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

BRIEF OF THE APPELLANTS

February 2, 2018

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INTRODUCTION[1]

Through both its statutory pronouncements and its Constitution, Maine protects a woman's right to abortion. Indeed, Maine is among a handful of states that have enacted a Reproductive Privacy Act (RPA) that explicitly prohibits the state from restricting "a woman's exercise of her private decision to terminate a pregnancy." 22 M.R.S. § 1598(1) (2016). But, contrary to both the Constitution and the RPA, and in the absence of any State or federal mandate to do so, the Maine Department of Health and Human Services (DHHS) penalizes and discriminates against women who exercise their right to abortion by prohibiting them from using MaineCare, an otherwise comprehensive insurance plan for low-income Mainers, to cover the cost of an abortion. In doing so, DHHS violates both Maine's statutory law and its state constitutional guarantees of liberty, safety, and equality.

Pregnant women can exercise their fundamental constitutional right to reproductive privacy in one of two ways: They can continue the pregnancy or they can end it. Either way they need medical care. If they decide to continue the pregnancy, Maine will pay for all of the associated medical care. If, however, they exercise their right to abortion, the state withholds coverage for the care they need.

[1] Unless otherwise indicated, all emphasis is added and all quotations and citations are omitted.

As the vast majority of courts, including the Massachusetts Supreme Judicial Court, to have considered the question have recognized, by telling pregnant women that the state will cover their pregnancy-related medical care if they continue their pregnancy, but will withhold coverage if they have an abortion, the ban on MaineCare coverage for abortion infringes on fundamental rights. Yet, instead of following this persuasive precedent, the Superior Court in this case adopted the minority – and widely criticized – rule set down by the U.S. Supreme Court in *Harris v. McRae*, 448 U.S. 297 (1980). In so doing, the Superior Court erred as a matter of law.

As set forth below, and as numerous other courts have recognized, *Harris* was wrongly decided even as a matter of federal law. But, even if it were not, the U.S. Supreme Court's interpretation of the federal Constitution does not control this case. This is particularly so where, as here, the federal decision is based on an assertion of a specific policy interest – using the allocation of public funds to prevent abortions – that is foreclosed by Maine's express public policy, as well as testimony from DHHS in this case. Indeed, the sole rationale for the challenged regulation in this case is a purported desire to achieve "compliance and consistency" with federal law. But, as even DHHS admits, nothing in federal law prohibits a state from covering abortion in its Medicaid program; indeed, seventeen states currently provide such coverage. Given the independent values and

language of this State's laws and Constitution, this Court should not allow such an inadequate rationale to justify its restriction on women's ability to exercise this fundamental right. Accordingly, this Court should reverse the Superior Court, declare the ban unlawful and/or unconstitutional, and permanently enjoin its enforcement.

FACTS

I. PROCEDURAL HISTORY

Plaintiffs are three enrolled Medicaid providers who provide a range of reproductive and sexual health care services and are the sole publicly-accessible abortion providers Maine. A80-83, A85-86. Plaintiffs and their patients are affected by 10-144 C.M.R. ch. 101(II), § 90.05-2 ("the MaineCare Ban" or "the Ban"), a regulation that prohibits state Medicaid coverage for abortion, except where the pregnancy threatens a woman's life or is the result of rape or incest. A14.

On November 24, 2015, Plaintiffs filed an official capacity suit against DHHS challenging the legality and constitutionality of the Ban and seeking declaratory and injunctive relief. A45, 65.

The parties cross-moved for summary judgment, A8, and the Superior Court granted Defendant's motion. A10, A42. This timely appeal followed. A10-11.

II. THE MEDICAID PROGRAM

Medicaid is a joint federal-state program designed to provide medical care to poor and low-income individuals. A12. Under the Medicaid program, participating states pay for medical services under their state Medicaid plans, and the federal government reimburses a portion of the costs for eligible medical services. 42 U.S.C. § 1396b(a)(1) (2016). DHHS admits that federal law allows states to use their own funds to provide coverage for additional health services or to broaden eligibility requirements. A127-28.[2] Between 2014 and 2016, Maine spent more than one billion dollars per year covering optional benefits under the MaineCare program. A14.

Maine's Medicaid program, "MaineCare," is administered by DHHS. A13. According to DHHS, the purpose of MaineCare is to make it more likely that people living in poverty will be able to obtain medical care. A87. DHHS covers "those reasonably necessary medical and remedial services that are provided in an appropriate setting and recognized as standard medical care required for the prevention and/or treatment of illness, disability, infirmity or impairment and

[2] Defendant raised numerous objections, qualifications, and denials in response to the Plaintiffs' Statement of Material Facts that were not resolved by the Superior Court. As set forth in the portions of the appendix cited herein, those responses are not supported by rule, case law, and/or record citation, and should therefore be deemed admitted. *See Stanley v. Hancock County Comm'rs,* 2004 ME 157, ¶ 18, 864 A.2d 169.

which are necessary for health and well-being." 10-144 C.M.R. ch. 101(II), § 90.04. For example, MaineCare provides coverage for a broad range of elective and non-elective medical services, including physician services, in-patient and out-patient hospital services, prescription drug coverage, x-ray and laboratory tests, and mental health services, 10-144 C.M.R. ch. 101(II), §§ 45, 55, 65, 80, 90, 90.01-2, as well as transportation costs and related expenses for certain out-of-state services, 10-144 C.M.R. ch. 101(I), §§ 1.14-.15; 10-144 C.M.R. ch. 101(II), §§ 113, § 113.06-7(C)(4)(E). With respect to pregnancy, MaineCare covers virtually any care a woman needs other than abortion. For example, it covers "antepartum care, delivery, postpartum care, and other services normally provided in uncomplicated maternity care," A14, as well as any "other problems requiring additional or unusual services and requiring hospitalization," 10-144 C.M.R. ch. 101(II), § 90.04-4(B). In addition, a child born to a mother covered by MaineCare is covered under MaineCare for one year following birth, even if the mother does not remain MaineCare-eligible. A14. MaineCare covers income-eligible children and teenagers through age twenty. *Id.*

A federal appropriations measure, known as the Hyde Amendment (or "the federal Medicaid ban"), prohibits *federal* Medicaid funds from covering abortion, except when the pregnancy is life-threatening or in cases of rape or incest. A13, A29. The purpose of the Hyde Amendment is to "prevent abortions." *See, e.g.*,

McRae v. Califano, 491 F. Supp. 630, 641 (E.D.N.Y. 1980), *rev'd on other grounds sub nom*. *Harris*, 448 U.S. 297. DHHS admits that is not one of the objectives of MaineCare. A125-27. As DHHS also admits, federal law permits states to provide broad coverage for abortion, and seventeen states, including Vermont, Connecticut, and Massachusetts, currently do so. A127-29.

