

IN THE SUPREME COURT OF MISSOURI

No. SC99185

STEPHANIE DOYLE, et al., APPELLANTS

VS.

JENNIFER TIDBALL, et al., RESPONDENTS

Appeal from the Circuit Court of Cole County
The Honorable Jon E. Beetem, Judge

BRIEF OF HOUSE MINORITY FLOOR LEADER CRYSTAL QUADE AND
ASSISTANT HOUSE MINORITY FLOOR LEADER RICHARD BROWN IN
SUPPORT OF PLAINTIFFS-APPELLANTS

Casey Millburg, No. 71081
201 West Capitol Avenue, Rm. 204
Jefferson City, Missouri 65101
Telephone: 573-256-9807
casey.millburg@house.mo.gov

*Attorney for State Representatives
Crystal Quade and Richard Brown*

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	3
INTEREST OF AMICUS.....	5
INTRODUCTION.....	6
ARGUMENT.....	7
I. The Missouri House of Representatives did not authorize the filing of an <i>amicus</i> brief in support of Respondents.....	7
a. The Missouri House’s rules and its other governing authorities require a vote of the members to authorize the filing of an <i>amicus</i> brief on its behalf.....	7
b. The Missouri House’s rules and its other governing authorities, require a vote of the members to authorize the hiring of outside counsel to file an <i>amicus</i> brief on its behalf.....	9
c. The filing of the <i>amicus</i> brief without the required vote circumvents the Missouri House’s rules and processes, violates the principles of a democratic republic, and should therefore be disregarded.....	10
II. The purported brief of the Missouri House of Representatives incorrectly frames the choices legislators had and made for funding Medicaid.....	12
CONCLUSION.....	15
CERTIFICATE OF SERVICE AND COMPLIANCE	15

TABLE OF AUTHORITIES

CASES

Planned Parenthood v. Dept. of Social Services, 602 S.W.3d 201 (Mo. banc 2020).....12

Reynolds v. Sims, 377 U.S. 533 (1964).....11

U.S. v. Ballin, 144 U.S. 1 (1892).....10

Vieth v. Jubelirer, 541 U.S. 267 (2004).....11

STATUTES

HB 2 (2021) § 2.500.....13

HB 3 (2021) §§ 3.300, 3.305, 3.310.....13

HB 4 (2021) §§ 4.600, 4.605.....13

HB 5 (2021) § 5.600.....13

HB 6 (2021) §§ 6.600, 6.700, 6.705, 6.710, 6.715, 6.720.....14

HB 7 (2021) §§ 7.040, 7.950.....14

HB 8 (2021) § 8.005.....14

HB 9 (2021) § 9.400.....14

HB 10 (2021) § 10.1020.....14

HB 11 (2021) §§ 1.325, 11.1030.....14

HB 12 (2021) § 12.600.....	14
----------------------------	----

RULES

Rule 12, <i>Rules of the MO House of Representatives, 101st General Assembly</i>	9
Rule 37(2), <i>Rules of the MO House of Representatives, 101st General Assembly</i>	7, 9
Rule 92, <i>Rules of the MO House of Representatives, 101st General Assembly</i>	10
Rule 129, <i>Rules of the MO House of Representatives, 101st General Assembly</i>	7, 9
Rule II.8, <i>Rules of the U.S. House of Representatives</i> (117th Cong.).....	8, 10

OTHER AUTHORITIES

<i>Jefferson's Manual of Motions</i> , § 283.....	11
<i>Jefferson's Manual of Motions</i> , § 291b.....	9
<i>Journal of the MO House of Representatives</i> , Jun. 28, 2021.....	12
<i>Journal of the MO House of Representatives</i> , Jun. 29, 2021.....	12
<i>Journal of the MO House of Representatives</i> , Jun. 30, 2021.....	12
<i>U.S. House of Representatives</i> , H. Res. 1420, Aug. 26, 1976, p. 1858.....	9
<i>U.S. House of Representatives</i> , H. Res. 334, May 9, 1977, pp. 13949– 52.....	9
<i>U.S. House of Representatives</i> , H. Res. 1497, Sept. 2, 1976, p. 28937.....	9
<i>U.S. House of Representatives</i> , H. Res. 884, Nov. 2, 1977, p. 36661.....	9

INTEREST OF AMICUS

Crystal Quade is the state representative for the 132nd District, representing part of Greene County in the Missouri House of Representatives (“Missouri House”). In addition to being a member of the Missouri House since 2016, she is in Missouri House leadership, having served as the Missouri House Minority Floor Leader since January 2019. As a state representative, she is afforded the opportunity to vote upon every House Resolution (“H.R.”) authorizing the Missouri House to adopt an official position or take action on behalf of the body.

