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

REPLY BRIEF OF THE APPELLANTS

April 12, 2018

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INTRODUCTION[1]

DHHS claims "[t]his is not a case involving a state law that burdens access to abortion services without a benefit to the state." Red Br. 34. This is patently false. Although DHHS (incorrectly) asserts there is no evidence that Maine women are prevented from obtaining an abortion due to lack of funds, even DHHS does not dispute that the Medicaid Ban causes MaineCare-eligible women to experience significant delays in obtaining abortions, increasing both the risks and costs related to the procedure, and causing the health of women suffering from pregnancy-related conditions to deteriorate. *See, e.g.*, Blue Br. 6–11; Br. Amici Curiae of Maine Public Health Association ("MPHA") et al. 4–9. Nor does DHHS dispute that the Ban causes MaineCare-eligible women to make substantial sacrifices that harm themselves and their families to afford abortions necessary for their physical and mental health and well-being. *See, e.g.*, Blue Br. 6–11; Br. Amici Curiae of MPHA et al. 4–9.

Strikingly, despite these undisputed harms, DHHS identifies no benefit the Ban brings to the State. As set forth below, the Medicaid Ban is not necessary to comply with federal law. And DHHS does not (because it cannot) claim that it saves the State money. Moreover, while the Ban certainly penalizes MaineCare-

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

eligible women for deciding to have abortions instead of continuing their pregnancies, DHHS does not (because it cannot) contend that promoting childbirth over abortion was the purpose of the Ban when it was promulgated or the reason for its continued enforcement today.

All DHHS is left with is the argument that—despite a statute declaring the express public policy of the State not to restrict a woman's exercise of her decision to have an abortion, and despite the unique and independent text and history of the State Constitution—these widespread harms are permissible because the Medicaid Ban mimics federal law. If that is not a burden without a benefit, then nothing is.

ARGUMENT

I. NEITHER FEDERAL NOR STATE LAW REQUIRES THE CREATION OF A SEPARATE FUNDING PROGRAM.

DHHS's suggestion that state Medicaid coverage for abortion is "expressly prohibited" by federal law, Red Br. 11, and therefore this challenge is not to the Medicaid Ban, but "the *lack* of a separately funded state program for abortion services," *id.* at 40 (emphasis in original), is simply wrong. Nothing in federal law prohibits state coverage of abortion *within a state's Medicaid program*. Though the Hyde Amendment prohibits federal funding for abortions outside its exceptions, the U.S. Supreme Court has clearly stated that any "State is free, if it so chooses, *to include in its Medicaid plan* those medically necessary abortions for which federal

reimbursement is unavailable." *Harris v. McRae*, 448 U.S. 297, 311 n.16 (1980). For this reason, both the West Virginia and Oregon Supreme Courts have rejected the very argument raised by DHHS here. *See Boley v. Miller*, 187 W. Va. 242, 245 (1992); *Planned Parenthood Ass'n v. Dep't of Human Res. of State of Or.*, 687 P.2d 785, 790 (Or. 1984). Indeed, numerous states currently provide broader coverage for abortion through their state Medicaid programs. *See* Pls.' Reply in Supp. of Cross-Mot. for Summ. J. 4–5 (demonstrating that Hawaii, Alaska, and Minnesota provide broader coverage for abortion through their Medicaid programs).[2] Therefore, if this Court were to strike the Medicaid Ban the MaineCare program would still comply with federal law.

Because neither federal nor state law require it, that DHHS lacks "authority to establish a separate state funded program for abortions without legislative action," Red Br. 19, is beside the point. Indeed, prior to the promulgation of the state and federal Medicaid Bans, MaineCare covered abortion services on par with all other covered pregnancy-related services. *See generally Preterm, Inc. v. Dukakis*, 591 F.2d 121, 130 (1st Cir. 1979). DHHS does not contend any separate

[2] *None* of the examples DHHS cites stand for this proposition. Red Br. 40 n.22. For example, DHHS cites not to Oregon's Medicaid program but to a limited funding program for individuals who do not meet the requirements for Medicaid. *See* Or. Admin. R. 410-120-1210(4)(e)(B); *see also* Pls.' Reply. in Supp. of Cross-Mot. for Summ. J. 5 n.5 (responding to identical claims concerning Washington, West Virginia, Vermont, and Arkansas Medicaid programs).

