MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Docket No. 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 FEDERAL CONSTITUTIONAL LAW SCHOLARS KATHRYN ABRAMS, JILL E. ADAMS, KHIARA BRIDGES, ERWIN CHEMERINSKY, MICHELE GOODWIN, AND SYLVIA LAW, *AMICI CURIAE* SUPPORTING APPELLANTS

Erwin Chemerinsky*
BERKELEY LAW
215 Boalt Hall
Berkeley, CA 94720
510.642.1741

Jill E. Adams*
CENTER ON REPRODUCTIVE RIGHTS AND JUSTICE
452 Boalt Hall
Berkeley, CA 94720
510.642.8567
**admission pro hac vice pending*

Richard L. O'Meara
MURRAY, PLUMB & MURRAY
75 Pearl Street, P.O. Box 9785
Portland, ME 04104-5085
207.773.5651
Counsel for *Amici Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF INTEREST

As scholars of the United States Constitution, we concern ourselves with its accurate interpretation and proper application through jurisprudence in state and federal courts. We are equally invested in ensuring against the misapplication of precedent when a past ruling is wrongful, does not constitute a reasonable reading of federal constitutional protections, or ignores principles of constitutional interpretation.

The proper resolution of this case is a matter of direct concern to us. We submit this brief as friends of the court and hope it will assist the Justices in reaching a decision.

Amici[1] are the following scholars who teach and write about matters contained herein:

Kathryn Abrams, Professor of Law, Berkeley Law.

Jill E. Adams, Executive Director, Center on Reproductive Rights and Justice, Berkeley Law.

Khiara Bridges, Professor of Law, Boston University School of Law.

Erwin Chemerinsky, Dean and Jesse H. Choper Distinguished Professor of Law, Berkeley Law.

[1] Each scholar joins this brief in his or her individual capacity and not as a representative of the institution listed for identification purposes only.

Michele Goodwin, Chancellor's Professor of Law, University of California at Irvine School of Law.

Sylvia Law, Elizabeth K. Dollard, Professor of Law, Medicine and Psychiatry, New York University Law.

STATEMENT OF THE ISSUE

Whether the Maine Supreme Judicial Court ought to rely on *Harris v. McRae*, 448 U.S. 297 (1980), the U.S. Supreme Court case that narrowly upheld the constitutionality of the Hyde Amendment against vehement dissents and in contravention of existing precedent, to rule on whether the MaineCare abortion coverage ban violates state statutory or constitutional protections.

SUMMARY OF ARGUMENT

The Supreme Court of Maine ought not rely on *Harris v. McRae* to rule in the present case, because the narrow majority broke with then-recent precedent and longstanding principle to uphold a law that undercuts a State interest and coerces constitutionally protected decision making. *McRae* was wrongly decided and ought to be considered invalid for several reasons, including its use of the wrong (lower) level of review, its allowance of a coercive public benefits scheme in contravention of the government neutrality principle, and its disregard for the State interest in health.

Laws that impinge on fundamental rights are viewed with suspicion by courts and considered under a strict scrutiny level of review. However, in reviewing the Hyde Amendment, a Medicaid coverage ban that impinges on the fundamental right to abortion, the *McRae* majority veered away from the appropriate strict scrutiny standard. Instead of applying the proper level of review, as the Court did in *Roe v. Wade*, 410 U.S. 113 (1973), the Court in *McRae* applied rational basis review, claiming that the State need not remove non-government created obstacles from the path of a woman seeking an abortion. While the Hyde Amendment would not have passed muster under strict scrutiny, it barely did so under rational basis and only because the Court drew false binaries between impediments and incentives to reach its conclusion. State courts have not been as willing to diminish the potency of the right declared in *Roe* and have applied an appropriately high level of scrutiny in reviewing and striking down their own abortion coverage bans. *See Dept. of Health & Soc. Servs. v. Planned Parenthood of Alaska*, 28 P.3d 904, 909–10 (Alaska 2001); *Simat Corp. v. Ariz. Health Care Cost Containment Sys.*, 56 P.3d 28, 34–35 (Ariz. 2002); *Comm. to Defend Reprod. Rights v. Myers*, 625 P.2d 779, 781 (Cal. 1981); *Moe v. Sec'y of Admin. & Fin.,* 417 N.E.2d 387, 402 (Mass. 1981); *Women of Minn. v. Gomez*, 542 N.W.2d 17, 31 (Minn. 1995); *Right to Choose v. Byrne*, 450 A.2d 925, 934 (N.J. 1982); *Doe v.*

Maher, 515 A.2d 134, 150–51 (Conn. 1986); *N.M. Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 854 (N.M. 1998).

Neutrality is a cornerstone of good governance in a democracy and a standard against which the State is held accountable when it governs in a biased manner. In *McRae*, the Court did not hold the State accountable for structuring a public benefit to nakedly coerce its preferred outcome of a constitutionally protected decision. Several state courts have struck down state abortion coverage bans for violating the principle of government neutrality. *See Moe,* 417 N.E.2d at 402 (holding that the state must act impartially when it distributes benefits to support the exercise of constitutional rights); *see also Doe*, 515 A.2d at 151-52; *Planned Parenthood of Alaska*, 28 P.3d at 915; *Gomez*, 542 N.W.2d at 19; *Women's Health Ctr. Of W. Va., Inc. v. Panepinto*, 446 S.E.2d 658, 666 (W. Va. 1993); *Byrne*, 450 A.2d at 935; *Myers*, 625 P.2d at 784.

