IN THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA AND THE COMMISSIONER OF THE DEPARTMENT OF HEALTH AND SOCIAL SERVICES, Appellants, v. PLANNED PARENTHOOD OF THE GREAT NORTHWEST, Appellee.	)	Supreme Court No. **S-16123**

Trial Court Case No. 3AN-14-4711 CI

APPEAL FROM THE SUPERIOR COURT,
THIRD JUDICIAL DISTRICT AT ANCHORAGE,
THE HONORABLE JOHN SUDDOCK, PRESIDING

BRIEF OF APPELLEE PLANNED PARENTHOOD OF THE GREAT NORTHWEST

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Alaska Const., Art. I, § 1

This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

AS 47.07.010 Purpose

It is declared by the legislature as a matter of public concern that the needy persons of this state who are eligible for medical care at public expense under this chapter should seek only uniform and high quality care that is appropriate to their condition and cost effective to the state and receive that care, regardless of race, age, national origin, or economic standing. It is equally a matter of public concern that providers of services under this chapter should operate honestly, responsibly, and in accordance with applicable laws and regulations in order to maintain the integrity and fiscal viability of the state's medical assistance program, and that those who do not operate in this manner should be held accountable for their conduct. It is vital that the department administer this chapter in a manner that promotes effective, long-term cost containment of the state's medical assistance expenditures while providing medical care to recipients. Accordingly, this chapter authorizes the department to apply for participation in the national medical assistance program as provided for under 42 U.S.C. 1396--1396p (Title XIX, Social Security Act)

AS 47.07.068 Payment for abortions

(a) The department may not pay for abortion services under this chapter unless the abortion services are for a medically necessary abortion or the pregnancy was the result of rape or incest. Payment may not be made for an elective abortion.

(b) In this section,

(1) "abortion" has the meaning given in AS 18.16.090;

(2) "elective abortion" means an abortion that is not a medically necessary abortion;

(3) "medically necessary abortion" means that, in a physician's objective and reasonable professional judgment after considering medically relevant factors, an abortion must be performed to avoid a threat of serious risk to the life or physical health of a woman from continuation of the woman's pregnancy;

(4) "serious risk to the life or physical health" includes, but is not limited to, a serious risk to the pregnant woman of

(A) death; or

(B) impairment of a major bodily function because of

(i) diabetes with acute metabolic derangement or severe end organ damage;

(ii) renal disease that requires dialysis treatment;

(iii) severe pre-eclampsia;

(iv) eclampsia;

(v) convulsions;

(vi) status epilepticus;

(vii) sickle cell anemia;

(viii) severe congenital or acquired heart disease, class IV;

(ix) pulmonary hypertension;

(x) malignancy if pregnancy would prevent or limit treatment;

(xi) kidney infection;

(xii) congestive heart failure;

(xiii) epilepsy;

(xiv) seizures;

(xv) coma;

(xvi) severe infection exacerbated by pregnancy;

(xvii) rupture of amniotic membranes;

(xviii) advanced cervical dilation of more than six centimeters at less than 22 weeks gestation;

(xix) cervical or cesarean section scar ectopic implantation;

(xx) any pregnancy not implanted in the uterine cavity;

(xxi) amniotic fluid embolus; or

(xxii) another physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy that places the woman in danger of death or major bodily impairment if an abortion is not performed.

7 AAC 105.100 Covered services

The department will pay for a service only if that service

(1) is identified as a covered service in accordance with AS 47.07 and 7 AAC 105 - 7 AAC 160;

(2) is provided to an individual who is eligible for Medicaid under 7 AAC 100 on the date of service;

(3) is ordered or prescribed by a provider authorized to order or prescribe that service under applicable law;

(4) is provided by a person who is enrolled as a Medicaid provider or rendering provider under 7 AAC 105.210, or otherwise eligible to receive payment for services under 7 AAC 105 - 7 AAC 160;

(5) is medically necessary as determined by criteria established under 7 AAC 105 - 7 AAC 160 or by the standards of practice applicable to the provider;

7 AAC 105.110 Noncovered services

Unless otherwise provided in 7 AAC 105 - 7 AAC 160, the department will not pay for a service that is

(1) not reasonably necessary for the diagnosis and treatment of an illness or injury, or for the correction of an organic system, as determined upon review by the department;

(2) not properly prescribed or medically necessary in accordance with criteria established under 7 AAC 105 - 7 AAC 160 or by standards of practice applicable to the prescribing provider;

(3) incurred for an evaluative or periodic checkup, examination, or immunization

(A) that is in connection with the participation, enrollment, attendance, or accomplishment of a program or activity unrelated to the recipient's physical or mental health or rehabilitation; or

(B) unless it is

(i) for a mammogram;

(ii) part of an EPSDT screening; or

(iii) required by the department for the purpose of determining eligibility for Medicaid;

(4) for or in connection with cosmetic therapy or plastic or cosmetic surgery, including rhinoplasty, nasal reconstruction, excision of keloids, augmentation mammoplasty, silicone or silastic implants, facioplasty, osteoplasty (prognathism and micronathism), dermabrasion, skin grafts, and lipectomy; however, coverage is available if required for the following corrective actions if performed within the normal course of treatment or otherwise beginning no later than one year after birth or the event that caused the need for the corrective action:

(A) repair of an injury;

(B) improvement of the functioning of a malformed body member;

(C) correction of a visible disfigurement that would materially affect the recipient's acceptance in society;

(5) a nonmedical charge imposed by a recipient's friend or relative;

(6) for a person who is in the custody of federal, state, or local law enforcement, including a juvenile in a detention or correctional facility, except as an inpatient in a medical institution;

(7) for an experimental or investigational service, including one

(A) that is in a phase I or II clinical trial as defined in the United States Department of Health and Human Services, National Institutes of Health, Glossary of Terms for Human Subjects Protection and Inclusion Issues, adopted by reference in 7 AAC 160.900;

(B) for which inadequate available clinical or preclinical data exists to provide a reasonable expectation that the proposed service is at least as safe and effective as one not under experiment or investigation;

(C) for which an expert has issued an opinion that additional information is needed to assess the safety or efficacy of the proposed service;

(D) for which final approval from the appropriate governmental body has not been granted for the specific indications for which the use of the service is being proposed; however, if a drug has received final approval from the United States Food and Drug Administration (FDA) for any indication, final approval is not required for the specific indication for which use is being proposed if

(i) the prescription or order was issued by a licensed health care provider within the scope of the provider's license;

(ii) prior authorization was obtained from the department if required under 7 AAC 105 - 7 AAC 160; or

(iii) the condition being treated with the drug is not otherwise excluded as a use of the drug; or

(E) whose use is not in accordance with customary standards of medical practice;

(8) for missed appointments; however, the provider may charge the recipient;

(9) for interpreter services;

(10) for infertility services;

(11) for impotence therapy and services;

(12) for treatment, therapy, surgery, or other procedures related to gender reassignment;

(13) for sterilization for recipients under 21 years of age and hysterectomies performed solely for sterilization purposes;

(14) for nonsurgical weight reduction or maintenance treatment programs and products;

(15) for nonmedical fitness maintenance centers and services;

(16) for educational services or supplies that are separately identifiable in

(A) the United States Department of Health and Human Services, Centers for Medicare and Medicaid Services' (CMS) Healthcare Common Procedure Coding System (HCPCS), adopted by reference in 7 AAC 160.900; or

(B) Alternative Link's ABC Coding Manual for Integrative Healthcare, adopted by reference in 7 AAC 160.900;

(17) an alternative therapy or other service including acupuncture, homeopathic or naturopathic remedy, or Ayurvedic medicine;

(18) an outpatient drug for which payment under the United States Department of Health and Human Services, Centers for Medicare and Medicaid Services' drug rebate program established in 42 U.S.C. 1396r-8 is not available;

(19) for which the recipient does not meet the eligibility requirements for that service under 7 AAC 100; or

(20) after the recipient's date of death.

7 AAC 135.010(a) Scope of Medicaid behavioral health services

(a) The department will pay for a behavioral health service under 7 AAC 135.010 - 7 AAC 135.290 if

(1) the recipient meets the criteria for services under 7 AAC 135.020;

(2) the provider meets the criteria for payment under 7 AAC 135.030;

(3) the service is identified as a treatment need in

(A) a professional behavioral health assessment under 7 AAC 135.110 or a reassessment conducted while the recipient is receiving behavioral health services; and

(B) a behavioral health treatment plan;

(4) screening and brief intervention services are provided in accordance with 7 AAC 135.240;

(5) the department has given prior authorization for the service under 7 AAC 105.130 and 7 AAC 135.040;

(6) the service is medically necessary and clinically appropriate;

(7) the service is provided as active treatment;

(8) the service, if it is a behavioral health clinic service, is provided under the general direction of a physician;

(9) the service is provided by a member of the provider's staff who is performing that service as a regular duty within the scope of that staff member's knowledge, experience, and education; and

(10) the clinical record requirements of 7 AAC 105.230 and 7 AAC 135.130 are met.

7 AAC 135.020 Recipient eligibility for Medicaid behavioral health services

(a) The department will pay for behavioral health clinic services for the following individuals only:

(1) a child experiencing an emotional disturbance;

(2) a child experiencing a severe emotional disturbance;

(3) an adult experiencing an emotional disturbance;

(4) an adult experiencing a serious mental illness.

(b) The department will pay for behavioral health rehabilitation services for the following individuals only:

(1) an individual experiencing a substance use disorder characterized by

(A) a maladaptive pattern of substance use; or

(B) cognitive, behavioral, or physiological symptoms indicating that the individual will continue to use a substance despite significant substance-related problems associated with its use;

(2) a child experiencing a severe emotional disturbance;

(3) except as provided in (d) of this section, an adult experiencing a serious mental illness.

(c) If, during the assessment, evaluation, or treatment of a child experiencing an emotional disturbance, a provider determines that the recipient may have a severe behavioral health disorder and that the recipient is in need of behavioral health rehabilitation services, that provider shall refer the recipient to a provider that provides behavioral health rehabilitation services in the community.

(d) A child experiencing a severe emotional disturbance may be provided comprehensive community support services under 7 AAC 135.200, in place of therapeutic behavioral health services for children under 7 AAC 135.220, if that recipient

(1) is at least 18 years of age and under 21 years of age; and

(2) except for age, falls within the definition of an adult experiencing a serious mental illness.

