MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Docket Number Cum-17-494

Mabel Wadsworth Women's Health Center; Family Planning Association of Maine d/b/a Maine Family Planning and Primary Care Services; and Planned Parenthood of Northern New England,

Appellants

v.

Ricker Hamilton, Commissioner of the Department of Health and Human Services,

Appellee

Appeal from the Cumberland County Superior Court

AMICUS CURIAE BRIEF OF MARSHALL J. TINKLE

March 22, 2018

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INTRODUCTION

Pursuant to Rule 9(e)(1) of the Maine Rules of Appellate Procedure and the parties' blanket consents to the filing of *amicus curiae* briefs, I respectfully offer the following *amicus* brief on the state constitutional issues raised by this appeal. Plaintiffs/Appellants have challenged section 90.05-2 of the MaineCare regulations (codified at 10-144 C.M.R. Ch. 101 II, § 90.05-2) (the "Ban") on both statutory and state constitutional grounds. I have nothing to add to their statute-based argument. Of course, if the Court strikes down the Ban on statutory grounds, it need not and should not address the constitutional challenge. *See In re Christopher H.*, 2011 ME 13, ¶ 18, 12 A.3d 64, 69. On the other hand, if the Court does reach the constitutional issues, I respectfully offer the following analysis as a long-time student of the Maine Constitution.[1]

SUMMARY OF ARGUMENT

This appeal presents an opportunity for the Court to independently construe two provisions of the Maine Constitution's Declaration of Rights. Based on the text of these clauses, the dictates of logic, and the great weight of judicial authority under identical or similar provisions, the MaineCare regulation that generally

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[1] The undersigned has written extensively on the Maine constitution. *See, e.g.*, Tinkle, THE MAINE STATE CONSTITUTION (Oxford University Press 2d ed. 2013); Tinkle, THE MAINE STATE CONSTITUTION: A REFERENCE GUIDE (Greenwood 1992); Tinkle, *Forward into the Past: State Constitutions and Retroactive Laws*, 65 Temple L. Rev. 1253 (1992); Tinkle, *State Constitutional Law in Maine: At the Crossroads*, 13 Vt. L. Rev. 61 (1988); Tinkle, *The Resurgence of State Constitutional Law*, 18 Me. Bar Bull. 257 (1984).

denies coverage for abortions while extending coverage for other pregnancy-related medical procedures violates sections 1 and 6-A of Article I of our Constitution. Virtually the only way to reach a contrary conclusion would be to blindly embrace the much-criticized analysis of dissimilar federal guarantees by a razor-thin majority of the United States Supreme Court. Though reliance on such case law might offer a seductive shortcut, the Court should resist any temptation to disregard its fundamental duty to act as the final and independent arbiter of the meaning of the State's highest law.

The interpretation of the state Constitution is reviewed *de novo*. *State v. Johansen*, 2014 ME 132, ¶ 11, 105 A.3d 433,436.

ARGUMENT

1. Rule 90.05-2(A) violates the strictures pertaining to liberty, safety and happiness in section 1 of the Declaration of Rights.

a. Preliminary considerations.

A few fundamentals are worth noting at the outset. Maine's Constitution is unique. Its framers did not seek to replicate any preexisting constitution. *See generally* Tinkle, THE MAINE STATE CONSTITUTION 6-7 (2d ed. 2013). This uniqueness extends to the first article of the state Constitution, the Declaration of Rights. From a wide variety of models, the framers carefully selected which rights would be enumerated and the terminology in which such rights would be couched.

Though the federal Bill of Rights predated the Maine Constitution by nearly three decades, few, if any, of the twenty-five sections of the Declaration of Rights were drawn directly from the federal document.[2]

Hence, there is little historical or textual justification for relying on federal interpretation of federal constitutional guarantees in interpreting the Maine Constitution. This is particularly true for the interpretation of Article I, section 1, which has no federal analogue.

b. Text and History of Article I, section 1.

Article I, section 1 of the Maine Constitution provides:

> Natural rights. All people are born equally free and independent, and have certain natural, inherent and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.

