing to change how the Governor may play a role in the appropriation process. ... The Initiative does not purport to appropriate existing funds nor does it implicate the Governor's role in the appropriation process.").

The Amendment thus leaves the actual funding of Medicaid expansion (if any) to the discretion of the General Assembly and Governor through the ordinary appropriations process—or as Justice Scalia once described it—the "hurly-burly, the give and take of the political process between the legislative and the executive." Hearings Before the Subcomm. on Intergovernmental Relations of the S. Comm. on Government Operations, 94th Cong. 87 (1975) (statement of Antonin Scalia, Assistant Att'y Gen., Office of Legal Counsel). As discussed below, the Amendment in no way alters or usurps the Assembly's and Governor's constitutionally vested array of powers over the appropriation process.

B. The Amendment does not strip the General Assembly's sole power to appropriate funds.

Missouri's Constitution emphatically vests the power to appropriate with the Assembly. See Const. art. III §36; *Rebman v. Parson,* 576 S.W.3d 605, 609 (Mo. 2019), *as modified on reh'g* (June 25, 2019) (noting Assembly's "unquestioned power" over the raising and appropriation of funds); *see also* 16 C.J.S. Constitutional Law §319 ("The legislature is the sole and exclusive authority for the appropriation of the funds of the state."); 81A C.J.S. States §411 ("The power to appropriate the money of the State resides in the legislature, and such power is exclusive or supreme."). **This means the "General Assembly 'has the undoubted power to make or to refuse to make an appropriation authorized by the Constitution.'"** *Rebman,* 576 S.W.3d at 610 (emphasis added). **"The policy underlying the constitutional appropriations requirement is that each legislature must have discretion to respond to the financial needs of the times,"** *State ex rel. Kansas City Symphony v. State,* 311 S.W.3d 272, 278 (Mo. App. W.D. 2010), and allows the legislature to "decide the relative worth of social services, education, agricultural programs, public safety, corrections, operations of the executive office and the general assembly – to name but a few – and to fund these governmental activities within a balanced budget," *Weinstock v. Holden,* 995 S.W.2d 411, 418-19 (Mo. 1999).

Moreover, all exceptions to the Assembly's sole power of appropriation are explicitly defined in the text of the Constitution. Article III §36 lists the order of priority the legislature must follow in appropriating:

First: For payment of sinking fund and interest on outstanding obligations of the state.

Second: For the purpose of public education.

Third: For the payment of the cost of assessing and collecting the revenue.

Fourth: For the payment of the civil lists.

Fifth: For the support of eleemosynary and other state institutions.

Sixth: For public health and public welfare.

Seventh: For all other state purposes.

Eighth: For the expense of the general assembly.

The Medicaid expansion Amendment does not purport to alter this prioritization. *Cf. Moore v. Brown,* 350 Mo. 256, 270, 165 S.W.2d 657, 664 (1942) (noting a constitutional amendment inappropriately "place[d] [an] appropriation at the top of the list, ahead of the public debt, public schools, cost of collecting the revenue, expenses of the state government, eleemosynary institutions, etc." without explicitly amending this article). In Moore, the Supreme Court emphasized that amendments by initiative should not be interpreted to take the "power of appropriating all revenue in the state treasury out of the hands of the general assembly" or alter the funding priorities set out in §36. *Moore,* 165 S.W.2d at 664. Additionally, Article IX §1 requires the General Assembly to "establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law" and explicitly "set a minimum appropriation from state revenue for the public schools." *State ex rel. Sikeston R-VI Sch. Dist. v. Ashcroft*, 828 S.W.2d 372, 374-75 (Mo. 1992).

The exceptions to the Assembly's otherwise plenary spending power are thus explicitly set out in the constitutional text. That is, **when the General Assembly is required to make a particular expenditure, the Constitution uses mandatory and unambiguous terms to set the appropriation. See art. IX §3(a) ("All appropriations by the state for the support of free public schools and the income from the public-school fund shall be paid at least annually and distributed according to law.");** §3(b) ("in no case shall there be set apart less than twenty-five percent of the state revenue, exclusive of interest and sinking fund, to be applied annually to the support of the free public schools").