7 AAC 160.900 Requirements adopted by reference

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(d) The following department documents are adopted by reference:

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(30) the Certificate to Request Funds for Abortion, revised as of December 2013

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INTRODUCTION

Fifteen years ago, this Court held that the equal protection clause of the Alaska Constitution prohibits the State from refusing to provide Medicaid coverage to low-income women seeking medically necessary abortions if the State also provides health coverage to other low-income individuals, including women who decide to carry their pregnancies to term.[1] Flouting this clear precedent, the Alaska legislature and the Department of Health and Social Services ("DHSS") passed the challenged Statute[2] and Regulation,[3] which effectively eliminate almost all Medicaid coverage for medically necessary abortions. The Statute and Regulation (collectively "the Funding Restrictions") impose a narrow and restrictive definition of "medical necessity" for abortion coverage, which the superior court found will harm low-income women seeking abortion because of threats to their health by preventing or delaying them from obtaining abortion. The superior court's decision is consistent with this Court's precedent and should be affirmed.

The superior court's meticulous factual findings – which the State does not argue are erroneous – demonstrate that women seeking abortion are singled out for unfavorable treatment and denied coverage unless they are extremely ill. There is virtually no

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1 *State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc. ("Planned Parenthood 2001")*, 28 P.3d 904, 906 (Alaska 2001).

2 AS 47.07.068.

3 7 AAC 160.900(d)(30) (incorporating by reference the revised "Certificate to Request Funds for Abortion" [Exc. 70-72]).

coverage for abortions that are medically necessary due to mental health conditions, and the Funding Restrictions also eliminate abortion coverage for fetal anomalies, even in cases where the fetus has no chance of survival. In no other context does the State refuse to cover the cost of medical treatment for a Medicaid patient unless she is physically very sick, or impose restrictive definitions of what constitutes "medically necessary" treatment. Instead, in all other contexts, the State affords medical providers the discretion to exercise their judgment in determining what treatment is medically necessary.

The State's differential treatment of low-income women seeking abortion infringes on a fundamental right, and therefore is subject to strict scrutiny. This Court has repeatedly recognized that when a woman is pregnant she must decide either to carry her pregnancy to term or to have an abortion; in either situation she needs medical care to effectuate her decision; and in either circumstance the woman is exercising her fundamental right to reproductive freedom.[4]

The State cannot justify the Funding Restrictions' impingement on a fundamental right under strict scrutiny, or even under a lower level of review. In fact, the Funding Restrictions undermine two of the State's purported interests, namely cost savings and protecting low-income Alaskans' health. The State will incur greater costs if it forces low-income women to carry to term, both because the State will have to treat women's worsening health conditions and because the costs of prenatal and delivery services are at

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[4] *Planned Parenthood of the Great Northwest v. State ("Planned Parenthood 2016")*, Op. No. 7114, 2016 WL 3959952, at *11, *14 n.102, *16 (Alaska July 22, 2016); *Planned Parenthood 2001*, 28 P.3d at 909, 913.

least twenty times higher than the cost of an abortion. The Funding Restrictions also blatantly undermine the State's interest in protecting patients' health, given that countless low-income women will suffer deterioration of their health if they are unable to obtain an abortion. Under any standard of review, the State may not jeopardize the health of poor women by excluding coverage for medically necessary abortions from the Medicaid program. Simply put, the Funding Restrictions are not only unconstitutional, they are cruel.

The State grasps at straws when it attempts to save the Funding Restrictions by reading them broadly. The superior court correctly held that the expansive reading of the Funding Restrictions adopted by the State for litigation purposes is contrary to the plain language of the Funding Restrictions and the legislative history, which both indicate that the legislature and DHSS intended to deny coverage for abortion unless a woman's health condition meets a "high-risk, high-hazard standard." Furthermore, even under the State's interpretation, Medicaid will not cover abortion made medically necessary by many medical conditions, including nearly all mental health conditions. In addition, the State's construction bars consideration of a whole host of health and social factors that contribute to a physician's determination of whether an abortion, like any medical service, is medically necessary. The Funding Restrictions are a deliberate attempt to circumvent this Court's decision in *Planned Parenthood 2001*, and the superior court's decision striking them down under Alaska's equal protection clause[5] should be affirmed.

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5 Alaska Const. Art. I, § 1.

STATEMENT OF ISSUES

1. Given that the Funding Restrictions impose a more restrictive standard of medical necessity on women seeking abortions than the standard applied to Medicaid recipients seeking other services, did the superior court correctly conclude that, under this Court's decision in *Planned Parenthood 2001*, the Funding Restrictions violate the Alaska Constitution's right to equal protection for women who exercise their fundamental right to reproductive freedom?

2. In light of the plain text of the Statute and Regulation, the record evidence, and the legislative history, did the superior court correctly read the Funding Restrictions to impose a standard for Medicaid coverage for abortion that requires women either to suffer from an extremely serious medical condition or to face a very high risk of developing such a condition?

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

A. ALASKA MEDICAID PROGRAM

Alaska provides general medical assistance for the poor through its Medicaid program, a cooperative federal-state funded program that is administered by DHSS.[6] Under DHSS regulations, Medicaid will reimburse services that are "medically necessary

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[6] AS 47.07.010 *et seq.* The Alaska legislature established the program to provide "needy persons of this state who are eligible for medical care at public expense . . . only uniform and high quality care that is appropriate to their condition and cost-effective to the state . . . ." AS 47.07.010.

as determined by criteria established under 7 AAC 105 - 160 or by the standards of practice applicable to the provider."[7] There is no omnibus definition of medical necessity by which DHSS determines if services are covered. [Exc. 102] Rather, the program operates as a good faith system that presumes the services billed to Medicaid are medically necessary. [Exc. 102; Tr. 602-03] For some services, the State requires a more particular showing that a service is medically necessary, using neutral criteria based upon considerations of cost-effectiveness,[8] efficacy,[9] or potential for abuse or fraud. [Tr. 547, 588] The State also requires a showing of medical necessity for services that may have either a medical or a non-medical purpose. [Tr. 547][10]

The superior court found that, far from adhering to detailed and rigid rules about what is covered and what is not, the Medicaid program in Alaska covers services aimed at both physical and psychological health, and funds a number of services aimed at promoting the overall well-being of low-income Alaska citizens. [Exc. 116] For instance, Medicaid funds behavioral health services, including drug addiction and family counseling. [Exc. 103] Medicaid also pays for expensive breast reconstruction following

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7 7 AAC 105.100(5). The provisions of 7 AAC 105 - 160 do not further define "medically necessary."

8 For example, DHSS would not authorize inpatient care where less expensive outpatient care is adequate. [Tr. 547]

9 For example, Medicaid may decline to authorize a service where it has not been proven effective and other, more effective care is available. [Tr. 547]

10 For example, orthodonture may be needed to correct a medical condition or to improve the appearance of a patient's teeth. Medicaid does not pay for purely cosmetic treatment. To obtain coverage, a provider must establish that there is an actual medical condition that requires the orthodontic treatment. [Tr. 547-48]

cancer surgery, including the cost of a specialist to tattoo a nipple and an areola to perfect the reconstruction, "considering it necessary for the emotional wellbeing of the affected woman." [Exc. 103] Medicaid also will pay for the removal of a benign facial tumor that is disfiguring to "reduce stigma and psychological suffering." [Exc. 103] Medicaid covers a host of family planning and pregnancy services without any additional requirements to establish medical necessity, including contraception, tubal ligation and vasectomy, and prenatal and delivery care. [Exc. 102-03]

B. THE REGULATION

Since 2000, physicians assessing Alaska Medicaid patients seeking abortion have relied on the following definition of "medically necessary":

> [T]he terms medically necessary abortions or therapeutic abortions are used interchangeably to refer to those abortions certified by a physician as necessary to prevent the death or disability of the woman, or to ameliorate a condition harmful to the women's physical or psychological health, as determined by the treating physician performing the abortions services in his or her professional judgment.[11]

On December 10, 2013, DHSS adopted a regulation that severely limits the definition of "medical necessity," conditioning Medicaid payment for abortion on a physician's certification that the abortion was "medically necessary to avoid a threat of serious risk to the physical health of the woman from continuation of her pregnancy due to the impairment of a major bodily function including but not limited to one of the following: [i] diabetes with acute metabolic derangement or severe end organ damage;

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[11] *Planned Parenthood of Alaska, Inc. v. Perdue*, No. 3AN-98-07004CI (Alaska Super. Ct. Sept. 18, 2000). [Exc. 10]

[ii] renal disease that requires dialysis treatment; [iii] severe preeclampsia; [iv] eclampsia; [v] convulsions; [vi] status epilepticus; [vii] sickle cell anemia; [viii] severe congenital or acquired heart disease, class IV; [ix] pulmonary hypertension; [x] malignancy where pregnancy would prevent or limit treatment; [xi] severe kidney infection; [xii] congestive heart failure; [xiii] epilepsy; [xiv] seizures; [xv] coma; [xvi] severe infection exacerbated by the pregnancy; [xvii] rupture of amniotic membranes; [xviii] advanced cervical dilation of more than six centimeters at less than 22 weeks gestation; [xix] cervical or cesarean section scar ectopic implantation; [xx] pregnancy not implanted in the uterine cavity; [xxi] amniotic fluid embolus; or [xxii] another physical disorder, physical injury, or physical illness, including a physical condition arising from the pregnancy."[12] In addition to these enumerated conditions, the Regulation includes a narrow provision for "a psychiatric disorder that places the woman in imminent danger of medical impairment of a major bodily function if an abortion is not performed."[13] The Regulation makes no provision for abortions sought due to grave or lethal fetal anomalies.

The stated purpose of the Regulation is to "permit the program to determine the proper source of funds" – meaning whether the abortion must be paid for only by the State, or whether it falls into the limited circumstances for which federal funding is allowed (*i.e.*, when the pregnancy is the result of rape or incest or endangers a woman's

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12 7 AAC 160.900(d)(30).

13 *Id.*

life). [Exc. 71] However, at trial, DHSS witnesses provided no explanation for the Regulation or why this particular definition of medically necessary abortion was adopted. Cindy Christensen, a DHSS employee, stated there was no reason to believe the certificate required by the Regulation was adopted due to any concern over cost or misuse. [Tr. 603]

C. THE STATUTE

In 2014 the Alaska legislature enacted Senate Bill 49 ("SB 49" or "the Statute"), which also drastically limits the circumstances under which an abortion is "medically necessary." The definition in SB 49 is virtually identical to the definition in the Regulation and includes the same enumerated physical health conditions.[14] Like the Regulation, the Statute excludes coverage for serious or fatal fetal anomalies. [Exc. 83, 131] Unlike the Regulation, the Statute specifically excludes Medicaid coverage for abortions sought due to mental health conditions. [Exc. 83, 114]

Senator Coghill, the bill's sponsor, and his staffers asserted that the list of conditions in the bill was developed based on consultation with medical professionals, and what they believed would satisfy this Court. [Exc. 136, 154] Dr. John Thorp, who worked with Senator Coghill to develop the list, told the Senate Finance Committee that his goal was to

> come up with a list of conditions that unequivocally threatened the life of the mother of – at great magnitude, and would constitute a solid medical indication for a termination of pregnancy. And would be conditions at which even women who wanted to continue a pregnancy, or wouldn't

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[14] There is one difference: the Regulation lists "severe kidney infection," while the Statute lists "kidney infection."