The Court in *McRae* also erred by ignoring the State interest in maternal health. Instead, the Court focused solely on the State interest in potential fetal life when evaluating the legitimacy of the Hyde Amendment. While *Roe* insisted on abortion restrictions containing exceptions for the pregnant woman's health, the Hyde Amendment was upheld without one and with the obvious effect of harming pregnant women's health. States have found such a repercussion unacceptable and antithetical to the core purpose of the public insurance programs that have been

contorted by these abortion coverage bans. *See Myers*, 625 P.2d at 790 (noting that the primary purpose of the state's welfare program is to promote health and that abortion restrictions directly impede that purpose); *see also Doe*, 515 A.2d at 152; *Byrne*, 450 A.2d at 935; *Doe v. Wright*, No. 91-CH-1958, slip op. at 1 (Ill. Cir. Ct. Dec. 2, 1994); *Planned Parenthood Ass'n Inc. v. Dep't of Human Res. of State of Or.*, 663 P.2d 1247, 1260 (Or. 1983) (*affirmed sub nom Planned Parenthood Ass'n. Inc. v. Dep't of Human Res. of State of Oregon*, 687 P.2d 785 (Or. 1984)).

For these and other reasons, *McRae* was wrongly decided, should be considered an invalid interpretation of federal law, and should not inform the Maine Supreme Judicial Court's reasoning or ruling in the present case.

ARGUMENT

Introduction

Harris v. McRae was wrongly decided by a split Court with vigorous dissents. This brief will concentrate on a few of the several reasons the opinion should be considered erroneous and invalid. We will explain how the Court applied the wrong (lower) standard of review to a law restricting the right to choose abortion, which had been declared a fundamental right. We will also describe how, in upholding the Hyde Amendment, the majority in *McRae* allowed Congress to breach the time-honored principle of government neutrality and use its largesse to influence constitutionally protected decisions about pregnancy. Finally, we will

explain how the Court failed to properly account for the State interest in health implicated by abortion.

I. The U.S. Supreme Court applied the wrong standard of review.

Courts traditionally review laws regulating fundamental rights under strict scrutiny. However, when reviewing the Hyde Amendment, a regulation of the fundamental right of a person to decide to have an abortion, the *McRae* Court did not apply strict scrutiny and instead applied rational basis review with discussion of the State's non-obligation to remove obstacles not of its own creation. *McRae*, 448 U.S. at 315-17. The regulation was upheld under this inappropriately low level of review, but as the Court itself admits, it likely would have been struck down under heightened scrutiny. *Id.* at 316. The Hyde Amendment only passed muster, even under this erroneously low level of review, because the Court drew hairsplitting, and arguably arbitrary, distinctions. In reviewing coverage bans in their own state insurance programs, many states have treated abortion like the fundamental right it is and applied strict scrutiny, as the *Roe* Court intended. *See Planned Parenthood of Alaska*, 28 P.3d at 909–10; *Simat Corp.*, 56 P.3d at 34–35; *Myers*, 625 P.2d at 78; *Moe*, 417 N.E.2d at 402; *Gomez*, 542 N.W.2d at 31; *Byrne*, 450 A.2d at 934; *Doe*, 515 A.2d at 150–51; *Johnson*, 975 P.2d at 854.

The U.S. Supreme Court declared in *Roe* that the right to end a pregnancy is both fundamental and protected by the U.S. Constitution. *Roe*, 410 U.S. at 732-33.

Laws that encumber fundamental rights are subject to strict scrutiny, and under this standard of review, the government must prove that any such restriction is narrowly tailored to further a compelling government interest. However, only a few years after *Roe*, a slight majority pulled the Court away from its own precedent and decided a series of abortion funding cases in which it examined state and federal Medicaid coverage bans – not under the high-powered microscope of strict scrutiny – but under the foggy lens of rational basis. *See Maher v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438 (1977).

After the *Roe* decision, several states immediately enacted laws limiting abortion coverage in their public insurance plans. Cynthia Soohoo, *Hyde-Care for All: The Expansion of Abortion-Funding Restrictions under Health Care Reform*, 15 CUNY L. REV. 391 (2012) (citing to Frederick S. Jaffe et al, *Abortion Politics: Private Morality and Public Policy*, 127 (1981) (between 1973 and 1975, thirteen states established restrictions on Medicaid funding for abortion). Reproductive rights advocates challenged these abortion coverage bans, and two such challenges came before the U.S. Supreme Court. In 1977, the Court decided *Maher* and *Beal*, ruling that neither the federal Medicaid statute nor the federal Constitution required state public insurance programs to cover abortions considered not medically necessary and not covered by the federal Medicaid program. *Maher*, 432 U.S. at 480; *Beal*, 432 U.S. at 447. The Court's reasoning in these cases turned on its

interpretation of *Roe* as neither requiring the State to subsidize abortion care nor keeping the State from subsidizing childbirth in order to encourage its favored pregnancy outcome.

