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What's Next?: Missouri's Medicaid Expansion after Doyle v. Tidball

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NOTE

What's Next?: Missouri's Medicaid Expansion after *Doyle v. Tidball*

Doyle v. Tidball, 625 S.W.3d 459 (Mo. 2021) (en banc).

Jayke Simsheuser*

I. INTRODUCTION

For Autumn Stultz, a single mother suffering from severe tonsil stones, Melinda Hille, a Type 1 Diabetic forced to choose between eating and paying for medication, Stephanie Doyle, a mother of three unable to afford her eczema medications, and approximately 275,000 other Missourians, August 10, 2021 was a good day.¹ More than a decade after the enactment of the Affordable Care Act and just over a year since Missourians voted to expand Medicaid, Missourians ages 19 to 65 making under 138% of the federal poverty level became officially eligible for Medicaid coverage through the state's MO HealthNet program.² Their excitement, however, may be short-lived.

In *Doyle v. Tidball*, the Supreme Court of Missouri held that Medicaid expansion, codified in Article IV, Section 36(c) of the Missouri Constitution, was validly enacted.³ But, it did so walking a thin and potentially unstable constitutional line.⁴ Because the court declined to fully clarify the extent of the General Assembly's discretion in funding the

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¹ See Petition for Declaratory & Injunctive Relief, *Doyle v. Tidball*, 2021 WL 2629499 (Mo. Cir. Ct.), (No. 21AC-CC00186), 2021 WL 4197488.

² *Doyle v. Tidball*, 2021 WL 4205081, *1 (Mo. Cir. Ct.), *aff'd in part, vacated in part*, 625 S.W.3d 459 (Mo. 2021) (en banc).

³ *Doyle v. Tidball*, 625 S.W.3d 459, 460 (Mo. 2021) (en banc).

⁴ *Id.* at 460–61.

program,⁵ it has left the door open to an underfunded MO HealthNet system and future constitutional challenges.

Part II of this Note outlines the facts and holding of *Doyle*. Part III explains the history of Medicaid and Missouri constitutional challenges under Article III, Section 51. Part IV then examines the Supreme Court of Missouri's reasoning in deciding *Doyle*. Finally, Part V argues the court's holding did not go far enough and may result in eligible Missourians being denied the very coverage now guaranteed to them in Article IV, Section 36(c).

II. FACTS AND HOLDING

Missouri has long embraced the initiative process, which allows voters to amend the state constitution directly.⁶ This process has remained popular and resulted in the passage of a myriad of large-scale policy proposals, including demands for increased minimum wage, sanctioning medical marijuana, campaign financing reform, and more.⁷

In August 2020, by a vote of 53.25% to 46.75%, Missouri voters amended the Missouri Constitution to expand Medicaid.⁸ Before this expansion, Missouri restricted MO HealthNet coverage to certain categories of low-income individuals, including “those receiving state supplement payments for the aged, blind, and disabled; pregnant women; children under age 19; their custodial parents; and those who [were] 65 and older.”⁹ After nearly a decade of failed attempts,¹⁰ MO HealthNet

⁵ *Id.* at 465.

⁶ Nicholas R. Theodore, *We the People: A Needed Reform of State Initiative and Referendum Procedures*, 78 MO. L. REV. 1401, 1407 (2013) (detailing the early history of initiative petitions in Missouri); Gunnar Johanson, Note, *Indirect Initiative and Unpopular Referendum in Missouri*, 86 MO. L. REV. 625, 630 (2021).

⁷ Johanson, *supra* note 6 at 630–31 (listing thirteen separate initiative petitions approved by Missouri voters between 2006 and 2013).

⁸ *Official Election Results*, BD. OF STATE CANVASSERS (Aug. 24, 2020), https://www.sos.mo.gov/CMSImages/ElectionResultsStatistics/All_Results_2020_Primary_8_4_2020.pdf [<https://perma.cc/UU4J-L6P6>].

⁹ *Doyle*, 625 S.W.3d at 460–61; *see* MO. REV. STAT. § 208.151 (2019).

¹⁰ David A. Lieb, *Petition seeks to put Medicaid expansion on Missouri ballot*, AP NEWS (May 1, 2020), <https://apnews.com/article/aa28ce3a907ed506dc7698ed58770937> [<https://perma.cc/M7P4-ZZNS>]. In 2012 and 2013, then-Governor Jay Nixon pushed for Medicaid expansion, but was thwarted by Republican-led efforts to maintain the status quo. Rudi Keller, *Missouri Medicaid Expansion: Will it Bust the Budget or Pay for Itself?*, COLUMBIA DAILY TRIBUNE (last updated Oct. 25, 2020), <https://www.columbiatribune.com/story/news/state/2020/10/23/missouri-medicaid-expansion-bust-budget-pay-itself/3744313001/> [<https://perma.cc/7JP6-PJP3>]; Kyle Cheney, *Missouri Nixes Medicaid Expansion*, POLITICO (May 8, 2013), <https://www.politico.com/story/2013/05/missouri-lawmakers-torpedo-medicaid->

eligibility drastically expanded to include individuals between ages 19 and 65 with household incomes up to 138% of the federal poverty level.¹¹

In addition to covering 275,000 more Missourians,¹² Article IV, Section 36(c) declares qualifying Missourians “*shall* be eligible for medical assistance under MO HealthNet and *shall* receive coverage for the health services package.”¹³ The amendment also required the Department of Social Services (“DSS”) to “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” by March 1, 2021, and to “take all actions necessary to maximize federal financial participation in funding medical assistance pursuant to this section.”¹⁴

Despite the mandate, members of the Missouri legislature intensely debated and resisted funding the program.¹⁵ Notwithstanding a significant

expansion-091040 [https://perma.cc/QZ6P-KLT4]. In 2014, SB 661 was introduced to expand Medicaid in step with the ACA, but failed to make it out of committee. SB 661, 97th General Assembly, (Mo. 2014), https://www.senate.mo.gov/14info/BTS_Web/Bill.aspx?SessionType=R&BillID=28098253 [https://perma.cc/KSB6-W822]. Again in 2015, SB 90 was introduced to expand MO Healthnet, but died in committee. SB 90, 98th General Assembly (Mo. 2015), https://www.senate.mo.gov/15info/BTS_Web/Bill.aspx?SessionType=R&BillID=23 [https://perma.cc/M53M-MKCD]. In 2016, another effort to expand MO HealthNet was defeated in committee. SB 648, 98th General Assembly (Mo. 2016), https://www.senate.mo.gov/16info/BTS_Web/Bill.aspx?SessionType=R&BillID=22246558 [https://perma.cc/N69Y-UNXF]. More successful attempts occurred in 2019 and 2020. See SB 27, 100th General Assembly (Mo. 2019), https://www.senate.mo.gov/19info/BTS_Web/Bill.aspx?SessionType=R&BillID=94 [https://perma.cc/4NNP-HJQN]; SB 104, 100th General Assembly (Mo. 2019), https://www.senate.mo.gov/19info/BTS_Web/Bill.aspx?SessionType=R&BillID=40 [https://perma.cc/6XTQ-HF4P]; SB 564, 100th General Assembly (Mo. 2020), https://www.senate.mo.gov/20info/BTS_Web/Bill.aspx?SessionType=R&BillID=26838066 [https://perma.cc/WZP3-AXWN].

¹¹ *Doyle*, 625 S.W.3d at 461; Mo. CONST. art. IV, § 36(c).

¹² Brief for Missouri House of Representatives as Amicus Curiae in Support of Respondents at 11, *Doyle v. Tidball*, 625 S.W.3d 459 (Mo. 2021) (No. SC 99185), 2021WL 3173695.

¹³ Mo. CONST. art. IV, § 36(c) (emphasis added). When interpreting constitutional language, Missouri courts have stressed the importance of giving the language its plain meaning. See, e.g., *Richards v. Treasurer of Missouri*, 179 S.W.3d 299, 304 (Mo. Ct. App. 2005). The usage of the word “shall” in constitutional language is significant and its plain meaning “connotes a mandatory duty.” *McAlister v. Shrohmeyer*, 395 S.W.3d 546, 552 (Mo. Ct. App. 2013) (quoting *St. Louis Police Officers' Ass'n v. Bd. of Police Comm'rs of City of St. Louis*, 259 S.W.3d 526, 528 (Mo. 2008) (en banc)).

¹⁴ Mo. CONST. art. IV, § 36(c).