The Medicaid expansion Amendment contains no such mandatory appropriation language. *See Cady,* 606 S.W.3d at 665 (the Amendment "does not direct or restrict the General Assembly's ability to change the number of appropriations for the MO HealthNet program or to increase or decrease funding for the program based on health-care-related costs"); *see also Seay v. Jones,* 439 S.W.3d 881, 890–91 (Mo. Ct. App. 2014) (constitutional amendment only curtails the "Generally Assembly's virtually unbounded discretion over appropriations" if it does so explicitly).

Proponents of immediate Medicaid expansion may claim support in the Amendment's mandate to the Department of Social Services and the MO HealthNet Division to submit Medicaid SPAs to the federal government requesting Medicaid expansion. But, especially in light of the court decisions before the Amendment was placed on the ballot, this directive must be interpreted as *contingent* on the General Assembly appropriating funds to cover the expansion. Because submitting the SPA would expose the State to binding, and potentially permanent, funding obligations under the federal Medicaid program,[5] the mere act of submission in the absence of an appropriation would *itself* violate the legislature's appropriation power. Neither the Assembly, nor as discussed below, executive officers can incur an obligation absent an appropriation. Const. art. III §§36, 37. Thus, to the extent the Amendment purports to obligate state officials to submit an expansion plan, any such directive must be interpreted to be contingent on the General Assembly appropriating funds for expansion.

C. The Amendment does not divest the Governor's role in the appropriations and expenditure process.

Requiring immediate Medicaid expansion in the absence of the needed appropriations would not only violate the Assembly's constitutional powers—it would also unconstitutionally usurp the Governor's constitutional authority. Under the Missouri Constitution, the "budget process … begins and ends with the Governor." *Church v. Missouri,* 913 F.3d 736, 751 (8th Cir. 2019) (quoting *Missouri Health Care Ass'n,* 89 S.W.3d at 508). The Governor initiates the process by submitting a budget to the General Assembly, Const. art. IV §24, which the Assembly must consider, art. IV §25. The Governor also has a line item veto, art. IV §26, which "is a powerful budget balancing tool." *State ex rel. Sikeston R-VI Sch. Dist. v. Ashcroft,* 828 S.W.2d 372, 374-75 (Mo. 1992). Significantly, the Constitution explicitly exempts only two areas from the Governor's line item veto: debt and public schools. Id. Finally, Article IV §27 "broadly authorizes the governor to control the rate at which any appropriation is expended and to balance the state's budget by reducing expenditures in the event that state revenues fall below the revenue expectations." State ex rel. Liberty Sch. Dist. v. Holden, 121 S.W.3d 232, 233 (Mo. banc 2003); *see also Missouri Health Care Ass'n v. Holden,* 89 S.W.3d 504, 512 (Mo. 2002) ("[T]he constitution broadly empowers the Governor to determine how the pain of revenue shortfalls is to be distributed."). The Governor's broad authority to issue line-item vetoes and reduce expenditures is yet another way the Constitution implements Missouri's powerful and overriding interest in a balanced budget. *Missouri Health Care Ass'n,* 89 S.W.3d 507-08 (Mo. 2002) ("It is clear from its provisions that, beyond the state's narrowly restricted capacity to borrow money, the constitution does not permit the state to spend money it does not have.").