This provision is derived from John Adams's original draft of the 1780 Massachusetts Constitution. *See* Mass. Const. Part 1, art. I.[3] *See generally* Tinkle,

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[2] *See* Tinkle, *State Constitutional Law in Maine: At the Crossroads*, 13 Vt. L. Rev. 61, 63-67, 100-01 (1988).

[3] Massachusetts made one change to Adams's original draft by substituting the phrase "born free and equal" for his locution "born equally free and independent." *See* R. Taylor, CONSTRUCTION OF THE MASSACHUSETTS CONSTITUTION 334 (1980). Thus, Article I of the Massachusetts Declaration of Rights provided: "All men are born free and equal, and have certain natural, essential, and unalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness." Mass. Const. 1780, pt. 1, art. I. Adams's intent in employing the language "born equally free and independent" (adopted by the Maine framers) was to convey the understanding that all have equal *rights*. *See* R. Taylor, *supra*, at 334.

supra, at 29. Similar terms are found in several other state charters but nowhere in the United States Constitution.

Like the equal protection clause of the Fourteenth Amendment, the natural rights clause of Maine's Declaration of Rights protects the individual from inequality of treatment. *See State v. Mitchell*, 97 Me. 66, 70, 53 A. 887 (1902); *Proprietors of Kennebec Purchase v. Laboree*, 2 Me. 275 (1823); *see also State v. Old Tavern Farm, Inc.,* 133 Me. 468, 471, 180 A. 473, 474 (1935) (section secures to all persons equal right to pursue any lawful occupation under equal regulation); *State v. Mayo*, 106 Me. 62, 66, 75 A. 295, 297 (1909) (equal right to use public roads for travel); *Moor v. Veazie*, 32 Me. 343, 356 (1850), *aff'd*, 20 U.S. 345 (1852) (equal right to navigate in navigable waters). But it also constitutes a source of unspecified liberties deemed fundamental. *See Danforth v. State Department of Health & Welfare*, 303 A.2d 794, 800 (Me. 1973) (parents' right to custody of their children); *see also Goodridge v. Dep't of Public Health*, 440 Mass. 309, 344, 798 N.E.2d 941, 970 (2003) (Greaney, J., concurring) ("This provision … guaranteed to all people in the Commonwealth – equally – the enjoyment of rights that are deemed important or fundamental."); L. Friedman & L. Thody, THE MASSACHUSETTS STATE CONSTITUTION 32 (2011) ("The declaration of the existence of 'natural, essential and unalienable' human rights suggests that explicitly stated rights are merely 'among' those that are not given up as the price

for enjoying the benefits of civil society and government; the existence of others is clearly envisaged."). The State may interfere with these rights only to the extent "manifestly necessary" to secure public benefits as an exercise of the police power. *See Mayo*, 106 Me. at 66.

Additionally, this section expressly recognizes the right of "pursuing and obtaining safety." Although this Court has not specifically construed the safety guarantee, courts in other states with identical constitutional safeguards have reasoned that the right to pursue safety embraces the right of personal security and the preservation of one's health. *See, e.g., Right to Choose v. Byrne*, 450 A.2d 925, 933-34 (N.J. 1982); *Tomlinson v. Armour & Co.*, 75 N.J.L. 748, 757 (E.&A. 1908); *Doe v. Maher*, 40 Conn. Supp. 394, 515 A.2d 134, 150 (1986) (state constitution covers "the right to make decisions which are necessary for the preservation and protection of one's health"); *cf. Old Tavern Farm*, 133 Me. at 471 ("Health being the necessity of all personal enjoyment…").

c. Application to Rule 90.05-2(A).

As Plaintiffs have demonstrated, carrying an unplanned pregnancy to term may entail substantial risks to a woman's health and safety, particularly if she is living in poverty. Yet the Ban prevents such a woman from receiving funds to end the pregnancy unless the health risks are so severe as to threaten her very life. The question is whether the withholding of MaineCare funds, which are otherwise

available for pregnancy-related healthcare, violates the right to protect one's health and safety guaranteed by section 1 of the Declaration of Rights.