¹⁵ Kurt Erickson, *Missouri Senate Rejects Funding for Medicaid Expansion*, ST. LOUIS POST-DISPATCH (Apr. 28, 2021), <https://www.stltoday.com/news/local/govt-and-politics/missouri-senate-rejects-funding-for-medicaid->

budget surplus estimated at \$1.1 billion, many Republican members contended that the state could not handle the long-term financial impacts of Medicaid expansion.¹⁶ Even amid a groundswell of support and claims that expansion could actually spur a boon to the Missouri economy,¹⁷ some Republicans argued that their constituents were misled as to the financial effects of Medicaid expansion and vowed to “protect them from that lie.”¹⁸

Despite legislative resistance, a plan was submitted in compliance with the Section 36(c) mandate.¹⁹ However, that plan was eventually withdrawn by DSS, citing a lack of adequate funding from the General Assembly.²⁰ DSS announced it could not provide coverage to the newly eligible population because the General Assembly failed to appropriate funds specifically for those individuals.²¹ According to DSS, House Bills 10 and 11 – the appropriation bills funding MO HealthNet Fiscal Year 2022 – “implicitly . . . require[d] that none of the appropriated funds be used to provide coverage or services to individuals who would be eligible for MO HealthNet only pursuant to article IV, section 36(c).”²² DSS contended that the General Assembly, relying in part on the United States Supreme Court’s line-drawing between pre-expansion and post-expansion Medicaid,²³ intended to fund *only* the pre-expansion population.²⁴ In light of DSS’s interpretation and the General Assembly’s apparent intent,

expansion/article_33249172-2601-51ff-b4fd-4ff541ed3331.html
[https://perma.cc/AZU8-DJHS].

¹⁶ Sebastian Martinez Valdivia, *Missouri Legislature Tries To Back Out Of Voter-Approved Medicaid Expansion*, NPR (Apr. 8, 2021), <https://www.npr.org/sections/health-shots/2021/04/08/985033020/missouri-legislature-tries-to-back-out-of-voter-approved-medicaid-expansion> [https://perma.cc/GDP4-FCKS].

¹⁷ See *New Impact Report Shows Broad Economic Benefits to Medicaid Expansion in Missouri*, MO. FOUND. FOR HEALTH (Jun. 9, 2020), <https://mffh.org/news/new-impact-report-shows-broad-economic-benefits-to-medicaid-expansion-in-missouri/> [https://perma.cc/62QZ-WFL4]; Andrew D. Martin and David H. Perlmutter, *Support for Medicaid Expansion in Missouri*, WASHINGTON UNIV. IN ST. LOUIS, OFFICE OF THE CHANCELLOR (June 23, 2020), <https://andrewdmartin.wustl.edu/support-for-medicaid-expansion-in-missouri/> [https://perma.cc/Q334-DRJ2].

¹⁸ Valdivia, *supra* note 16.

¹⁹ *Doyle v. Tidball*, 625 S.W.3d 459, 461 (Mo. 2021) (en banc).

²⁰ *Id.*

²¹ *Id.* at 465.

²² *Id.*

²³ See Brief of the Missouri House of Representatives as Amicus Curiae in Support of Respondents, *Doyle v. Tidball*, 625 S.W.3d 459 (Mo. 2021) (en banc) (No. SC 99185), 2021 WL 3173695 at *22 (citing Chief Justice Robert’s language describing Medicaid expansion under the ACA as “a shift in kind, not merely of degree” resulting in a “new health care program.” *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 585 (2012)).

²⁴ *Id.* at *22–32.

Missouri Governor Michael L. Parson withdrew the expansion plan, noting that “[w]ithout a revenue source of funding authority from the General Assembly, we are unable to proceed with the expansion at this time. . . .”²⁵

Plaintiffs Autumn Stultz, Melinda Hille, and Stephanie Doyle, each newly eligible for Medicaid under expansion, filed suit against DSS after it announced its intent not to proceed with expansion.²⁶ They claimed they were eligible for and entitled to coverage through MO HealthNet and sought: “(1) a declaratory judgment stating DSS’ decision to refuse to extend benefits violate[d] article IV, section 36(c); and (2) an injunction requiring DSS and MO HealthNet to take the steps necessary to implement article IV, section 36(c), which include[d] re-filing the state plan amendment.”²⁷

The circuit court focused its analysis on whether Article IV, Section 36(c) violated *another* provision of the Missouri Constitution,²⁸ Article III, Section 51, which explicitly prohibits initiatives that appropriate funds not raised by the initiative itself.²⁹ Effectively, this provision prohibits Missouri voters from passing initiatives that are not self-funding or that remove the General Assembly’s discretion to use its appropriations power.³⁰

The circuit court found that Article IV, Section 36(c) created a new class of 275,000 eligible Missourians, an obligation on Missouri to cover at least 10% of the cost of the new population’s benefits, and an estimated \$1.8 million in expansion costs.³¹ However, the court also found that

²⁵ Becky Sullivan, *Missouri Will Not Expand Medicaid Despite Voter’s Wishes, Governor Says*, NPR (May 13, 2021, 3:32 PM ET), <https://www.npr.org/2021/05/13/996611586/missouri-will-not-expand-medicaid-despite-voters-wishes-governor-says> [<https://perma.cc/7Y29-QLUE>].

²⁶ Complaint at 11, *Doyle v. Tidball*, 2021 WL 2629499 (Mo. Cir. Ct.) (No. 21AC-CC00186).

²⁷ *Doyle*, 625 S.W.3d at 461.

²⁸ See *Doyle v. Tidball*, 2021 WL 2629499, *2–3 (Mo. Cir. Ct.), *aff’d in part, vacated in part*, 625 S.W.3d 459 (Mo. 2021) (en banc). A finding that Article IV, Section 36(c) violated Article III, Section 51 would render the amendment unconstitutional. Brief of the Missouri House of Representatives as Amicus Curiae in Support of Respondents, *Doyle v. Tidball*, 625 S.W.3d 459 (No. SC 99185), 2021 WL 3173695 at *12. While the Missouri Constitution grants the people the power to amend the constitution, “[t]he people, speaking with equal vigor through the same constitution, have placed limitations on the initiative power.” *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 827 (Mo. 1990) (en banc).

²⁹ MO. CONST. art. III, § 51 (“The initiative shall not be used for the appropriation of money other than of new revenues created and provided for thereby, or for any other purpose prohibited by this constitution.”).

³⁰ *Doyle*, 625 S.W.3d at 464.

³¹ *Doyle v. Tidball*, 2021 WL 2629499, *2 (Mo. Cir. Ct.), *aff’d in part, vacated in part*, 625 S.W.3d 459 (Mo. 2021) (en banc). (“The effect of the actual application

Article IV, Section 36(c) did *not* create its own source of funding.³² Rather, the court reasoned that Article IV, Section 36(c) implicitly required the General Assembly to appropriate additional funds for Medicaid expansion.³³ Thus, the court “determined the initiative that resulted in article IV, section 36(c) violated article III, section 51 of the Missouri Constitution and, therefore, was never effective.”³⁴ Because of Article IV, Section 36(c)’s “*shall* be eligible. . . and *shall* receive” language, the court found that the General Assembly would have no choice but to maintain a Medicaid program and fund its expansion.³⁵ As such, the circuit court held in favor of the defendants on all claims.³⁶

After some confusion on where to file,³⁷ plaintiffs appealed directly to the Supreme Court of Missouri, which exercised exclusive appellate jurisdiction under Article V, Section 3 of the Missouri Constitution.³⁸ Concluding that nothing in Article IV, Section 36(c) deprived the General Assembly of its appropriation discretion, the court held that the amendment did not violate Article III, Section 51 and was, therefore, effective.³⁹

of Amendment 2 is as follows: 1) Amendment 2 creates a class of 275,000 new eligibles for MO HealthNet Benefits; 2) The State will bear at least 10% of the cost of those benefits; and 3) The estimated cost for such expansion is 1.8 million dollars. The Missouri Constitution provides that state revenues may not be expended without an appropriation.”).

³² *Id.* at *2 n.4.

³³ The court acknowledged the plain effect of Article IV, Section 36(c). *Doyle*, 625 S.W.3d at 466. In the face of a Missouri constitutional guarantee of Medicaid coverage (if the state continued to have a Medicaid program at all), the General Assembly was left with no other option than to fund the expanded Medicaid program. *Id.* at 461. Although the Supreme Court of Missouri later rejected this plain understanding of Section 36(c), the court here recognized that Section 36(c) “indirectly requires the appropriation of revenues not created by the initiative and is therefore unconstitutional under Article III, section 51 of the Missouri Constitution.” *Doyle*, 2021 WL 2629499 at *3.