Further reflecting Missouri's commitment to fiscal responsibility, the Constitution and laws closely regulate the executive branch's ability to draw funds from the treasury. Article IV §28 provides that officers shall not draw money from the treasury "except by warrant drawn in accordance with an appropriation made by law." The Supreme Court has interpreted the phrase "appropriation made by law" to encompass only a law enacted through ordinary appropriation legislation or an initiative that (unlike the Medicaid expansion Amendment) includes a dedicated revenue source. *See Moore,* 165 S.W.2d at 664. Article IV §28 further specifies that executive officers may not incur any obligation for the payment of State funds without an appropriation and "unencumbered balance sufficient to pay it." Art. IV §28. And statutes also require state officers to review and certify that funds are not expended "unless the money has been previously appropriated by law" and the expenditure does not "exceed the amount appropriated by law for that purpose." Mo. Ann. Stat. §33.170; *see also* Mo. Ann. Stat. §33.030; Missouri AG Op. No. 1, 1982 WL 185891, at *3 (Feb. 22, 1982).

Thus, **an executive officer cannot withdraw State funds or incur a financial obligation solely on the authority of an Amendment—they can do so only in accordance with a statutory appropriation or initiative appropriation that provides a revenue source.** An executive officer's submission of a Medicaid SPA to the federal government without a legislative appropriation would thus explicitly conflict with several bedrock constitutional and statutory requirements. And nothing in the Amendment restricts the Governor's "role in the appropriations process." *Cady,* 606 S.W.3d at 665; *see also Seay,* 439 S.W.3d at 890-91. Any Medicaid expansion thus remains "subject to the General Assembly's virtually unbounded discretion over appropriations, to the Governor's line-item veto, and to the Governor's constitutional authority to withhold appropriated funds when fiscal circumstances require." *Seay,* 439 S.W.3d at 890-91.

D. The Amendment must be interpreted to preserve the General Assembly's and Governor's powers over the appropriation process.

The Amendment's directives to expand Medicaid coverage and submit a SPA to the federal government can be easily harmonized with the Constitution's comprehensive appropriations process. Medicaid expansion—and the submission of a SPA to implement that expansion—*must* be contingent on the Assembly appropriating money to fund expansion with the Governor's consent. The Amendment states that "the Department of Social Services and the MO HealthNet Division shall submit all state plan amendments necessary to implement this section to the United States Department of Health and Human Services, Centers for Medicare and Medicaid Services." But the Amendment does not provide for nor otherwise address the appropriations necessary to implement expansion. Thus, the Amendment, which does not purport to alter any other article of the Constitution, is reliant upon the Assembly's and Governor's discretionary constitutional appropriation authority—particularly given that the submission of an expansion SPA *obligates* the State to expend money if accepted. Indeed, this is precisely the interpretation adopted by the Missouri courts as a condition of allowing the Amendment onto the ballot in the first place. *See Cady,* 606 S.W.3d at 665; *see also Cady,* 2020 WL 5093610, at *3 ("The Court must read the initiative to harmonize it with these provisions and treat it merely as an amendment to MO HealthNet's eligibility criteria, subject to the legislature's appropriation power."). In particular, the Amendment's directive to submit a SPA requesting expansion must be construed as contingent upon an appropriation because the mere submission of a SPA has the potential to obligate the State under federal law to expend massive sums of as-yet-unappropriated funds.

"Spending Clause legislation like Medicaid is 'much in the nature of a contract.'" *Armstrong v. Exceptional Child Center,* 135 S. Ct. 1378, 1387 (2015) (quoting *Pennhurst State School & Hosp. v. Halderman,* 451 U.S. 1, 17 (1981)); *see also id.* (Medicaid agreements are akin to "contracts between two governments"). That is, "in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst,* 451 U.S. at 17. As long as the State has "exercise[d] [its] choice knowingly, cognizant of the consequences of [its] participation," *id.*, then it is bound by federal law to meet its obligations under Spending Clause programs it has elected to join. In short, in a "federal-state funding and spending agreement" such as Medicaid, "[t]he State promises to provide certain services to private individuals, in exchange for which the Federal Government promises to give the State funds." *Blessing v. Freestone,* 520 U.S. 329, 349 (1997) (Scalia, J., concurring) (emphases added).