Nonetheless DHHS promulgated the Ban, which withholds state MaineCare coverage for abortion, except when the pregnancy is life-threatening or is the result of rape or incest. A14. Thus, MaineCare-eligible women are denied coverage for all other abortions that are "reasonably necessary medical and remedial services . . . necessary for [her] health and well-being," 10-144 C.M.R. ch. 101(II), § 90.04; A92, including abortions that are necessary because the pregnancy seriously jeopardizes a woman's health and in the case of lethal fetal anomalies. A87, A92.

There is no medical or financial justification for the MaineCare Ban. A88, A92. The sole stated rationale for the Ban is to "achieve consistency and compliance with federal law." A37.

III. CONSEQUENCES OF THE MAINECARE BAN

The MaineCare Ban has serious consequences for Maine women. Abortion is almost always safer for a woman than carrying a pregnancy to term, A91-92, and the physical and mental health risks posed by pregnancy disproportionately affect MaineCare-eligible women. A90-91, A94-98, A163. Even for a healthy woman, an

uncomplicated pregnancy can be extremely stressful, painful and physically taxing, making work, child care and other daily tasks extremely difficult. A90, A92. Pregnancy also stresses most major organs, increasing a woman's risk of developing significant medical issues. A92-94. In every pregnancy, there is a risk of a miscarriage and the associated risks of infection, hemorrhage, surgery and death. A94. And labor and delivery carries with it the risks of blood clots, embolism, infection, injuries to internal organs or the pelvic floor, hemorrhage and death. A94. The health risks associated with pregnancy are magnified for women with pre-existing medical conditions, such as diabetes, hypertension, asthma, heart disease, lupus, rheumatoid arthritis, and renal disease. A94-95. Pregnancy can exacerbate these conditions, causing even more severe health problems including seizures, diabetic coma, hemorrhage, heart damage, and loss of kidney function. A94-95. Women living with these medical conditions may choose to terminate their pregnancies to avoid the risk that their conditions worsen during pregnancy. A86. An unwanted pregnancy can also cause or exacerbate mental health issues, including substance abuse disorders. A86, A95. Despite these serious medical consequences, the MaineCare Ban prevents enrolled women from using their insurance to cover the abortion care they need to relieve these debilitating pregnancy-related conditions. A98.

The consequences of being forced to carry an unwanted pregnancy to term are long-term and significant: In addition to the risks detailed above, some women's ability to complete their education or obtain long-term employment will be curtailed A86, and some will face diminished prospects of escaping poverty A99; A259-62. Studies show that women denied abortions are more likely to fall below the poverty line and rely on public assistance than women who are able to obtain abortions. A259.

Research demonstrates that a disproportionately high percentage of women who seek abortions have poverty-level incomes. A178-83. Maine has the second-highest poverty rate in New England. A88. Poor women in Maine (particularly single mothers) face significant financial obstacles that prevent them from meeting basic needs for shelter, food, heat, and medical care. A89, A136-39. Studies show 18–37% of Medicaid-eligible women who carried their pregnancies to term would have had an abortion instead if Medicaid coverage had been available. A239.

A significant percentage of Plaintiffs' abortion patients qualify for MaineCare. A183, A92. In Maine, abortion services performed up to about 14 weeks of pregnancy, as dated from a woman's last menstrual period (LMP), cost between $500-600 and up to $1,000 for abortions performed between 16.0-18.6 weeks LMP. A76. This is an unobtainable cost for many of Plaintiffs' patients: to afford an abortion without MaineCare, Plaintiffs' patients have to reduce already-

limited budgets for food, clothing and other essentials for themselves and their families; delay or forgo payment of rent and utility bills, putting them at risk of eviction or losing power or heat; delay or forgo payment of other bills, such as car, cell phone, internet, or other medical care, or risk defaulting on outstanding tuition bills or loan payments; take out costly and risky "payday" loans with exorbitant interests rates and fees that they cannot afford; and/or pawn or sell furniture, laptops, phones, cars, or other family belongings. A90, A220-30.

Plaintiffs provide extensive financial counseling to try to help patients find the necessary funds, A90-91, but due to the extensive time this fundraising often takes, Plaintiffs are regularly contacted by and see MaineCare-eligible women who are close to or past the clinic's gestational age limit but delayed calling or coming in for their appointment until they could raise funds for the procedure, A203-04, A242. For example, one of Plaintiffs' patients was too sick to work and could not come up with even $20 to contribute to the cost of the procedure, until it was almost too late. A211-12. This delay can increase the risk, A91-92, cost, A76, and length of the abortion procedure, A218, as well as create new costs (i.e., travel, hotel, lost wages from time-off work) and force patients suffering from serious pregnancy-related physical and mental health issues to live with their continuing, often worsening, health conditions much longer than necessary, A90, A148, A150-51, A196, A207-09, A214.

By the time some patients are able to raise the money, they are too far in their pregnancy to obtain an abortion anywhere in the state other than Portland or in Maine at all. A203-09, A212-13, A216, A242.[3] For the example, by the time another patient saved enough paychecks to pay for her abortion, she was turned away from the first clinic because she was past the gestational limit; given the later stage of pregnancy she had to travel to Portland for the procedure, which carried increased risks, A91, was far more expensive, and had to be performed over two days so that the patient also had to raise money to pay for a hotel, A209-10. Still another patient who scrimped and saved was so far along in pregnancy by the time she came up with the money that she was unable to obtain an abortion anywhere in the State. A204.

Even with financial counseling and outside assistance, some still cannot raise enough money to afford the care they need. A196, A203, A241-42. For example, one such patient – a single mother on MaineCare – had recently been evicted, was experiencing domestic violence, and had no income or access to cash. A191. Another patient on MaineCare had significant disabilities, was unemployed, and living out of a hotel, which had charitably allowed her and her family to live

[3] Plaintiff's clinic in Portland is the only clinic that provides abortions after 14 weeks LMP; no clinics in the state provide abortions after 19 weeks LMP. A85-86.

there free of charge given their circumstances. A193. Still another patient was participating in a jobs training program where her income was less than $100 per month, and she was desperate for the abortion so that she could continue in the program and get a job. A194. While Plaintiffs offer discounted services, rate-reductions, or even free procedures, to patients in truly desperate circumstances, such as these, they cannot afford to do this for every patient. A102, A107-16.

IV. THE SUPERIOR COURT DECISION

Plaintiffs argue that by providing coverage for pregnancy-related care generally, but prohibiting coverage for nearly all abortions, the Ban contravenes the public policy of the State of Maine, as expressly set forth in statute, in violation of the Administrative Procedures Act (APA), and violates Article 1, Sections 1 (Natural Rights) and 6-a (Discrimination Against Persons) of the Maine Constitution. A45, A61-63. The Superior Court rejected DHHS's threshold justiciability challenges to Plaintiffs' claims, A25, but granted summary judgment against Plaintiffs on all of their statutory and constitutional claims. With respect to Plaintiffs' claim that the MaineCare Ban violates the RPA, the Superior Court held that "[t]he government's failure to fund abortion services is not, in itself, a restriction on the right to choose to have an abortion," because, in its view, the decision to "subsidize one constitutionally protected choice and not the other" does not, as a matter of law, burden or restrict the exercise of a constitutional right.