In a parallel effort to curb abortion coverage on the federal level, Congress first passed the Hyde Amendment in 1976, as part of the annual appropriations process, limiting federal Medicaid coverage of abortion care. Pub. L. No. 94-439, §209, 90 Stat 1418 (1976). The Amendment's sponsor, Illinois Senator Henry Hyde, declared his desire to keep women from having abortions and his willingness to manipulate Medicaid to that end, candidly stating, "I certainly would like to prevent, if I could legally, anybody having an abortion, a rich woman, a middle-class woman, or a poor woman. Unfortunately, the only vehicle available is the . . . Medicaid bill." Susan Randall, *Health Care Reform and Abortion*, 9 BERKELEY WOMEN'S L.J. 58 (1994) (citing to 123 Cong. Rec. 19,700 (1977) (statement of Rep. Hyde)).

The Hyde Amendment was immediately challenged, and the district court declared it unconstitutional under the Equal Protection and Due Process components of the Fifth Amendment and the Free Exercise Clause of the First Amendment. *McRae v. Califano*, 491 F. Supp. 630, 736-42 (E.D.N.Y. 1980).

The case eventually reached the U.S. Supreme Court, which relied heavily on the reasoning in *Maher* and *Beal* to uphold the Hyde Amendment in *Harris v.*

McRae. *See McRae*, 448 U.S. 297. The narrow majority determined that the unequal subsidization of two different pregnancy outcomes did not constitute governmental interference with a woman's right to determine whether to end a pregnancy or carry it to term. *Id.* at 318.

Justice Brennan, dissenting, noted the unprecedented nature of the decision: "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 (Brennan, J., dissenting).

To reach its conclusion, the majority drew what dissenters considered an arbitrary distinction between "state interference with a protected activity" and "state encouragement of an alternative activity." *Id.* at 314–15 (majority opinion). Justice Marshall, along with other dissenters, noted that to women impacted by the Hyde Amendment, the distinction was irrelevant, and the denial of coverage was tantamount to the denial of the abortion right itself. *Id.* at 338 (Marshall, J., dissenting). He wrote, "The Court's opinion studiously avoids recognizing the undeniable fact that, for women eligible for Medicaid—poor women—denial of a Medicaid-funded abortion is equivalent to denial of a legal abortion altogether. By definition, these women do not have the money to pay for an abortion themselves." *Id.*

In agreement with the four vigorously dissenting justices, scholars, advocates, and state courts throughout the country have roundly criticized *McRae* as having been wrongly decided under the jurisprudence of its time. *See e.g. Gomez*, 542 N.W.2d at 29 ("We are unpersuaded by the *McRae* majority in that it failed to recognize that the infringement created by a statutory funding ban on abortion is indistinguishable from the infringement the Court found in earlier cases"); *Doe*, 515 A.2d at 151-52 ("This court is unable to reconcile the mandate and logic of the United States Supreme Court in *Roe v. Wade*, (to which at least eight of the justices of the Supreme Court adhered as of the date *McRae* was decided) with the *McRae*… decision"); Erwin Chemerinsky and Michele Goodwin, *Abortion: A Woman's Private Choice*, 95 TX L. REV. 1189, 1241 (2017) ("The Supreme Court's decisions in the abortion-funding cases were premised on the assumptions that the government has a valid interest in discouraging abortion and that there is a difference between prohibiting abortion and creating an incentive in favor of childbirth. Neither of these assumptions would be consistent with the view that abortion is a private moral judgment"); Jill E. Adams and Jessica Arons, *A Travesty of Justice: Revisiting Harris v. McRae*, 21 WM. & MARY J. WOMEN & L. 5, 30 (2014) ("Under the precedent that existed at the time—i.e., *Roe* and the Court's apparent commitment to a health exception in *Maher* and *Beal*—many believed that the Hyde Amendment violated the Constitution… Only by

disregarding precedent—and the conditions of poor women's lives—could the Court come to a contrary conclusion"); *Exclusion of Therapeutic Abortions from Medicaid Coverage: In Harris v. McRae*, 94 HARV. L. REV. 96, 99 (1980) ("The most disturbing aspect of the majority opinion is its almost complete failure to acknowledge well-settled doctrine involving the distribution of governmental benefits"); Michael J. Perry, *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on Harris v. McRae*, 32 STAN. L. REV. 1113, 1122 (1980) ("For while Roe quite plainly does not forbid all governmental actions that might have the effect of making a woman prefer childbirth to abortion, Roe does require that government take no action, including the selective withholding of Medicaid funds, predicated on the view that abortion is per se morally objectionable—just as government has an undisputed obligation (to borrow one of the Court's own examples) not to take action predicated on the view that sending one's children to a private school is morally objectionable").

a. In *McRae*, the Supreme Court failed to treat abortion like a fundamental right.