Submission of an expansion SPA that would expand Medicaid is thus an offer to contract with the federal government, and—should the federal government accept—Missouri would be bound to satisfy its obligations, including contribution of its share of the costs of covering the expansion population. Once the expansion plan is accepted, it would take another plan amendment to withdraw or alter that aspect of the plan, which the federal government is under no obligation to approve. Indeed, on one recent occasion, a State discovered that some voluntary Medicaid benefits, once granted, may not be withdrawn at all. *See Mayhew v. Burwell,* 772 F.3d 80, 84 (1st Cir. 2014) (holding that ACA provision requiring the maintenance of voluntary benefits extended to 19- and 20-year-olds for nine additional years

was constitutional). At bottom, **submitting an expansion SPA is not a mere ministerial or preparatory act, but a binding commitment that the State will comply with obligations set by federal law—which, in this context, includes a commitment to spend tens of millions of dollars as part of the State's share of medical costs for the expanded population. But, as discussed above, neither the Assembly nor executive branch can incur such an obligation absent an appropriation**. *See* Const. art. III §§36, 37.

It is a fundamental principle of interpretation that the best reading "must harmonize the application of" provisions of equal weight because "there can be no justification for needlessly rendering [these two provisions] in conflict if they can be interpreted harmoniously." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 180 (2012). This canon applies even to provisions, such as the Amendment, that contain the phrase "[n]otwithstanding any provision of law to the contrary." See *Weinstock v. Holden,* 995 S.W.2d 411, 420 (Mo. 1999) ("The phrase applies, by its terms, only to the other provisions of the Constitution that are 'to the contrary' and not possible of harmonization."). The Amendment thus can displace the Assembly's and Governor's constitutionally mandated roles in the appropriations process only if there is "an irreconcilable repugnance between" the Amendment and the Constitution's existing provisions. *Barnes v. Bailey,* 706 S.W.2d 25, 29-30 (Mo. 1986). No such repugnance exists. Indeed, the Amendment was allowed on the ballot in the first place only after courts determined that it *does not purport to alter the constitutional appropriation process. See Cady,* 606 S.W.3d at 665; *see also Cady,* 2020 WL 5093610, at *3. Because the Amendment is silent regarding appropriations, it does not conflict with the constitutional appropriation and budget provisions. Its implementation remains subject to the traditional appropriations process, and neither the Assembly nor the Executive can take any steps that would obligate the State to expand Medicaid—such as submission of an expansion SPA—absent a lawful appropriation.

III. The Governor and Assembly Should Not Act to Fund Medicaid Expansion

Through their Constitution, the people of Missouri have resolved that a fiscally responsible government is of fundamental importance. Medicaid expansion, by contrast, is a massive, open-ended commitment that would strain the State's budget in perpetuity and crowd out other important spending priorities. Indeed, to cover just one year of the expanded program would likely cost the State $200 million, which would seriously imperil the Assembly's ability to adequately fund the State's countless other commitments. Even those figures, moreover, are almost certainly too low. For the States that have expanded Medicaid, expenditures and enrollment have inevitably dwarfed the initial projections. As noted above, in expansion States, both enrollment and cost per enrollee ultimately exceeded federal projections by more than *50 percent. See Why States Should Not Expand Medicaid,* supra.

Expansion would also divest the Assembly's and Governor's ability to implement their duty to maintain a balanced budget. Once the federal government has accepted a State's expansion application, it is under no obligation to allow the State to revoke or curtail the expansion if it proves to be more costly than initially anticipated. And the State's obligations under its

expansion plan—revokable only by consent of the federal government—are *mandated* by federal law. Thus, in the future, if Medicaid expansion is draining funds from other important priorities such as education, Medicaid expansion would win out every time. The act of submitting an expansion SPA to the Federal government would thus place Medicaid funding as the State's top funding priority as a function of federal law, any state-law constitutional constraints notwithstanding. And, of course, the federal government is under no obligation to *continue* funding 90% of the costs of expansion in the future; indeed, President Obama proposed lowering the matching rates just a few years after the ACA was enacted. In short, expansion would tie the State's hands on critical budgetary matters and leave it at the mercy of federal laws and regulations in determining how to allocate scarce funding between Medicaid and other important state priorities.