A29-30. The court also rejected Plaintiffs' alternative APA argument, that the Ban violates DHHS's mission and guiding principles. A31-33.

With respect to Plaintiffs' constitutional claims, the Superior Court relied exclusively on the U.S. Supreme Court's decision in *Harris v. McRae* to hold that the Ban did not infringe on Plaintiffs' patients constitutional rights. A34-40. Following *Harris*, the Superior Court therefore applied rational basis review to Plaintiffs' equal protection, due process, and privacy claims. A35-38, A40. The Superior Court did not disagree with Plaintiffs that the governmental interest identified in *Harris*—promoting childbirth over abortion—is not a legitimate state interest in Maine, or that "it is more costly for the state to withhold reimbursement for abortions than it would be to fully subsidize such procedures with state funds," or that DHHS is under no federal legal obligation to withhold state coverage for abortion. A36-37. Nonetheless, the Superior Court held that the sole stated rationale for the Ban put forth by DHHS – the desire to "achieve consistency and compliance" with federal law – was rationally related to a legitimate state interest. A36-38.

Finally, the Superior Court held that the independent guarantees of liberty and safety contained in Article 1, Section 1 the Maine Constitution did not distinguish the Maine Constitution from the federal Constitution. A39-41.

ISSUES PRESENTED FOR REVIEW

By providing coverage for pregnancy-related care generally but withholding coverage for abortion:

1. Does the MaineCare Ban contravene the RPA in violation of the APA?
2. Does the MaineCare Ban infringe the fundamental right to abortion in violation of the due process and equal protection guarantees, as well as the independent protections for liberty, safety, and against discrimination on the basis of the exercise of a constitutional right, contained in Article 1, Sections 1 and 6-a of the Maine Constitution?
3. Is the MaineCare Ban unconstitutional because it is not rationally related to advancing a legitimate state interest?

SUMMARY OF ARGUMENT

The Medicaid Ban violates the RPA and Maine's Constitution, and the Superior Court erred in holding otherwise.

The RPA prohibits the State from restricting a woman's exercise of her right to an abortion. The MaineCare Ban "confines, limits, and restrains" the right to an abortion by discriminatorily withholding coverage for *only* that choice. Women who exercise their abortion right lose otherwise available medical coverage, forcing them to take drastic measures with their finances and health—none of which occurs if they choose childbirth.

The Superior Court erred in holding that the U.S. Supreme Court's decision in *Harris v. McRae*, 448 U.S. 297 (1980), upholding the Hyde Amendment overrides that plain meaning analysis. The reasoning in *Harris* is inapplicable in Maine, where, unlike the federal context, there is no public policy to restrict abortion. The Superior Court also erred in relying on this Court's decision in *Anderson v. Town of Durham*, 2006 ME 39, 895 A.2d 944, to hold that the coercive effect of the decision to withhold government benefits upon exercise of a constitutional right does not, as a rule, amount to a restriction or infringement of that right. To the contrary, the facts of that case are distinguishable and numerous cases have held that discriminatory withholding of government benefits can and does restrict and infringe upon fundamental rights.

The MaineCare Ban also infringes upon women's fundamental constitutional right to abortion in violation of the Maine Constitution. Numerous courts, including the Massachusetts Supreme Judicial Court in *Moe v. Secretary of Administration and Finance*, 382 Mass. 629 (1981), have relied on their states' constitutions in rejecting similar bans.[4]

[4] *See, e.g.*, *Simat Corp. v. Ariz. Health Care Cost Containment Sys.*, 203 Ariz. 454, 460 (Ariz. 2002); *State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Ak., Inc.*, 28 P.3d 904, 907 (Alaska 2001); *N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 27, 126 N.M. 788, 797–98, 975 P.2d 841, 850–51 (1998), *cert. denied*, 526 U.S. 1020 (1999); *Women of Minn. v. Gomez*, 542 N.W.2d 17, 19 (Minn. 1995); *Women's Health Ctr. of W. Va., Inc. v. Panepinto*, 446 S.E.2d 658, 661 (W. Va. 1993); *Right to Choose v. Byrne*, 450 A.2d 925, 927–28 (N.J. 1982); *Comm. to Defend Reprod. Rights v. Myers*, 625 P.2d 779, 781 (Cal. 1981); *Jeannette R. v. Ellery,* No. BDV-94-811, 1995 Mont. Dist. LEXIS 795, at *20 (Mont. Dist. May 19, 1995)

Yet the Superior Court failed to even cite to *Moe*, instead relying on the erroneous and much criticized reasoning in *Harris*, *supra*, upholding the Hyde Amendment under the U.S. Constitution under rational basis review. Even assuming that *Harris* were otherwise persuasive in the federal context—which it is not—there are two primary reasons why it cannot be transplanted into Maine. First, Maine statute and public policy forbid the rationale behind the Hyde Amendment, which animated the decision in *Harris*—discouraging women from having abortions. Indeed, no other state with a statute like the RPA has a similar Medicaid ban, further demonstrating the two are incompatible. Second, Maine's Constitution contains language not found in the federal Constitution, including the safety and anti-discrimination guarantees in Article 1, Sections 1 and 6-A, which reflect state-specific policies and values and have independent force. As such, the reasoning in *Harris* should be rejected, and this Court should apply heightened scrutiny to Plaintiffs' constitutional claims, which the Ban indisputably cannot survive.

Finally, even assuming that rational basis scrutiny applies, the Ban cannot pass muster. Indeed, the sole justification for the Ban—"consistency and compliance" with federal law—is irrational given that federal law is entirely

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(attached as Exh. A); *Doe v. Wright,* No. 91-CH-1958, slip op. at 1 (Ill. Cir. Ct. Dec. 2, 1994) (attached as Exh. B); *Doe v. Maher*, 515 A.2d 134, 150, 152 (Conn. Super. Ct. 1986); *Doe v. Celani*, No. S81-84CnC, slip op. at 19 (Vt. Super. Ct. May 23, 1986) (attached as Exh. C); *Planned Parenthood Ass'n v. Dep't of Human Res.*, 663 P.2d 1247, 1260–61 (Or. Ct. App. 1983), *aff'd on other grounds,* 297 Or. 562, 687 P.2d 785 (1984) (declining to reach constitutional issue).

indifferent to whether any state provides coverage for abortion in its state Medicaid program.

Accordingly, the Medicaid Ban should be declared unlawful and unconstitutional and its enforcement permanently enjoined.

ARGUMENT

I. THE MAINECARE BAN VIOLATES THE APA BECAUSE IT CONFLICTS WITH MAINE PUBLIC POLICY

The Superior Court's holding that the MaineCare Ban does not as a matter of law unlawfully conflict with or violate the RPA, in violation of the APA, is reviewed *de novo*. *See, e.g.*, *Doane v. Dep't of Health & Human Servs.*, 2017 ME 193, ¶ 11, 170 A.3d 269, 273; *Carignan v. Dumas*, 2017 ME 15, ¶ 14, 154 A.3d 629.