Writing for the majority in *McRae*, Justice Stewart reaffirmed the essential right enshrined in *Roe* but described it in unfamiliar and weakened terms, as protecting women from "unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." *McRae*, 448 U.S. at 314 (quoting *Maher*, 432 U.S. at 473-74).

The four dissenting justices recognized the majority's depiction of the abortion right as a stark departure from the *Roe* precedent. The Court was not writing in the reverent tones and absolute terms commanded by a fundamental right, as Justice Stevens pointed out in his dissent:

> [T]he Court explicitly held that prior to fetal viability [the government's interest in potential human life] may not justify any governmental burden on the woman's choice to have an abortion . . . . In effect, the Court held that a woman's freedom to elect to have an abortion prior to fetal viability has *absolute constitutional protection*, subject only to valid health regulations. . . . We have a duty to respect that holding. The Court simply shirks that duty in this case.

Id. at 350-51 (Stevens, J., dissenting) (emphasis added). In his own dissent, Justice Brennan asserted that, at the very least, *Roe* imposed a complete prohibition on state interference with abortion in the first trimester:

> *Roe* and its progeny established that the pregnant woman has a right to be free from state interference with her choice to have an abortion—a right which, at least prior to the end of the first trimester, *absolutely prohibits any governmental regulation* of that highly personal decision.

Id. at 330 (Brennan, J., dissenting) (emphasis added).

b. Instead of strict scrutiny, the Supreme Court applied rational basis.

In *McRae*, the majority required only that the Hyde Amendment be rationally related to the government's interest in protecting fetal life, rather than subjected to the strict scrutiny due to a fundamental right. Justice Stewart

explained, "[i]t is the Government's position that the Hyde Amendment bears a rational relationship to its legitimate interest in protecting the potential life of the fetus. We agree." *McRae*, 448 U.S. at 324. He went on to note that:

> Where, as here, the Congress has neither invaded a substantive constitutional right or freedom, nor enacted legislation that purposefully operates to the detriment of a suspect class, the only requirement of equal protection is that congressional action be rationally related to a legitimate governmental interest. The Hyde Amendment satisfies that standard.

Id. at 326.

The dissenting justices viewed the Hyde Amendment as precisely the sort of government interference with the abortion right disallowed by *Roe* that would have been struck down under the appropriate standard of review, had the majority only respected precedent. Justice Marshall explicitly rejected the majority's approach, writing, "I continue to believe that the rigid "two-tiered" approach is inappropriate and that the Constitution requires a more exacting standard of review than mere rationality in cases such as this one. Further, in my judgment the Hyde Amendment cannot pass constitutional muster even under the rational-basis standard of review." *Id.* at 341 (Marshall, J., dissenting).

While we maintain that the *McRae* Court should have applied strict scrutiny, we agree with Justice Marshall that the Hyde Amendment is unconstitutional even under the lesser requirements of rational basis review. Furthermore, there is no refuge for the majority's effort to undermine this fundamental right by applying a

lower standard of review simply because the Court went on to adopt the undue burden standard years later in *Casey v. Planned Parenthood*, 505 U.S. 833 (1992). The Hyde Amendment would not pass constitutional muster under the Court's most recent interpretation of the undue burden standard in *Whole Women's Health v. Hellerstedt*, 136 S.Ct. 2292, 2300 (2016), striking down two Texas state laws for placing an unconstitutional undue burden on a woman's right to have an abortion. Pointing to *Casey*, the court explained that in assessing whether an abortion regulation constitutes an undue burden, the court is required to "consider the burdens a law imposes on abortion access together with the benefits those law confer." *Id.* at 2309. The majority explained that a law is unconstitutional if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion. *Id.* at 2300 (citing *Casey*, 505 U.S. at 878). In finding the two Texas laws unconstitutional, the court wrote that, "each places a substantial obstacle in the path of women seeking a previability abortion, each constitutes an undue burden on abortion access, and each violates the Federal Constitution." *Id*. at 2300.

The simple fact remains that the *McRae* Court shirked its responsibility to follow precedent with no acknowledgement or explanation for doing so. Justice Brennan summarized the sentiment in his dissent: "It is obvious that the Hyde Amendment is nothing more than an attempt by Congress to circumvent the

dictates of the Constitution and achieve indirectly what *Roe v. Wade* said it could not do directly." *McRae*, 488 U.S. at 331.

c. The majority relied on arbitrary distinctions for the Hyde Amendment to pass muster, even under the erroneously low standard of review.

The majority in *McRae* ignored the firm precedent established in *Roe* and chose, instead, to emulate the tenuous concepts described in *Maher* and *Beal*. Under those contours, the majority dismissed the notion that the Hyde Amendment interfered with a constitutional right, explaining that it "places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest." *Id.* at 315.

The obstacle, as the majority saw it, was the Medicaid user's poverty – not the ban on abortion coverage in Medicaid. Writing for the majority, Justice Stewart reasoned, "The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency." *Id*. at 316.

The Court painstakingly distinguished between the government inserting and removing an obstacle from the path of a woman trying to obtain an abortion. According to Justice Stewart, because the government did not insert a Medicaid

user's poverty, the government was not obligated to remove, or otherwise help her remedy it, when it kept her from having the abortion she needed. *Id*.