appropriation was required to cover abortion services then, or would be required to restore coverage today. *See, e.g.*, *Moe v. Sec'y of Admin. & Fin.*, 382 Mass. 629, 642 (1981) ("[P]laintiffs do not seek any forced appropriation of funds . . . [T]he sole restriction pertaining to the coverage of medical services is the abortion funding provision challenged here."); *see also* Red Br. 10 (discussing DHHS's "broad authority to . . . defin[e] the type of medical care to be provided to Medicaid beneficiaries"). Nor has DHHS submitted any evidence that "the funds already appropriated [for the MaineCare program] would be inadequate to pay for abortions once the restrictions are stricken." *Comm. to Defend Reproductive Rights v. Cory*, 132 Cal. App. 3d 852, 858 (Cal. Ct. App. 1982).[3] Therefore, this case in no way implicates decisions concerning "the allocation of state resources" that are "properly left to the legislative body." Red Br. 13.[4]

As such, it is irrelevant whether DHHS has the authority to create a separate abortion funding program. DHHS undoubtedly has the authority to *restore* state Medicaid coverage for abortion by lifting its self-imposed restriction on that coverage, and violates Maine law by refusing to exercise it.

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[3] To the contrary, restoring state Medicaid coverage for abortion would likely protect the public fisc. *See* A130–135.

[4] Even if it did, the State's discretion to allocate resources is not limitless. *See, e.g. Moe*, 382 Mass. at 652 (". . . when a State decides to alleviate some of the hardships of poverty by providing medical care, the manner in which it dispenses benefits is subject to constitutional limitations.").

II. DHHS CANNOT EVADE THE PLAIN LANGUAGE OF THE REPRODUCTIVE PRIVACY ACT.

In 1993, the Legislature unambiguously declared the public policy of the State to be neutrality towards a woman's "exercise of her private decision to terminate [her] pregnancy." Reproductive Privacy Act ("RPA"), 22 M.R.S. § 1598(1). Relying almost exclusively on the U.S. Supreme Court's decision in *Harris*, DHHS insists that "Maine does not restrict a woman's decision to have an abortion by declining to pay for it," Red Br. 2. However, DHHS utterly fails to reckon with *Harris's* flawed, and anomalous, reasoning. *See* Blue Br. 28–29; *see also generally* Br. Amicus Curiae of Federal Constitutional Scholars. Taken to its logical conclusion, DHHS's argument is that a law providing publicly subsidized travel to the polls for registered Democrats, but not Republicans, would not amount to a state-imposed "restriction" on the right to vote, but a mere "refusal to subsidize" the exercise of the right to vote. As set forth below, *see infra* 12–14, DHHS fails to explain how providing Medicaid coverage *only* to those pregnant women who carry to term, and withholding it from those who exercise their right to abortion, is any different.[5]

[5] DHHS's discussion of mandatory versus optional Medicaid services is another distraction. *See* Red. Br. 3–4, 10–11. DHHS has opted to participate in the Medicaid program and therefore has opted to provide comprehensive pregnancy-related care to poor and low-income Mainers. Plaintiffs' argument is solely that, under Maine law, DHHS cannot discriminatorily fund the exercise of only one of

DHHS likewise fails to address that *Harris* not only acknowledged that the Hyde Amendment was designed to coerce and prevent poor women from obtaining abortions, but approved of it on this basis as well. *See* 448 U.S. at 324. Therefore, even if, in contrast to most courts, this Court regards *Harris* as well-reasoned, that reasoning is inapplicable in Maine where state law expressly precludes government interference with a woman's decision to have an abortion. Indeed, while DHHS notes that thirty-three states have elected not to provide broader Medicaid coverage for abortion than the Hyde Amendment, *see* Red Br. 13, it fails to acknowledge that *not one of those states* has declared the protection of the right to abortion from government interference as explicit public policy. *See* Blue Br. 17. As this Court recognized in *Bates v. Dep't of Behavioral and Developmental Servs.*, 2004 ME 154, ¶¶ 43–46, 863 A.2d 890, federal constitutional principles do not create a ceiling where state statutes provide broader protections.[6]

Stuck with the plain language of the RPA, DHHS urges this Court to infer contrary legislative "intent" from inaction, silence, and a one-sided presentation of an inconclusive legislative record. *See* Red Br. 12–20. These arguments contravene

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two mutually exclusive constitutionally-protected courses of action. *See* Blue Br. 17–21, 24–30.