³⁴ *Doyle*, 625 S.W.3d at 462.

³⁵ *Doyle*, 2021 WL 2629499, at *2–3 (emphasis added).

³⁶ *Doyle*, 625 S.W.3d at 462.

³⁷ Professor Thomas B. Bennett (@Tommy_Bennett), TWITTER (Jun. 23, 2021, 3:33 PM), https://twitter.com/tommy_bennett/status/1407799064717058057 [https://perma.cc/JP8T-N4D9].

³⁸ *Id.*; MO. CONST. art. V, § 3 (“The supreme court shall have exclusive appellate jurisdiction in all cases involving the validity of . . . a provision of the constitution of this state. . .”).

³⁹ *Doyle*, 625 S.W.3d at 465 (The court also held that the circuit court did not err in overruling intervenors motion to intervene as of right).

III. LEGAL BACKGROUND

Medicaid maintains a fickle position in American healthcare and politics. On one hand, Medicaid is the primary vehicle to healthcare for over 75 million Americans.⁴⁰ On the other, the program – and particularly its expansion – remains a source of sharp criticism from Republican and right-wing politicians.⁴¹ As states like Missouri have sought to extend the program after the passage of the Affordable Care Act, they have been met with a frenzy of political and legal attacks.⁴² To better understand the development of Medicaid in Missouri and the legal challenges to its expansion under Article IV, Section 36(c), this Part examines the history of both MO HealthNet and challenges to it under Article III, Section 51. Specifically, this Part first discusses the history of Medicaid, subsequent legislative acts affecting the program, and the program's current impact in Missouri. Next, it examines the history of Article III, Section 51 challenges in Missouri and the Supreme Court of Missouri's approach to citizen-led initiatives.

A. Medicaid and Subsequent Legislative Acts

Since its enactment under Title XIX of the Social Security Act,⁴³ Medicaid has become a central facet of American healthcare.⁴⁴ The public insurance program gives federal funding to states that provide medical

⁴⁰ *February 2022 Medicaid & CHIP Enrollment Data Highlights*, MEDICAID.GOV, <https://www.medicaid.gov/medicaid/program-information/medicaid-and-chip-enrollment-data/report-highlights/index.html> [https://perma.cc/3DE9-RAP7] (last visited Jun. 3, 2022).

⁴¹ For example, despite the improved health outcomes associated with Medicaid expansion and increased federal funding under the Biden administration, Republicans like Wyoming State Senator Troy McKeown (R-WY) criticize Medicaid expansion as “penalizing hardworking Americans to make sure everyone gets a program” and moving American healthcare “closer to one-payer health care.” Sarah Kliff, *Obamacare's Survival Is Now Assured, but It Still Has One Big Problem*, N.Y. TIMES (Jun. 28, 2021), <https://www.nytimes.com/2021/06/28/upshot/medicaid-expansion-democrats-obamacare.html> [https://perma.cc/CH5R-3KQJ].

⁴² See e.g., *Doyle*, 625 S.W.3d at 459.

⁴³ Title XIX, Public Law 89–97, 1965 amendments to the Federal Social Security Act. Interestingly enough, Medicaid was signed into law by President Lyndon B. Johnson in Independence, Missouri at the Harry S. Truman Library on July 30, 1965. *Remarks with President Truman at the Signing in Independence of the Medicare Bill, July 30, 1965*, LBJ PRESIDENTIAL LIBRARY (Jul. 30, 1965), <https://www.lbjlibrary.org/object/text/remarks-president-truman-signing-independence-medicare-bill-07-30-1965> [https://perma.cc/JAZ2-LMUH]. President Truman, in fact, was in attendance. *Id.*

⁴⁴ Sara Rosenbaum, *Medicaid*, Health Policy Report, N ENGL J MED, Vol. 346, No. 8, 635, 636 (Feb. 21, 2002).

insurance for some of its neediest populations.⁴⁵ Although state participation is voluntary, every state in the country has elected to participate since 1982.⁴⁶ Missouri was quick to adopt the program and has continuously participated since 1967.⁴⁷ With 75 million Americans, including one in every six Missourians (before Article IV, Section 36(c)), receiving benefits under Medicaid through state programs, Medicaid's importance is difficult to overstate.⁴⁸

The program is jointly funded by federal and state governments but is run largely at the direction of the states.⁴⁹ As long as a state's Medicaid program meets the minimum federal standards, it receives federal funding as determined by the Federal Medical Assistance Percentage ("FMAP").⁵⁰ Generally speaking, a state's wealth relative to the rest of the country determines its FMAP apportionment.⁵¹ FMAPs range between 50% and 83%,⁵² with Missouri at 66.36%.⁵³

While Medicaid coverage was originally limited to "pregnant women, children, needy families, the blind, the elderly, and the disabled," the 2010 passage of the Patient Protection and Affordable Care Act ("ACA") dramatically expanded the program's reach.⁵⁴ The ACA,

⁴⁵ *Id.* at 635–36 ("There are two basic criteria for eligibility: financial need (as evidenced by low income or impoverishment due to high medical bills) and a federally recognized eligibility category (e.g., a household with dependent children, an age of 65 years or older, and disability). Both criteria must be met for enrollment.").

⁴⁶ Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 542 (2012).

⁴⁷ Mo. Found. for Health, *Missouri Medicaid Basics* (Spring 2019), <https://mffh.org/wp-content/uploads/2019/01/2018-Missouri-Medicaid-Basics-web.pdf> [<https://perma.cc/68Z5-G8UK>].

⁴⁸ Feb. 2022 Medicaid & CHIP Enrollment Data Highlights, *supra* note 40.

⁴⁹ Policy Basics: Introduction to Medicaid, CTR. ON BUDGET AND POL'Y PRIORITIES, (Apr. 14, 2020), https://www.cbpp.org/sites/default/files/atoms/files/policybasics-medicaid_0.pdf [<https://perma.cc/A55W-YQ4W>].

⁵⁰ Matching rates, MEDICAID AND CHIP PAYMENT AND ACCESS COMM'N, <https://www.macpac.gov/subtopic/matching-rates/> [<https://perma.cc/R2S3-22D8>] (last visited Apr. 23, 2022).

⁵¹ Keller, *supra* note 10. To encourage compliance with the ACA's Medicaid expansion mandate, the federal government would reimburse state governments for 90% of costs associated with expansion. Federal Financial Participation in State Assistance Expenditures; Federal Matching Shares for Medicaid, the Children's Health Insurance Program, and Aid to Needy Aged, Blind, or Disabled Persons for October 1, 2021 Through September 30, 2022, 85 Fed. Reg. 76586, 76587 (Nov. 30, 2020) [hereinafter Federal Financial Participation].

⁵² Medicaid's Federal Medicaid Assistance Percentage (FMAP), CONG. RSCH. SERV., (Jul. 29, 2020), <https://sgp.fas.org/crs/misc/R43847.pdf> [<https://perma.cc/F2MC-J2BT>].

⁵³ 85 Fed. Reg. 76588 (Nov. 30, 2020).

⁵⁴ Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 541–42 (2012); *see also* Olena Mazurenko et al., *The Effects of Medicaid Expansion Under The ACA: A Systematic Review*, 37(6) HEALTH AFFAIRS 944, 944 (2018).

commonly referred to as “Obamacare,” aimed to provide affordable health care to millions of Americans.⁵⁵ The implications of the ACA were broad but focused on: (1) guaranteed access to insurance for individuals with pre-existing conditions; (2) reduction of insurance premiums by use of community-based pricing; (3) mandated purchase of insurance for individuals; (4) access to essential benefits without additional payments; and (5) Medicaid eligibility expansion.⁵⁶ The ACA originally *required* participating states to expand state Medicaid eligibility criteria to include “nonelderly adults with incomes up to 138 percent of the federal poverty level” or risk losing *all* federal Medicaid funds.⁵⁷ Mandated expansion was met with stern resistance and subjected to several constitutional challenges,⁵⁸ which were ultimately resolved by the Supreme Court of the United States in *National Federation of Independent Business v. Sebelius* (“*NFIB*”).⁵⁹

In *NFIB*, a fractured Supreme Court considered whether mandatory Medicaid expansion fell within Congress’s constitutional spending power.⁶⁰ The Court ultimately held that the mandatory expansion was unconstitutional because Congress exceeded the scope of its power when it conditioned all Medicaid funding on a state’s agreement to drastically expand Medicaid coverage.⁶¹ Rather than completely striking down the ACA’s Medicaid Expansion provision, however, the Court declared that states must comply with the ACA’s expansion criteria only if they choose to accept the additional funds offered by the federal government.⁶² In other words, while there is no penalty for refusing to expand, additional federal funding through the ACA is made available only to those states

⁵⁵ Namrata Uberoi et al., Issue Brief: Health Insurance Coverage and the Affordable Care Act, 2010–16, ASPE (Mar. 3, 2016) (estimating twenty million previously uninsured adults gained access to coverage because of the ACA by 2016).