Having chosen rational basis as the appropriate measure, named poverty as the obstacle in question, and relinquished the government of a duty to remedy the obstacle, the majority went on to conclude, "it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices." *Id.*

Justice Brennan responded to the majority's first argument in his dissent, saying it is not a woman's poverty alone but "the combination of her own poverty and the Government's unequal subsidization of abortion and childbirth" that impede her ability to exercise her constitutional right. *Id*. at 333 (Brennan, J., dissenting). We agree that while poverty necessitates low-income women's reliance on Medicaid, it is the program's lopsided coverage that pressures them to forgo their constitutional right to abortion or suffer a penalty for exercising it. The penalty may be the high out-of-pocket costs for the service and attendant expenses, the sacrifices made in order to reach a healthcare clinic, the risk of criminalization for self-inducing abortion, or forced motherhood.

Justice Brennan also criticized the majority's analysis for failing to recognize that the skewed distribution of public benefits functioned as a State-imposed obstacle that complicates – if not completely impedes – a woman's ability

to exercise her fundamental right just as effectively as a regulatory prohibition or criminal sanction. *Id.* at 334. He revealed the true nature of the Hyde Amendment as a constitutionally impermissible obstacle preventing women from receiving abortion care:

> Antipathy to abortion, in short, has been permitted not only to ride roughshod over a woman's constitutional right to terminate her pregnancy in the fashion she chooses, but also to distort our Nation's health care programs. As a means of delivering health services, then, the Hyde Amendment is completely irrational. As a means of preventing abortions, it is concededly rational -- brutally so. But this latter goal is constitutionally forbidden.

Id. at 337 n.4.

Finally, Justice Brennan addressed the majority's delineation between theoretical entitlement to claim a right and practical ability to exercise a right facilitated by public benefits, making clear that this was not the right framing for the case.

The proposition for which these cases stand is not that the State is under an affirmative obligation to ensure access to abortions for all who may desire them; it is that the State must refrain from wielding its enormous power and influence in a manner that might burden the pregnant woman's freedom to choose whether to have an abortion.

> The Hyde Amendment's denial of public funds for medically necessary abortions plainly intrudes upon this constitutionally protected decision, for both by design and in effect, it serves to coerce

> indigent pregnant women to bear children that they would otherwise elect not to have.

Id. at 330.

As Justice Marshall observed in his dissent, "The Court's decision today marks a retreat from *Roe v. Wade* and represents a cruel blow to the most powerless members of our society." *Id*. at 338 (Marshall, J., dissenting). As for the dichotomy drawn by the majority between the government impeding a protected activity versus encouraging an alternative activity, he wrote that for the women impacted by the Hyde Amendment, it was a distinction without a difference. *Id*. at 347.

d. Contrary to the *McRae* holding, states have struck down state Medicaid abortion bans for impinging on the fundamental right to privacy that includes abortion.

A total of thirteen state courts have seen the folly in the *McRae* opinion and have struck down state Medicaid abortion coverage bans. *See Planned Parenthood* of Alaska, 28 P.3d 904; *Simat Corp.*, 203 Ariz. 454; *Myers*, 625 P.2d 779; *Doe*, 515 A.2d 134; *Moe*, 417 N.E.2d 387; *Gomez*, 542 N.W.2d 17; *Jeannette R. v. Ellery*, No. BDV-94-811 (Mont. Dist. Ct. May 22, 1995); *Wright*, No. 91-CH-1958, slip op. at 1; *Byrne*, 450 A.2d 925; *Johnson*, 975 P.2d 841; *Planned Parenthood Ass'n*, 663 P.2d 1247; *Doe v. Celani*, No. S81-84CnC (Vt. Super. Ct. May 26, 1986); *Panepinto*, 446 S.E.2d 658. Among the states that have struck down abortion coverage bans in state Medicaid programs, eight have done so by

recognizing the fundamental nature of the abortion right and reviewing restrictions on the right under heightened, if not strict, scrutiny. *See Planned Parenthood of Alaska*, 28 P.3d at 909–10; *Simat Corp.*, 56 P.3d at 34–35; *Myers*, 625 P.2d at 781; *Moe*, 417 N.E.2d at 402; *Gomez*, 542 N.W.2d at 31; *Byrne*, 450 A.2d at 934; ; *Doe*, 515 A.2d at 150–51; *Johnson*, 975 P.2d at 854.

State courts are bound by federal precedent only when interpreting federal law; when interpreting their own state laws, they can find greater protections in their state constitutions. This is especially true in Maine where the Maine Constitution contains language ensuring safety and guaranteeing anti-discrimination that is not found in the U.S. Constitution. *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]."). As noted in *State v. Caouette*, 446 A.2d 1120, 1121 (1982), "federal decisions do not serve to establish the complete statement of controlling law but rather to delineate a constitutional minimum or universal mandate for the federal control of every State." The court in *McRae* was limited by the U.S. Constitution, but Maine may establish a higher standard when "assessing 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, 626 (1972) (citing to *Lego v. Twomey*, 404 U.S.