[6] DHHS's claim, *see* Red Br. 8, 28, that by including *Harris* in a string cite when describing the then-current state of federal law in *Bates*, *see* 2004 ME 154, ¶ 43, 863 A.2d 890, this Court cited *Harris* "with approval" or otherwise incorporated its reasoning into state constitutional law is disingenuous.

basic principles of statutory interpretation. **First**, "legislative inaction is indicative of nothing." *Mahaney v. Miller's, Inc.*, 669 A.2d 165, 169 (Me. 1995); *see also Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) ("[Legislative] inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction."). Therefore, DHHS cannot rely on two failed legislative attempts to create separate programs to provide insurance coverage for abortion (one occurring fifteen years before the RPA was enacted) to argue that the RPA permits DHHS to exclude abortion coverage from MaineCare. *See* Red Br. 14–16. There may be any number of "[v]arious considerations of parliamentary tactics and strategy [that] might be suggested as reasons for the [failures of these proposals] . . . but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle." *Helvering v. Hallock*, 309 U.S. 106, 121 (1940).[7] Nor does the failure of the Legislature to repeal the Medicaid Ban establish that the Ban is lawful. Otherwise, every regulation would be *ipso facto* lawful unless and until the Legislature repealed it, at

[7] Likewise, DHHS's argument that the Legislature's failure to enact new laws restricting abortion outside the funding context somehow demonstrates legislative acquiescence to the Medicaid Ban, Red Br. 19, is even more indefensible. *See United States v. Meek*, 366 F.3d 705, 720 (9th Cir. 2004) ("Sorting through the dustbin of discarded legislative proposals is a notoriously dubious proposition.").

which point judicial review—no less the Maine Administrative Procedure Act—would be irrelevant. *See, e.g.*, 5 M.R.S. § 8058.[8]

Second, DHHS cannot substitute the RPA's unambiguous language with selective excerpts from its legislative history or Statement of Fact. *See* Red Br. 12, 16-18; *see also Ford Motor Co. v. Darling's*, 2016 ME 171, ¶ 24, 151 A.3d 507.[9] It is the "statutory language, plain on its face, that the legislators voted to enact and the Governor signed, not the sponsor's Statement of Fact," nor any other legislator's statements. *Stone v. Bd. of Registration in Med.*, 503 A.2d 222, 227 (Me. 1986). If the Legislature had intended to "qualify and limit general terms which have a plain meaning," it could only do so by "adopting definitions and limiting amendments into the law—not by policy statements in legislative history." *Id.* at 227–28. "To depart from the controlling text of [the Act] in search

[8] Because even DHHS concedes that the RPA's text is unambiguous, *see* Red Br. 7, and because DHHS is not charged with administering the RPA, so its interpretation of that statute (as opposed to, e.g., the MaineCare statute) is entitled no deference, *Thompson v. Shaw's Supermarkets,* 2004 ME 63, 847 A.2d 406, is inapposite, *see* Red Br. 18. In *Thompson*, this Court deferred to the Department of Labor's interpretation of the state overtime statute—which it was explicitly charged with administering—*only after* determining that the statutory text was ambiguous and did not clearly resolve the question at hand. 2004 ME 63, ¶ 7, 847 A.2d 406.

[9] In addition to conceding that the RPA's text is unambiguous on its face, *Town of China v. Althenn*, 2013 ME 107, ¶ 6, 82 A.3d 835, DHHS does not assert that construing "restrict" in accordance with its plain meaning would produce an "illogical or absurd" result, *Preti Flaherty Beliveau & Pachios LLP v. State Tax Assessor*, 2014 ME 6, ¶ 11, 86 A.3d 30.

of an alternative interpretation would amount to rewriting the law enacted by the legislature." *Id.* at 228.

DHHS's use of legislative history here is the "equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993). DHHS neglects to cite those floor statements in which various representatives characterized the RPA as "chang[ing] the policy stance of the State of Maine," Legis. Rec. H-399-400 (1st Reg. Sess. 1993)[10] to go "beyond *Roe v. Wade*," *id.* at H-405 (Representative Simoneau), and "open[] up the availability of abortions," 1 Legis. Rec. H-448 (1st Reg. Sess. 1993) (Representative Robichaud). As one representative put it, "[m]any people have referred to the bill not having any effect on what is presently in law in the state. So, if this bill, [], doesn't change the law at all, why are we fighting and trying so hard to pass it and not have any restrictions on it?" Legis. Rec. H-448 (1st Reg. Sess. 1993) (Representative Vigue).[11] DHHS simply cannot selectively invoke portions

[10] *See also id.* ("[L.D.] 318 . . . takes a proactive stand which is actually a preemptive strike against the consideration of reasonable restrictions, . . . If the proponents of 318 had wanted to do some house cleaning . . . they would have put forth a bill that took out the enjoined paragraph and did not make an attempt to change the policy stance of the State of Maine.").