The concerns with Medicaid expansion by no means end there, and also include the following well-documented problems in States that have chosen to pursue expansion:

- **Harming the truly needy:** Whereas the initial iteration of the Medicaid program focused on giving care to those who could not fend for themselves—such as the disabled and poor families with young children—the expansion population includes able-bodied adults without children who are far less in need of public benefits. By expanding coverage to these individuals, the State would divert scarce resources away from those who need it the most.

- **Worse access to care:** Medicaid *coverage* does not automatically translate into *care*. Due to complex paperwork and administrative burdens and low reimbursement rates, many healthcare providers do not accept Medicaid patients at all. Expansion would thus place even more strain on the providers who serve such patients, resulting in delays in receiving care and potentially lower quality care for those currently enrolled in the Medicaid program.

- **No improvement in health outcomes:** There is no good evidence suggesting that Medicaid expansion actually improves health outcomes. Between 2013 and 2017, overall mortality and drug overdose deaths were worse in States that expanded Medicaid than those that did not. And a pilot program in Oregon in which some uninsured adults were randomly selected by lottery to receive Medicaid benefits found no improvement in health outcomes between those who received the benefits and those who did not. There is also no evidence that Medicaid expansion has helped in the fight against COVID-19—to the contrary, 70 percent of the 10 states with the highest deaths per capita are expansion states.

Finally, allowing Medicaid to be expanded in the absence of an appropriation would promote irresponsible uses of the initiative process in the future. The Medicaid expansion amendment passed by a slim margin even though it was studiously silent as to how the massive costs of the expansion would be funded. That amendment almost certainly would have been defeated if it had detailed the tax hikes or offsetting spending cuts that would be needed to pay for the expansion. Allowing this gambit to succeed would thus create terrible incentives for the proponents of future initiatives: they could secure passage of costly new programs or spending through the initiative process and then leave the Assembly and the Governor with all the difficult choices and tradeoffs about how to pay for those programs. This would ensure that future proponents of ballot initiatives tout the benefits of their new

programs while hiding or downplaying the costs. The need to avoid such gamesmanship is precisely why the Constitution prohibits appropriation by initiative. *See Bartle,* 359 S.W.2d at 718. Appropriations are made through a complex and deliberative process filled with checks and balances for a reason. In enacting their fundamental law, the people of Missouri vested their elected representatives and officials with the duty to act responsibly with the People's money. Missouri's government must reject attempts to circumvent the State's commitment to a balanced budget by appeal to idealistic but unfunded and irresponsible promises.

CONCLUSION

Nothing in the Amendment compels the General Assembly and Governor to take steps to implement Medicaid expansion absent an appropriation. Implementing this expansion would conflict with Missouri's commitment to a balanced budget, would pose a grave threat to the State's long-term fiscal outlook, would leave the State at the mercy of federal mandates, and would divert scarce Medicaid resources away from those who truly need it the most. The State should decline to pursue this irresponsible policy.

REFERENCES

1. See Virginia Young, "In first vote this year on Medicaid expansion, Mo. Senate predictably says no," St. Louis Post-Dispatch (Feb. 5, 2014), https://bit.ly/2KXtd01.
2. See SB 518 (2014), https://bit.ly/2YuGpwp; David A. Lieb, "Missouri Senate defeats Medicaid expansion," Associated Press (Feb. 5, 2014), https://bit.ly/3j0cXrF; Elizabeth Crisp, "Missouri House committee rejects Medicaid expansion bill," St. Louis Post-Dispatch (Feb. 26, 2013), https://bit.ly/3sZ7Z30.
3. Id.
4. See Jason Taylor, "Missouri becoming more isolated with state's refusal to expand Medicaid," Missourinet (Nov. 16, 2018), https://bit.ly/3orVxoY.
5. For the mechanics of the Medicaid SPA process, see infra I.D.