Richard Brown is the state representative for the 27th District, representing part of Jackson County in the Missouri House. In addition to being a member of the Missouri House since 2016, he is in Missouri House Leadership, having served as the Missouri House Assistant Minority Floor Leader since January 2021. As a state representative, he is afforded the opportunity to vote upon every H.R. authorizing the Missouri House to adopt an official position or take action on behalf of the body.

An *amicus* brief filed with this court on July 8, 2021, purports to represent the Missouri House and its positions on *Doyle*. The brief does not and cannot represent the Missouri House, nor its positions. Under the Missouri House’s operating rules, a majority of representatives must vote to pass an H.R. authorizing the Missouri House to file an *amicus* and hire outside counsel to do represent the body in that effort. No such H.R. was ever filed, let alone brought to members for a vote or passed. The brief misrepresents to this Court the actions of the Missouri House, and should be disregarded. At the very least, this Court should not attribute its arguments to the Missouri House.

INTRODUCTION

Amici, as duly-elected state representatives and members of the Missouri House, file this *amicus curiae* brief in an effort to address two significant misrepresentations created by the filing of the brief purporting to represent the Missouri House. The first is the brief's misrepresentation to this Court that the Missouri House authorized its filing. The second is the brief's misrepresentation of the choices of the General Assembly regarding appropriating funds for the MO HealthNet program.

ARGUMENT

I. The Missouri House of Representatives did not authorize the filing of an *amicus* brief in support of Respondents.

The Missouri House purports to file an *amicus* brief in support of Respondents' position. That is impossible. The Missouri House never authorized the filing of this *amicus* brief on its behalf, nor the hiring of outside counsel to assist in such an effort. The rules and other authorities governing the Missouri House's operations are clear: the only way this brief could be valid is if the Missouri House's members voted to pass an H.R. authorizing outside counsel to file it. No such vote has occurred.

a. The Missouri House's rules and its other governing authorities require a vote of the members to authorize the filing of an *amicus* brief on its behalf.

The Missouri House is governed by its operating rules, currently the *Rules of the House of Representatives, 101st General Assembly* ("Missouri House Rules.") These rules were adopted by its members on January 12, 2021. Rule 129 states that, where the Missouri House's rules are silent, the Rules of the U.S. House of Representatives ("U.S. House Rules"), parliamentary precedents and interpretations by the U.S. House, and Jefferson's Manual of Motions ("Jefferson's Manual") "shall govern the House in all cases in which they are applicable and not inconsistent with the standing rules and orders of the House and the joint rules of the Senate and House of Representatives." Rule 129, 37(2), *Rules of the MO House of Representatives, 101st General Assembly*.

No Missouri House Rule speaks to how the chamber may file legal briefs or engage with the courts on behalf of the body when it is not a party to that litigation.

However, the U.S. House Rules note that “the House, the Speaker, a committee or the chair of the committee” must be “*authorized*” (emphasis added) to act on behalf of the chamber in a litigation matter. *Rules of the U.S. House of Representatives (117th Cong.)*, Rule II.8. Further, Jefferson’s Manual speaks directly to how the Missouri House may file an *amicus* brief to represent its interests, noting that U.S. House precedent is to use an H.R. to “*authorize[]* the Speaker to take any steps considered necessary, including intervention as a party or by submission of briefs *amicus curiae*, in order to protect the interests of the House before the court.” *Jefferson’s Manual of Motions*, § 291b (emphasis added).

This guidance is applicable and consistent with the manner in which the Missouri House typically utilizes an H.R. The Missouri House uses these resolutions to take a formal position of the body on a matter, or to urge an outside entity to take a specific action at the chamber’s behest. Under its rules, a majority of the members must vote in favor of the H.R. in order for it to pass.

Litigation on behalf of the U.S. House can only be entered into after consultation with and approval of the “Bipartisan Legal Advisory Group (BLAG).” BLAG “speaks for, and articulates the institutional position of, the House in all litigation matters.” *Rules of the U.S. House of Representatives (117th Cong.)*, Rule II.8. The Missouri House has no BLAG corollary, however, meaning that guidance is inapplicable and inconsistent with the Missouri House’s Rules and does not govern.

What does govern, however, is the guidance from both Jefferson’s Manual and the U.S. House Rules requiring the Missouri House to authorize the filing of *amicus* briefs by

a majority of members voting in favor of such an H.R. That guidance is “applicable and not inconsistent” with the relevant Missouri rules and precedent. Rule 129, *Rules of the MO House of Representatives, 101st General Assembly*. However, the Missouri House did not pass an H.R. authorizing the submission of an *amicus* brief on its behalf in *Doyle*. The *amicus* brief purportedly submitted on its behalf is consequently unauthorized and does not and cannot represent the body.

b. The Missouri House’s rules and other governing authorities require a vote to authorize hiring outside counsel to file an *amicus* brief on its behalf.

