

# Next Steps to Defeat Medicaid Expansion in Missouri

**To:** OSP Partners

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## Key Points

- In its reversal of the lower court's ruling, the Missouri Supreme Court extended an open invitation to the General Assembly to explicitly decline to fund Medicaid expansion.
- The Court held that, “[t]he General Assembly maintains the discretion to decide whether and to what extent it will appropriate money for MO HealthNet programs,” acknowledging that the legislature has the authority to explicitly withhold funding for the expansion population (able-bodied adults).
- The General Assembly has an opportunity to solidify its intent regarding the funding of the expansion group as invited to do by the Missouri Supreme Court. The governor may call a special legislative session and the General Assembly may then pass a single subject appropriation bill that explicitly states that the General Assembly is not providing any funding for the expansion group, while also amending HB10 and HB11 to state the same.
- Following passage of this appropriation bill and these amendments, another lawsuit by Plaintiffs can be expected, in which the state will likely prevail.

## Overview

On July 22, 2021, the Missouri Supreme Court reversed the lower court's ruling which had declared the Medicaid expansion amendment unconstitutional in violation of article III, § 51 of the Missouri Constitution.<sup>1</sup> In finding that the Medicaid expansion amendment did not violate article III, § 51, the Court drew a distinction between an initiative that appropriates money, which is unconstitutional, and one that merely requires the expenditure of money in order to implement it, which the Court held does not violate the Missouri Constitution.<sup>2</sup>

The key, according to the Court, is that the General Assembly must maintain, “discretion in appropriating funds to implement [the] initiative,” which the Court stressed has been maintained by the General Assembly here.<sup>3</sup> In other words, as long as the General Assembly maintains the power to choose whether or not to fund an initiative (that costs money but has not raised any new funds to cover those costs) and to what extent, then the initiative will not be seen to appropriate funds in violation of the Missouri Constitution.

In addition, refusing to look beyond the text of the General Assembly's appropriation bills, the Court also held that House Bills 10 and 11 did not contain a limitation against using the funds appropriated for the FY22 MO HealthNet program to also fund the Medicaid expansion amendment. Without an explicit limitation in the language of the statute, the Court concluded that the General Assembly must have intended to provide the Department of Social Services (DSS)



with, “appropriation authority to provide services for all individuals eligible for MO HealthNet, including individuals eligible for coverage and services pursuant to [the Medicaid expansion amendment].”<sup>4</sup>

In the end, the Missouri Supreme Court sent the case back to the lower court with instructions to enter judgement for the Plaintiffs and to determine and issue appropriate court orders to carry out the Court’s ruling. This is where the case currently stands.

The purpose of this memo is to determine what course of action the governor and General Assembly must now take to stop Medicaid expansion, and to highlight some future courses of action that Plaintiffs are likely to take in response.

## **Next Steps that Should be Taken to Ensure the Medicaid Expansion Effort is Defeated**

Although the Missouri Supreme Court reversed the lower court’s decision, it carved out an important avenue for defeating the Medicaid expansion effort. The Court held that, “[t]he General Assembly maintains the discretion to decide whether and to what extent it will appropriate money for MO HealthNet programs.”<sup>5</sup> Moreover, any initiative “that deprives the General Assembly of discretion and requires it to appropriate money for the initiative’s purposes” will violate article III, §51.<sup>6</sup> In other words, the Court has called on the General Assembly to perform its function under the Missouri Constitution by clarifying its original intent not to appropriate funds to cover the expansion population.

To defeat the Medicaid expansion effort, two steps should be taken. First, the governor must call a special legislative session. In Missouri, the governor “may convene the General Assembly in special session for a maximum of 60 calendar days at any time,” but “[o]nly subjects recommended by the Governor in his call or a special message may be considered.”<sup>7</sup> Therefore, the governor must call a special legislative session for the purpose of allowing the legislature to make clear—through a single subject appropriations bill and amendments to existing appropriation bills—whether or not it intends to fund the Medicaid expansion amendment.

Second, the General Assembly must pass a single subject appropriation bill that explicitly states that the General Assembly is not providing any funding for the expansion group, while also amending HB10 and HB11 to state the same. The General Assembly should also go through the entire Medicaid appropriation line by line and specify that each line item is intended only for the pre-expansion population.