⁵⁶ See *Nat’l Fed’n of Indep. Bus.*, 567 U.S. at 538–40.

⁵⁷ Mazurenko, *supra* note 54.

⁵⁸ See *Nat’l Fed’n of Indep. Bus.*, 567 U.S. at 530–31.

⁵⁹ *Id.* at 585. The Court also addressed other constitutional challenges, including whether the individual mandate was a valid use of Congress’s powers. *Id.* at 546–47.

⁶⁰ *Id.* at 585; U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, *to pay the Debts and provide for the common Defence and general Welfare of the United States*; but all Duties, Imposts and Excises shall be uniform throughout the United States.”) (emphasis added).

⁶¹ *Nat’l Fed’n of Indep. Bus.*, 567 U.S. at 583 (The court reasoned that the mandate represented a “shift in kind, not merely degree” in that the ACA conditioned both the “new” and the “old” funding on a state’s expansion of Medicaid. Such a shift exceeded the Congress’s spending power.).

⁶² *Id.* at 587–88 (Despite finding that the expansion mandate was unconstitutional, the court found thrust of the act “need not fall in light of [the Court’s] constitutional holding.”).

which agree to expand their Medicaid programs to the newly eligible populations.⁶³

Despite Medicaid's nationwide presence, its expansion has met significant resistance among the states.⁶⁴ Currently, thirty-eight states and the District of Columbia have expanded or started expanding Medicaid.⁶⁵ Much of the concern for non-expansion states has related to increased costs associated with expansion—a concern that seems warranted given that the estimated cost per enrollee was \$6,366 as of 2015.⁶⁶ At least in part, however, that apprehension is ameliorated by the ACA's federal reimbursement for expansion states.⁶⁷ As of 2020, and for as long as the ACA remains in effect in its current form, the federal government reimburses ninety percent of Medicaid expansion costs incurred by the states.⁶⁸

Recently, Congress enacted increased financial incentives for states to expand Medicaid.⁶⁹ Amid the COVID-19 pandemic, Congress passed the Families First Coronavirus Response Act (“FFCRA”) and the American Rescue Plan Act (“ARPA”). The FFCRA increased FMAP for expansion states by 6.2% if states met the statutory requirements detailed in the Act.⁷⁰ Under the ARPA, states covering eligible individuals in the ACA expansion group receive an additional 5% FMAP increase on top of

⁶³ *Id.*

⁶⁴ So much so, thirteen states filed suit in the Federal District Court for the Northern District of Florida the very same day President Obama signed the ACA into law. *Id.* at 540.

⁶⁵ Feb. 2022 Medicaid & CHIP Enrollment Data Highlights, *supra* note 40.

⁶⁶ See e.g., Valdivia, *supra* note 16 (detailing Rep. Cody Smith, a Republican member of the General Assembly, statement on concerns on Medicaid expansion's impact on the state budget); Brian C. Blasé, *Evidence Is Mounting: The Affordable Care Act Has Worsened Medicaid's Structural Problems*, MERCATUS CENTER AT GEORGE MASON UNIVERSITY (2016) (citing CENTERS FOR MEDICARE & MEDICAID SERVICES, 2015 Actuarial Report on the Financial Outlook of Medicaid, at 27).

⁶⁷ Federal Financial Participation, *supra* note 51.

⁶⁸ *Id.* (noting the reimbursement rate for 2014–16 would be 100%, gradually declining to 90% in 2020, where it remains indefinitely).

⁶⁹ Missouri Medicaid Expansion Brings Quality Essential Health Coverage to More than 275,000 Missourians, CENTERS FOR MEDICARE & MEDICAID SERVICES (Oct. 4, 2021), <https://www.cms.gov/newsroom/press-releases/missouri-medicaid-expansion-brings-quality-essential-health-coverage-more-275000-missourians> [<https://perma.cc/UME3-FJZQ>].

⁷⁰ Families First Coronavirus Response Act, Pub. L. 116-127, § 6008(a) (2020); Medicaid CMS-64 FFCRA Increased FMAP Expenditure Data Collected through MBES, MEDICAID.GOV, <https://www.medicaid.gov/medicaid/financial-management/state-budget-expenditure-reporting-for-medicaid-and-chip/expenditure-reports-mbes/mbses/medicaid-cms-64-ffcra-increased-fmap-expenditure-data-collected-through-mbes/index.html> [<https://perma.cc/SZT9-DFSU>] (last visited Apr. 24, 2022). This increase, however, only lasted during the emergency period (through March 2022). *Id.*

the 6.2% increase provided in the FFCRA.⁷¹ Federal incentives for Medicaid expansion could be significant in Missouri, with the state standing to receive an additional \$968 million over the next two years in federal funding.⁷²

The federal government's incentivization of Medicaid expansion has been nothing short of immense. Covering nearly all costs of expansion and increasing other federal reimbursements,⁷³ the government has given states ample reason to expand. Despite this, some states have been resistant.⁷⁴ Missouri is no exception.⁷⁵ Only after multiple failed attempts to expand Medicaid following the passage of the ACA and a direct amendment of the state constitution was Missouri able to expand its MO HealthNet program.⁷⁶

B. Article III, Section 51 and Prior Missouri Challenges to Initiatives

In 2020, Missouri voters exercised their constitutional right to directly amend the Missouri Constitution by passing then-Amendment 2—now codified as Article IV, Section 36(c).⁷⁷ Generally, the initiative petition process operates as a popular referendum proposed and voted on directly by the citizens.⁷⁸ While Missourians “reserve power to propose and enact or reject laws and amendments to the constitution,” that power is not limitless.⁷⁹

The most pertinent of these restrictions is Article III, Section 51, which states in relevant part, “[t]he initiative shall not be used for the appropriation of money other than of new revenues created and provided for thereby, or for any other purpose prohibited by this constitution.”⁸⁰ In

⁷¹ *Missouri Medicaid Expansion Brings Quality Essential Health Coverage to More than 275,000 Missourians*, *supra* note 69.

⁷² *Id.*

⁷³ Robin Rudowitz et al., *New Incentive for States to Adopt the ACA Medicaid Expansion: Implications for State Spending*, KAISER FAMILY FOUND. (Mar. 17, 2021), <https://www.kff.org/medicaid/issue-brief/new-incentive-for-states-to-adopt-the-aca-medicaid-expansion-implications-for-state-spending/> [https://perma.cc/A4FW-L3AR].

⁷⁴ States that have not yet expanded Medicaid include: Alabama, Florida, Georgia, Kansas, Mississippi, North Carolina, South Carolina, South Dakota, Wisconsin, Wyoming, Tennessee, and Texas. *Status of State Medicaid Expansion Decisions: Interactive Map*, KAISER FAMILY FOUND. (Oct. 8, 2021), <https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map/> [https://perma.cc/6CW8-8GGW].

⁷⁵ *Id.*

⁷⁶ *Keller*, *supra* note 10.

⁷⁷ MO. CONST. art. IV, § 36(c); BD. OF STATE CANVASSERS, *supra* note 8.

⁷⁸ MO. CONST. art. IV, § 49.

⁷⁹ *Id.*

⁸⁰ *Id.* § 51.

other words, this provision ensures that the initiative petition process does not overtake the General Assembly's "virtually unbounded" power to appropriate state funds unless an initiative raises sufficient new revenues on its own.⁸¹ Practically, this makes sense. Appropriation decisions, in theory at least, are better trusted to the General Assembly, which is more informed on the state budget than the general public.