The Missouri House Rules identify limited circumstances under which outside counsel may engage on behalf of the body. Missouri House Rule 12 allows the speaker to hire “special counsel to assist committees in extraordinary circumstances,” and Rule 37(2) allows the Chief Clerk of the Missouri House to “contract with outside legal counsel for the purpose of investigating [a sexual harassment] complaint.” Rule 12; Rule 37(2), *Rules of the MO House of Representatives, 101st General Assembly*. Neither circumstance is present in regards to the *amicus* purportedly filed on behalf of the Missouri House.

Jefferson’s Manual states that the House has “on occasion *authorized* special appearances on its own behalf by special counsel when the prerogatives or powers of the House have been questioned in the courts.” *Jefferson’s Manual of Motions*, § 291b (emphasis added). The precedent Jefferson’s Manual cites is uniform in one important aspect: the authorization occurs when the House approves an H.R. to authorize such legal representation. *See, e.g., H. Res. 1420, Aug. 26, 1976, p. 1858; H. Res. 334, May 9, 1977, pp. 13949– 52; H. Res. 1497, Sept. 2, 1976, p. 28937; H. Res. 884, Nov. 2, 1977, p.*

36661. The U.S. House Rules also identify its Office of General Counsel as the entity’s default institutional legal representation.” *Rules of the U.S. House of Representatives* (116th Cong.), Rule II.8.

Neither the U.S. House Rules nor Jefferson’s Manual contradict Missouri House Rules on this topic. They are consistent with the more conservative, “occasional” approaches to engaging outside counsel the Missouri House has used, up until this unauthorized *amicus* attempt. And, as is true for the U.S. House, the Missouri House’s General Counsel is the default provider of institutional legal representation.

The guidance from Jefferson’s Manual and the U.S. House Rules is “applicable and not inconsistent” with the Missouri House’s limited authorization of outside counsel. If the Missouri House wanted outside counsel to file an *amicus* brief in *Doyle* on behalf of the body, its members needed to pass an H.R. that said that. The Missouri House has not so much as filed an H.R. authorizing this. The *amicus* brief purportedly submitted on behalf of the body is consequently unauthorized and does not and cannot represent it.

c. The filing of the *amicus* brief without the required vote circumvents the Missouri House’s rules and processes, violates the principles of a democratic republic, and should therefore be disregarded.

The only avenue by which the Missouri House may speak is through an official action of the body, and an official action can only be taken when a quorum of the body is present. *See U.S. v. Ballin*, 144 U.S.1, 7 (1892); *see also* Rule 29 *Rules of the MO House of Representatives*, 101st General Assembly. No H.R. has been put before the body (or a quorum thereof) either seeking permission to hire an attorney for the purpose of drafting

and filing an *amicus* brief, or to authorize the Missouri House to otherwise file an *amicus* brief in *Doyle* on behalf of the body. Nevertheless, the brief at issue was filed in the Missouri House's name.

It may be undeniably true that, had an H.R. to authorize the *amicus* brief actually been put to the Missouri House's members for a vote, the number of legislators in the majority party means the chamber would have authorized the *amicus* brief. But political realities do not diminish the necessity of upholding the requirement that members of the Missouri House must be afforded the opportunity to vote on these matters. This is particularly true for members of the minority party, as circumventing the Missouri House's process signals to Missourians that unless they are represented by a member of the majority party, their voice does not matter.

That is not how our democratic republic is meant to function. *See Reynolds v. Sims*, 377 U.S. 533, 558 (1964) ("The conception of political equality from the Declaration of Independence to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.") (quotation omitted). Although the majority rules, the minority party representing its voters still is entitled to participate in the deliberative process of the Missouri House. *See Vieth v. Jubelirer*, 541 U.S. 267, 312 (2004) (Kennedy, J., concurring) (noting that voting serves to protect minorities). Legislative rules "operate[] as a check and control on the actions of the majority, and [are], in many instances, a shelter and protection to the minority, against the attempts of power." *Jefferson's Manual of Motions*, Sec. I, Sect 283.

Although *Doyle* was filed and argued during the interim between legislative sessions, initially making it difficult to secure the required H.R., the Missouri House was recently in a special legislative session on another issue relating to the MO HealthNet program. *See Journal of the Missouri House of Representatives*, June 28, 2021; *Journal of the Missouri House of Representatives*, June 29, 2021; *Journal of the Missouri House of Representatives*, June 30, 2021. At that time, the Missouri House could have considered an administrative matter relating to whether or not to file an *amicus* brief in this case. No rule or guidance prohibits the Missouri House from considering administrative matters at any time it is in session. But, it did not consider this matter.