> consider abortion, might have it recommended to them as an option to protect their health.

[Exc. 179; *see also* Exc. 85] In response to a question from Senator Coghill, Dr. Thorp agreed that everything on the list "would be more likely than not to pose a substantial risk to the life or physical health of a mother-to-be." [Exc. 85, 180] Later, Dr. Thorp reiterated to the Senate Judiciary Committee that, "in constructing the medical conditions," they were "trying to define those [that] would be a clear and imminent threat of a mother's health, threaten her life." [Exc. 197-98] Likewise, Chad Hutchinson, of Senator Coghill's staff, explained to the House Judiciary Committee: "[W]e are trying to narrow the focus specifically to limit it to physical conditions pursuant to the recommended language by the Hyde Amendment and the 2001 Planned Parenthood case." [Exc. 202] Chad Hutchinson confirmed that SB 49 is limited only to physical conditions and intentionally omits any provision for a woman's psychological health:

> It is our fundamental belief that mental and psychological conditions should not be included under the definition of medically necessary. The reason why we believe that is because of the testimony that we have received on the Senate side from a plethora of experts that have all stated that mental and psychological conditions should not be included in the definition for medically necessary abortion.

[Exc. 204]

The House rejected two amendments that would have incorporated psychiatric disorders into the definition of "medically necessary," including a psychiatric disorder that places a woman in imminent danger of death.[15] [Exc. 172, 175] And the Senate

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[15] It is possible, though not certain, that under the Statute, Medicaid would pay for an

rejected an amendment that would have broadened the definition of "medically necessary" to include reasons other than the physical health of the woman. [Exc. 169]

D. THE EFFECTS OF PREGNANCY ON WOMEN'S HEALTH

Based on "largely undisputed findings of fact," the superior court concluded that "the decision to carry a fetus to term exposes a woman to an inevitable array of foreseeable and unforeseeable risks." [Exc. 128] Because of these risks, an abortion may be medically necessary to protect a woman's health in a wide range of circumstances, the vast majority of which are not covered by the Funding Restrictions. Indeed, the experts who testified at trial – five obstetrician-gynecologists and three psychiatrists – all agreed that a myriad of health and social factors affect a woman's physical and psychological health in significant ways during pregnancy. [Exc. 88-92, 94-95, 97-98, 99-101, 103-05, 128; Tr. 739-41, 762-66; Brief of Appellants ("At Br.") 11-13] Pre-existing conditions can increase the chance of complications during a pregnancy, or a pregnancy can exacerbate those conditions. [Exc. 88-93] Even for women who are relatively healthy, pregnancy can affect their health in profound ways. [Exc. 88-93] Based on this evidence, the superior court held that the Funding Restrictions exclude Medicaid

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abortion if a woman was at imminent risk of suicide because she faced a "serious risk" of "death." AS 47.07.068(b)(4)(A). As the superior court found, however, "[t]he legislation's sponsors argued that mental health considerations can never justify an abortion." [Exc. 114; *see also* Exc. 202, 204] Ultimately, the availability of such a narrow exception is irrelevant because it excludes many medically necessary abortions, including those for mental health reasons. [Exc. 114-15 (finding that "an abortion can in fact resolve psychiatric symptoms of women with anxiety, depression or obsessive-compulsive disorders," and "be critical in the management of patients suffering psychotic breaks or schizophrenia")]

coverage for a host of physical and psychological medical conditions that may, in the judgment of the physician, make an abortion medically necessary. [Exc. 110-17]

For example, all pregnant women are at risk of developing preeclampsia [Exc. 102], a condition characterized by elevated blood pressure and kidney damage that can pose life threatening health risks and "may be analogized to a ticking time bomb." [Exc. 88] In addition, the superior court found that some pregnant women, including those who are obese or who suffer from chronic hypertension or diabetes, are at even greater risk of preeclampsia and gestational diabetes. [Exc. 88-90; Tr. 654-56] For women who already suffer certain health conditions, the superior court found that pregnancy can exacerbate the severity of those conditions. [Exc. 88-90, 104, 111-12] Pre-existing diabetes can be more difficult to control during pregnancy; heart disease can "advance to a higher class of functional incapacity;" pain crises due to sickle cell anemia can become more frequent. [Exc. 89-91, 104] For a woman who takes medication to manage a health condition such as epilepsy, high blood pressure, or diabetes, pregnancy may interfere with her ability to use such medication because of its potential adverse effects on the fetus. [Exc. 90-91] To avoid harm to the fetus, a woman in these circumstances may have to reduce her medication dosage or switch to a different drug whose efficacy is unproven; both options risk compromising her health. [Exc. 90-91, 95, 98; Tr. 815-16] As the court found, for some women, the Funding Restrictions "will unjustifiably delay [their] abortions until they are riskier" [Exc. 129]; for others, it will "prevent their medically indicated abortion[s]." [Exc. 93]

Pregnancy can also threaten a woman's mental health, as the superior court found. [Exc. 94-98, 104-05] Just as with physical health conditions, pregnancy can cause the onset of a new mental illness or exacerbate a pre-existing mental illness. [Exc. 104] Indeed, "[t]he postpartum period presents particular vulnerabilities for the expression of major depressive disorders." [Exc. 104] The court found, based on the testimony of expert psychiatrists, that up to 20% of women experience a depressive episode during pregnancy and 9% will suffer a major depressive disorder. [Exc. 94, 97, 104; Tr. 814] Postpartum depression, a major depressive disorder thought to be caused at least in part by the hormonal changes of pregnancy, is more likely to recur in women who have previously experienced such depression. [Exc. 104] In addition, the superior court found that, just as with medications used to treat physical illness, pregnancy may limit a woman's use of medications she would otherwise take to control mental illness, or force her to switch to a less effective medication. [Exc. 90, 95] Bipolar patients, for example, often stop using lithium during pregnancy. [Exc. 90, 98, 105] Again, adjusting or stopping medications because of a woman's concern about their effect on the fetus may cause her illness to recur or worsen, putting her health at risk. [Exc. 98] Under any of these circumstances, abortion may be a medically necessary treatment to avoid jeopardizing the woman's health. [Exc. 97]

In addition to the above physical and psychological conditions that may make abortion medically necessary for some women, the superior court found that abortion is medically indicated in instances of fatal fetal anomaly, such as when a fetus has been diagnosed with anencephaly or Tay-Sachs disease. [Exc. 105]

Based on agreement among Planned Parenthood's and the State's experts who testified at trial, the superior court also found that social and economic factors, such as poverty, can affect a woman's health, and are important in determining care and treatment. [Exc. 92, 100; Tr. 27, 79-82, 326-27, 330-31, 682, 739-41, 762-66] Moreover, pregnancy itself can be stressful, whether planned or not [Exc. 94-95, 97; Tr. 822-23], and an unwanted pregnancy is a "profound stressor" that can affect a woman's health during pregnancy. [Exc. 97] As the superior court summarized: "Pregnancy and delivery are out-of-control events entailing substantial physical discomfort. The implications of child-raising, of job changes and stresses, and of relationship effects can be overwhelming to a particular woman." [Exc. 94-95]

The evidence in the record fully supports the superior court's finding that, "[i]n assessing risk to patients and the best interests of patients, physicians must take into account the social, economic, and other situational life factors that may affect a patient's response to illness or pregnancy." [Exc. 92 (citing examples)][16] One of the many examples noted by the court implicating these diverse factors involved a high school student from the Yukon-Kuskokwim Delta. She had been sexually abused from a young age but had become a high performing student with plans to attend college. After learning she was pregnant, she stopped eating and was no longer able to function at

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16 The superior court's findings implicitly reject the position of the State's witnesses that an abortion is medically necessary only when the life of the woman is at risk [Exc. 103, 115; Tr. 696, 766-67], which the court concluded was based on those witnesses' personal opposition to abortion. [Exc. 115-16]

school. The Planned Parenthood physician found her abortion medically necessary. [Exc. 100] If the Funding Restrictions were in place, with their narrow definition of "medically necessary," Medicaid would not have covered the abortion for this young woman until her condition worsened to a life-threatening degree. [Exc. 115, 116]

The superior court's "largely undisputed findings of fact" make clear that pregnancy poses risks to all women and can be medically necessary in a wide range of circumstances. [Exc. 128-29] Thus, the superior court concluded that the Funding Restrictions "only capture[] the very worst medical outcomes, the tip of the iceberg for those conditions and circumstances that would render an abortion medically indicated." [Exc. 92] The court further found, based on the testimony of Planned Parenthood's physicians, that the Funding Restrictions effectively eliminate Medicaid-funded abortions at Planned Parenthood clinics, given that a woman suffering from one of the twenty-one enumerated conditions or a condition of like severity would be too ill to receive an abortion in a clinic setting, and would instead be cared for in a hospital. [Exc. 100-01; Tr. 424-25, 494-95]

II. STATEMENT OF LEGAL PROCEEDINGS

A. THE SUPERIOR COURT'S HOLDINGS AS TO CONSTRUCTION OF THE STATUTE AND THE REGULATION

Before reaching Planned Parenthood's equal protection claim, the superior court addressed the scope of the Funding Restrictions. Planned Parenthood argued, based on the inclusion of the detailed definition of "medically necessary abortion" and the specific enumerated conditions, that the Funding Restrictions cover an abortion only if a woman

is experiencing one of the twenty-one conditions or another physical condition of comparable severity. [Exc. 106-07] The State asserted that the Funding Restrictions should be interpreted to allow Medicaid coverage if there is a "non-trivial possibility . . . that a cited condition might ensue in the future, even if such a risk could not be fairly characterized as either serious or imminent." [Exc. 108] The superior court rejected the assertion that the Funding Restrictions can fairly be read to provide Medicaid coverage for an abortion merely because there is a "possible remote risk[]" that one of the twenty-one conditions will develop. [Exc. 109] The court observed that "all pregnancies entail a risk that a serious risk will arise" [Exc. 109], and found no support for the State's claim that the legislature intended such a broad reading [Exc. 108-09].