The following is suggested language to be included in the new appropriation bill:

*“No funds appropriated for FY 2022 shall be used to provide coverage or services to individuals who would not be eligible for MO HealthNet but for article IV, section 36(c) of the Missouri Constitution.”*

The following is suggested language to be included in HB10 and HB11:

*“No funds appropriated in this bill shall be used to provide coverage or services to individuals who would not be eligible for MO HealthNet but for article IV, section 36(c) of the Missouri Constitution.”*

The following is suggested language to be included in HB10 and HB11, line by line:



*“The funds appropriated in this line item are intended to be used to provide coverage or services only to individuals who would be eligible for MO HealthNet in the absence of article IV, section 36(c) of the Missouri Constitution.”*

The General Assembly’s authority to pass such an appropriation bill and to make the above-described amendments, all of which simply refuse to fund the Medicaid expansion amendment in its entirety is clearly within the power of the General Assembly and avoids the constitutional issues outlined in *Planned Parenthood*, described below.<sup>8</sup>

## **Following Passage of the Appropriation and Amendments Described Above Another Lawsuit Should be Expected Which will Likely Fail**

Finally, it should be noted that while the Missouri Supreme Court’s ruling does provide the avenue outlined above by which the General Assembly may refuse to fund Medicaid expansion, it will likely lead to another legal challenge from Plaintiffs once the supplemental budget has been passed.

The subsequent lawsuit will likely allege that the Missouri General Assembly’s supplemental budget bill violates the Missouri Supreme Court’s holding in *Planned Parenthood* which held that “[a]ny attempt to use an appropriation bill to amend such general laws necessarily runs afoul of the multiple subject prohibition in article III, section 23 of the Missouri Constitution.”<sup>9</sup> In other words, Plaintiffs will argue that by refusing to fund the Medicaid Expansion Amendment, the General Assembly is amending the law in violation of the Missouri Constitution.

This subsequent lawsuit will likely fail and—though highly unlikely—could result in the Missouri Supreme Court potentially overruling its recent decision in *Planned Parenthood*, as DSS argued it must, but which the Court carefully avoided having to do by finding that the MO Healthnet FY 2022 appropriation bills did “not restrict funding for coverage or services provided by [the Medicaid expansion amendment].”<sup>10</sup>

The most likely result will be that the Court will distinguish this case from *Planned Parenthood* by finding that whereas the General Assembly in *Planned Parenthood* sought to deny funding to only a subgroup of providers who were included in the full group authorized for funding under the current law, which the Court found to constitute an amendment to the law, here, the General Assembly is simply using its discretion to refuse to fund the entire group included under 36(c) and in no way amending it. Regardless, the most likely outcome will be that the subsequent lawsuit filed by Plaintiffs following passage of the supplemental budget bill and amendments outlined above will fail.

## **Bottom Line**

To defeat this Medicaid Expansion effort the governor may call a special legislative session for the purpose of allowing the legislature to pass a supplemental budget bill and to amend existing appropriation bills. The General Assembly may then pass a bill that explicitly states that the General Assembly has not and is not appropriating any funding for the expansion group, while also amending HB10 and HB11 to state the same.

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<sup>1</sup> Mo. Const. art. III, §36(c) (hereinafter, the “Medicaid Expansion Amendment”).

<sup>2</sup> *Doyle, et al. v. Tidball, et al.*, 2021 Mo. LEXIS 261, \*10.

<sup>3</sup> *Id.* at \*10-11.

<sup>4</sup> *Id.* at \*13.



# LEGAL MEMO

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<sup>5</sup> *Id.* at \*12.

<sup>6</sup> *Id.* at \*8.

<sup>7</sup> Missouri House of Representatives, “The Legislative Process in Missouri,” <https://house.mo.gov/billtracking/info/howbill.htm>.

<sup>8</sup> See e.g., *Rebman v. Parson*, 576 S.W.3d 605, 610 (Mo. 2019) (“General Assembly ‘has the undoubted power to make or to refuse to make an appropriation authorized by the Constitution.’”); *Planned Parenthood of St. Louis Region v. Dep’t of Social Servs.*, 602 S.W.3d 201 (Mo. Banc 2020).

<sup>9</sup> *Id.* at 211.

<sup>10</sup> *Doyle, et al. v. Tidball, et al.*, 2021 Mo. LEXIS 261, \*15, n.6.