DHHS rules and regulations must comply with state statutes and public policy. *See, e.g.*, 5 M.R.S. § 8058; 22 M.R.S. § 3173; 2 Am. Jur. 2d *Administrative Law* § 218 (2017). Under the APA, a regulation is invalid, *inter alia*, if it "exceeds the rule-making authority of [DHHS]" and/or if it is "otherwise not in accordance with law." 5 M.R.S. § 8058; *see also* 22 M.R.S. § 3173 (requiring DHHS's MaineCare regulations to be "consistent with the laws of the State"). By providing coverage for pregnancy-related care generally but withholding coverage for abortion, DHHS exceeds the limits placed on its rulemaking authority by the RPA.

The RPA unambiguously declares that it is the public policy of the State of Maine "not [to] restrict a woman's exercise of her private decision to terminate a pregnancy before viability." 22 M.R.S. § 1598(1). There are two, and only two, explicit statutory exceptions: the requirement that only physicians provide abortions and certain requirements relating to minors' ability to consent to abortion. *Id.* Other than those explicit exceptions, the prohibition is absolute. *See, e.g. Musk v. Nelson*, 647 A.2d 1198, 1201-02 (Me. 1994) ("[A] well-settled rule of statutory interpretation states that express mention of one concept implies the exclusion of others not listed. The statute provides for a single exception and implicitly denies the availability of any other."). Maine is one of only six states that have enshrined such protection from state interference with the right to abortion in state statute.[5] Of these six states, Maine is the *only* one that prohibits Medicaid coverage for abortion.

As the Superior Court recognized, the plain meaning of the term "restrict" is to "confine, limit, or restrain." A28. Relying primarily on the Supreme Court's decision in *Harris*, however, the Superior Court held that "the government's failure to fund abortion services is not, in itself, a restriction on the right to choose to have an abortion." A29-30. But this formulation of the question "overlooks the fact

[5] *See e.g.*, Cal. Health & Safety Code §§ 123462, 123466 (2017); Conn. Gen. Stat. Ann. § 19a-602(a) (2017); Haw. Rev. Stat. § 453-16 (2017); Md. Code Ann., Health-Gen. § 20-209 (2017); Wash. Rev. Code Ann. § 9.02.100 (2017).

that there is 'more' than a simple refusal to fund a protected activity in this case; instead, there is a program that selectively funds but one of two choices of a constitutionally protected decision, thereby penalizing the election of the disfavored option." *Harris*, 448 U.S. at 336 n.6 (Brennan, J., dissenting). It "is the state's offer of money to women for health care services necessary to carry the pregnancy to term" *in conjunction with* "the state's ban on health care funding for women who choose therapeutic abortions" that constitutes the state-imposed restriction on the right. *Women of State of Minn v. Gomez*, 542 N.W. 2d 17, 31 (Minn. 1995).[6]

This is so because every pregnant woman faces two, mutually exclusive options: to continue her pregnancy to term or terminate it. *See, e.g.*, *Harris*, 448 U.S. at 333 (Brennan, J., dissenting) ("A poor woman in the early stages of pregnancy confronts two alternatives: she may elect either to carry the fetus to term or to have an abortion."). Regardless of what a woman decides, she will need medical care. A92, A247; *see also Harris*, 448 U.S. at 332–333 (Brennan, J., dissenting) ("In every pregnancy, one of these two courses of treatment is medically necessary."); *Moe*, 382 Mass. at 654 (same). Thus, the restriction on a woman's ability to decide – without government interference – whether to have an abortion does not result from "an absolute right to have abortions or an equivalent

[6] For a full description on why *Harris* does not dictate the result here, see *infra* at pp. 28-38.

right to have . . . abortions subsidized by the State," but from the discriminatory funding of two mutually exclusive alternatives during pregnancy. *Moe*, 382 Mass. at 651-52.

As other courts rejecting the rationale adopted by the Superior Court have explained:

> Faced with these two options, financially independent women might not feel particularly compelled to choose either childbirth or abortion based on the monetary incentive alone. Indigent women, on the other hand, are precisely the ones who would be most affected by an offer of monetary assistance, and it is these women who are targeted by the statutory funding ban.

Gomez, 542 N.W.2d at 31; *Committee to Defend Reproductive Rights v. Myers*, 625 P.2d 779, 799 (Cal. 1981) ("[W]hen the state finances the cost of childbirth, but will not finance the termination of pregnancy, it realistically forces an indigent pregnant woman to choose childbirth even though she has the constitutional right to refuse to do so."); *Women's Health Ctr. of W. Va., Inc. v. Panepinto*, 446 S.E.2d 446 S.E.2d 658, 666 (W. Va. 993) ("This disparity in funding . . . clearly operates to coerce indigent pregnant women to bear children they would not otherwise choose to have").

The undisputed record in this case illustrates why this is so. It is undisputed that MaineCare is a lifeline for poor and low-income Mainers, enabling them to access critical health care that they otherwise would not be able to afford. A87. And, as the record also demonstrates, without MaineCare, poor and low-income

women must make extreme sacrifices that harm their health and well-being, as well as that of their families, in order to afford an abortion. A90, A220-30. The only way for a MaineCare-eligible pregnant woman to avoid these harms is to forgo exercise of her right to abortion altogether. If she gives up that right, the state will pay for all of the medical care related to her pregnancy. In providing coverage for necessary medical care only if the woman continues her pregnancy, the Ban thereby "restricts" a woman's exercise of her decision to terminate a pregnancy in violation of the RPA.

Nothing in this Court's decision in *Anderson v. Town of Durham*, 2006 ME 39, 895 A.2d 944, compels a different result. In *Anderson*, this Court expressly recognized that a state funding decision (such as the denial of a benefit) that puts pressure on a person to forgo the exercise of their constitutional right places an impermissible burden on that right. *Id.* ¶ 54; *see also Dotter v. Me. Empl. Sec. Comm'n*, 435 A.2d 1368, 1372 (Me. 1981); *Lambert v. Wentworth*, 423 A.2d 527, 534 (Me. 1980). In that case, however, the plaintiffs made no claim that attending a secular school "is proscribed by their faith, or that they are being punished for engaging in conduct mandated by their faith, or that the statute places any pressure on them to modify their beliefs." *Anderson*, 2006 ME 39, ¶ 54, 895 A.2d 944. In other words, unlike in this case, the families who desired to send their children to religious schools in *Anderson* did not experience any pressure to forfeit or abandon

the exercise of a fundamental constitutional right in order to obtain an essential public benefit.[7] As such, this Court concluded their right to free exercise had not been "restricted" in any way. *Id.* That conclusion is simply inapposite here where the denial of MaineCare coverage for abortion, but not for pregnancy-related care, puts substantial pressure on Plaintiffs' patients to forego – irrevocably – the right to terminate a pregnancy.