B. THE SUPERIOR COURT'S HOLDINGS AS TO PLANNED PARENTHOOD'S EQUAL PROTECTION CLAIM

The court, noting the "explicitly catastrophic nature" of each of the twenty-one enumerated conditions [Exc. 109], found that the Funding Restrictions "limit[] Medicaid funding to high-risk high-hazard situations while failing to address serious but less than catastrophic health detriments." [Exc. 111] The court also found that the Funding Restrictions deny coverage for an abortion due to lethal fetal anomalies [Exc. 113], as well as "non-lethal but still grave fetal abnormalities limiting life quality or life expectancy that a [low-income] woman may deem beyond her capacity to manage, and that will cause her extreme emotional distress and detriment to her general health." [Exc. 113] As to the Regulation's additional provision for "psychiatric disorder[s]," the superior court emphasized that "[n]o testifying witness had propounded any hypothetical"

that would permit coverage under this provision "beyond that of a full-fledged psychiatric disorder per DSM V criteria that posed an imminent risk of suicide." [Exc. 110] Indeed, the State "conceded as much in final argument." [Exc. 110; Tr. 880]

The superior court held that the Funding Restrictions' high-risk high-hazard standard does not accord with the standard applied to other Medicaid services, thereby impermissibly discriminating against women seeking abortions. [Exc. 117-18] In the Medicaid program, "[d]octors routinely consider life circumstances and mental health of their patients, and abortion-seeking Medicaid patients are entitled to no less quality of care." [Exc. 129] Thus, the court concluded:

> The State has identified no other context in which medical service to poor people is titrated with such exacting rigor, with such indifference to risk factors, to sub-catastrophic physical health detriments, and to human suffering. In numerous other contexts, Medicaid relieves human suffering unrelated to serious end-organ damage . . . . Medicaid will pay $9,000 in routine prenatal care and $12,000 in routine delivery expense for a pregnancy where a poor woman elects to carry to term in the face of significant risks. But it cannot pay $650 for the same poor woman who is unwilling to bear those risks and who exercises her constitutional right to terminate her pregnancy. The court is aware of no other context where Medicaid engages in such a relentlessly one-sided calculus.

[Exc. 116-17]

C. THE SUPERIOR COURT'S HOLDINGS AS TO THE STANDARD OF "MEDICALLY NECESSARY" APPLICABLE TO ABORTION

Lastly, the superior court considered the question of what standard of medical necessity is consistent with this Court's decision in *Planned Parenthood 2001* and the "physician-deferential standard" generally used by DHSS. [Exc. 118-30] The court recognized that, for nearly fifty years, DHSS left the determination of a medically

necessary abortion to the judgment of physicians, just as it defers to the physician's professional judgment for other services and procedures. [Exc. 119] The court concluded that the definition of medically necessary abortion, used by the Alaska Medicaid program since 1993,[17] is the one most consistent with the constitutional principles articulated in this Court's *Planned Parenthood 2001* decision. [Exc. 129-30]

STANDARDS OF REVIEW

The superior court's findings of fact, "including those pertaining to the credibility of witnesses," will be upheld unless "clearly erroneous."[18] "All factual findings are reviewed 'in the light most favorable to the prevailing party below.'"[19] This Court "will find clear error only if 'after a thorough review of the record, we come to a definite and firm conviction that a mistake has been made.'"[20]

"Issues regarding the constitutionality of statutes" and issues of statutory interpretation are questions of law that the Court reviews *de novo*.[21]

The assertion by Amicus Alaska Physicians for Medical Integrity that this Court "owes no deference to the constitutional fact findings" of the superior court [Am. Br. of

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17 *Supra* at 6.

18 *3-D & Co. v. Tew's Excavating, Inc.*, 258 P.3d 819, 824 (Alaska 2011).

19 *Id.* (quoting *N. Pac. Processors, Inc. v. City & Borough of Yakutat*, 113 P.3d 575, 579 (Alaska 2005)).

20 *Id.* (quoting *Soules v. Ramstack*, 95 P.3d 933, 936 (Alaska 2004)).

21 *L.D.G., Inc. v. Brown*, 211 P.3d 1110, 1118 (Alaska 2009).

Alaska Physicians for Medical Integrity 2] is incorrect.[22] All *parties* in this case agree that the superior court's findings of fact are reviewed for clear error. [At. Br. 19]

ARGUMENTS

I. THE SUPERIOR COURT CORRECTLY HELD THE FUNDING RESTRICTIONS UNCONSTITUTIONAL UNDER ALASKA'S EQUAL PROTECTION CLAUSE.

Here, just as in *Planned Parenthood 2001*, strict scrutiny is the appropriate level of review, and, just as in that case, the Funding Restrictions fail under that level of review. Simply put, the Funding Restrictions single out women who need abortion for discriminatory treatment. Indeed, as the superior court found, Medicaid-eligible women will be denied coverage for medically necessary abortion, while similarly situated Medicaid recipients will have coverage for other medically necessary care. For abortion, and only abortion, the Funding Restrictions prohibit physicians from using their discretion to determine medical necessity; the opposite is true for other types of medical care. To justify this discriminatory treatment, the State must demonstrate that the Funding Restrictions are narrowly tailored and serve a compelling government interest.

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[22] The Alaska cases relied on by Amicus do not support its position. In *State v. Erickson*, 574 P.2d 1, 4 (Alaska 1978), this Court, in its discussion of legislative facts, contemplated when it was appropriate to consider information not in the evidentiary record, and did not address *de novo* review of findings of fact following an evidentiary hearing. And *Troyer v. State*, 614 P.2d 313, 318 (Alaska 1980), stands only for the unremarkable proposition that, when considering mixed questions of fact and law, this Court reviews the factual elements for clear error and applies *de novo* review to questions of law. Amicus would have this Court ignore well-settled precedent and nullify the superior court's extensive findings of fact by applying *de novo* review. There is no basis for this radical proposal and it should be rejected.

The State cannot meet this high bar. Moreover, as the superior court's analysis demonstrates, even under the lowest level of scrutiny, the Funding Restrictions violate equal protection. The denial of medical care to needy persons neither relates to the goals of Medicaid, nor serves a legitimate purpose.

A. THE FUNDING RESTRICTIONS FAIL STRICT SCRUTINY.

In a challenge under Alaska's equal protection clause, the Court determines what level of scrutiny to apply to the challenged action using the "'sliding scale' standard."[23] Under this standard, the Court first "establish[es] the nature of the right allegedly infringed by state action."[24] This is "the most important variable in fixing the appropriate level of review."[25] The State's burden to justify the action increases as the "right it affects grows more fundamental: at the low end of the sliding scale the state needs only to show that it has a legitimate purpose; but at the high end – when its action directly infringes a fundamental right – the state must prove a compelling government interest."[26] The Court "next examine[s] the importance of the state purpose served by the challenged action in order to determine whether it meets the requisite standard."[27] Lastly, the Court

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[23] *Planned Parenthood 2001*, 28 P.3d at 909 (quoting *Matanuska-Susitna Borough Sch. Dist. v. State*, 931 P.2d 391, 396 (Alaska 1997)); *see also Planned Parenthood 2016*, 2016 WL 3959952 at *10.

[24] *State v. Planned Parenthood of Alaska*, 35 P.3d 30, 42 (Alaska 2001).

[25] *Planned Parenthood 2001*, 28 P.3d at 909 (internal quotation marks and citation omitted).

[26] *State v. Planned Parenthood of Alaska*, 35 P.3d at 42; *see also Planned Parenthood 2016*, 2016 WL 3959952 at *10.

[27] *State v. Planned Parenthood of Alaska*, 35 P.3d at 42; *see also Planned*

"consider[s] the particular means that the state selects to further its purpose; a showing of substantial relationship between means and ends will suffice at the low end of the scale, but at the high end the state must demonstrate that no less restrictive alternative exists to accomplish its purpose."[28] Applying this three-part test to the Funding Restrictions, it is clear that they are subject to strict scrutiny, and that they fail this exacting standard.

1. The Funding Restrictions Treat Similarly Situated Medicaid Patients Dissimilarly.

At the outset, the superior court's meticulous – and "largely undisputed" [Exc. 128] – factual findings demonstrate that the Funding Restrictions single out abortion as the only type of medical treatment so stringently regulated. The superior court provided numerous illustrations of this discriminatory treatment of women seeking abortion compared to patients seeking other types of medical care. For example, heart disease patients receive Medicaid coverage for treatment – such as "statins, blood thinners, and blood pressure medication" – regardless of the level of classification of the patient's heart disease. [Exc. 112] But when a woman with heart disease seeks an abortion to protect her health, reimbursement is provided only if she suffers from "Class IV [heart disease], which must be either fully realized or imminent." [Exc. 112] As a result, the Funding Restrictions "discriminate against women" who need abortion to prevent "critical but sub-catastrophic deterioration of their health." [Exc. 112]

Parenthood 2016, 2016 WL 3959952 at *11.

[28] *State v. Planned Parenthood of Alaska*, 35 P.3d at 42; *see also Planned Parenthood 2016*, 2016 WL 3959952 at *11.

The superior court also highlighted the disparate treatment of women who seek abortion in the context of fetal anomalies, even fatal ones. Even the "State's experts agreed that such abortions are medically necessary." [Exc. 113] Nevertheless, the Funding Restrictions prohibit coverage for such abortions. The superior court found this denial of coverage to be "wholly uncharacteristic of, and at odds with, the more universal tendency of Medicaid to assuage dire medical outcomes."[29] [Exc. 114]

Similarly, even though Medicaid covers a wide range of mental health treatment, the Funding Restrictions deny Medicaid coverage for virtually all women who seek medically necessary abortions because they are suffering from "mental illness or extreme emotional distress." [Exc. 114] For example, the court found, based on "credible expert testimony," that "abortion can in fact resolve psychiatric symptoms of women with anxiety, depression or obsessive compulsive disorders" and relieve "clinically significant mental distress." [Exc. 114-15] But the Funding Restrictions prohibit coverage for abortion for a woman with compromised mental health unless she is at "imminent risk of suicide." [Exc. 110] Outside the context of abortion, Medicaid will pay for behavioral health clinic services for individuals experiencing "an emotional disturbance" or "a serious mental illness," even if the patient is not actively suicidal,[30] and will reimburse

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[29] The State, even in its broad – and unsupported – interpretation of the Funding Restrictions, does not argue that abortions for lethal fetal anomalies are covered, despite the State's experts' testimony that coverage should be included in these circumstances. [Exc. 103-04; Tr. 751] Dr. Caughey, a maternal-fetal medicine specialist and expert for Planned Parenthood, characterized this omission as "unconscionable." [Tr. 122]

[30] 7 AAC 135.020(a).

for services that are "medically necessary and clinically appropriate," as determined by the physician in his or her discretion.[31] But that is not true in the context of abortion.

The superior court also found that the Funding Restrictions treat women who seek to carry their pregnancies to term differently than women who seek to end their pregnancies. Medicaid covers all medically necessary care for women who carry their pregnancies to term, but under the Funding Restrictions, only covers abortion if the woman's health is severely compromised. Indeed, Medicaid will pay $21,000 in routine prenatal and delivery expenses where a low-income woman decides to carry her pregnancy to term. [Exc. 117] Furthermore, "[s]cheduled c-sections do not require pre-approval via certification of their medical necessity." [Exc. 102] The superior court's finding that pregnant women who seek abortion and pregnant women who carry to term are similarly situated, but treated differently, is consistent with this Court's recent decision striking down Alaska's abortion parental notification law. In that case, the Court concluded that the notification law treated similarly situated minors – pregnant minors who decide to carry to term and pregnant minors who decide to have an abortion – dissimilarly by requiring parental notification in one context but not the other.[32]

The superior court's finding that the Funding Restrictions treat Medicaid recipients seeking abortion differently from Medicaid recipients seeking other services is also consistent with this Court's *Planned Parenthood 2001* decision. As this Court held,

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31 7 AAC 135.010(a)(6).

