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,	)	
	)	
Plaintiffs,	)	
	)	
V.	)	PLAINTIFFS' MEMORANDUM OF LAW
	)	IN SUPPORT OF THEIR CROSS-MOTION
Ricker Hamilton, Acting Commissioner of the	)	FOR SUMMARY JUDGMENT AND
Maine Department of Health and Human	)	<b>OPPOSITION TO DEFENDANT'S</b>
Services, in his official capacity,	)	MOTION FOR SUMMARY JUDGMENT
	)	
Defendant.	)	

# **INTRODUCTION**

Plaintiffs 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 ("Plaintiffs"), pursuant to Maine Rule of Civil Procedure 56, seek a declaration that the challenged regulation, which withholds MaineCare coverage for abortion from eligible women in nearly all circumstances, violates the Maine Administrative Procedure Act ("APA") and numerous provisions of the Maine Constitution, as well as an injunction against future enforcement of that regulation by the Defendant, Ricker Hamilton, Acting Commissioner of the Maine Department of Health and Human Services ("DHHS" or "the Department").

Notwithstanding the volume of paper submitted by the parties, there is no genuine issue of material fact in this case. The parties' Consolidated Statement of Material Facts ("CSMF") reveals that, in the face of Plaintiffs' copious fact and expert testimony and documentary evidence illustrating the devastating physical, psychological, and financial harm the challenged regulation inflicts on MaineCare-eligible women, Defendant has failed to submit any admissible evidence that would rebut Plaintiffs' showing. Indeed, the undisputed facts contained in parties' Joint Statement of Undisputed Material Facts ("JSUMF") alone are sufficient to grant summary judgment in Plaintiffs' favor. However, because Defendant failed to properly deny or controvert the facts contained in the Plaintiffs' Statement of Material Facts ("PSMF") those facts-which only provide further support for Plaintiffs' claims-should be deemed both admitted and undisputed, as well. Even construed in the light most favorable to him, Defendant's "conclusory allegations, improbable inferences, and unsupported speculation" are wholly insufficient to carry his burden. Dyer v. Dep't of Transp., 2008 ME 106, ¶ 14, 951 A.2d 821. Nor can Defendant construct any persuasive argument in favor of the legality of the challenged regulation. To the contrary, it patently violates Maine's statutory prohibition against restricting a woman's exercise of the decision to have an abortion, the Department's statutory mission and obligation to advance the health and wellbeing of all Mainers, and, not least, the fundamental-and independentprotections set forth in the Declaration of Rights of the Maine Constitution.

Therefore, in view of the undisputed record and based on the arguments set forth below, Plaintiffs are entitled to summary judgment as a matter of law on all their claims.

#### **STATUTORY AND REGULATORY FRAMEWORK**

Medicaid is a joint federal-state program designed to provide medical care to poor and low-income individuals in states across the country. *See* 42 U.S.C. §§ 1396–1396v (2017); 42

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C.F.R. § 430.0 (2017). Under the Medicaid program, participating states pay for medical services under their state Medicaid plans and the federal government reimburses them for a portion of the costs of those services. 42 U.S.C. §§ 1396b(a)(1). To qualify for federal reimbursement, a state Medicaid program must meet the minimum statutory requirements for coverage and eligibility, as set forth by federal law. 42 U.S.C. §§ 1396a(a)(10), 1396d(a). As Defendant admits, however, "federal law does not prevent states from using their own funds to provide coverage for additional health services and/or broaden eligibility requirements." Def.'s Resp. to PSMF ¶ 5.<sup>1</sup> For example, while the federal statute known as the Hyde Amendment restricts the circumstances in which *federal* funds may be used to cover the cost of abortions for Medicaid recipients, it is well-settled that states are free to cover abortions in their state Medicaid programs beyond those extremely limited circumstances; indeed, to date, seventeen states, including Vermont, Connecticut, and Massachusetts, have done just that. Consol. Appropriations Act, 2017. Pub. L. No. 115-31, div. H, tit. V §§ 506, 507, 131 Stat. 135 (2017); *Harris v. McRae*, 448 U.S. 297, 311 n.16 (1980); PSMF ¶ 6.

Maine participates in the Medicaid program through its state medical assistance plan "MaineCare," which is administered by DHHS. 22 M.R.S. §§ 42, 3173 (2016); 10-144 C.M.R. ch. 101(I), § 1.02-1 (2013). Through MaineCare, DHHS provides eligible low-income residents with coverage for a broad range of elective and non-elective medical services encompassing physician services, in-patient and outpatient hospital services, prescription drug coverage, x-ray