[11] *See also* Legis. Rec. H-399 (1st Reg. Sess. 1993) (Representative Pouliot) ("This bill is not designed to preserve the status quo but to take Maine to a radical extreme pro-abortion position.").

of an "ambiguous legislative history to muddy clear statutory language." *Milner v. Dept of Navy*, 562 U.S. 562, 572 (2011).

III. THE MEDICAID BAN VIOLATES THE MAINE CONSTITUTION.

DHHS argues that *Harris* "resolves" this case. Red Br. 23. But this argument disregards this Court's duty to independently construe the Maine Constitution—even where parallel state and federal provisions are concerned—in accordance with the State Constitution's history and text, the public policy of the State, and the "appropriate resolution of the values . . . at stake." *State v. Collins*, 297 A.2d 620, 626 (Me. 1972).

First, *Harris* is neither controlling nor persuasive here because Plaintiffs raise claims under state constitutional provisions that do not appear in the U.S. Constitution and were not before the Court in *Harris. See* Blue Br. 33–38. By urging this Court to rely exclusively on *Harris* in construing these provisions, DHHS improperly diminishes not only their independent vitality – rendering them virtually meaningless – but also the Maine Constitution's history and the will of the Maine voters who ratified these provisions. *See id.*; *see also* Br. Amicus Curiae of Marshall Tinkle, Esq., 2–5, 14–15.[12] For example, the Medicaid Ban is a textbook example of dissimilar treatment of similarly-situated individuals based on

[12] As is ably explained in the Amicus Curiae Brief of Marshall J. Tinkle, Esq. at 2–9, DHHS's contention that the history of and early decisions under Section 1 establish that interpretation of that provision is controlled by the Fourteenth Amendment of the Federal Constitution, *see* Red Br. 37–39, is simply incorrect.

the exercise of a constitutional right. *See* Blue Br. 37. However, DHHS ignores this claim, thereby implying that Section 6-a's unique and explicit guarantee that "[n]o person shall be . . . denied the enjoyment of that person's civil rights or be discriminated against in the exercise thereof," is not entitled any consideration by this Court. Me. Const. Art. 1 § 6-a.[13] DHHS likewise urges this Court to allow *Harris*—a decades-old (and much-maligned) 5-4 federal court decision interpreting wholly different constitutional text—to dictate the interpretation of Section 1, *see* Red Br. 39, while providing no justification for disregarding the well-reasoned opinions of state courts construing nearly identical clauses in nearly identical cases, *see, e.g.*, *Women's Health Ctr. of W. Va., Inc. v. Panepinto*, 191 W. Va. 436, 439 (W. Va. 1993); *Right to Choose v. Byrne*, 91 N.J. 287, 292–93 (N.J. 1982); *Doe v. Celani*, No.S81-84CnC, slip op. at 19 (Vt. Super. Ct. May 23, 1986).[14]

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[13] Contrary to DHHS's argument, Red Br. 26–27, Plaintiffs do not argue the Medicaid Ban violates Section 6-a because it discriminates on the basis of indigency, or because it funds some "reasonably necessary medical and remedial" services and not others, but because it discriminates between pregnant women who exercise their constitutional right to abortion and those who do not.

[14] Nothing in *Doe I v. Williams*, 2013 ME 24, 61 A.3d 718, forecloses Plaintiffs' Section 1 claim. *See* Red Br. 36–37. In *Doe I*, this Court construed the Section 1 claim to be asserting "a fundamental right to [informational] privacy, a right to protection of reputation, and a right to fundamental fairness." 2013 ME 24 ¶ 70, 61 A.3d 718. This Court "decline[d] to expand [its] interpretation of Maine's Constitution to include a generalized right to 'fundamental fairness" and held that the specific privacy and reputational interests asserted—keeping private the fact of

Second, the existence of earlier cases construing the state and federal due process and equal protection clauses co-extensively does not extinguish this Court's duty to independently examine the claims currently before it. *See also* Tinkle Br. 11–15. These earlier cases "should not be read as an acknowledgment that federal law requires [that] result . . . nor to diminish [this Court's] view of the independent sufficiency of [the Maine Constitution] as the basis for decision." *State v. Flick*, 495 A.2d 339, 344 (1985).