32 *Planned Parenthood 2016*, 2016 WL 3959952, at *9, *11 & n.84.

"some women – particularly those who suffer from pre-existing health problems – face significant risks if they cannot get abortions."[33] This Court then catalogued a number of health conditions that would be excluded from coverage,[34] most of which continue to apply here. As the superior court found:

> [T]he statute completely fails to cover several deprivations of medically necessary care noted in the [*Planned Parenthood 2001* decision], including for women who must choose between the risks of teratogenic effects of psychotropic medications needed for their bipolar or epileptic status, versus real but sub-catastrophic health risks if they forego these medications; and for women who require months in order to self-fund their procedures and so incur increased medical risk due to the delay.

[Exc. 111] Under the Funding Restrictions, "abortions for poor women are subject to an entirely different register of scrutiny." [Exc. 116] As the superior court summarized, there is "no other context where Medicaid engages in such a relentlessly one-sided calculus" [Exc. 117], or where "medical service to poor people is titrated with such exacting rigor." [Exc. 116]

In light of the superior court's thorough factual findings, the State is hard-pressed to explain why the Funding Restrictions single out abortion from all other medical care. The State does not even attempt to argue that the superior court's factual findings are clearly erroneous. Instead, the State tries to argue that there is daylight between a doctor's determination of what is medically indicated for a patient and what is "medically necessary" for Medicaid reimbursement. [At. Br. 53] But this distinction does not hold

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33 *Planned Parenthood 2001*, 28 P.3d at 907.

34 *See id.*

true in contexts outside of abortion. Alaska "has no omnibus definition of 'medical necessity' by which it determines whether medical services are covered by Medicaid." [Exc. 102] Rather, in deciding whether to reimburse a physician for medical care under Medicaid, the State "generally presume[s] that a physician provided a medically necessary service" based on the physician's medical judgment, by "taking into account the patient's individualized nature and specific life circumstances." [Exc. 102, 117][35] By sharp contrast, in the context of abortion, the Funding Restrictions "capture[] the very worst medical outcomes, the tip of the iceberg for those conditions and circumstances that would render an abortion medically indicated," but otherwise deprive a physician of the ability to determine "medical necessity" in his or her discretion. [Exc. 92]

The State effectively concedes that it has singled out abortion for differential treatment in making its next argument, namely that the Funding Restrictions appropriately treat abortion differently because abortion is "one of a handful of procedures frequently sought even though not necessary to protect the patient's health." [At. Br. 49] This argument is unavailing for two reasons. First, contrary to the State's claims [At. Br. 41], the Funding Restrictions do not distinguish between "medically necessary abortions" and "elective abortions." As discussed *supra* at 10-16, the superior court found that the Funding Restrictions exclude numerous medical conditions for which an abortion may be medically necessary. Second, even when comparing abortion to other

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35 As the State admits, Medicaid regulations generally allow doctors to determine what is "medically necessary" based on "the standards of practice applicable to the provider." [At. Br. 6 (quoting 7 AAC 105.100(5))]

types of medical care that may be sought for reasons "not necessary to protect the patient's health," the Funding Restrictions still treat abortion differently by denying doctors the ability to determine when the procedure is necessary to protect a woman's health. For example, Medicaid does not cover cosmetic surgery unless it is needed to, *inter alia*, "correct[] a visible disfigurement that would materially affect the recipient's acceptance in society."[36] In that context, the physician has the discretion to determine whether the patient's disfigurement meets that standard. Similarly, a woman may select a scheduled c-section for reasons unrelated to protecting her health. Medicaid allows a physician to determine if a scheduled c-section is medically necessary and does "not require pre-approval via certification." [Exc. 102] However, in the context of abortion – and only abortion – doctors have no such discretion, and instead are hamstrung by a list of extreme medical diagnoses that a woman must meet before Medicaid will cover her abortion. In all of these ways, the Funding Restrictions treat Medicaid recipients seeking abortion differently than all other Medicaid patients, including pregnant women who decide to carry their pregnancies to term.

2. Step One: The Funding Restrictions Infringe On A Fundamental Right.

The State's differential treatment of Medicaid patients seeking abortion unquestionably implicates a fundamental right. In an unbroken line of cases, this Court has consistently held that the "the right to an abortion is the kind of fundamental right and

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[36] 7 AAC 105.110(4).

privilege encompassed within the intention and spirit of Alaska's constitutional language."[37] In the specific context of Medicaid coverage for abortion, this Court has held that Medicaid restrictions that limit coverage for abortion "affect[] the exercise of a constitutional right, the right to reproductive freedom," and are therefore subject to strict scrutiny.[38] This "[j]udicial scrutiny of state action is equally strict where the government, by selectively denying a benefit to those who exercise a constitutional right, effectively deters the exercise of that right."[39] This is true even where, as here, the challenged law does not directly "forbid individual exercise of constitutional rights."[40] The superior court found that the Funding Restrictions would deter and/or prevent women from accessing abortion [Exc. 93, 129] – just as the regulation challenged in *Planned Parenthood 2001* did.[41] The Funding Restrictions therefore infringe upon the fundamental right to abortion and are subject to strict scrutiny.

In the face of this well-settled precedent, the State makes two arguments to resist the application of strict scrutiny, neither of which has merit. First, the State argues that there is no selective denial of Medicaid benefits to women who exercise their right to

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37 *Valley Hosp. Ass'n v. Mat-Su Coalition for Choice*, 948 P.2d 963, 968 (Alaska 1997); *see also Planned Parenthood 2016*, 2016 WL 3959952 at *11; *State v. Planned Parenthood of Alaska*, 35 P.3d at 40-41; *Planned Parenthood 2001*, 28 P.3d at 909.

38 *Planned Parenthood 2001*, 28 P.3d at 909.

39 *Id.*

40 *Id.* at 910.

41 *Id.* at 911 (underscoring that it was "undisputed" that the funding restriction "deters women from obtaining abortion," and that the State had conceded that 35% of women "who would otherwise have obtained abortions [would] instead carry their pregnancies to term").

abortion "so long as [the criteria for abortion coverage] meet[] the across-the-board requirement for all Medicaid services – that the service is needed to protect the patient's health." [At. Br. 36] This argument fails because the superior court found, as discussed *supra* at 20-25, there is no such parity between the criteria for abortion coverage and coverage for other medical care, including medical care for women who decide to carry their pregnancies to term. The State does not require a patient to face "a serious risk of impairment of a major bodily function" before the physician may provide treatment under Medicaid in any context other than abortion.[42]

Second, the State argues that, to trigger strict scrutiny, the State's action must "directly infringe" on fundamental rights rather than merely "affect" a fundamental right.[43] This argument is mere semantics. In various cases, the Court has said that a law triggers strict scrutiny when it "burden[s]"[44] or "infringe[s]" on a fundamental right;[45] or

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[42] Unlike abortions, as governed by the Funding Restrictions, for all the types of treatment cited by the State, the physician retains the ability to make decisions in his or her discretion, and the State imposes only general, neutral criteria on the parameters of that treatment. [At. Br. 36 & n.80 (citing 7 AAC 135.020(a) (allows coverage for behavioral health services if a child or adult is experiencing "an emotional disturbance"); 7 AAC 105.110(4) (provides coverage for reconstructive surgery to repair an injury, improve functioning of a malformed body member, or "correct[]" "a visible disfigurement that would materially affect the recipient's acceptance in society"); 7 AAC 110.153 (permits coverage for orthodontics for those under twenty-one years of age to correct poor bite); 7 AAC 125.020(a)-(c) (authorizes coverage for a personal care attendant after assessment of dependency); 7 AAC 130.205(d) (allows coverage for home and community-based services as an alternative to institutional care for prolonged illnesses))]

[43] At. Br. 37 (quoting *State v. Planned Parenthood of Alaska*, 35 P.3d at 42, and *Planned Parenthood 2001*, 28 P.3d at 909).

[44] *State v. Planned Parenthood of Alaska*, 171 P.3d 577, 582 (Alaska 2007); *see also State v. Ostrosky*, 667 P.2d 1184, 1193 (Alaska 1983) ("As legislation *burdens* more

when it "impairs,"[46] "implicate[s]," "regulate[s]," or "interferes" with a fundamental right.[47] Even if these terms connoted a different test – which they do not – the Funding Restrictions trigger strict scrutiny under any of them, including the State's arguably more stringent "directly infringes" test. Indeed, as the superior court found, the Funding Restrictions "will impose on some poor women costs that will delay or prevent their medically indicated abortion." [Exc. 93] The State ignores this finding when it argues that the Funding Restrictions do not "directly infringe" on the fundamental right to abortion but "only limit[] state subsidies for abortion." [At. Br. 38] This Court rejected that exact argument in *Planned Parenthood 2001*, and it should do so again. The question raised in the equal protection challenge is not – as the State poses it – whether the State must subsidize constitutional rights. "Rather, the issue is whether the State, having enacted a benefits program, may discriminate between recipients in the manner attempted by [DHSS] today."[48] Thus, for all of the reasons discussed above, and based on this Court's precedent, strict scrutiny applies here.[49]

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fundamental rights, such as rights to speak and travel freely, it is subjected to more rigorous scrutiny . . . ." (emphasis added)).

45 *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 265 (Alaska 2004).

46 *Schiel v. Union Oil Co. of Calif.*, 219 P.3d 1025, 1030 (Alaska 2009).

47 *Fraternal Order of Eagles v. City and Borough of Juneau*, 254 P.3d 348, 355 (Alaska 2011).

48 *Planned Parenthood 2001*, 28 P.3d at 906.