First of all, the natural rights clause should be viewed as encompassing a woman's right to terminate her pregnancy before viability of the fetus. *See, e.g., Hodes & Nauser, MDs, P.A. v. Schmidt*, 52 Kan. App. 2d 274, 282-90, 311, 368 P.3d 667 (2016); *Right to Choose*, 450 A.2d at 933-34. This is consistent with the nearly universal view that the rights to enjoy liberty and to pursue happiness under state constitutional natural rights clauses necessarily postulate rights to privacy and personal autonomy. *See, e.g., Commonwealth v. Wasson*, 842 S.W.2d 487, 494-99, 501-02 (Ky. 1992) (recognizing right of privacy emanating from natural rights provision); *In re Quinlan*, 70 N.J. 10, 355 A.2d 647, 663-64 (1976) (natural rights clause guarantees privacy); *Munley v. ICS Financial House, Inc.*, 1977 Okla. Civ. App. LEXIS 104, *11-13 (Feb. 15, 1977) ("It surely cannot be doubted that one of the basic natural rights of man emanating from the protective zone of liberty is a right to privacy. … Certainly a right to privacy would seem to be an integral part of one's right to pursue happiness."); Wriggins, *Maine's "Act to Protect Traditional Marriage and Prohibit Same-Sex Marriages": Questions of Constitutionality Under State and Federal Law*, 50 ME. L. REV. 345, 367, 376 (1998). It is likewise consistent with this Court's recognition that the "liberty" referenced in both the United States and Maine Constitutions "includes the rights

to … abortion." *Doe v. Williams*, 2013 ME 24, ¶ 65, 61 A.3d 718, 737, 738. Furthermore, an abortion may be necessary to protect one's health and safety, the right to which is guaranteed by Maine's natural rights clause. This section must be liberally construed to carry out its broad purposes. *See Opinion of the Justices*, 2017 ME 100, ¶ 58, 162 A.3d 188, 209.[4]

Secondly, the Court should hold that the Ban violates this fundamental right to an abortion. The great majority of courts that have addressed identical regulatory schemes have held that they infringe on the cognate provisions of their state constitutions. *See, e.g., Moe v. Secretary of Administration & Finance*, 382 Mass. 629, 417 N.E.2d 387 (1981); *Right to Choose*, 450 A.2d at 927-28; *Doe v. Selani*, No. S81-84CnC, slip op. at 19 (Vt. Super. Ct. May 23, 1986) (ban impinges on constitutionally guaranteed right to safety); *Women's Health Center of West Virginia, Inc. v. Panepinto*, 446 S.E.2d 658, 661 (W. Va. 1993). These courts reason that when the state in effect tells indigent women that their pregnancy-related medical expenses will be covered only if they carry the pregnancy to term and not if they opt to end the pregnancy, it is interfering with their constitutionally-protected right to choose the latter option. *Moe*, 382 Mass. at 651-54; *Women of Minnesota v. Gomez*, 542 N.W. 2d 17, 19, 31 (Minn. 1995). This is because "when the state finances the costs of childbirth, but will not finance the termination of

[4] Article I, section 24 of the Maine Constitution, the "saving clause" of the declaration of rights, may provide an additional source for such fundamental rights as a woman's right to choose whether to terminate a pregnancy. *See* Tinkle, *supra*, at 64; *Wriggins, supra*, at 367 n. 152.

pregnancy, it realistically forces an indigent pregnant woman to choose childbirth even though she has the constitutional right to refuse to do so." *Committee to Defend Reproductive Rights v. Myers*, 29 Cal. 3d 252, 625 P.2d 779, 799, 172 Cal. Rptr. 866 (1981). "This disparity in funding … clearly operates to coerce indigent pregnant women to bear children they would not otherwise choose to have." *Women's Health Center of West Virginia*, 191 W. Va. 436, 446 S.E.2d at 666. Thus, though there is no right *per se* to governmental subsidies for abortions, the constitutional guarantee of equality in the exercise of natural rights requires the state to subsidize pregnancy-related medical care in a neutral manner. *See Moe*, 382 Mass. at 652-54; *Right to Choose*, 450 A.2d at 935; *State Dep't of Health & Social Services v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 906-07 (Alas. 2001). This reasoning appears unassailable.