In any event, this Court need not hold that the Maine equal protection and due process clauses are necessarily broader than their federal counterparts—in this or any other case—to reject *Harris* as unpersuasive. For example, the Massachusetts Supreme Judicial Court decision in *Moe*, rejecting *Harris*, did not start from the premise that the Massachusetts Constitution is necessarily broader than the Federal Constitution. Rather, it began from the premise—equally applicable here—that it was not bound by federal decisions when interpreting the state constitution, *Moe*, 382 Mass. at 651, and then examined the majority and

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a conviction—did not rise to the level of a constitutionally-protected interest. *Id.* 2013 ME 24 ¶¶ 60–63, 67, 61 A.3d 718. Here, by contrast, it is undisputed that the Maine Constitution protects the woman's fundamental liberty interest in choosing whether to bear or beget a child. Blue Br. 22. In short, the *Doe I* Court did nothing more than answer the limited question presented, which is distinct from and therefore not dispositive of the question presented here. *Cf. State v. L.V.I. Group*, 1997 ME 25, ¶ 15, 690 A.2d 960 (construing challenge to retroactivity of statute as due process, not Section 1, claim).

dissents in *Harris* to determine whether its reasoning nevertheless was persuasive. *Id.* at 651–52. This Court has approved of this approach to state constitutional interpretation. *See, e.g.*, *Flick*, 495 A.2d at 343 n.2. Ultimately, the *Moe* Court rejected *Harris* because it found the reasoning unpersuasive on the merits (*i.e.*, because *Harris* was irreconcilable with well-reasoned federal precedent concerning whether "a selective grant of benefits" impinges constitutional rights), not because the Massachusetts Constitution is inherently broader than the U.S. Constitution. *Moe*, 382 Mass. at 652. In fact, that court has performed the same sort of independent analysis in subsequent abortion cases only to agree with the U.S. Supreme Court. *See, e.g.*, *Planned Parenthood League of Mass., Inc., v. Att'y Gen.*, 424 Mass. 586, 596–97 (Mass. 1997).

Here, just as in *Moe*, the reasoning in *Harris* contradicts longstanding precedent holding where the denial of a benefit pressures a person to forgo the exercise of their constitutional right, it impermissibly burdens that right. *See, e.g.*, *Anderson v. Town of Durham*, 2006 ME 39, ¶ 54, 895 A.2d 944; *see also Dotter v. Me. Emp't. Sec. Comm'n*, 435 A.2d 1368, 1372 (Me. 1981); *Lambert v. Wentworth*, 423 A.2d 527, 534 (Me. 1980). In arguing otherwise, *see* Red Br. 29, DHHS fails to contend with the facts underlying *Anderson*. In *Anderson*, this Court expressly recognized the foregoing principle, 2006 ME 39, ¶ 54, 895 A.2d 944, but found a statute preventing the use of public tuition subsidies at private religious

schools imposed no such burden where the plaintiffs did not 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," *id.* By contrast, the record indisputably shows that 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 abortion. *See, e.g.*, Blue Br. 6–11, 17–20; Br. Amici Curiae MPHA, et al. 4–9.

To the extent DHHS argues that the Medicaid Ban could only burden the exercise of a constitutional right if it withheld *all* Medicaid benefits from women—including benefits wholly unrelated to pregnancy—who obtained abortions, Red Br. 30, that is also incorrect. Far from supporting this argument, *see id.* at n.16, this Court's decision in *Lambert* undermines it. 423 A.2d at 534 (striking residency requirement for property tax exemption for veterans because it burdened fundamental right to travel). The plaintiff in *Lambert* was not precluded from obtaining *all* tax exemptions because he had not been a resident of Maine long enough, just the one. *Id.* at 530. Yet, this Court did not hold the residency requirement would be unlawful only if it resulted in the loss of all conceivable tax credits.