<sup>&</sup>lt;sup>1</sup> Pursuant to Me. R. Civ. P. 56(h) and 7(b)(1)(B), Plaintiffs' hereby incorporate by reference the parties' jointly prepared CSMF. As explained in Def.'s Br. in Supp. Mot. Summ. J. ("Def.'s Br.") n.5, the parties' CSMF contains (1) the JSUMF (CSMF pp. 1-27), consisting of facts admitted by both parties; (2) Defendant's Statement of Material Facts or "DSMF" (CSMF pp. 27-51), including Plaintiffs' responses and Defendant's replies; and (3) the PSMF, including Defendant's responses and Plaintiffs' replies and responses. Any record materials or affidavits supporting citations to the CSMF referenced herein may be found in either the R. Materials Supporting Citations to CSMF submitted with Def.'s Mot. for Summ. J., or Pls.' Additional R. Materials Supporting Pls.' Citations to CSMF, submitted with this brief.

and laboratory tests, and mental health services. 22 M.R.S. § 3173; 10-144 C.M.R. ch. 101(II), §§ 45, 55, 65, 80, 90 (2015 & 2016) (describing services); 10-144 C.M.R. ch. 101(II), § 90.01-2 (defining elective surgery); PSMF ¶ 2. MaineCare also provides reimbursement for transportation costs and related travel expenses incurred in obtaining covered medical care. 10-144 C.M.R. ch. 101(I), § 1.15; 10-144 C.M.R. ch. 101(II), § 113 (2015). If a covered service is not available in Maine, MaineCare will authorize payment for services provided out-of-state, including transportation costs, provided other criteria are met. 10-144 C.M.R. ch. 101(II), § 113.06-7(C)(4)(E); 10-144 C.M.R. ch. 101(I), § 1.14.

DHHS defines a covered service as "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 which are necessary for health and well-being." 10-144 C.M.R. ch. 101(II), § 90.04. With respect to pregnancy-related care, MaineCare covers "antepartum care, delivery, postpartum care, and other services normally provided in uncomplicated maternity care." *Id.* § 90.04-4(B). Antepartum care "includes usual prenatal services (e.g., initial and subsequent history, physical examination, recording of weight, blood pressure, fetal heart tones, maternity counseling, etc.)." *Id.* MaineCare also covers any "other problems [a pregnant woman might experience] requiring additional or unusual services and requiring hospitalization." *Id.*; *see also* PSMF ¶ 65. In addition, if a woman is covered by MaineCare on the day her baby is born, her newborn will also be covered under MaineCare for a year beginning at birth, regardless of whether the woman maintains eligibility for Medicaid throughout the year. 10-144 C.M.R. ch. 332, pt. 2, § 13.1(I) (2016). MaineCare will continue to cover children and teenagers through age twenty, provided

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they meet certain family income eligibility requirements. 10-144 C.M.R. ch. 332, pt. 3, § 2.1 (2016).

In contrast to the broad coverage provided to MaineCare-eligible women who continue their pregnancies to term, DHHS withholds abortion coverage from MaineCare-eligible women in nearly all circumstances. Pursuant to 10-144 C.M.R. ch. 101(II), § 90.05-2 ("the Regulation"), MaineCare covers abortions only when the pregnancy is life-threatening or is the result of rape or incest. Accordingly, unless one of these three circumstances is met, a MaineCare-eligible woman will be denied MaineCare funding for an abortion, regardless of whether that abortion is a "reasonably necessary medical and remedial service[] . . . [that is] necessary for [her] health and well-being," 10-144 C.M.R. ch. 101(II), § 90.04; *see also* JSUMF ¶ 125.

#### FACTS

As set forth in the parties' CSMF, there is no genuine dispute in this case concerning any of the following material facts.

#### I. POVERTY AND ACCESS TO HEALTH CARE IN MAINE

Maine has the second-highest poverty rate in New England—in 2015, approximately 13.4% of Mainers were living below the federal poverty level ("FPL"). JSUMF ¶ 98. However, this figure likely undercounts the total number of Mainers struggling to make ends meet, as the FPL, which is a measure used by the U.S. government to determine the official level of poverty, is based on an outdated formula that assumes families spend approximately one-third of their budget on food, and that does not take into account the cost of child care, medical expenses, utilities, and taxes. *See id.* ¶¶ 96, 99; *see also id.* ¶ 102.<sup>2</sup> Poverty has a disproportionate impact on Maine women. *Id.* ¶¶ 104–111. The poorest families in Maine are those headed by single

<sup>&</sup>lt;sup>2</sup> In 2017, the FPL is an annual income of \$12,060 for a one-person family and \$24,000 for a family of four; \$4,180 is added for each additional person to compute the FPL for larger families. *Id.* ¶ 97.

mothers who have very young children. *Id.* ¶ 105; *see also* PSMF ¶ 10. Women in Maine are far more likely than men to hold low-wage jobs. JSUMF ¶¶ 109–10. As low-wage workers, these women are more likely to be underemployed and, consequently, to experience difficulties retaining stable employment and accumulating monetary resources over time. *Id.* ¶ 111. Single women who run households are hit the hardest. *Id.* ¶¶ 105–108. Indeed, in 2017, a woman working a full-time minimum wage job in Maine will have annual earnings of only slightly above the FPL if she has one child; her earnings will be under the poverty level if she has any more children. PSMF ¶ 10. As the evidence in the record shows, low-income women in Maine particularly single mothers—face significant financial obstacles that preclude them from meeting their own basic needs for shelter, food, heat, and medical care, as well as the basic needs of those they provide for. *See, e.g.*, JSUMF ¶ 107; PSMF ¶¶ 12–14.<sup>3</sup>