49 The State's slippery slope argument is equally unpersuasive. The State poses hypotheticals about limitations on Medicaid coverage for other types of medical care. [At. Br. 39-40] But none of those types of medical care has been deemed a fundamental right like abortion. Moreover, no slippery slope has materialized since the Court's

3. Step Two: The Interests Identified By The State Are Not Compelling.

To justify its blatant discrimination against women who seek abortion, the State must identify a compelling interest.[50] As this Court recently stated, "[t]o prove an interest compelling in the equal protection context, the State must show that the interest actually needs to be vindicated because it is significantly impaired at present."[51] This is a high bar, and one that the State cannot meet. Indeed, the State has all but conceded that, if strict scrutiny applies, the Funding Restrictions must fall. [Tr. 864] It is therefore unsurprising that the State makes only a half-hearted attempt to argue that it has a compelling interest in setting spending limits for Medicaid to ensure the feasibility of the Medicaid program. [At. Br. 58] Simply put, controlling costs is not a compelling interest. As this Court has recognized time and again, under any level of scrutiny, "cost savings alone are not sufficient government objectives under our equal protection analysis. The government can adequately protect its tax base and minimize cost without discriminating between similarly situated classes."[52]

The State also tries impermissibly to shoehorn the State's interest in protecting "poor Alaskans' health" into the "feasibility" argument, asserting that, if the Medicaid program is jeopardized, then low-income Alaskans' health will be too. This argument is

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decision in 2001, and there is no reason to think it would now.

50 *Treacy*, 91 P.3d at 266.

51 *Planned Parenthood 2016*, 2016 WL 3959952 at *12 n.88.

52 *State v. Schmidt*, 323 P.3d 647, 663 (Alaska 2014) (internal quotation marks and citations omitted) (citing additional cases).

part and parcel of the cost-containment argument, and should rejected for the reasons discussed above. But even looking at the State's interest in low-income Alaskans' health in isolation, the State has not shown that it passed the Funding Restrictions because that interest is "significantly impaired at present" by covering abortion. Thus, it cannot be considered a compelling interest in this case. Moreover, as discussed *infra*, the State's interest in protecting poor Alaskans' health is not served by – and is in fact undermined by – the Funding Restrictions.

4. Step Three: The State Has Failed To Show The Funding Restrictions Serve A Compelling Interest And Are Narrowly Tailored.

Even if the State's identified interests were compelling, the Funding Restrictions neither serve those interests nor are they narrowly tailored. For example, even if reducing costs to ensure feasibility of the program were a compelling interest – which it is not – the Funding Restrictions do not serve that interest. To begin with, for decades Alaska Medicaid has reimbursed for abortions with no detriment to the system, and the State presented no evidence to the contrary. As the superior court found, "Alaska Medicaid expends over one billion dollars per year on Medicaid services. Alaska Medicaid expends less than two hundred thousand dollars on abortion." [Exc. 102] Thus, only 0.02% of Medicaid is spent on abortion coverage. Such a minute amount of money cannot possibly burden the system. Even if it did, the Funding Restrictions would actually cause the Medicaid program to spend *more* money.[53] If Medicaid-eligible

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[53] As the superior court found, many poor women will not be able to pay for an

women are unable to obtain an abortion, and are forced to carry to term, Medicaid will pay for all expenses related to childbirth, which far exceed the cost of abortion. Prenatal care and delivery expenses can cost as much as $21,000 per patient. [Exc. 117] In contrast, the cost of an abortion is $650-1,000. [Exc. 93-94] Furthermore, if a woman seeking a medically necessary abortion must wait until she becomes so severely ill that she reaches the high threshold set by the Funding Restrictions, Medicaid will end up paying more for treatment of her underlying health condition, and more for the abortion, which becomes more expensive as the pregnancy progresses. [Exc. 93] Thus there can be no doubt that the Funding Restrictions undermine, rather than further, the State's interest in reducing costs.

Moreover, it is axiomatic that the Funding Restrictions are detrimental to, and do not promote, the State's interest in protecting poor Alaskans' health. The superior court's decision is replete with findings of fact demonstrating that the Funding Restrictions would jeopardize the health of poor women by forcing them to delay abortion, or by denying them access to abortion altogether. *See supra* at 10-16. These findings are consistent with this Court's recent decision striking down the abortion parental notification law. As this Court held in *Planned Parenthood 2016*:

> [P]arental notification *hinders* the State's interest in protecting minors' health by discouraging and potentially delaying them from obtaining constitutionally protected medical treatment. If there is no medically or psychologically inferred difference between pregnant minors making

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abortion on their own; as a result, those women will be prevented from having an abortion if Medicaid does not cover it. [Exc. 93]

> reproductive choices . . . under its own theory the Notification Law is *detrimental* to the State's compelling interest in protecting the health of minors seeking termination.[54]

Because the State has failed to prove that the Funding Restrictions serve a compelling state interest, there is no need to address the State's argument that the Funding Restrictions are narrowly tailored. But even if the Court were to do so, it should reject that argument. The State argues that the Funding Restrictions are narrowly tailored to prevent reimbursement of medical care based on abortion patients' subjective assessment of their condition, which could then lead to other patients demanding Medicaid coverage for other types of medical care based on their subjective assessment of their condition. [At. Br. 58-59] This argument suffers from a fatal flaw. The *patient's* subjective assessment of her condition does not determine whether an abortion is medically necessary under Medicaid; rather, the *medical provider* makes that determination based on his or her medical evaluation of the patient. This is precisely the same discretion medical providers are afforded in every context besides abortion. Striking down the Funding Restrictions merely puts abortion patients in the same position as other patients, thereby allowing the physician to use his or her discretion to determine medical necessity.

B. THE FUNDING RESTRICTIONS FAIL EVEN UNDER A LOWER LEVEL OF SCRUTINY.

Even under the lowest level scrutiny, the Funding Restrictions are unconstitutional. Under this standard of review, "differential treatment of similarly

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54 *Planned Parenthood 2016*, 2016 WL 3959952 at *15 n.104.

situated people is permissible only if the distinction between the persons rests upon some ground of difference having a fair and substantial relation to the object of the legislation."[55] The State must also show that its "objectives are legitimate."[56] The State cannot meet this burden.

The State has no legitimate interest in "jeopardiz[ing] the health and privacy of poor women by excluding medically necessary abortion from a system providing all other medically necessary care for the indigent."[57] Indeed, as this Court recognized in 2001, providing "necessary medical care to all Medicaid-eligible Alaskans except women who medically require abortions . . . lacks a fair and substantial relation to the object of the Medicaid program," which is to protect the health of low-income Alaskans.[58] As discussed *supra* at 10-16, 28, the Funding Restrictions exclude numerous medical conditions that place a woman's health at risk, including virtually every psychological condition, and thereby jeopardize the health of low-income women. Denying low-income women coverage for medically necessary abortion is therefore not a legitimate state interest.

Moreover, the Funding Restrictions would deny low-income women coverage for medically necessary abortions "*based solely on political disapproval* of the medically

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55 *Planned Parenthood 2001*, 28 P.3d at 911 (internal quotation marks and citation omitted).

56 *Schiel*, 210 P.3d at 1030.

57 *Planned Parenthood 2001*, 28 P.3d at 912 (internal quotation marks and citation omitted).

58 *Id.* at 911.

necessary procedure."[59] This Court recently confirmed that "'political disapproval' alone cannot justify treating women differently based upon how they exercise their reproductive choices."[60] Here, as the superior court recognized, the legislature targeted abortion because of its opposition to the procedure and intentionally excluded coverage for conditions recognized as medically necessary by this Court in 2001. This deliberate disfavoring of abortion is exemplified by the fact that "the legislature uncritically accepted the testimony of self-identified anti-abortion advocates promoting a fabricated consensus on medical necessity." [Exc. 118]

All of this points to the conclusion that the Funding Restrictions were not passed with a legitimate purpose but, instead, likely an illegitimate one: targeting a politically unpopular type of medical care. Therefore, under even the lowest level of review, the Funding Restrictions must fall, and the superior court's decision should be affirmed.

II. THE FUNDING RESTRICTIONS ARE UNCONSTITUTIONAL ON THEIR FACE, AND THE STATE'S CONTRARY INTERPRETATION IS NOT SUPPORTED BY THE TEXT OR LEGISLATIVE HISTORY.

The superior court rightly found that the Funding Restrictions set a "high-risk high-hazard" standard for Medicaid funded abortions – one that precludes coverage in all but the most dire circumstances. [Exc. 107] In a Hail Mary attempt to save the Funding Restrictions from constitutional infirmity, the State claims that the court misconstrued not only the Statute and the Regulation, but also the relevant legislative history. The State is

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59 *Id.* at 905 (emphasis added).

60 *Planned Parenthood 2016*, 2016 WL 3959952 at *2 (quoting *Planned Parenthood 2001*, 28 P.3d at 905).

wrong on both counts. The court's reading of the Funding Restrictions is supported by their text – including both the prefatory language and the enumerated list of qualifying conditions, which must be taken together as a whole.

Because the meaning of the Funding Restrictions is plain and unambiguous, the State bears a heavy burden to demonstrate that the Statute and Regulation ought to be interpreted broadly, contrary to their plain language. The State has not met this burden. To the extent this Court finds the legislative history to be instructive, a careful examination of that history supports the superior court's holding. Even if this Court were to find the Funding Restrictions susceptible to the State's expansive interpretation, adopting such an interpretation would amount to judicial rewriting of the Funding Restrictions and would be contrary to legislative intent.

A. THE PLAIN WORDING OF THE FUNDING RESTRICTIONS EXCLUDES MEDICAID COVERAGE FOR ABORTION FOR ALL BUT THE MOST EXTREME PHYSICAL CONDITIONS.

As the superior court noted, courts tasked with construing a statute "adhere closely to the text's plain meaning." [Exc. 105][61] When a statute is clear and unambiguous, Alaska courts will not ascribe a different meaning to it in the absence of "clear legislative history" demonstrating a "contrary legislative intent."[62] In the event a party contends that a different meaning controls, Alaska courts utilize a sliding scale approach, wherein "the

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61 *See also Am. Marine Corp. v. Sholin*, 295 P.3d 924, 926 (Alaska 2013) ("Statutory interpretation begins with the plain meaning of the text . . . .").

62 *Lot 04B & 5C, Block 83 Townsite v. Fairbanks N. Star Borough*, 208 P.3d 188, 193 (Alaska 2009) (internal quotation marks and citation omitted).

more plain the language of the statute, 'the more convincing the contrary legislative history must be.'"[63] In other words, the clearer the meaning of a statute on its face, the heavier the burden on the party asserting a different meaning.[64]

This Court also adheres to the principle that courts should "construe all sections of an act together."[65] "Whenever possible, this [C]ourt interprets each part or section of a statute with every other part or section, so as to create a harmonious whole."[66] This principle is based on the presumption that "the legislature intended every word, sentence, or provision of a statute to have some purpose, force, and effect, and that no words or provisions are superfluous."[67]

Applying these rules of construction here makes clear that the Statute imposes a narrow and restrictive definition of "medically necessary" designed to prevent low-income women in Alaska from obtaining abortion coverage under Medicaid in all but the most extreme circumstances. For an abortion to qualify for Medicaid coverage, the prefatory language requires a woman's physician to determine that the abortion "*must* be performed to avoid a threat of serious risk to [her] life or *physical* health."[68] In other

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63 *Homer Elec. Ass'n v. Towsley*, 841 P. 2d 1042, 1044 (Alaska 1992) (quoting *State v. Alex*, 646 P2d. 203, 208 n.4 (Alaska 1982)).