477, 489 (1972) (expressly stating that "the States are free, pursuant to their own law, to adopt a higher standard. They may indeed differ as to the appropriate resolution of the values they find at stake").

This court has required the state of Maine to satisfy strict scrutiny standards when its actions have interfered with a fundamental liberty interest. See *Rideout v. Riendeau*, 2000 ME 198, ¶¶ 19–22, 761 A.2d 291. To be consistent, the court would apply the same standard to the MaineCare abortion coverage ban's interference with the fundamental liberty interest at hand.

We urge this court to follow the lead of the thirteen states that have overturned their own Medicaid coverage bans and affirm superior protections for women's reproductive rights as articulated in the state constitution.

II. The U.S. Supreme Court allowed Congress to violate the principle of government neutrality.

While ignoring its own time-honored principle of *stare decisis*, the *McRae* Court allowed Congress to ignore its principle of government neutrality. It is decidedly not neutral for the State to profess a preference for one of two possible outcomes of a health condition and subsidize only the outcome of its preference. Several state courts have, instead, insisted on impartiality in governance and struck down abortion coverage bans that allocate government largesse in biased and coercive manners.

Common sense, good governance, and the principle of government neutrality dictate the State may not use slanted public benefit schemes to influence people's decisions about the exercise of their constitutional rights. For instance, the State cannot prohibit only speech it disfavors, extend voting rights only to members of its preferred political party, or provide legal representation only to defendants accused of crimes it finds palatable. Were government neutrality to operate appropriately in the abortion funding context, it would also mean the State could not fund through public insurance only the pregnancy outcome of its preference, thereby pressuring people to forego exercising their fundamental constitutional right.

However, in *McRae* the Court turned a blind eye to the neutrality principle by relying on *Maher* to reaffirm its stance that the State may make "a value judgment favoring childbirth over abortion, and . . . implement[ing] that judgment by the allocation of public funds." *McRae*, 448 U.S. at 314 (quoting *Maher*, 432 U.S. at 474). It condoned the government's failure to govern disinterestedly with respect to a fundamental right.

a. The federal government should not influence constitutionally protected decisions by subsidizing and incentivizing only its favored outcome.

Justice Stevens explained how the simple principle would operate in the Medicaid context in his dissent: "Having decided to alleviate some of the hardships

of poverty by providing necessary medical care, the government must use neutral criteria in distributing benefits." *Id.* at 356 (Stevens, J., dissenting). He explained that denying benefits to someone because of her choice to exercise her constitutional right to abortion is akin to denying someone benefits because of their choice to practice their religion or speak out in opposition to a government program. *Id.* at 356-57.

Just as *McRae* disregarded *Roe* by failing to treat abortion as a fundamental right, it also disregarded decades of Supreme Court decisions ratifying the principle of government neutrality. In his dissent, Justice Brennan stated, "that [the Supreme Court has] 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 *Sherbert v. Verner*, 374 U.S. 398 (1963); *Frost & Frost Trucking Co. v. R.R. Comm'n*, 271 U.S. 583 (1926); *Speiser v. Randall*, 357 U.S. 513 (1958); *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *U. S. Dept. of Agric. v. Moreno*, 413 U.S. 528 (1973); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975). *But cf. Shapiro v. Thompson*, 394 U.S. 618 (1969); *Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250 (1974)). Based on precedent, it was clear to Justice Stevens that, the Hyde

Amendment "constitute[s] an unjustifiable, and indeed blatant, violation of the sovereign's duty to govern impartially." *Id.* at 356-57 (Stevens, J., dissenting).

b. States have struck down their abortion coverage bans for breaching the neutrality principle.

Several state courts agreed with Justice Stevens's logic and struck down their own bans on abortion coverage in public insurance for violating the neutrality principle. *See Moe*, 417 N.E.2d at 402; *Doe*, 515 A.2d at 151-52; *Planned Parenthood of Alaska*, 28 P.3d at 915; *Gomez*, 542 N.W.2d at 19; *Panepinto*, 446 S.E.2d at 666; *Byrne*, 450 A.2d at 935; *Myers*, 625 P.2d at 784. The Supreme Court of Massachusetts put a finer point on the problem with impartiality in the context of a fundamental right:

> As an initial matter, the Legislature need not subsidize any of the costs associated with child bearing, or with health care generally. However, once it chooses to enter the constitutionally protected area of [reproductive] choice, it must do so with genuine indifference. It may not weigh the options open to the pregnant woman by its allocation of public funds; in this area, government is not free to "achieve with carrots what [it] is forbidden to achieve with sticks."

Moe, 417 N.E.2d at 402 (quoting Laurence H. Tribe, American Constitutional Law § 15-10, at 933 n.77 (1978)).

This logic and language was echoed by courts in Alaska, California, Connecticut, Minnesota, New Jersey, New Mexico, and West Virginia, which determined there was no genuine indifference in policies that covered pregnancy and childbirth while denying coverage for abortion. *See Planned Parenthood of*

Alaska, 28 P.3d at 915; *Myers*, 625 P.2d at 784; *Doe*, 515 A.2d at 151-52; *Gomez*, 542 N.W.2d at 19; *Byrne*, 450 A.2d at 935; *Johnson*, 975 P.2d at 857; *Panepinto*, 446 S.E.2d at 666.