Article III, Section 51 challenges are scarcely litigated in Missouri courts.⁸² When brought, however, these challenges have typically involved initiative petitions that proposed city ordinances with the "evident purpose and effect" of removing the appropriation discretion from local governments.⁸³ Generally, Missouri courts have held that initiative petitions which expressly or, in some cases, implicitly force a City legislative body to appropriate funds violate Article III, Section 51.⁸⁴

In *Kansas City v. McGee*, for example, the Supreme Court of Missouri concluded that an initiative petition violated Article III, Section 51 where it proposed an ordinance to create a firemen's pension plan.⁸⁵ The ordinance explicitly required the City Council to make periodic payments into the pension plan in the amount requested by the trustees.⁸⁶ While the defendants contended that the ordinance was not an appropriations bill, and thus not subject to Article III, Section 51, the court noted that it would "take from the City Council the control over the finances of the City."⁸⁷ Because the ordinance forced the City Council's hand and removed its discretion in the appropriation of city funds, the court held that the ordinance violated Article III, Section 51.⁸⁸

The Supreme Court of Missouri faced a similar issue in *State ex rel Card v. Kaufman*.⁸⁹ There, the court considered an appeal of an issuance of a permanent writ of mandamus "requiring a mayor and city council to submit to voters a proposed amendment to the city charter."⁹⁰ The proposed amendment would have required that University City Fire Department employee salaries match or exceed those of employees of the Fire Department of St. Louis.⁹¹ Although the proposed amendment did

⁸¹ *Seay v. Jones*, 439 S.W.3d 881, 890 (Mo. Ct. App. 2014).

⁸² See Westlaw Notes of Decisions on MO. CONST. art. III, § 51 (citing 23 cases decided on this provision).

⁸³ *Boeving v. Kander*, 496 S.W.3d 498, 510 n.6 (Mo. 2016) (en banc).

⁸⁴ *Doyle v. Tidball*, 625 S.W.3d 459, 463–64 (Mo. 2021) (en banc).

⁸⁵ *Id.* at 463.

⁸⁶ *Kansas City v. McGee*, 269 S.W.2d 662, 666 (Mo. 1954) ("The ordinance [said that] the Council shall appropriate the amount asked for by the trustees administering the pension plan.").

⁸⁷ *Id.* at 665.

⁸⁸ *Id.* at 666.

⁸⁹ *State ex rel Card v. Kaufman*, 517 S.W.2d 78, 79 (Mo. 1974).

⁹⁰ *Doyle*, 625 S.W.3d at 464.

⁹¹ *Kaufman*, 517 S.W.2d at 79.

not explicitly require the City to appropriate a specific amount of money to Fire Department salaries, the court concluded that “it le[ft] *no discretion* to the city manager or the city council and in effect [was] an appropriation measure.”⁹² Because of the initiative petition’s potential effect on the City’s appropriation discretion, the court ruled that the proposed measure would have violated Article III, Section 51 and reversed the issuance of a permanent writ of mandamus.⁹³

In a more recent case, the Supreme Court of Missouri took up whether a local tax law violated Article III, Section 51.⁹⁴ In *City of Kansas City v. Chastain*, a proposed initiative imposed two new sales taxes to fund the construction of a light rail system and other public transportation developments.⁹⁵ The initiative generally instructed the legislature to spend the funds for public transportation.⁹⁶ But, it neither explicitly appropriated funds for a specific purpose nor committed the City to any particular project or development.⁹⁷ Unlike *Kaufman* and *McGee*, this proposed initiative involved raising new revenues via sales taxes.⁹⁸ The court synthesized its prior holdings, noting that “[w]hat is prohibited is an initiative that, either expressly or through *practical necessity*, requires the appropriation of funds to cover the costs associated with the ordinance.”⁹⁹ The court pointed to the proposed initiative’s new revenue sources and lack of explicit instruction to support its contention that the initiative imposed “no unfunded financial obligations on the city either expressly or through practical necessity.”¹⁰⁰ As such, the proposed initiative did not violate Article III, Section 51.¹⁰¹

While rare, Missouri courts have also reviewed Article III, Section 51 challenges before a state-wide election.¹⁰² In *Cady v. Ashcroft*, the Missouri Court of Appeals weighed in on the constitutionality of Medicaid expansion embodied in then-Amendment 2 before the August 2020 election.¹⁰³ The court noted that pre-election challenges to initiative

⁹² *Id.* at 80 (emphasis added).

⁹³ *Id.* at 81–82.

⁹⁴ See *City of Kansas Citv. Chastain*, 420 S.W.3d 550 (Mo. 2014) (en banc).

⁹⁵ *Id.* at 553–54.

⁹⁶ *Id.* at 556.

⁹⁷ *Id.* at 557 (Wilson, J., concurring).

⁹⁸ *Id.* at 556 (majority opinion). See also *Kaufman*, 517 S.W.2d at 79; *Kansas City v. McGee*, 269 S.W.2d 662, 665 (Mo. 1954).

⁹⁹ *Chastain*, 420 S.W.3d at 555 (emphasis added).

¹⁰⁰ *Id.* at 556.

¹⁰¹ *Id.*

¹⁰² See e.g., *Boevig v. Kander*, 496 S.W.3d 498 (Mo. 2016) (en banc); *Cady v. Ashcroft*, 606 S.W.3d 659, 665 (Mo. Ct. App. 2020); *Chastain*, 420 S.W.3d at 554–55.

¹⁰³ *Cady*, 606 S.W.3d at 664–65. Amendment 2 would go on to become MO. CONST., art. IV, § 36(c).

petitions are limited and primarily focus on whether an initiative has been properly placed before voters.¹⁰⁴ Particularly in cases involving Article 51, the court described the pivotal question as whether the initiative facially appropriates previously existing funds.¹⁰⁵ The court also noted that it is required to harmonize the initiative to the extent possible with the Missouri Constitution rather than create an irreconcilable conflict when it conducts a pre-election review.¹⁰⁶ Thus, the court was limited to reviewing whether then-Amendment 2 satisfied the petition requirements and whether it *blatantly* violated Article III, Section 51 on its face.¹⁰⁷

Despite the amendment's mandate that eligible individuals *shall* be eligible and *shall* receive MO HealthNet benefits, the court contended that the initiative did 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."¹⁰⁸ Ultimately, it saw the appellants' Article 51 arguments as focusing on what then-Amendment 2 "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."¹⁰⁹ Seemingly, the court reasoned that this interpretation harmonized the otherwise irreconcilable conflict between the proposed amendment and Article III, Section 51 by leaving to the General Assembly the discretion to fund Article IV, Section 36(c)'s guarantee.¹¹⁰ After the court determined there were no threshold defects or anything in then-Amendment 2 that facially violated Article III, Section 51, it affirmed the lower court's judgment and deferred the assessment of Medicaid expansion's constitutionality until after the measure passed.¹¹¹

¹⁰⁴ *Id.* at 666–67 (quoting *City of Kansas City v. Kansas City Board of Election Commissioners*, 505 S.W.3d 795, 798 (Mo. 2017) (en banc)) ("[P]re-election challenges are limited to claims that the procedures for submitting a proposal to the voters were not followed."); *Id.* at 668 (quoting *Chastain*, 420 S.W.3d at 554–55) ("In *Chastain*, the Missouri Supreme Court held that the trial court had been authorized 'to conduct pre-election review of the facial constitutionality of an initiative petition' because the issue was whether the proposed ordinance was plainly 'an unconstitutional appropriation ordinance under article III, section 51 of the Missouri Constitution.'").

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 665 (citing *Comm. for a Healthy Future, Inc. v. Carnahan*, 201 S.W.3d 503, 507 (Mo. 2006) (en banc)); *Consol. Sch. Dist. No. 1 of Jackson Cnty. v. Jackson Cnty.*, 936 S.W.2d 102, 103–04 (Mo. 1996) (en banc); *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 827 (Mo. 1990) (en banc).

¹⁰⁷ *Cady*, 606 S.W.3d at 667.

¹⁰⁸ *Id.* at 668.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 668–69.

¹¹¹ *Id.* at 668.