Because the members of the Missouri House were not given the opportunity to vote on whether the Missouri House should file that *amicus* brief, this Court should disregard it. At the very least, the lack of authority to file the *amicus*, or to represent the Missouri House, means that this Court should not attribute the arguments in it to the Missouri House. It shows a profound lack of respect for this Court that individual members of the Missouri House would choose to misrepresent that their views are the views of the whole body, or even a majority of it, when there has been no vote. Even a majority caucus with a supermajority of members must operate within the Missouri House Rules.

II. The purported brief of the Missouri House of Representatives incorrectly frames the choices legislators had and made for funding Medicaid.

A little over one year ago in *Planned Parenthood v. Department of Social Services*, this Court recognized that the General Assembly is faced with thousands of difficult choices every year when creating the state's budget. *See* 602 S.W.3d 201, 211 (Mo. banc

2020). The brief purporting to represent the Missouri House reiterates the incorrect framing in the briefs of other *amici* and the State of the choice that was before legislators on MO HealthNet funding. Those briefs frame that choice as an either-or, pitting the constitutional appropriation power of the General Assembly against the constitutional right of citizens to receive MO HealthNet benefits.

As experienced appropriators, the General Assembly indeed knew that it had choices to make regarding appropriations for MO HealthNet funding. One of its most important choices was whether or not to use its constitutional appropriation power to try to insulate the funding it did appropriate for MO HealthNet from being used by certain eligibility categories. Ultimately, after months of intensive consideration, the General Assembly chose to not only pass a budget that removed previously-existing language prohibiting the use of funds for the newly eligible population, but also to not otherwise condition or limit eligibility for the MO HealthNet appropriations it authorized.

There is little doubt the General Assembly knew it was making this choice. At the same time, it chose to not place eligibility restrictions for MO HealthNet appropriations, it chose to restrict the use of an array of other program funds across appropriations bills. The General Assembly implemented budget language restrictions relating to the administration of federal grants; student data; common core; tuition and scholarships for DACA students; toll toads; feral hogs, land purchases; the U.S. Army Corps of Engineers and U.S. Environmental Protection Agency standards; landowner registry; community development block grants; state aircraft; and child care vendors. *See* HB 2 (2021) Section 2.500; HB 3 (2021) Sections 3.300, 3.305, 3.310; HB 4 (2021) Sections 4.600, 4.605; HB 5 (2021

Section 5.600; HB 6 (2021) Sections 6.600, 6.700, 6.705, 6.710, 6.715, 6.720; HB 7 (2021) Sections 7.040, 7.950; HB 8 (2021) Section 8.005; HB 9 (2021) Section 9.400; HB 10 (2021) Section 10.1020; HB 11 (2021) Sections 11.325, 11.1030; HB 12 (2021) Section 12.600. But it *chose* not to do the same in regards to eligibility for MO HealthNet appropriations.

No doubt that was a difficult choice for some members. However, members of the General Assembly were elected to make tough choices. The General Assembly, and the Missouri House in particular, is closer to the people than any other branch of government. It is the Missouri House's duty to consider what is best for constituents and Missourians across the state. Sometimes that means funding a program that it may not want to fund, but recognizes it has to, as the body did when it chose against placing conditions or limitations on eligibility for use of MO HealthNet benefit appropriations in Fiscal Year 2022.

Those who purport to represent the Missouri House now ask this Court to make a series of choices that it should not, ostensibly to insulate legislators from the realities of their choices. They ask this Court to choose to divine the tea leaves of appropriation ratios instead of simply reading the language—and the lack thereof—of appropriations bills. They ask this Court to choose to draw a legal conclusion from the coordinated activities of the Missouri General Assembly, Department of Social Services, and Governor's Office, instead of recognizing that political entities will predictably behave like political entities. Ultimately, they ask this Court to choose to allow an unauthorized brief that does not represent the Missouri House to help invalidate a citizen-enacted Constitutional provision. This Court should not do so.

CONCLUSION

The Missouri House has never authorized the filing of an *amicus* brief on its behalf in *Doyle*, nor did it authorize the hiring of outside counsel to do so. Furthermore, the *amicus* brief that purports to represent the Missouri House misrepresents the choices that body had and made in appropriating funds for the Missouri Medicaid program. Consequently, the Court should strike that brief or, at a minimum, the positions within it should not be attributed to the Missouri House.

Respectfully Submitted,

/s/ Casey Millburg

Casey Millburg, No. 71081
201 West Capitol Avenue, Rm. 204
Jefferson City, Missouri 65101
Telephone: 573-256-9807
casey.millburg@house.mo.gov

*Attorney for State Representatives
Crystal Quade and Richard Brown*

CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was served electronically via the Court's electronic filing system on the 12th day of July, 2021 to all counsel of record.

I also certify that the foregoing brief complies with the limitation in Rule 84.06(b) and that the brief contains 3,156 words.

/s/ Casey Millburg