In reaching a different conclusion, the Superior Court disregarded this substantial body of case law and instead relied solely on *Harris v. McRae*, 448 U.S. 297 (1980). That case, however, is not helpful in interpreting Maine's natural rights clause. *McRae* was decided under the United States Constitution, which has no provision similar to this state's natural rights clause. The best way of determining the scope of this clause is by consulting the well-reasoned opinions on the scope of nearly identical provisions in other state constitutions. *McRae* has nothing to say about such provisions.

Finally, the infringement of the natural rights clause is not outweighed by countervailing considerations. Rights under this clause, like other constitutional rights, are not absolute but may have to yield to weightier governmental interests. But freedoms under section 1 of the Declaration of Rights must yield only to an exercise of the police power that is "manifestly necessary" to secure public benefits. *See Mayo*, 106 Me. at 66.

There is no evidence that the Ban is manifestly necessary to secure any public benefits. Any state action that constrains a woman's decision to terminate a pregnancy before viability is *contrary* to public policy. 22 M.R.S. § 1598(1). The stated rationale of the Ban, "to achieve consistency and compliance with federal law," is clearly insufficient, since the federal law in question does not affect the state's ability to use state funds to subsidize abortions. Lifting the Ban would be no more "inconsistent" with federal law than, say, raising a state tax would be "inconsistent" with recent Congressional legislation lowering certain federal taxes – or than increasing state funding for legal services to the poor would be "inconsistent" with a decrease in federal funding. This is a particularly vacuous reason for interfering with a fundamental right.[5]

Consequently, the Ban should be declared unconstitutional under Article I, section 1 of the Maine Constitution.

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[5] The Ban does not even advance the goal of national uniformity, since so many other states (either because of their courts' constitutional rulings or otherwise) do provide funding for abortions.

2. Rule 90.05-2(A) violates Section 6-A of the Declaration of Rights.

Like the Fourteenth Amendment to the United States Constitution, section 6-A of Article I of the Maine Constitution contains a due process clause that protects such fundamental rights as the right to an abortion. *Doe*, 2013 ME 24, ¶ 65. The Ban infringes on this right for all of the reasons discussed above under the natural rights clause. *See Doe*, 515 A.2d at 150; *Moe*, 417 N.E.2d at 402.

The Ban further violates the equal protection clause of Section 6-A. As one court, discussing a rule identical to the Ban, explained, the rule provides unequal treatment to members of an identifiable class. *See Planned Parenthood Ass'n v. Department of Human Resources*, 63 Or. App. 41, 57, 663 P.2d 1247, 1258 (1983), *aff'd on other grounds*, 297 Or. 562 (1984):

> Here, the group of women qualifying for assistance who seek medically necessary services relating to pregnancy does constitute a class.... The members of the class who are denied an equal right to those services are those whose physicians have determined that it is medically necessary to terminate pregnancy for the sake of their health.

Id. In other words, "indigent women are denied medical assistance their physicians have determined to be necessary to their physical health, because the prescribed assistance involves an abortion, whereas other indigent pregnant women who seek medically necessary assistance relating to pregnancy that does not involve an abortion are granted assistance." *Id.* at 58, 663 P.2d at 1259; *see also State v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 913 (Alas. 2001) (state

equal protection clause does not permit governmental discrimination against women who exercise fundamental right to reproductive choice); *Simat Corp. v. Arizona Healthcare Cost Containment System*, 203 Ariz. 454, 458, 56 P.3d 28, 32 (2002) (restriction on abortion funding "discriminates between two classes of women"); *Doe v. Maher*, 40 Conn. Supp. 394, 515 A.2d 134, 135 (1986) (funding restrictions on abortions violate state equal protection and due process clauses); *Right to Choose*, 450 A.2d at 941 (statute limiting funding for abortions violated state equal protection clause); *New Mexico Right to Choose/NARAL v. Johnson*, 126 N.M. 788, 1999 NMSC 5, ¶ 2, 975 P.2d 841, 844-45 (1998) (funding restrictions violated state equal rights amendment); *Women's Health Center of West Virginia, Inc. v. Panepinto*, 191 W. Va. 436, 446 S.E.2d, 658, 667 (1993) (state failed to act neutrally in imposing funding restrictions that favored childbirth over abortion); *Jeannette v. Ellery*, 1995 Mont. Dist. LEXIS 795, *26-27 (May 22, 1995) (in imposing funding restrictions, state lacked compelling interest outweighing unequal treatment infringing fundamental right).