Missouri's Article III, Section 51 jurisprudence, especially after *Cady*, lacked a clear precedent for future courts to follow. In truth, it is no clearer today. However, Missouri caselaw seems to suggest that where an initiative petition explicitly or implicitly commandeers the legislature's appropriation discretion, it is constitutionally defective.¹¹² The line between a constitutional guarantee and legislative discretion, however, is difficult to discern. This tension was at the forefront of the Supreme Court of Missouri's discussion in *Doyle v. Tidball*.¹¹³

IV. INSTANT DECISION

In *Doyle v. Tidball*, a unanimous Supreme Court of Missouri vacated the circuit court's decision to invalidate Article IV, Section 36(c).¹¹⁴ Reviewing the matter *de novo*,¹¹⁵ the court began its analysis by defining the scope of Article III, Section 51's prohibition against appropriation-by-initiative.¹¹⁶ The court explained that "what article III, section 51 prohibits is an initiative that authorizes the expenditure and disbursement of a specified amount for a specified purpose without providing new revenue," including one which "deprives the General Assembly of discretion and requires it to appropriate money for the initiative's purposes."¹¹⁷

The court's analysis was straightforward. Because Article IV, Section 36(c) contained no explicit "stand appropriated" language or other similar phrase, the focus was on whether the amendment disrupted the General Assembly's discretion to appropriate state funds.¹¹⁸ The court noted that an initiative may still violate Article III, Section 51 – even where it does not expressly use the word "appropriation" – if it requires the General Assembly to appropriate a specified amount for the initiative's purpose.¹¹⁹ Distinguishing the case from *McGee, Kaufman*, and *Chastain*, the court determined that the General Assembly was not deprived of its discretion to "decide whether and to what extent it [would] appropriate money to MO HealthNet programs."¹²⁰

In other words, the court concluded that the General Assembly remained free to opt in or out of Medicaid *and* appropriate whatever funds

¹¹² See e.g., *City of Kansas City. Chastain*, 420 S.W.3d 550, 556 (Mo. 2014) (en banc).

¹¹³ *Doyle v. Tidball*, 625 S.W.3d 459, 467 (Mo. 2021) (en banc).

¹¹⁴ *Id.* at 460–65. The Supreme Court of Missouri also affirmed the circuit court's overruling of proposed intervenors motion to intervene as a matter of right. *Id.* at 462.

¹¹⁵ *Id.* at 463 (citing *Peters v. Johns*, 489 S.W.3d 262, 266 (Mo. 2016) (en banc)).

¹¹⁶ *Id.* at 463–64.

¹¹⁷ *Id.* at 463.

¹¹⁸ *Id.* at 464–65.

¹¹⁹ *Id.* at 465.

¹²⁰ *Id.*

it deemed necessary to fund MO HealthNet.¹²¹ With no violation of Article III, Section 51, the court overruled the circuit court's decision and held Article IV, Section 36(c) valid and enforceable.¹²²

The court also held that DSS's interpretation of House Bills 10 and 11 – that the General Assembly's intention to fund only the pre-expansion population prevented DSS from disbursing funds for coverage of the newly eligible population under Article IV, Section 36(c) – was invalid.¹²³ Despite the contentions that the General Assembly only appropriated funds to pre-expansion eligible Missourians,¹²⁴ the court found no “limitation against using the funds appropriated to provide coverage or services to individuals eligible under only Article IV, Section 36(c).”¹²⁵ In reaching its conclusion, the court interpreted the plain language of House Bills 10 and 11 and held that the “amounts appropriated and other extrinsic evidence cannot be used to alter the plain language of the purposes stated—to fund MO HealthNet without distinguishing between benefits provided to individuals who are eligible as part of the pre-expansion population and those eligible only under Art. IV, Section 36(c).”¹²⁶ In rejecting DSS's interpretation that the General Assembly only meant to appropriate funds for previously eligible Missourians, the court held DSS was required to disburse funds and services, so long as Missouri has a Medicaid program, to *all* eligible enrollees, regardless of when they became eligible.¹²⁷

The court vacated the circuit court's judgment as to the constitutionality of Article IV, Section 36(c) and remanded the case to the circuit court with instructions to enter judgment for the plaintiffs.¹²⁸

V. COMMENT

Following the Supreme Court of Missouri's ruling in *Doyle v. Tidball*, media outlets championed the decision as the final word on Missouri's Medicaid expansion.¹²⁹ The battle, however, is likely far from

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 465–66.

¹²⁴ Brief for Missouri House of Representatives as Amicus Curiae Supporting Respondents, *supra* note 12.

¹²⁵ *Doyle*, 625 S.W.3d at 465.

¹²⁶ *Id.* at 466.

¹²⁷ *Id.* at 466–67.

¹²⁸ *Id.* at 467.

¹²⁹ See, e.g., Jim Salter and Summer Ballentine, *Missouri Supreme Court reverses Medicaid Expansion Decision*, THE ASSOCIATED PRESS, (July 22, 2021), <https://apnews.com/article/courts-michael-brown-medicaid-3690befde29aa1b27406a3472fb566aa> [<https://perma.cc/24AK-UB39>]; Tami Luhby, *Missouri Supreme Court rules in favor of Medicaid expansion*, CNN, (July 22, 2021),

over. Despite its declaration that Article IV, Section 36(c) passed constitutional muster, the court did not reach the attendant question of what would happen to eligible Missourians if the General Assembly, in its discretion, underfunded MO HealthNet.¹³⁰ This decision may prove injurious to newly eligible populations and MO HealthNet moving forward.

On its face, it is difficult to reconcile how Medicaid expansion does not require, at least implicitly, the General Assembly to appropriate significant funds toward an expanded MO HealthNet. The expansion, covering 275,000 newly eligible Missourians, is reported to cost the state upwards of \$130 million annually after federal reimbursement.¹³¹ This leaves Missourians questioning how Section 36(c) cannot plainly force the General Assembly to appropriate additional funds to the MO HealthNet Program.

While the court correctly pointed out that an initiative does not violate Article III, Section 51 simply because an expenditure arises from its passage, its application of this principle to Article IV, Section 36(c) is misplaced.¹³² Costs related to expanding MO HealthNet are not merely incidental. Rather, they are necessary components of Article IV, Section 36(c)'s mandate. The court's prior jurisprudence has made clear that Article III, Section 51 prohibits initiatives that either explicitly or *implicitly* force the General Assembly to appropriate funds to a given initiative.¹³³ Because Article IV, Section 36(c) contains no explicit "shall stand appropriated" language, the salient question becomes whether it removes – either explicitly or implicitly – the General Assembly's appropriation discretion.¹³⁴ The text of Article IV, Section 36(c)'s mandate is clear: Missourians between the ages of 19 and 65, with household income up to 138% of the federal poverty level, "*shall* be eligible for medical assistance under MO HealthNet and *shall* receive

<https://www.cnn.com/2021/07/22/politics/missouri-medicaid-expansion-court/index.html> [https://perma.cc/Q9ME-NMUX].

¹³⁰ In fact, the court explicitly chose not to answer the question. *Doyle*, 625 S.W.3d at 467 n.4 ("The consequences of whether and how much to appropriate for any particular purpose from the nearly \$33 billion at the General Assembly's disposal can – and nearly always will – weigh heavily in the General Assembly's deliberations. But, those considerations – like the decisions themselves – belong to the General Assembly and not to this Court, and the consequences of appropriations that turn out to be less than the full cost of MO HealthNet for FY 2022 are not before the Court in this case.").

¹³¹ Luhby, *supra* note 129.

¹³² *Doyle*, 625 S.W.3d at 463–65.

¹³³ See e.g., *Kansas City v. McGee*, 269 S.W.2d 662, 662 (Mo. 1954); *State ex rel Card v. Kaufman*, 517 S.W.2d 78, 78 (Mo. 1974); *City of Kansas City v. Chastain*, 420 S.W.3d 550, 553 (Mo. 2014) (en banc).

¹³⁴ *Doyle*, 625 S.W.3d at 463–65.

coverage for the health benefits service package.”¹³⁵ The apparent effect of this mandate would be to *require* the General Assembly to appropriate adequate funds to accommodate the newly eligible population. Leaving no discretion for the General Assembly to determine whether to fund Medicaid expansion in the first place, Article IV, Section 36(c) would violate Article III, Section 51.¹³⁶

In a similar rationale to the *Cady* court,¹³⁷ the Supreme Court of Missouri in *Doyle* attempted to harmonize this conflict by holding that the General Assembly retained its discretion as to the appropriation of funds to MO HealthNet despite Article IV, Section 36(c)’s plain mandate.¹³⁸

The court’s logic is sweeping and, seemingly, allows the General Assembly to “decide whether and to what extent” to “appropriate money for MO HealthNet programs.”¹³⁹ At first glance, the court could have been referring to the General Assembly’s discretion to decide *whether* Missouri participates in Medicaid at all. Missouri, like all states since 1982, participates in Medicaid voluntarily and could opt out of the program at any time.¹⁴⁰ The court seemed to suggest that, because the General Assembly retains that threshold choice,¹⁴¹ Article IV, Section 36(c) removes none of the General Assembly’s discretion and comports with the requirement of Article III, Section 51.¹⁴²

¹³⁵ MO. CONST. art. IV, § 36(c).