64 *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 192-93 (Alaska 2007).

65 *State, Div. of Workers' Comp. v. Titan Enterprises, LLC*, 338 P.3d 316, 320 (Alaska 2014).

66 *Rydwell v. Anchorage School Dist.*, 864 P.2d 526, 528 (Alaska 1993).

67 *Id.* at 530-31.

68 AS 47.07.068(b)(3) (emphasis added).

words, no alternative treatment is available to protect the woman against death or impairment of a major bodily function. A "serious risk to [] life or physical health" means that a woman faces a "serious risk" of "death" or "impairment of a major bodily impairment *because of*"[69] one of twenty-one enumerated medical conditions,[70] or "another physical disorder, physical injury, or physical illness . . . that places [her] in danger of death or major bodily impairment if an abortion is not performed."[71]

The "explicitly catastrophic nature" of the twenty-one enumerated conditions is clear from the plain wording of the Statute. [Exc. 109] A number of the conditions – such as renal disease that requires dialysis treatment; severe pre-eclampsia; eclampsia; severe congenital or acquired heart disease, class IV; pulmonary hypertension; cervical or cesarean scar ectopic implantation; coma; and amniotic fluid embolus – are life-threatening. [Tr. 65, 70-71, 105, 702-03, 706, 708] Many enumerated conditions are qualified by the word "severe" and/or include language indicating how serious the woman's health condition must be in order to qualify for coverage.[72] The Statute's catch-all provision does not broaden the scope of coverage to include less serious health conditions; rather, it covers only those physical conditions that are "subject to like

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69 AS 47.07.068(b)(4)(B) (emphasis added).

70 AS 47.07.068(b)(4)(B)(i)-(xxi).

71 AS 47.07.068(b)(4)(B)(xxii).

72 *E.g.*, "severe pre-eclampsia;" "severe congenital or acquired heart disease class IV;" "severe infection exacerbated by pregnancy;" "renal disease that requires dialysis treatment;" "advanced cervical dilation of more than six centimeters at less than 22 weeks gestation." AS 47.07.068(b)(4)(B)(iii); (viii); (xvi); (ii); (xviii).

parameters of risk and hazard." [Exc. 107] Accordingly, regardless of whether a woman suffers from one of the enumerated conditions, or another equally serious health condition, she is ineligible for Medicaid coverage unless her condition is so severe that it places her at risk of death, or impairment of a major bodily function.[73]

The Regulation, like the Statute, requires a physician to certify that an abortion is medically necessary "to avoid a threat of serious risk to the physical health of the woman from continuation of her pregnancy *due to* the impairment of a major bodily function."[74] It includes the same twenty-one conditions and a catch-all provision for "another physical disorder, physical injury, [or] physical illness."[75] While the Regulation also contains a catch-all for "a psychiatric disorder that places the woman in imminent danger of medical impairment of a major bodily function,"[76] as explained *supra* at 15-16, this provision does not permit coverage for any condition other than the "imminent risk of suicide." [Exc. 110]

Read together, the list of enumerated conditions and the prefatory text make clear that the Funding Restrictions prohibit coverage for an abortion unless a woman is suffering from a "blindingly obvious, highly deteriorated physical health condition[]" that is both "significant and verifiable." [Exc. 107] The Funding Restrictions can mean only one thing: to be eligible for a Medicaid-funded abortion, a woman's physical health condition must manifest in its most extreme form – *e.g.*, "diabetes *with acute metabolic*

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73 AS 47.07.068(b)(4).

74 7 AAC 160.900(d)(30) (emphasis added).

75 *Id.*

76 *Id.*

derangement or *severe end organ damage*;" "*severe* congenital or acquired heart disease, *class IV*;" "*severe* infection *exacerbated by* pregnancy."[77] Thus, as the superior court explained, the fact that a woman's health condition – kidney disease, for example – *might* worsen during her pregnancy "would not justify a funded abortion," because coverage is only permitted under the Funding Restrictions where a woman's need for an abortion "arise[s] from 'renal disease that requires dialysis.'" [Exc. 107] Even a woman who suffers from one of the enumerated medical conditions deemed severe enough to qualify for Medicaid funding – kidney infection, for example[78] – would not automatically be eligible for Medicaid coverage of her abortion. Rather, the Funding Restrictions permit coverage only if a physician *also* determines that the kidney infection (or another enumerated condition) places her at serious risk of death or impairment of a major bodily function.[79]

B. THE STATE'S INTERPRETATION OF THE FUNDING RESTRICTIONS CANNOT BE SQUARED WITH THE PLAIN WORDING OF THE STATUTE AND REGULATION.

The State, recognizing that on their face the Funding Restrictions discriminate against women seeking Medicaid coverage for abortion, attempts to salvage them by asserting that the Statute and Regulation offer "broad Medicaid coverage for abortions needed to protect a pregnant woman's health." [At. Br. 29] The plain wording of the

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77 AS 47.07.068(b)(4)(B)(i); (viii); (xvi) (emphases added).

78 While the Statute lists "kidney infection" as one of the twenty-one conditions, the Regulation permits coverage only for "severe kidney infection." *Compare* AS 47.07.068(b)(4)(B)(xi) *with* 7 AAC 160.900(d)(30).

79 AS 47.07.068(b)(4).

Statute and Regulation do not, however, support the State's strained reading, nor does the evidence submitted to the superior court or the legislative history. And even if the State's construction were plausible, the Funding Restrictions still exclude coverage for many of the physical and psychological conditions that can make an abortion medically necessary.

1. The State's "Risk Of A Risk" Construction Conflicts With The Plain Text Of The Funding Restrictions.

Relying primarily on the prefatory language of the Statute and Regulation – specifically, the language contemplating coverage for conditions that pose a "*threat* of serious risk" – the State asserts that the Funding Restrictions authorize coverage so long as a woman faces a "non-trivial" risk of developing one of the twenty-one enumerated conditions, or a "similar condition[]." [At. Br. 18, 19] However, the word "non-trivial" appears nowhere in the Funding Restrictions or the legislative history; the State has pulled it out of thin air. The superior court correctly rejected this construction:

> The phrase "a threat of a serious risk to the physical health of the woman from continuation of her pregnancy" cannot reasonably be read to mean a mere distant "risk of a serious risk." Indeed, Dr. Caughey and Dr. Whitefield testified that all pregnancies entail a risk that a serious risk will arise. There is no indication in the legislative history that "a threat of serious risk" means anything less than "a serious risk." The word "threat" in the statute must be taken as a mere reiteration of "serious risk."

[Exc. 109] As the court recognized, the State's reading of a "threat of *serious* risk" to cover *any* non-trivial risk to a woman's health would essentially mean that all pregnant women would be eligible for coverage, because all women are at risk for developing conditions such as preeclampsia during pregnancy. [Exc. 102]

Construing the Funding Restrictions according to the State's interpretation would render the meticulously crafted list of conditions surplusage, in contravention of the rules of statutory construction. For example, the State urges the Court to find that "Medicaid will cover an abortion for women who have any of a wide range of conditions that commonly complicate pregnancy, such as obesity, diabetes, and preeclampsia" [At. Br. 3], despite their absence from the enumerated list. But adopting the State's reading – by disregarding the specific and detailed descriptions of the twenty-one enumerated conditions – is incompatible with the cardinal rule of construction presuming that "every word, sentence, or provision of a statute . . . ha[s] some purpose, force, and effect."[80]

The State's own experts do not agree with the interpretation urged by the State's attorneys. The State's experts testified that the Funding Restrictions restrict Medicaid coverage to those circumstances where a woman faces a significant and potentially life-threatening physical health condition. [Exc. 103, 115] Dr. Calvin "opined that under the statute an abortion is medically necessary when continuation of a pregnancy poses a threat to the life of the mother," and that "medical necessity" "should mean 'necessary to avoid fatal or near-fatal health crises.'" [Exc. 103, 115; *see also* Tr. 695-97][81]

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80 *Rydwell*, 864 P.2d at 528.

81 Besides being at odds with the plain language of the Funding Restrictions and the position of its own experts, the State's proposed interpretation is inherently unworkable, as demonstrated by its inconsistent positions over the course of this litigation. At an earlier stage of the proceedings, the State argued that "if pregnancy would force a woman with bi-polar disorder to stop medication or would otherwise exacerbate her condition, Medicaid would cover her abortion" [R. 123], but on appeal the State asserts that the Funding Restrictions exclude coverage for women who regulate a mental health disorder

Given the State's imprecise and illogical reading of the Funding Restrictions, and its experts' conflicting reading, it would be next to impossible for a physician tasked with implementing the Funding Restrictions according to the State's dubious construction to know which conditions are covered, and at what degree of severity.

2. Even Under The State's Implausible Interpretation, The Funding Restrictions Exclude Coverage For Many Medically Necessary Abortions.

The State asserts that the catch-all provision significantly expands the universe of conditions that would make a woman eligible for coverage. [At. Br. 29] However, the language of the catch-all provision must be "interpreted in light of the characteristics of the specific terms."[82] Given that the twenty-one enumerated conditions encompass only very serious and potentially life-threatening medical conditions, the superior court correctly found that the catch-all provision for "other physical conditions" encompasses only conditions "of like gravity and imminence." [Exc. 109] Accordingly, the State cannot salvage the Funding Restrictions by relying on the narrow catch-all provisions.

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with medications that pose a risk to fetal development. [At. Br. 55-56] Whereas the text of the Funding Restrictions provides clear, albeit impermissible guidance, the State's interpretation, untethered from the actual language, reflects nothing more than its current litigation posture.

[82] *City of Kenai v. Friends of Recreation Ctr., Inc.*, 129 P.3d 452, 459 (Alaska 2006); *see also, e.g., State v. First Nat'l Bank of Anchorage*, 660 P.2d 406, 412-13 (Alaska 1982) (applying the principle of *ejusdem generis* to conclude that transactions centered on real estate were not covered by the statute in question because the statute's general language was followed by a non-exhaustive list of twenty-five specific acts or practices, none of which involved real property).

Moreover, even under the State's construction, the Funding Restrictions still prohibit coverage in many circumstances that threaten a woman's health during pregnancy. Pregnancy "exposes a woman to an inevitable array of foreseeable and unforeseeable risks." [Exc. 128][83] The Funding Restrictions exclude any consideration of a woman's psychological health short of suicide [Exc. 110], and inhibit a physician's ability to determine medical necessity in light of the myriad health and social factors that may impact a woman's physical and psychological health during pregnancy. [Exc. 92, 94][84] As the State readily concedes, the Funding Restrictions prohibit Medicaid coverage for a woman who takes medications to regulate a mental health condition, abuses drugs or alcohol in a manner that poses a risk to the fetus, experiences physical abuse by a partner, or suffers mental distress as a result of carrying a fetus with lethal anomalies, because in the State's view, these situations do not implicate her "physical" health. [At. Br. 55-57] Thus, the State's interpretation of the Funding Restrictions fails to yield a construction that covers all medically necessary abortions.