As the New Jersey Supreme Court laid bare, it is plainly "not neutral to fund services medically necessary for childbirth while refusing to fund medically necessary abortions." *Byrne*, 450 A.2d at 935.

In his dissent, Justice Brennan elucidated the purpose and outcome of the slanted funding scheme, recognizing that the Hyde Amendment "both by design and in effect . . . serves to coerce indigent pregnant women to bear children that they would otherwise elect not to have." *McRae*, 448 U.S. at 330 (Brennan, J., dissenting). A Medicaid policy that functioned in the opposite manner – coercing women to have abortions they otherwise would not elect to have – would be equally offensive to the Constitution.

Under the principle of government neutrality, the State must not place its thumb on either side of the reproductive decision-making scale. But through the Hyde Amendment, Congress leans so heavily on the side of childbirth that it practically makes Medicaid users an offer they cannot afford to refuse. State courts have exposed their state abortion coverage bans for being exactly the coercive policies and strong-arming governance forbidden by the neutrality principle. We

urge this court to hold the state of Maine to the same righteous standard of neutral governance.

III. The U.S. Supreme Court disregarded the State interest in health.

The *McRae* majority erred by ignoring *Roe's* guidance in another way: focusing solely on the state interest in potential fetal life to the exclusion of the interest in the health of the pregnant woman. By disregarding the health interest, the Court condoned an abortion funding restriction that makes no exception to cover abortions needed to protect the pregnant woman's health. While all pregnancies pose some risk to women's health and life, some pregnancies cause, worsen, or threaten health problems. States have taken a different tack, honoring the State interest in health as the underlying purpose of public insurance programs, and rejecting abortion coverage bans as antithetical to that purpose. *See Myers*, 625 P.2d at 790; *Doe*, 515 A.2d at 152; *Byrne*, 450 A.2d at 935; *Planned Parenthood Ass'n Inc.,* 663 P.2d at 1260; *Wright*, No. 91-CH-1958, slip op. at 1.

In making its determination in *Roe*, the Court considered the individual's interest in being able to determine the outcome of her pregnancy against the State interests in the pregnant woman's health and the potential life of the fetus. *See Roe*, 410 U.S. 113. While both State interests grow throughout pregnancy, at no point does the interest in potential fetal life eclipse the interest in maternal health. *Id.* at 165. In fact, the *Roe* Court demanded that states maintain exceptions to restrictions

on abortion – throughout pregnancy – when the pregnant woman's health could be at risk. *Id*. However, the Hyde Amendment makes no exception for Medicaid to cover abortions in order to protect the woman's health. Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, §§ 506–07, 131 Stat. 135, 562. The only exceptions to the federal coverage ban are for abortions necessary to save the life of the pregnant woman or for pregnancies resulting from rape or incest. *Id*.

If the Court in *McRae* had followed *Roe* and interrogated the lack of a health exception, it would have struck down the Hyde Amendment as unconstitutional. But instead, it shirked precedent and exalted the fetal life interest while neglecting the maternal health interest.

a. The majority focused solely on the State interest in potential fetal life.

The *McRae* majority disregarded the State interest in maternal health, despite its prescribed superior heft when weighed against other government interests in the abortion context. The opinion discussed the rational relationship between the Hyde Amendment and the legitimate interest in potential fetal life – completely isolated from the interlocking set of interests to which it belongs. This strangely singular treatment did not escape Justice Stevens, who explained the proper relationship of the interests in his dissent:

> [I]t is misleading to speak of the Government's legitimate interest in the fetus without reference to the context in which that interest was held to be legitimate. For *Roe v. Wade* squarely held that the States

> may not protect that interest when a conflict with the interest in a pregnant woman's health exists.

McRae, 448 U.S. at 351 (Stevens, J., dissenting). Not only did *Roe* insist the interest in potential fetal life be considered alongside the interest in health, it made clear the latter would always supersede the former, as Justice Marshall pointed out in his dissent: "[T]he premise underlying the Hyde Amendment was repudiated in *Roe v. Wade*, where the Court made clear that the State interest in protecting fetal life cannot justify jeopardizing the life or health of the mother." *Id*. at 338 (Marshall, J. dissenting).

However, in an about-face, the Court determined that the state's interest in potential fetal life – standing on its own – was sufficient to justify a policy that not only ignores but predictably harms women's health.

b. Without a health exception, the Hyde Amendment condemns women who need abortions to suffer health problems and risk injury.

By definition, Medicaid users do not possess the resources needed to pay the costs of their medical care. Thus, a pregnant Medicaid user must carry a compromised or compromising pregnancy longer while she borrows, barters, and sells whatever is necessary to cobble together the funds for the service. Rachel K. Jones, *At What Cost? Payment for Abortion Care by U.S. Women*, 23(3) WOMEN'S HEALTH ISSUES 173 (2013) (finding that in order to afford an abortion, many poor women defer or neglect to pay utility bills or rent, delay buying food for

themselves or their children, rely on family members for financial help, receive financial assistance from clinics, or sell their personal belongings). During this time, she suffers additional pain, discomfort, and debilitation from the pregnancy and/or the accompanying health problems while risking permanent injury or disability.