Finally, even if this Court were to apply rational basis review as in *Harris*, Maine's Medicaid Ban fails even that deferential level of review. The sole state interest asserted in *Harris* was Congress's express interest in removing federal Medicaid coverage for abortion in order to prevent women from having abortions. 448 U.S. at 324–26.[15] DHHS cannot claim the same interest here, as it is foreclosed by public policy and DHHS testimony, *see* A125–27, as well as historical rulemaking documents demonstrating that DHHS was not motivated by any such interest, *see* Ex. 1 to Def.'s Mot. for Summ. J. (June 13, 2017) (historical rulemaking documents).[16]

Nor is there any other justification for the Ban. DHHS cannot disclaim its exclusive responsibility for promulgating—and justifying—the Medicaid Ban by pointing to "[t]he Legislature's decision not to establish a separate state program"

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[15] To the extent DHHS suggests that *Harris* also approved a state interest in "containing the cost of the Medicaid program by limiting services to those which are federally reimbursable," Red Br. 30–31, *Harris* made no such holding.

[16] Even if DHHS had expressed such an interest in 1978, that interest was foreclosed as a matter of public policy in 1993 when the Legislature enacted the RPA. Nor can DHHS disclaim its own testimony pursuant to M.R. Civ. P. 30(b)(6) that it is not one of the objectives of the MaineCare program to promote childbirth over abortion. A125–27; *see also Booker v. Mass. Dep't of Pub. Health,* 246 F.R.D. 387, 389 (D. Mass. 2007) (explaining that persons designated by a corporation to testify give "binding answers for the corporation."). DHHS's suggestion that this Court should not only disregard this direct testimony but should supplant it with various statements made by anti-abortion legislators in connection with failed legislative proposals is plainly wrong. *See* Red Br. 14, 19 n.11, 32.

for abortion coverage, or by pretending that "compliance" with federal law demands the Ban. *See* Red Br. 31–32; *see also supra* 2–4. Moreover, DHHS does not attempt to justify the Medicaid Ban on the basis it saves the State any money, *see* A88, conceding that even without federal reimbursement the cost of care related to carrying a pregnancy to term far exceeds the cost of abortion, *see* A130–35.[17] Thus, the best DHHS can do is assert an interest in conformity with federal law for the sake of conformity alone—even though conformity confers no benefit, and instead likely harms any actual state interests. *See* Br. Amici Curiae of MPHA, et al. 8, 22. As such, the State has utterly failed to assert even a rational justification for the Medicaid Ban.

IV. THE SUPERIOR COURT HAD SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' CONSTITUTIONAL CLAIMS.

DHHS mischaracterizes Plaintiffs' challenge as "a challenge to the lack of a separately funded state program for abortion services" and then attacks the Superior Court's subject matter jurisdiction over this imaginary claim. Red Br. 40–41. Concerning Plaintiffs' actual challenge to the constitutionality of the Medicaid Ban (a regulation), the Superior Court correctly found that it had subject matter

[17] In arguing that enforcing the ban is rational despite providing no financial benefit to the State, and in the face of evidence to the contrary, DHHS misses the point. Red Br. 32. It may not be irrational to do so *in the service of a state interest in protecting fetal life*, *see id.* 14–15, but it is certainly irrational to do so for, as here, virtually no reason at all.

jurisdiction because "Section 8058 of the Maine Administrative Procedure Act, coupled with Plaintiffs' 'aggrieved party' status, [] establishes jurisdiction to grant declaratory relief on any of the . . . constitutional grounds for relief set forth in the Complaint." A24–25; *see also id.* at A25 (holding this case "particularly appropriate for declaratory relief, given the . . . significant public interest in the resolution of those questions) (citing *Perry v. Hartford Acci. & Indem. Co.,* 481 A.2d 133, 136 (Me. 1984)).[18]

CONCLUSION

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

Respectfully,

Date: April 12, 2018

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[18] To the extent DHHS argues that Plaintiffs should have attempted to seek reimbursement for an abortion prohibited under the Medicaid Ban and then administratively appealed that denial, Red Br. 41, that argument is without merit. DHHS concedes that such an appeal would be futile. *See* A23. Moreover, given DHHS's admission that it lacks authority to create a separate abortion funding program, it cannot now suggest Plaintiffs file a futile petition for rulemaking to create just such a program, or engage in a futile effort to seek judicial review of DHHS's failure to do so. Red Br. 41.

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CERTIFICATE OF SERVICE

I, Zachary L. Heiden, counsel for the Appellants, certify that I have this day caused two copies of the *Reply Brief of Appellants* to be served upon the Appellee by mailing copies by first-class mail, postage prepaid, addressed as follows:

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