The Superior Court again disregarded such closely analogous decisions from sister states and looked solely to the *McRae* case. The court invoked the following syllogism: Section 6-A of the Maine Constitution is coextensive with the Fourteenth Amendment; the Supreme Court has held that a restriction on federal funding of abortions does not violate the Fourteenth Amendment; therefore, a

similar state restriction does not violate Section 6-A. This Court should reject such flawed reasoning on several grounds.

First, this Court's prior comments on Section 6-A cannot be read as declaring that this section is *always* coextensive with the Fourteenth Amendment. The Court's language has usually been far more circumspect. *See, e.g., State v. Richardson*, 285 A.2d 842, 844 (Me. 1972) ("we conceive the limitations upon the powers of the state to act *in the matters now before us* established by the Maine Constitution to be no more stringent than the restrictions federally imposed") (emphasis supplied). Any suggestion that the two provisions were coextensive not only with respect to the particular matter before the Court but also for other matters *not* before the Court would, by definition, constitute *dicta* having no precedential value.

Second, the notion that Section 6-A is always coextensive with the Fourteenth Amendment is not a coherent jurisprudential doctrine. The Fourteenth Amendment has no fixed meaning, and its application to ever-changing circumstances depends on a wide array of factors that may or may not pertain in the Maine environment. As construed by the U.S. Supreme Court, the Fourteenth Amendment keeps changing over time. To take an obvious example, its equal protection clause was viewed for decades as not prohibiting states from excluding their black citizens from most of their public schools and universities and other

public facilities, *see Plessy v. Ferguson*, 163 U.S. 537 (1896). The Court arrived at a contrary view of the clause only in 1954, *see Brown v. Board of Education*, 347 U.S. 483 (1954). Suppose that a future Supreme Court were to decide to return to the *Plessy* understanding. Would Section 6-A at that moment automatically cease providing protection to African-Americans? Such a result clearly would be absurd.

Third, this Court has frequently recognized that its interpretation of the Maine Constitution is not bound by how a majority of the U.S. Supreme Court happens to construe a similar federal provision. *See, e.g., State v. Cauoette*, 446 A.2d 1120, 1122 (Me. 1982); *State v. Collins*, 297 A.2d 620, 625 (1972). It has acknowledged its duty to independently construe the State Constitution, *see State v. Cadman*, 476 A.2d 1148, 1150 (Me. 1984), and to consult federal case law only to the extent it may provide useful and nonexclusive guidance. *See State v. Flick*, 495 A.2d 339, 343 (Me. 1985). The fact that parallel state and federal constitutional provisions contain the same broad objectives "does not support the non sequitur that the Supreme Court's decisions under such a text not only deserve respect but presumptively fix its correct meaning also in state constitutions." *Id.* The Court rejects "any straitjacket approach by which we would automatically adopt the federal construction of [a guarantee of the U.S. Constitution] ... as the meaning of the nearly identical provision of the Maine Constitution." *State v. Bouchles*, 457 A.2d 798, 801-02 (Me. 1983).

Fourth, Section 6-A is *not* identical to the Fourteenth Amendment; the text of the former plainly provides additional protection. Like the Fourteenth Amendment, it requires "the equal protection of the laws"; but it further provides, in language found nowhere in the federal Constitution, that no person may "be denied the enjoyment of that person's civil rights or be discriminated against in the exercise thereof." Me. Const. art. I, § 6-A. This language cannot be regarded as surplusage. *See Finks v. Maine State Highway Comm'n*, 328 A.2d 791, 799 (Me. 1974). Its meaning is in fact self-evident: Neither men nor women may be discriminated against in the exercise of their civil rights. "Civil rights," in the more restricted sense, include all constitutionally guaranteed rights. 15 Am. Jur. 2d *Civil Rights* §§ 1, 3 (2000); *see* BLACK'S LAW DICTIONARY 300 (10th ed. 2014) (term includes any rights of personal liberty guaranteed by, *inter alia*, the Bill of Rights and the Fourteenth Amendment).