If a pregnant Medicaid user is able to pull together the funds for an abortion, it will be later in the pregnancy, meaning the financial costs for the service and physical risks, while still low, will have increased. Zane S et al., *Abortion-related mortality in the United States: 1998–2010*, 126(2) OBSTETRICS & GYNECOLOGY 258 (2015). If she is not able to obtain the abortion, either because she could not secure the money or because the gestational age of the pregnancy has surpassed the time limits for abortion in her state, she will be forced to carry to term a pregnancy that threatens her health, give birth, and risk permanent disability or death. Elizabeth Raymond and David Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States,* 119 OBSTETRICS & GYNECOLOGY 215 (2012) (finding that the risk of death associated with childbirth is approximately fourteen times higher than that with abortion). Furthermore, women who seek abortions but are denied are more likely than those who receive abortions to experience years of economic hardship and insecurity. Diana Greene Foster et

al, *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States*, 108 AM. J. PUB. HEALTH, 407, 412 (2018).

In his dissent, Justice Marshall described the inhumane impact of the Hyde Amendment's lack of a health exception, "Federal funding is thus unavailable even when severe and long-lasting health damage to the mother is a virtual certainty." *McRae*, 448 U.S. at 339 (Marshall, J., dissenting).

Justice Marshall went on to expose another disturbing reality of the government's hard-lined approach to only covering abortions when it has been determined that the pregnant woman may lose her life if she does not obtain an abortion. And, that is, that disease, infections, and other health conditions are dynamic and can be difficult to predict, meaning that the line between a condition threatening a pregnant woman's health and threatening her life is often blurry, in motion, and at the mercy of a multitude of factors. Justice Marshall illustrated the predictable outcomes of the abortion coverage ban's inadequately narrow exceptions, "By the time a pregnancy has progressed to the point where a physician is able to certify that it endangers the life of the mother, it is in many cases too late to prevent her death, because abortion is no longer safe." *Id.* at 339-40. One must query the ethical and moral considerations of a policy that, in effect, withholds medical treatment that can improve or eliminate a health problem until that problem can be deemed life-threatening.

c. States have confronted the abortion coverage bans' counterproductive effect of harming health within public insurance programs designed to protect health.

State courts have diverged from the *McRae* Court's example, acknowledging the paramount importance of protecting people's health in shaping abortion policy and examining restrictions on the right. *See e.g. Byrne*, 450 A.2d at 941 (Pashman, J., concurring in part and dissenting in part) (noting that "the right to choose whether or not to bear a child is partly grounded on the constitutional right to health" and agreeing with the lower court's proclamation that New Jersey recognizes a fundamental right to health). For example, when the California Supreme Court heard a challenge to the state's limitation on abortion coverage in its public insurance program, the court juxtaposed the program's purpose, which was to promote health, with the coverage ban's effect, which was to harm health:

> The restrictions at issue here directly impede this fundamental purpose. Even when an abortion represents the appropriate medical treatment for a poor pregnant woman, the statute virtually bars payment for that treatment and thus subjects the poor woman to significant health hazards and in some cases to death.

Myers, 625 P.2d at 790.

Only by flouting precedent could the *McRae* Court ignore the State interest in maternal health and consider only its interest in potential fetal life in order to uphold an insurance coverage ban on abortions with no health exception.

CONCLUSION

For the reasons set forth above, the Justices of the Maine Supreme Judicial Court ought to disregard *Harris v. McRae* in determining the just outcome for this case.

Dated: March 23, 2018

Erwin Chemerinsky*
Dean
BERKELEY LAW
215 Boalt Hall
Berkeley, CA 94720
510.642.1741

Jill E. Adams*
Executive Director
CENTER ON REPRODUCTIVE RIGHTS AND JUSTICE
452 Boalt Hall
Berkeley, CA 94720
510.642.8567

**admission pro hac vice pending*

Richard L. O'Meara
MURRAY, PLUMB & MURRAY
75 Pearl Street, P.O. Box 9785
Portland, ME 04104-5085
207.773.5651
Counsel for *Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused two copies of the Brief of *Amici Curiae* Federal Constitutional Law Scholars to be served upon counsel of record by mailing copies by first-class mail, postage prepaid, addressed as follows.

Susan P. Hermann. Deputy Attorney General
Halliday Moncure, Assistant Attorney General
Office of the Attorney General
6 State House Station
Augusta, ME 04333

Zachary Heiden, Esquire, Legal Director
American Civil Liberties Union of Maine
121 Middle Street, Suite 301
Portland, ME 04101

Dated: March 23, 2018

_____

Richard L. O'Meara
Maine Bar No. 3510
MURRAY, PLUMB & MURRAY
75 Pearl St., P.O. Box 9785
Portland, ME 04101-5085
207.773.5651
Email: romeara@mpmlaw.com

Counsel for *Amici Curiae*