¹³⁶ Generally, this is what the trial court held. *Doyle*, 625 S.W.3d at 463. Considering the political unfeasibility of withdrawing from Medicaid altogether, the initiative which became Article IV, Section 36(c) “indirectly require[d] the appropriation of revenues not created by the initiative and is therefore unconstitutional under Article III, section 51 of the Missouri Constitution.” *Doyle v. Tidball*, 2021 WL 2619499, *3 (Mo. Cir. Ct.), *aff’d in part, vacated in part*, 625 S.W.3d 459 (Mo. 2021) (en banc).

¹³⁷ *Cady v. Ashcroft*, 606 S.W.3d 659, 668–69 (Mo. Ct. App. 2020).

¹³⁸ *Doyle*, 625 S.W.3d at 465.

¹³⁹ *Id.*

¹⁴⁰ *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 542 (2012).

¹⁴¹ Although the trial court seemingly disagreed. *Doyle*, 2021 WL 2629499 at *2 (“Were there no Medicaid program currently funded, Amendment 2 would *require* the creation of one for its beneficiaries.”) (emphasis added).

¹⁴² There is a question, however, as to whether the General Assembly has a realistic choice of whether to participate in Medicaid or not. *Doyle*, 625 S.W.3d at 460. Considering Medicaid’s established role in Missouri healthcare and state budget, it seems at least arguable that if the General Assembly has a choice, it is in name only. *Id.* In a quintessential Hobson’s choice, the General Assembly would effectively be asked to either take away the state’s largest medical insurer or fund Medicaid expansion in Missouri. *Id.* Considering Medicaid’s entrenchment in Missouri healthcare and the importance of MO HealthNet benefits to thousands of Missourians, the General Assembly opting out of Medicaid is, at best, far-fetched. *Id.* If the choice made at the discretion of the General assembly is really no choice at all, then the General Assembly’s discretion has effectively been removed in violation of Article III, Section 51. *Id.*

The court's language regarding the General Assembly's discretion as to *what extent* it appropriates funds for MO HealthNet, however, is more problematic. The court's holding, which permits the General Assembly – should it choose to continue participating in Medicaid at all – to fund MO HealthNet to the extent it deems fit, seriously threatens the rights of eligible individuals to coverage and benefits. But, to be clear, the threat does not come about simply because the General Assembly retains some discretion.¹⁴³ Rather, the threat lies in the extent to which the Republican-led General Assembly, which sharply resisted the initiative before its passage and has been critical of it since its enactment, would opt not to fund it at all or in inadequate measure.¹⁴⁴

With no funding requirement in Article IV, Section 36(c) and total discretion left to the General Assembly, there is little to stop it from intentionally underfunding the program.¹⁴⁵ What, then, are eligible individuals to do? Should they hope that when they need coverage Republicans do not control the General Assembly? Such a stance is as bleak as it is politically unlikely. Given the prominence of Republicans in the General Assembly, it begs the question: what are newly eligible Missourians to do if the General Assembly opts to provide inadequate funding for MO HealthNet or even to not fund it at all?

Therein lies the problem. By side-stepping these questions,¹⁴⁶ the court's opinion in *Doyle* left 275,000 newly eligible Missourians, as well

¹⁴³ For example, the General Assembly does and should have some discretion as to, among other things, administration costs. *Doyle*, 625 S.W.3d at 465. In running the MO HealthNet program, the General Assembly could use its discretion in appropriating funds for certain software programs, the kind of printers used in the office, etc. *Id.* Everyday discretionary spending judgments, which the General Assembly routinely makes, are not the concern. *Id.*

¹⁴⁴ Cameron Gerber, *Missouri Treasurer, GOP Lawmakers Rally Against Medicaid Expansion*, THE MISSOURI TIMES, (Jul. 27, 2020), <https://themissouritimes.com/missouri-treasurer-gop-lawmakers-rally-against-medicaid-expansion/> [https://perma.cc/V879-HM23]; Valdivia, *supra* at note 16.

¹⁴⁵ In fact, there is evidence that it is currently happening. Tessa Weinberg, *Lawmakers Say Special Session Likely Unneeded to Fund Missouri Medicaid Expansion*, MISSOURI INDEPENDENT (Aug. 11, 2021), <https://missouriindependent.com/2021/08/11/lawmakers-say-special-session-likely-unneeded-to-fund-missouri-medicaid-expansion/> [https://perma.cc/87NB-YH4P]. After the circuit court's order on remand, Missouri Governor Mike Parson stated:

We all know what the obstacle is. We don't have the funding to support it right now. So we've got to figure out. . . whether we're going to dilute the pool of money that we have now for the people that's on the program, and just how we're going to move forward.

Id.

¹⁴⁶ *Doyle*, 625 S.W.3d at 467 n.4.

as the pre-expansion eligible population,¹⁴⁷ wondering whether they have a right to health care coverage under Article IV, Section 36(c) or if their health care coverage is merely subject to the whim of a profoundly partisan Missouri legislature.¹⁴⁸

The court seemingly came to this conclusion to avoid a constitutional conflict with Article III, Section 51 and to give effect to the Medicaid expansion the people voted to enact. Though this was a legitimate end, the court has created another – and potentially more serious – constitutional quagmire. In effect, the court told newly eligible individuals, “You *shall* receive MO HealthNet coverage and benefits, if, that is, the General Assembly decides to pay for it.” There is either an *absolute* right to MO HealthNet coverage under Article IV, Section 36(c) or a *conditional* right, subject to the General Assembly’s discretion to fund the program. It cannot, and should not, be both.

Precisely because of this ambiguity, the court may soon encounter this issue again. Republican members of the Missouri legislature have made no secret of their disdain for Medicaid expansion.¹⁴⁹ Even before the election, Republican legislators were considering measures to allow the General Assembly to avoid funding some of the expansion population.¹⁵⁰ But for the opinion in *Doyle*, members of the legislature who expressed opposition to expansion may have successfully avoided funding the voter-approved expansion at all.¹⁵¹ In recent months the General Assembly has even attempted to replace Article IV, Section 36(c) with a bill – HJR 117 – which would allow the General Assembly to determine annually whether to fund the newly eligible MO HealthNet

¹⁴⁷ Because the court found House Bills 10 and 11 did not distinguish between the previously and newly eligible populations, the effects of underfunding could potentially be felt by both previously eligible individuals and those eligible only by virtue of Article IV, Section 36(c). *Id.*

¹⁴⁸ *Party Control of Missouri State Government*, BALLOTPEDIA, (2021), https://ballotpedia.org/Party_control_of_Missouri_state_government [https://perma.cc/3CMD-GULA].

¹⁴⁹ See, e.g., Austin Huguelet, *Missouri Voters Could Expand Medicaid, Then Let Lawmakers Block It On The Same Ballot*, SPRINGFIELD NEWS-LEADER (May 12, 2020), <https://www.news-leader.com/story/news/2020/05/11/could-gop-resolution-block-medicaid-expansion-missouri/3108394001/> [https://perma.cc/K7M2-GMJV].

¹⁵⁰ *Id.*

¹⁵¹ Phil McCausland, *Missouri Governor Won’t Fund Medicaid Expansion, Flouting State Constitution and Voters*, NBC NEWS (May 13, 2021), <https://www.nbcnews.com/politics/politics-news/missouri-governor-won-t-fund-medicaid-expansion-flouting-state-constitution-n1267265> [https://perma.cc/5UCG-Z3KJ]; Reid Wilson, *Missouri Abandons Voter-Approved Medicaid Expansion*, THE HILL (May 13, 2021), <https://thehill.com/homenews/state-watch/553352-missouri-abandons-voter-approved-medicaid-expansion> [https://perma.cc/W63J-VVB2].

population.¹⁵² Given the established anti-expansion stance of Missouri Republicans, this would likely be a choice in name only. As long as it remains politically expedient, it would seem that the newly eligible population would be routinely denied Medicaid coverage.¹⁵³ If the General Assembly remains indignant, even if HJR 117 fails, it could use its appropriation discretion consistent with *Doyle* to undermine the thrust of Article IV, Section 36(c) and welcome another constitutional challenge from an eligible individual who is unable to receive MO HealthNet benefits.