If Maine's public policy of not restricting a woman's exercise of the right to abortion means anything, it must mean that the State cannot "inject[] coercive financial incentives favoring childbirth into a decision that is constitutionally guaranteed to be free from governmental intrusion." *Harris*, 448 U.S. at 333 (Brennan, J., dissenting). Accordingly, the Ban "exceeds the rule-making authority of [DHHS]" and is "otherwise not in accordance with law." 5 M.R.S. § 8058. For this reason alone the Ban should be declared unlawful and its enforcement permanently enjoined.

[7] In any event, *Anderson* is distinguishable because the tuition funding statute was animated in part, if not entirely, by the state's interest in maintaining neutrality with respect to the diversion of public funds to religious institutions. 2006 ME 39, ¶ 61, 895 A.2d 944. That is quite unlike this case where it is the public policy of the State to maintain neutrality with regard to a whether a woman chooses abortion or childbirth.

II. THE MAINECARE BAN VIOLATES THE MAINE CONSTITUTION.

The Superior Court's holding that the MaineCare Ban does not violate the Maine Constitution, as a matter of law, is reviewed *de novo*. *State v. Elliott*, 2010 ME 3, ¶ 17, 987 A.2d 513, 519.

The Maine Constitution protects the fundamental right to make intensely personal decisions about one's body, one's health, and one's intimate relationships – including whether or not to bear a child – free from unwarranted government interference. *See Doe I v. Williams*, 2013 ME 24, ¶¶ 65, 61 A.3d 718 (both state and federal constitution recognize fundamental rights "to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion"). Regardless of whether it is framed as a question of equal protection or due process (or both), the decision to continue or terminate a pregnancy lies at the core of these rights, *see Doe I*, 2013 ME 24, ¶¶ 54, 65, 61 A.3d 718; *see also Valley Hosp. Ass'n, Inc. v. Mat-Su Coal. for Choice*, 948 P.2d 963, 968 (Ak. 1997) ("[A] woman's control of her body, and the choice whether or when to bear children, involves the kind of decision-making that is 'necessary for . . . civilized life and ordered liberty.'"); *Gomez*, 542 N.W.2d at 27 ("We can think of few decisions more intimate, personal, and profound than a woman's decision between childbirth and abortion."); *Moe*, 382 Mass. at 647 (the right to abortion is "an integral part of our jurisprudence").

The Superior Court did not take issue with the fact that abortion is a fundamental right protected by the Maine Constitution. Nor did it hold, and DHHS has never suggested, that the Ban serves a sufficiently compelling interest to justify any infringement of that right. Rather, relying on *Harris*, the Superior's Court's rejected Plaintiffs' constitutional claims based on a single erroneous determination—that providing coverage for pregnancy-related care generally but withholding coverage for abortion does not infringe upon the exercise of this fundamental right. This determination was flawed for at least three reasons. **First**, the undisputed facts leave no doubt that the MaineCare ban exacts a severe penalty on poor women who seek to exercise their right to abortion and coerces them to forgo exercise of the right altogether. It is well settled that when the withdrawal of a government benefit penalizes an individual for exercising a constitutional right or coerces them to not to exercise it, the government impinges on that right. In holding otherwise, the Superior Court misapplied this Court's jurisprudence and disregarded the persuasive opinions of the vast majority of courts to have addressed the issue, which have invalidated similar abortion coverage bans.

Second, as this Court has explained, even where state and federal constitutional provisions are identical, federal opinions guide the interpretation of the state constitution only when they are consistent with "public policy for the State of Maine and the appropriate resolution of the values (we) find at stake."

State v. Collins, 297 A.2d 620, 625 (1972). Here, it is the express public policy of this State "not [to] restrict a woman's exercise of her private decision to terminate a pregnancy before viability[.]" 22 M.R.S. § 1598(1). By contrast, the decision in *Harris* cannot be divorced from the purpose and policy driving the Hyde Amendment—preventing abortions. *See* 448 U.S. at 325. Accordingly, the Superior Court erred in finding *Harris* controlling because its result is contrary to the express public policy of this State.

Third, the Maine Constitution contains independent language and provisions that find no parallel in the federal constitution and warrant more expansive protection for the right to abortion than provided by the U.S. Supreme Court in *Harris*. *See* Me. Const. art. 1, § 1 ("All people . . . have certain natural, inherent and unalienable rights, among which are . . . defending life and liberty . . . and of pursuing and obtaining safety[.]"); art. 1, § 6-A ("No person shall be . . . discriminated against in the exercise [of civil rights]."). In following *Harris*, the Superior Court ignored this language in the paramount declaration of the rights of Mainers, and its unique history.

A. The MaineCare Ban Infringes on a Constitutional Right Because it Penalizes the Exercise of the Right to Abortion.

Although the refusal to provide a government subsidy may not offend constitutional principles in some cases, *see, e.g.*, *Anderson*, 2006 ME 39, ¶ 54, 895 A.2d 944, the Superior Court erred in holding that to be true in every case—

particularly this one. Context matters, and it is well settled that when the withdrawal of a government benefit penalizes individuals for exercising a constitutional right or coerces them to not to exercise it, the government impinges on that right. *See, e.g.*, *Dotter*, 435 A.2d at 1372 (holding that a policy that denies unemployment benefits because of conduct in accordance with religious beliefs thereby forcing adherents to choose between following their religion or obtaining government benefits infringes on a fundamental right); *Lambert*, 423 A.2d at 534 (withholding tax exemption from Maine residents of less than ten years "places a direct and real impediment upon . . . constitutional right to travel"). This is so even when the government is under no obligation to provide the benefit in the first instance and even if it, in theory, leaves an individual with "the same range of choice," *Harris*, 448 U.S. 317, if the government had decided not to provide any benefit at all, *see Ottman v. Fisher*, 319 A.2d 56, 59-60 (Me. 1974) ("The constitutional challenge cannot be answered by an argument that public assistance benefits are 'a 'privilege' and not a 'right.' Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation, or to denial of a tax exemption.").[8]

[8] In fact, "medical care is as much a basic necessity of life to an indigent as welfare assistance[] [a]nd governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of government entitlements," *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 259 (1974).

The Massachusetts Supreme Judicial Court relied on this well-settled doctrine to strike a virtually identical abortion coverage ban. *See, e.g.*, *Moe*, 382 Mass. at 652 ("While the State retains wide latitude to decide the manner in which it will allocate benefits, it may not use criteria which discriminatorily burden the exercise of a fundamental right."). As that court explained, although the state "need not subsidize any of the costs associated with child bearing, or with health care generally . . . it may not weigh the options open to the pregnant woman by its allocation of public funds[.]" *Id.* at 654. It therefore held the abortion coverage ban impinged the fundamental right to abortion under the state constitution. *Id.* at 655.