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83 *See supra* at 10-14.

84 *See also* Exc. 121 (citing *Doe. v. Bolton*, 410 U.S. 179, 192 (1973) (explaining that a physician exercising his or her medical judgment in determining whether an abortion is medically necessary should do so in light of the "physical, emotional, psychological, familial" and other factors that are "relevant to the well-being of the patient," and noting that these factors "may relate to health")). Indeed, even the State's own experts testified that – outside of the context of abortion – a patient's social and economic situation is an important factor taken into account by her physician when determining the best course of treatment. [Tr. 682, 739-41, 761-66]

C. THE LEGISLATIVE HISTORY SUPPORTS THE SUPERIOR COURT'S STATUTORY CONSTRUCTION, AND THE STATE'S ARGUMENTS TO THE CONTRARY ARE UNAVAILING.

Although the State posits that the meaning of the Funding Restrictions is clear and unambiguous, to the extent this Court finds it helpful to examine the legislative history, that history, as the superior court concluded, is "consistent only with a hard-core standard based on definitive bright lines." [Exc. 108]

While the State accuses the superior court of "pluck[ing] statements from the legislative history" to support its holding [At. Br. 28], it is the State that cherry-picks excerpts from the legislative history to suggest that the legislature sanctioned an expansive definition of "medically necessary" when enacting SB 49. In reality, both Senator Coghill, who sponsored SB 49, and the medical professionals invited by him to support the bill made clear that the bill was intended to permit Medicaid coverage for abortion only in very limited circumstances.[85] Indeed, the legislature *considered* and *rejected* three amendments that would have broadened the definition of "medically necessary."[86] These votes show that the legislature very deliberately excluded coverage for a woman's psychological health, even in the most extreme circumstances where a woman's life is in imminent danger due to a psychological disorder. [Exc. 169, 172, 175]

As the superior court observed, SB 49 was "repeatedly characterized as conforming both to the Hyde Amendment's formulation of rape, incest, and life

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85 *See supra* at 8-10.

86 *See supra* at 9-10.

endangerment" and to this Court's *Planned Parenthood 2001* decision. [Exc. 86; *see also* Exc. 136, 202, 207] But with these statements, the sponsors merely sought to manipulate the legislative record in anticipation of litigation.[87] Contrary to the claims of SB 49's supporters, the health conditions mentioned by this Court in *Planned Parenthood 2001* were just offered as examples;[88] they neither created a benchmark for when abortions are medically necessary, nor established an exhaustive list of every medical condition that might pose a risk to a woman's health during pregnancy. Moreover, the drafters of SB 49 deliberately altered this Court's language in telling ways; while this Court noted that diabetic women who cannot afford an abortion may face "preeclampsia,"[89] the Funding Restrictions only contemplate coverage for the most extreme manifestation of those disorders.[90] And while the Court highlighted the predicament of a woman with bipolar disorder who regulates her condition with medication that poses risks to the fetus,[91] the legislature deliberately chose to exclude coverage for abortion under such a scenario, and for mental health conditions generally.[92]

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87 *See, e.g.*, Exc. 133 (claiming that SB 49 "was based on the very language of the 2001 Planned Parenthood decision and includes direct language found in the federal Hyde Amendment").

88 28 P.3d at 907 (discussing women affected by the challenged regulation and referring to the "medical evidence provided to the superior court").

89 *Id.*

90 AS 47.07.068(b)(4)(B)(i), (iii).

91 *Planned Parenthood 2001*, 28 P.3d at 907.

92 *See supra* at 9-10 & n.15.

The State's reliance on the self-serving statements of the bill's sponsors is misplaced. As an initial matter, "the rule that [legislative] intent may be inferred from the statement of the sponsor of the bill only applies where the statement is consistent with the statutory language and other legislative history,"[93] which is not the case here. Moreover, courts "should not assume that isolated assertions by the bill sponsor accurately represent the intent of the entire legislature or the purpose of the entire bill."[94]

The best indication of legislative intent is the language actually adopted.[95] Here, the conditions enumerated in the bill were intentionally crafted in terms of the degree of "specificity" and the "degree of severity," based on input from medical professionals opposed to abortion, including Dr. John Thorp. [Exc. 85, 179] Dr. Thorp worked closely with Senator Coghill to develop a list of conditions that "that unequivocally threaten[] the life of the mother [] at great magnitude." [Exc. 179; *see also* Exc. 85] Both Dr. Thorp and Senator Coghill confirmed that the enumerated list consists of conditions that would be considered "life-endangering" for a pregnant woman. [Exc. 85, 180]

Accordingly, the sponsors' *ipse dixit* assertions that the Statute does not run afoul of the Alaska Constitution should be given little, if any, weight.[96] Such conclusory and

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93 Sutherland Statutory Construction § 48:15 (7th ed. 2007).

94 *Alaska Trustee, LLC v. Bachmeier*, 332 P.3d 1, 11 (Alaska 2014) (Bolger, J. and Fabe, C.J., dissenting in part) (criticizing majority's reliance on certain statements by bill sponsor in interpreting statute); *see also Tyler v. United States*, 929 F.2d 451, 456 n.8 (9th Cir. 1991) (noting that "the relevant intent is that of the entire council, not just that of the sponsor") (citing Sutherland Statutory Construction § 45.06 (4th ed. 1984)).

95 *See Homer*, 841 P.2d. at 1043-44.

96 *See, e.g., Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 604 n.3 (1998)

self-serving statements are inconsistent with the Statute's actual language and the legislative testimony, and thus offer no guidance to this Court in determining the constitutionality of the challenged Statute. Regardless of how many medical experts Senator Coghill claims to have consulted, or how many legal experts supposedly vetted the bill, it is the duty of this Court "to uphold the Alaska Constitution,"[97] to "ensure compliance with the provisions of the Alaska Constitution, including compliance by the legislature,"[98] and to "apply [its] independent judgment when interpreting constitutional provisions or statutes."[99]

D. This Court May Not Rewrite The Funding Restrictions In A Manner Contrary To Their Plain Meaning Or Legislative Intent.

The State urges this Court to accept its implausible statutory construction, based on the duty of Alaska courts "if possible [to] construe statutes so as to avoid the danger of unconstitutionality."[100] But where a statute "infring[es] on a constitutionally protected

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(Souter, J., dissenting) ("[C]ourts cannot allow a legislature's conclusory belief in constitutionality, however sincere, to trump incontrovertible unconstitutionality, for '[i]t is emphatically the province and duty of the judicial department to say what the law is.'" (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))).

97 *Planned Parenthood 2016*, 2016 WL 3959952 at *6.

98 *Planned Parenthood 2001*, 28 P.3d at 913 (internal quotation marks and citation omitted) (rejecting State's argument that the superior court, "by holding the Medicaid program to constitutional standards," had appropriated funds in violation of separation of powers).

99 *Schmidt*, 323 P.3d at 655 (internal quotation marks and citation omitted).

100 At. Br. 24 (quoting *State, Dep't of Revenue v. Andrade*, 23 P.3d 58, 71 (Alaska 2001)).

right [it] deserves close attention."[101] Moreover, this Court's "duty to uphold the Alaska Constitution is paramount; it takes precedence over the politics of the day and [the Justices'] own personal preferences."[102] Thus, where "a statute is susceptible of no reasonable construction avoiding constitutional problems, this [C]ourt is under a duty to nullify the statute, or, if possible, the particular provision found offensive to the constitution."[103] While Alaska courts strive to avoid a finding of constitutional infirmity, courts cannot interpret a statute in a manner that the legislature clearly did not intend,[104] or "read into a statute that which is not there, even in the interest of avoiding a finding of unconstitutionality."[105] Nor are Alaska courts permitted to "redraft[] patently defective statutes."[106] "[O]nly a *reasonable* construction may be placed on a statute . . . because giving the statute an unintended meaning 'would be stepping over the line of interpretation and engaging in legislation.'"[107] Performing such "radical reconstruction"

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101 *Planned Parenthood 2016*, 2016 WL 3959952 at *6.

102 *Id.*

103 *Bonjour v. Bonjour*, 592 P.2d 1233, 1237-38 (Alaska 1979).

104 *Gottschalk v. State*, 575 P.2d 289, 296 (Alaska 1978).

105 *Alaskans for a Common Language*, 170 P.3d at 192.

106 *Bonjour*, 592 P.2d at 1238; *see also Barber v. State, Dep't of Corrs.*, 314 P.3d 58, 68 (Alaska 2013) (rejecting statutory construction that "would go beyond merely applying a narrowing construction and into the impermissible territory of redrafting"); *Gottschalk*, 575 P.2d at 296.

107 *Alex*, 646 P.2d at 207-08 (emphasis added) (quoting *Gottschalk*, 575 P.2d at 296).

in order to "save [a statute] from unconstitutionality" is improper, particularly where doing so would be contrary to legislative intent.[108]

As discussed *supra* at 9-10, the Alaska legislature rejected three amendments that would have broadened the definition of medically necessary to allow some limited coverage for mental health conditions, and the State concedes that the Funding Restrictions, on their face, do not permit coverage for abortions sought due to mental health conditions or in cases of fetal anomaly. [At. Br. 49, 56-57, 57 n.128] Accordingly, the State's request that this Court construe the Funding Restrictions contrary to their plain meaning would require the Court to cross over the line of interpretation and impermissibly engage in radical reconstruction and impermissible rewriting.

* * *

The superior court appropriately construed the Funding Restrictions to set a high-risk, high-hazard standard, whereby Medicaid coverage for abortion is available only when a woman suffers from a serious and debilitating medical condition that poses a grave and imminent risk to her physical health. [Exc. 109] Nothing in the legislative history refutes the superior court's construction of the Statute. Accordingly, this Court should reject the State's interpretative gymnastics. The Funding Restrictions – even under the most generous interpretation – are unconstitutional as written. For the reasons

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108 *Gottschalk*, 575 P.2d at 296.

discussed above, this Court should affirm the superior court's order striking them down as a violation of the Alaska Constitution's equal protection clause.

CONCLUSION

This Court should affirm the decision of the superior court permanently enjoining enforcement of the Funding Restrictions. Further, this Court should order DHSS to fund all medically necessary abortions under the definition that has been in place for over twenty years, as expressed by Judge Tan in *Planned Parenthood of Alaska, Inc. v. Perdue*.[109]

DATED this 1st day of August, 2016.

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[109] No. 3AN-98-07004CI (Alaska Super. Ct. Sept. 18, 2000). [Exc. 10]