As discussed above, abortion is a fundamental right guaranteed by both the federal and Maine Constitutions. By its plain terms, then, Section 6-A prohibits treating women who exercise their right to an abortion less favorably than those who choose other pregnancy-related medical procedures. Yet this is precisely what the Ban accomplishes. Hence, Section 6-A provides a more explicit and comprehensive prohibition of the Ban than may be found in the Fourteenth Amendment.

Fifth, nothing in the legislative history of Section 6-A suggests that it was intended to operate in lockstep with the Fourteenth Amendment. Unlike most other guarantees of the federal Constitution, the Fourteenth Amendment expressly applies to the states. The adoption of Section 6-A would serve no purpose unless it was intended at least in some instances to go beyond the protections that Mainers already had by virtue of the Fourteenth Amendment. It cannot be presumed that this section was meant to be a cipher.

For all of these reasons, *McRae* is certainly not dispositive but at best has consultatory value, on the same footing as such state supreme court decisions as *Moe* and *Right to Choose*. However, the Court should reject *McRae* as not being helpful, because (a) the relevant language of Section 6-A is different from and more expansive than the provisions addressed in *McRae*; (b) the relevant policy considerations in Maine are different[6]; and (c) *McRae* is unpersuasive even as exegesis of federal law. The District Court in *McRae* had no trouble finding the so-called Hyde Amendment unconstitutional. *McRae v. Mathews*, 421 F. Supp. 533 (E.D.N.Y. 1976). However, five of the nine Justices of the Supreme Court disagreed, on the ground that the Medicaid restriction "leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no

[6] *See* 22 M.R.S. § 1598.

healthcare costs at all." *McRae*, 448 U.S. at 317. The four dissenters easily exposed the hollowness of this rationale. Justice Brennan, for example, elucidated that there are basically two alternative medical methods of dealing with pregnancy: childbirth and abortion. *McRae*, 448 U.S. at 332-33.

> In every pregnancy, one of these two courses of treatment is medically necessary, and the poverty-stricken woman depends on the Medicaid Act to pay for the expenses associated with that procedure. But under the Hyde Amendment, the Government will fund only those procedures incidental to childbirth. By thus injecting coercive financial incentives favoring childbirth into a decision that is constitutionally guaranteed to be free from governmental intrusion, the Hyde Amendment deprives the indigent woman of her freedom to choose abortion over maternity, thereby impinging on the due process liberty right recognized in *Roe v. Wade*.

Id. at 333. Moreover, the Supreme Court's own precedents had established that it is unconstitutional to grant or withhold financial benefits that burden one manner of exercising a constitutionally protected choice. *Id.* at 334-35; *see also id.* at 349 (Stevens, J., dissenting); *id.* at 345 (Marshall, J., dissenting); *id.* at 348 (Blackmun, J., dissenting).

Thus, the majority opinion in *McRae* has been roundly criticized. *See, e.g.*, Perry, *Why the Supreme Court was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on Harris v. McRae*, 33 Stan. L. Rev. 1113 (1980); Goldstein, *A Critique of the Abortion Funding Decisions: On Private Rights in the Private Sector*, 8 Hastings Const. L. Q. 313 (1981). Its reasoning has also been rejected by numerous state courts in the decisions discussed above. Significantly, each of

these decisions came *after Harris v. McRae*, and in each instance, the court, after discussing *Harris*, refused to follow it in a state constitutional analysis. *See National Educational Ass'n v. Garrahy*, 598 F. Supp. 1374, 1383 n. 10 (D.R.I. 1984) ("every state court that has considered the Medicaid abortion funding issue under a state constitution since *Harris* has come to the opposite conclusion"); *Simat*, 203 Ariz. at 461 (fifteen other state courts "have refused to follow *McRae*"). This Court should follow the overwhelming majority of state court interpretations of similar state constitutional provisions in rejecting the majority opinion in *McRae* and in holding funding restrictions on abortions to violate the state Constitution.

CONCLUSION

For the foregoing reasons, the Court should grant the appeal and declare that the Ban violates either or both of section 1 or section 6-A of Article I of the Maine Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marshall J. Tinkle, *amicus curiae*, hereby certify that I have this 22nd day of March, 2018, caused two (2) copies of the foregoing *Amicus Curiae* Brief of Marshall J. Tinkle to be served upon counsel of record in this action as follows:

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