Since *Moe* was decided most other courts to address similar laws have followed this approach. *See, e.g.*, *State Dep't of Health & Social Servs. v. Planned Parenthood of Ak., Inc.*, 28 P.3d 904, 906 (Ak. 2001) ("[S]imilar constitutional issues would arise if the Legislature . . . funded [Medicaid] abortions but refused to provide comparable medical care for poor women who choose childbirth.") (quoting *Myers*, 625 P.2d at 780); *Right to Choose v. Byrne*, 450 A.2d 925, 935 (N.J. 1982) ("[T]he Legislature need not fund any of the costs of medically necessary procedures pertaining to pregnancy; conversely, it could include in its Medicaid plan medically necessary abortions for which federal reimbursement is not available. Once it undertakes to fund medically necessary care attendant upon

pregnancy, however, government must proceed in a neutral manner").[9] Although these decisions have rested on a variety of state constitutional provisions – i.e., equal protection, equal-rights-for-women clauses, due process, and privacy – they are connected by a common thread: "[W]hen state government seeks to act for the common benefit, protection, and security of the people in providing medical care for the poor, it has an obligation to do so in a neutral manner so as not to infringe upon the constitutional rights of our citizens." *Planned Parenthood of Ak., Inc.*, 28 P.3d at 908–09 (quoting *Panepinto*, 446 S.E.2d at 667).

The same, deeply rooted principles apply here. By covering pregnancy-related medical care only if a woman forgoes her constitutional right to an abortion, the State puts substantial pressure on poor and low-income pregnant women to forgo the right and imposes a substantial penalty on those who do not. *See supra* pp. 6-8. Therefore, just as the disqualification for unemployment benefits based on attendance at a religious festival, *see Dotter*, 435 A.2d at 1372, or the denial of a tax exemption because an individual exercises their right to

[9] *See also Simat Corp.*, 203 Ariz. at 460; *N.M. Right to Choose/NARAL*, 975 P.2d 841, 850–51 (1998), cert. denied, 526 U.S. 1020 (1999); *Gomez*, 542 N.W.2d at 19; *Panepinto*, 446 S.E.2d at 661 (W. Va. 1993); *Myers*, 625 P.2d at 781; *Jeannette R.,* No. BDV-94-811, 1995 Mont. Dist. LEXIS 795, at *20 (Mont. Dist. May 19, 1995) (attached as Exh. A); *Doe,* No. 91-CH-1958, slip op. at 1 (Ill. Cir. Ct. Dec. 2, 1994) (attached as Exh. B); *Maher*, 515 A.2d 134, 150, 152 (Conn. Super. Ct. 1986); *Celani*, No. S81-84CnC, slip op. at 19 (Vt. Super. Ct. May 23, 1986) (attached as Exh. C); *Planned Parenthood Ass'n v. Dep't of Human Res.*, 663 P.2d 1247, 1260–61 (Or. Ct. App. 1983), *aff'd on other grounds,* 297 Or. 562, 687 P.2d 785 (1984) (declining to reach constitutional issue).

travel, *Lambert*, 423 A.2d at 534, government funding for medical care related to carrying a pregnancy to term, but not for abortion, penalizes the exercise of a constitutional right.

Notwithstanding the above, the Superior Court adopted the contrary reasoning of a sharply divided U.S. Supreme Court in *Harris*. In *Harris*, the majority held that the Hyde Amendment did not infringe the federal constitutional right to abortion because it "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 health care costs at all." 448 U.S. at 317. However, as the dissenting Justices in *Harris* explained at length, the majority opinion in *Harris* is not even defensible under the U.S. Supreme Court's own jurisprudence:

> It suffices to note that we have heretofore never hesitated to invalidate any scheme of granting or withholding financial benefits that incidentally or intentionally burdens one manner of exercising a constitutionally protected choice.

Id. at 334-35 (Brennan, J., dissenting) (citing cases); *see also id.* at 349 (Stevens, J., dissenting) ("The question is whether certain [eligible] persons . . . may be denied access to benefits solely because they must exercise the constitutional right to have an abortion in order to obtain the medical care they need. Our prior cases

plainly dictate the answer to that question."); *id.* at 345 (Marshall, J., dissenting), *id.* at 348 (Blackmun, J., dissenting). An example illustrates why this is so:

> Surely the Government could not provide free transportation to the polling booths only for those citizens who vote for Democratic candidates, even though the failure to provide the same benefit to Republicans "represents simply a refusal to subsidize certain protected conduct," and does not involve the denial of any other governmental benefits. Whether the State withholds only the special costs of a disfavored option or penalizes the individual more broadly for the manner in which she exercises her choice, it cannot interfere with a constitutionally protected decision through the coercive use of governmental largesse.

Id. at 336 n.6 (Brennan, J., dissenting).

As noted above, this Court's jurisprudence is consistent with the reasoning of *Moe*, its sister courts, and the *Harris* dissents—not the *Harris* majority. *See, e.g.*, *Dotter*, 435 A.2d at 1372; *Lambert*, 423 A.2d at 534. In fact, *Anderson* makes this clear. Had the Superior Court been correct that the denial of a government benefit can never infringe on a constitutional right, this Court would have summarily dismissed plaintiffs' claim that were entitled to state funding to send their children to religious schools. But this Court did not do so. Rather, it took pains to distinguish between laws that "condition[] receipt of an important benefit upon conduct proscribed by a religious faith, [or that] den[y] such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and violate his beliefs" and those

that merely refuse to subsidize the exercise of otherwise constitutionally-protected conduct. 2006 ME 39, ¶ 54, 895 A.2d 944; *see also Bagley v. Raymond Sch. Dep't*, 1999 ME 60, ¶ 18, 728 A.2d 127.

Here, the undisputed facts make plain that the MaineCare Ban forces a poor pregnant woman in Maine to choose between exercising her right to abortion and forfeiting much-needed assistance for medical care, on the one hand, and abandoning her right to abortion in order to obtain assistance for pregnancy-related care, on the other hand. Accordingly, the Ban has "a substantial penalizing effect," *Lambert*, 423 A.2d at 532, and the Superior Court's determination to the contrary was in error.

B. Maine Public Policy Warrants More Expansive Constitutional Protections for the Right to Abortion Than Provided in *Harris v. McRae*

Even if *Harris* were correctly decided under existing jurisprudence—which it was not—the Superior Court erred in finding it controlling here because its result is contrary to the express public policy of this State. As this Court has made clear, "federal decisions do not serve to establish the complete statement of controlling law, but rather to delineate a constitutional minimum." *State v. Caouette*, 446 A.2d 1120, 1122 (Me. 1982). Thus, this Court has not hesitated to "adopt a higher standard" where the "appropriate resolution of the values . . . at stake" warrant it. *Collins*, 297 A.2d at 625.