In the months following *Doyle*, Missouri received a sneak peek of the potential problems caused by an underfunded MO HealthNet. Despite the court's August 2021 order to begin enrolling eligible individuals, enrollment was largely unavailable until October.¹⁵⁴ According to the Governor's August 11, 2021 press release, the delays were attributable to the General Assembly's failure to include "sufficient staffing or appropriations" to implement Medicaid expansion effectively.¹⁵⁵ By October 2021, the delays and inadequate staffing provisions resulted in only 4,300 of the more than 17,000 total applicants successfully enrolling in MO HealthNet.¹⁵⁶ Other roll-out problems like this have continued to bog down enrollment numbers.¹⁵⁷ To date, an approximate total of 183,000 Missourians have enrolled in the MO HealthNet program.¹⁵⁸ While a significant uptick since October 2021, MO HealthNet enrollment

¹⁵² HJR, 101st Gen. Assemb., 2nd Reg. Sess. (Mo. 2022), <https://house.mo.gov/Bill.aspx?bill=HJR117&year=2022&code=R> [<https://perma.cc/QTH7-FBFE>].

¹⁵³ See Angela F. Brown, *HJR 117 Undermines Will of Missouri Voters*, THE ST. LOUIS AMERICAN (Mar. 4, 2022), https://www.stlamerican.com/your_health_matters/health_opinion/hjr-117-undermines-will-of-missouri-voters/article_f74ob756-9a7c-11ec-8446-2fff892204ce.html.

¹⁵⁴ Governor Michael L. Parson, *State Outlines Next Steps for Medicaid Expansion After Court Ruling*, OFFICE OF GOVERNOR MICHAEL L. PARSON (Aug. 11, 2021), <https://governor.mo.gov/press-releases/archive/state-outlines-next-steps-medicaid-expansion-after-court-ruling> [<https://perma.cc/P76N-XB6V>].

¹⁵⁵ *Id.*

¹⁵⁶ Cameron Gerber, *4.3K Missourians Enrolled in Expanded Medicaid Program*, THE MISSOURI TIMES (Oct. 7, 2021), <https://themissouritimes.com/4-3k-missourians-enrolled-in-expanded-medicaid-program/> [<https://perma.cc/34EG-WJ8E>]; CENTERS FOR MEDICARE & MEDICAID SERVICES, *supra* note 69.

¹⁵⁷ Sarah Fentem, *Pandemic, Lawsuits Hamper Missouri's Medicaid Enrollment*, ST. LOUIS PUBLIC RADIO (Jan. 12, 2022 5:14 AM CST), <https://news.stlpublicradio.org/health-science-environment/2022-01-12/pandemic-lawsuits-hamper-missouris-medicaid-enrollment> [<https://perma.cc/ZPD6-ZL9P>].

¹⁵⁸ Timothy McBride, PhD, MS, *Medicaid Expansion Enrollment Hits 183,000; Over 200,000 Have Applied Since August*, CENTER FOR HEALTH ECONOMICS & POLICY (Jun. 13, 2022), <https://publichealth.wustl.edu/Medicaid-expansion-enrollment-hits-180000-over-200000-have-applied-since-august/> [<https://perma.cc/GQ3J-6W59>].

still lags behind other similarly situated states that also passed Medicaid expansion in 2020. For example, in roughly the same time period, Oklahoma has enrolled over 250,000 people in its Medicaid expansion plan.¹⁵⁹ Ultimately, enrollment delays like this, potential denials of MO HealthNet benefits due to inadequate funding, and other future problems arising from an underfunded MO HealthNet may further the enrollment gap and operate as a bar for many low-income individuals from receiving the health care they badly need.

In the end, the Supreme Court of Missouri faced a difficult choice in *Doyle v. Tidball*. On one hand, the people of Missouri, in their wisdom, unequivocally sought to mandate that eligible populations *shall* be eligible and *shall* receive MO HealthNet coverage.¹⁶⁰ On the other, Article III, Section 51 clearly prohibits appropriation-by-initiative. By finding Article IV, Section 36(c) constitutional, the court weaved its logic around Article III, Section 51's prohibition without completely addressing the potential problems with unfettered General Assembly discretion. While Medicaid expansion, in many ways, is socially desirable, the court's reversal of the trial court created an ambiguity as to whether Medicaid coverage will actually be available to those the Missouri Constitution now says "shall receive" it. Eligible Missourians either have the right to MO HealthNet benefits or not. If Missourians have an absolute right, as the plain text of Section 36(c) demands, then the court may again have to grapple with the constitutionality of Article IV, Section 36(c)'s restriction of the General Assembly's appropriation discretion. If eligible Missourians only possess a conditional right to MO HealthNet benefits, subject to the General Assembly's discretion, then the court, or ideally the Missouri legislature, must find a solution for the underfunding problem.

Despite an effort to harmonize a seemingly irreconcilable conflict with Article III, Section 51, the court may have created another, possibly more significant constitutional question: what happens when an eligible person, whom the Missouri Constitution declares "*shall* receive coverage for the health benefits service package," is not able to access that coverage

¹⁵⁹ *SoonerCare Fast Facts*, OKLAHOMA HEALTH CARE AUTHORITY (Feb. 2022), https://oklahoma.gov/content/dam/ok/en/okhca/docs/research/data-and-reports/fast-facts/2022/february/TotalEnrollment02_22.pdf [<https://perma.cc/M76W-CLTK>]. Oklahoma has consistently outpaced Missouri in Medicaid expansion enrollment. As of November 2021, Oklahoma had already enrolled over 200,000 newly eligible adults, while Missouri had just over 50,000. See Emma Morris, *Medicaid Expansion is Working Just as Expected*, OKLAHOMA POLICY INSTITUTE (Nov. 15, 2021), <https://okpolicy.org/medicaid-expansion-is-working-just-as-expected/> [<https://perma.cc/4ZHN-TJGA>]; Fentem, *supra* note 157.

¹⁶⁰ MO. CONST. art. IV, § 36(c)(1); *McAllister v. Strohmeier*, 395 S.W.3d 546, 552 (Mo. Ct. App. 2013) (citing *St. Louis Police Officers' Ass'n v. Bd. of Police Comm'rs of City of St. Louis*, 259 S.W.3d 526, 528 (Mo. 2008) (en banc)).

because the General Assembly fails to adequately fund the program? The Supreme Court of Missouri may soon be forced to answer.

VI. CONCLUSION

Despite the good policy rationale and voter support behind expanding Medicaid in Missouri, the Supreme Court of Missouri failed to wholly address the problems that may occur as a result of the General Assembly's discretion over "whether and to what extent" to fund MO HealthNet expansion. Ultimately, it never had to reach the question, as the adequacy of future funding was not before it. But, had the court provided guidance on the issue – which was within their power to do – Missourians would have a clearer idea of where they stand when it comes to their access to MO HealthNet benefits.

Of course, if the General Assembly opts to fund Medicaid expansion adequately and move on to other issues, the question may never come before the court. That, in truth, may be the best possible outcome. Moving the political football to another subject could leave the "discretion" versus "right" tension behind while providing coverage for eligible individuals.

But, regardless of whether the General Assembly continues to fight Medicaid expansion, the Republican-led body likely has not seen the end of the large-scale initiative petitions it has been trying to stifle.¹⁶¹ Leading up to the November 2022 election, amid familiar partisan resistance, Missouri voters will cast their votes on a number of initiative petitions, including recreational cannabis use.¹⁶² And if those measures ultimately pass, the court may again have to grapple with how much discretion the General Assembly has in funding the will of the people.

For now, at least, eligible Missourians will attempt to access the coverage and care guaranteed to them in Article IV, Section 36(c). . . if the General Assembly decides to pay up.

¹⁶¹ David Rosman, *Proposal to Change Initiative Petitions in Missouri is a Threat to Democracy*, COLUMBIA MISSOURIAN (Apr. 7, 2021), https://www.columbiamissourian.com/opinion/local_columnists/proposal-to-change-initiative-petitions-in-missouri-is-a-threat-to-democracy/article_63edcedc-9701-11eb-adec-07120a7a45b0.html [<https://perma.cc/9PJS-9Y3Z>].

¹⁶² 2022 *Ballot Measures*, MISSOURI SECRETARY OF STATE (2008), <https://www.sos.mo.gov/default.aspx?PageID=10056> [<https://perma.cc/D8NC-JEG7>] (last visited August 29, 2022).