State constitutional provisions do not "*depend* on the interpretation of" parallel federal provisions. *State v. Flick*, 495 A.2d 339, 343 (Me. 1985) (emphasis in original). To the contrary, the federal Constitution sets the floor, not the ceiling, for the protection of individual rights. *See, e.g.*, *Caouette*, 446 A.2d at 1122 (stating that the "maximum statement of the substantive content" of the constitutional right against self-incrimination "must be decided by this Court—as a matter of Maine law."). Indeed, even where the drafters of parallel state and federal constitutional provisions plainly sought the same objectives, this "proposition does not support the non sequitur that the [U.S.] Supreme Court's decisions under such a text not only deserve respect but presumptively fix its correct meaning also in state constitutions." *Flick*, 495 A.2d at 343; *see also State v. Bouchles*, 457 A.2d 798, 801-02 (Me. 1983) (rejecting "any straitjacket approach by which we would automatically adopt the federal construction of the fourth amendment . . . as the meaning of the nearly identical provision of the Maine Constitution.").

For example, in *Collins*, this Court considered the evidentiary standard that should apply to the admissibility of a criminal defendant's confession. 297 A.2d at 625-26. The U.S. Supreme Court had previously determined the prosecution need only establish the voluntariness of a confession by preponderance of the evidence. *Id.* Despite the overarching similarities between the State and federal constitutional provisions at issue, this Court refused to adopt the federal approach. Recognizing

that federal decisions were merely intended to "prescribe [] a mandatory minimum standard," and that States were "free, pursuant to their own law, to adopt a higher standard," this Court "assess[ed] [the] public policy for the State of Maine" and based on "the appropriate resolution of the values [it found] at stake," determined that a higher evidentiary burden was required. *Id.*

Just as this Court recognized in *Collins*, Maine's public policy requires a departure from the decision in *Harris*. The federal policy withdrawing abortion coverage from the federal Medicaid program was passed in order to advance the federal government's stated interest in promoting childbirth over abortion, *see, e.g.*, *McRae*, 491 F. Supp. at 641 ("The debates made clear that the [policy] was intended to prevent abortions, not shift their cost to others."). And, the decision in *Harris* was predicated on the view that the federal Constitution "did not prevent [a state] from making a value judgment favoring childbirth over abortion, and . . . implement[ing] that judgment by the allocation of public funds." 448 U.S. at 314. But Maine's explicit public policy, as expressed in the RPA, does prevent precisely that: It prevents the state from attempting to coerce women into forgoing their right to have an abortion through the discriminatory allocation of public funds. 22 M.R.S. § 1598(1); *cf. Bates v. Dep't of Behavioral and Developmental Servs.*, 2004 ME 154, ¶¶ 43–46, 863 A.2d 890 ("Maine statutes in effect at the time the complaint was filed formed a basis for the plaintiffs' assertion of broader

substantive rights than those protected by the [Fourteenth Amendment of the] United States [Constitution]").

Accordingly, even though this Court has construed the state and federal guarantees of equal protection and substantive due process as co-extensive in non-abortion cases, *see* A34, 39, it has never done so where, as here, the express policy of the State dictates a different outcome. In fact, no court – including the U.S. Supreme Court – has ever upheld an abortion coverage ban in the face of an express public policy prohibiting government interference in a woman's decision to have an abortion. Given Maine's express public policy supporting the right to reproductive choice, "the appropriate resolution of the values . . . at stake" requires the repudiation of *Harris* and the conclusion that the Ban infringes the constitutional right to abortion.

C. The History and Text of Article 1, Sections 1 and 6-a of the Maine Constitution Warrant More Expansive Constitutional Protections for the Right to Abortion Than Provided in *Harris v. McRae*.

Maine's independent state constitutional provisions buttress this conclusion. In provisions that find no parallel in the federal Constitution, the Maine Constitution provides protection for safety (Me. Const. art. 1, § 1) and against discrimination in the exercise of civil rights (Me. Const. art. 1, § 6-A). The unique text and history of these provisions are evidence of the values and "maximum statement of the substantive content" of the Maine Constitution's protection for

individual rights and liberty, which likewise require the repudiation of *Harris*. *See Caouette*, 446 A.2d at 1122

Article 1, Section 1 ("Section 1") provides that "[a]ll people . . . have certain natural, inherent and unalienable rights, among which are those of enjoying and defending life and liberty . . . and of pursuing and obtaining safety[.]" Me. Const. art. 1, § 1; *see also Doe v. District Attorney*, 2007 ME 139, ¶¶ 42, 63, 932 A.2d 552 ("[Section 1], which does not appear in the federal Constitution, demonstrates our State's commitment to providing citizens . . . the possibility of a secure and content existence.") (Alexander, and Silver, JJ. concurring), *overruled on other grounds by State v. Letalien*, 2009 ME 130, 985 A.2d 4. Indeed, as other high courts interpreting similar provisions have held, unlike the Fourteenth Amendment, Section 1 expressly "accords a high priority to the preservation of health." *Byrne*, 450 A.2d at 934. Thus, "[t]he provision of enhanced guarantees for 'the enjoyment of life and liberty . . . and safety' by our state constitution both permits and requires us to interpret those guarantees independent from federal precedent." *Panepinto*, 446 S.E.2d at 664.

Forcing or coercing a woman to carry her pregnancy to term against her will, delaying her access to necessary abortion care, and compelling her to make dangerous sacrifices in order to afford abortion jeopardizes her right to pursue and obtain her own liberty and safety. *See supra* pp. 6-8. Indeed, it is undisputed that

abortion is almost always safer for a woman than carrying a pregnancy to term, as even a healthy pregnancy carries significant medical risks; and that pregnancy can exacerbate preexisting or underlying medical conditions that disproportionately affect MaineCare-eligible women. *See supra* p. 7. It is also undisputed that some women choose abortion in order to escape an abusive relationship and that the lack of MaineCare coverage for abortion puts the life and safety of these women at even greater risk. *See supra* pp. 7-8.

As such, courts in states with similar constitutional provisions have struck abortion funding bans for "impinging directly on the constitutionally guaranteed right to safety." *Doe v. Celani*, No. S81-84CnC, slip op. at 11 (Vt. Super. Ct. May 23, 1986) (attached as Exh. C); *see also Panepinto*, 446 S.E.2d at 665 ("Given that the term safety, by definition, conveys protection from harm, it stands to reason that the denial of funding for abortions that are determined to be medically necessary both can and most likely will affect the health and safety of indigent women in this state."); *Doe v. Maher*, 515 A.2d 134, 150 (Conn. Super. Ct. 1986) ("[T]he right to make decisions which are necessary for the preservation and protection of one's health, if not covered within the realm of privacy, stands in a separate category as a fundamental right protected by the state constitution.").

The history and text of Article 1, Section 6-A also support a departure from *Harris*. In 1963, the citizens of Maine amended the constitution to provide:

> *Discrimination against persons prohibited.* No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of that person's civil rights or be discriminated against in the exercise thereof.

Me. Const. art. 1, § 6-A (italics in original, underline added). While the first two clauses track the due process and equal protection language of the Fourteenth Amendment, the last clause—"[No person shall be . . .] denied the enjoyment of that person's civil rights or be discriminated against in the exercise thereof"—does not appear anywhere in the federal Constitution. In other words, nearly one hundred years after the ratification of the Fourteenth Amendment of the U.S. Constitution, the people of Maine voted to amend their Constitution not only to incorporate the language of the Fourteenth Amendment, but also to add broader language explicitly protecting Mainers from discrimination when they exercise their civil rights.

The voters' adoption of this unique and broader language must be considered to have independent force and effect. *See Bureau of Emp. Relations v. Me. Labor Relations Bd.*, 611 A.2d 59, 61 (Me. 1992) ("[T]he use of a disjunctive in a statute indicates alternatives and requires that those alternatives be treated separately."); *Op. of the Justices*, 2017 ME 100, ¶ 58, ___ A.3d ___ ("Our construction of the Maine Constitution depends primarily on its plain language, which is interpreted to mean whatever it would convey to an 'intelligent, careful

voter.'"). Indeed, "[i]n the construction of a [constitutional provision], nothing should be treated as surplusage, if a reasonable interpretation supplying meaning and force is possible." *See Finks v. Me. State Highway Comm'n*, 328 A.2d 791, 799 (Me. 1974). Any other view would mean the people intended to accomplish no change in the constitution when they amended the Declaration of Rights to enact Section 6-A.

The discrimination wrought by the Ban is so obvious that, as one court put it, "[t]o state the issue is to answer it." *Simat Corp. v. Ariz. Health Care Cost Containment Sys*., 203 Ariz. 454, 458 (Ariz. 2002). Though every pregnant woman must make one of two constitutionally-protected, mutually exclusive choices, poor and low-income women will receive MaineCare coverage for the health care they need only if they exercise their right to continue their pregnancies to term. This is a textbook example of dissimilar treatment of similarly-situated individuals solely on the basis of the exercise of one constitutional right as opposed to another. *See, e.g.*, *id.*; *Panepinto*, 446 S.E.2d at 666; *Gomez*, 542 N.W.2d at 28; *Byrne*, 450 A.2d at 934; *Myers*, 625 P.2d at 781.

Accordingly, in view of the Maine Constitution's explicit constitutional protections for liberty, safety, and against discrimination on the basis of an exercise of a constitutional right, "the appropriate resolution of the values . . . at

stake" requires the repudiation of *Harris* and the conclusion that the Ban infringes the constitutional right to abortion.

* * *

Given that the MaineCare Ban undeniably infringes the fundamental right to abortion, the only question remaining is whether it is justified by, and appropriately tailored to, advancing a sufficiently compelling state interest. *See Rideout v. Riendeau*, 2000 ME 198, ¶¶ 19–22, 761 A.2d 291 (holding that when a fundamental liberty interest is "interfered with by the State," the State is required to satisfy strict scrutiny and demonstrate that its actions are "narrowly tailored to serve a compelling state interest."). As noted above, neither the Superior Court nor DHHS have suggested that, if there was an infringement of a constitutional right, the State has an interest that would justify that infringement. Indeed, even the U.S. Supreme Court recognized that the federal Medicaid Ban could not survive heightened constitutional scrutiny. *Harris*, 448 U.S. at 316 (holding state's interest in potential life does not become compelling until after viability and, even then, "is insufficient to outweigh a woman's decision to protect her life or health" by choosing abortion). And if the interest in protecting potential life is not compelling then surely the purely administrative justifications for the Ban offered by DHHS in this case could not survive heightened scrutiny.

Therefore, in view of the above, this Court should declare the MaineCare Ban unconstitutional.

III. THE MAINECARE BAN IS UNCONSTITUTIONAL BECAUSE IT CANNOT SURVIVE EVEN RATIONAL BASIS REVIEW.

The Superior Court's holding that the MaineCare Ban satisfies rational basis review, as a matter of law, is reviewed *de novo*. *Elliott*, 2010 ME 3, ¶ 17, 987 A.2d 513.

At a minimum, laws that provide governmental benefits to some citizens and not to others must have a rational basis for the difference in treatment. *McBreairty v. Comm'r of Admin. & Fin. Services*, 663 A.2d 50, 53 (Me. 1995); *MacImage of Maine, LLC v. Androscoggin Cty.*, 2012 ME 44, ¶ 33, 40 A.3d 975. Indeed, whatever presumption of constitutionality a state law may enjoy, that presumption "is not absolute, but must give way if 'clear and irrefragable' evidence establishes the lack of a rational relationship between the evil sought to be prevented and the method adopted to do so." *State v. Rush*, 324 A.2d 748, 754 (Me. 1974). No such rational relationship exists in this case. Therefore, even if this Court holds that the Ban does not infringe on a fundamental right and rational basis review is appropriate, the law cannot survive.

The Legislature has already determined that selectively withholding MaineCare funding from eligible women in order to discourage them from choosing abortion is not a legitimate state interest. *See* 22 M.R.S. § 1598(1). And,

as DHHS admits, encouraging childbirth over abortion is not one of the objectives of the MaineCare program. A125. Nor has DHHS ever attempted to argue (nor could it) that the Ban is justified by any medical or public health rationale: As DHHS also admits, abortion is virtually always safer for a woman than carrying a pregnancy to term and, for some women, continuing a pregnancy is particularly dangerous. A92, A94-95. DHHS has likewise conceded that the Ban is not justified by any fiscal rationale. A88.

Instead, the stated rationale for the Ban is and always has been "to achieve consistency and compliance with federal law." A37. However, "[i]t is settled as a matter of Federal law that Medicaid-participant States remain free to subsidize at their own expense abortions beyond those for which Federal reimbursement is available." *Moe*, 382 Mass. at 634; *see also Harris*, 448 U.S. at 311 n.16. In other words, federal law does not require states to withhold state Medicaid coverage for abortion in order to "achieve consistency and compliance" with federal law. *See Moe*, 382 Mass. at 634. ("T]he relief sought here would not jeopardize Federal reimbursement for other services provided by the Massachusetts Medicaid program.").

Contrary to the Superior Court's holding, Plaintiffs do not argue that the Ban is irrational because it is not the "wisest decision" or the "best means of achieving the desired result" (although it is neither). A36. Instead, this is a challenge to the

continued enforcement of a ban that inflicts tremendous harms and inures no benefit to the State, on the basis of an asserted need to "achieve consistency and compliance with federal law" *even though* DHHS is fully aware it is under no federal (or State) legal obligation to do so. *See* A127-28. Perhaps DHHS's asserted interest might carry more weight if it was unsettled whether states were free to cover abortions using only state funds. But it is not. Surely, if anything is irrational it is the deliberate decision to cling to an inaccurate understanding of federal law when an accurate understanding of that law, and one that would relieve suffering of Mainers, has been widely known for decades.

In sum, the MaineCare Ban must be declared irrational and unconstitutional.

CONCLUSION

For the reasons set forth above, this Court should reverse the Superior Court decision, declare the MaineCare Ban unconstitutional, and permanently enjoin its enforcement.

Respectfully submitted,

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STATE OF MAINE

SUPREME JUDICIAL COURT
Sitting as the Law Court
Docket No. Cum-17-494

Mabel Wadsworth Women's Health Cer

v.

Commissioner of Department of Health a

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