Poor and low-income individuals are more likely to experience health problems than those with greater means. *See* PSMF ¶¶ 31–41. However, in view of the financial obstacles discussed above, they are *less* likely to be able access the care they need without assistance. JSUMF ¶ 91; PSMF ¶¶ 29, 50–56, 63. Even if a low-income patient is ultimately able to obtain the healthcare she needs, without MaineCare coverage, fundraising-associated delays in obtaining that care can have serious consequences for her health and wellbeing. PSMF ¶ 57. These challenges are amplified for the 60% of Maine's population living in rural areas, which

<sup>&</sup>lt;sup>3</sup> For example, one study that examined hardship among single parents (primarily single women) in Maine revealed that in 2014, 64% of single parents could not pay utility bills, 59% had a car that broke down and had no money to fix it, 74% had to reduce meal size, and 31% had to move due to housing costs. JSUMF ¶ 107. Another study of women living close to or slightly below the FPL in Maine revealed that approximately 35% of the study participants had fallen behind on rent; 45% had received utility cut off notices; 25% had skipped meals to save money; 20% had fallen behind on car payments; 30% had transportation problems (other than car payment); 10% were unable to get medical help for themselves; 15% were unable to get medical help for their children; 20% were unable to get dental help for themselves; and 10% were unable to get dental help for their children. PSMF ¶¶ 12–14.

not only tend to have higher poverty rates, but also have very limited access to health care facilities and limited or no access to the public transportation systems. *Id.* ¶¶ 18–21, 25–26. Thus, it is undisputed that MaineCare coverage plays a critical role in the lives of Maine's poor and uninsured by increasing the likelihood that they will access medical care. JSUMF ¶ 91; *see also id.* ¶¶ 92–93.

#### II. PLAINTIFFS AND THEIR PATIENTS

Plaintiffs are three health care clinics located (primarily) in Augusta, Bangor, and Portland, Maine. *Id.* ¶¶ 46, 47, 55, 74, 77. Plaintiffs provide a range of reproductive and sexual health care services, including abortion, and are the sole publicly-accessible clinics providing abortions in the State of Maine. *Id.* ¶¶ 46, 49, 60, 76–77. Plaintiff Mabel Wadsworth Women's Health Center ("Mabel Wadsworth"), located in Bangor, provides medication abortions up to 10 weeks of pregnancy, as dated from the woman's last menstrual period ("LMP"), and aspiration abortions up to 13.6 weeks (i.e., 13 weeks and 6 days) LMP. *Id.* ¶¶ 50–53. Plaintiff Maine Family Planning ("MFP") provides medication abortions up to 10 weeks LMP and aspiration abortions up to 14.0 weeks LMP at its principal site in Augusta. *Id.* at ¶¶ 55, 61.<sup>4</sup> Plaintiff Planned Parenthood of Northern New England ("PPNNE") provides medication abortions up to 10 weeks LMP and aspiration and surgical abortions through 18.6 weeks LMP at its health center in Portland. *Id.* at ¶¶ 77–78. No clinics in the state provide abortions after 18.6 weeks LMP. *Id.* ¶ 79.

Research demonstrates that a disproportionately high percentage of women who seek abortions have poverty-level incomes. PSMF ¶¶ 58–59. The same financial barriers that make it difficult for poor and low-income individuals to access health care generally impede the ability

<sup>&</sup>lt;sup>4</sup> MFP can sometimes provide medication abortions at smaller sites throughout the state through a telemedicine program, depending on resources and staff availability. *Id.* at ¶¶ 57–59, 67–73.

of poor and low-income women to obtain abortions. Studies show that between 18–37% of Medicaid-eligible women who carried their pregnancies to term would have had an abortion instead if Medicaid coverage had been available. *Id.* ¶ 109. In Maine, abortion services performed up to about 14 weeks LMP cost between \$500-600; this cost increases as the pregnancy progresses, up to \$1,000 for abortions performed between 16.0-18.6 weeks LMP. JSUMF ¶ 20. This means that the cost of the abortion procedure alone can cost a woman working full time at the current Maine minimum wage up to nearly *two-thirds* of her gross monthly earnings. PSMF ¶ 10; JSUMF ¶ 20. Added to this cost are attendant expenses related to travel, lodging (for women later in pregnancy who must have a two-day procedure), lost wages, and childcare. PSMF ¶¶ 24, 27, 28, 62, 82, 85–87, 90. These costs may be particularly burdensome for women in Maine who live in rural areas where abortion care is often very limited. *Id.* ¶ 21; *see also* JSUMF ¶ 113 (some women live more than 200 miles from a clinic providing abortions after 10 weeks LMP).

A significant percentage of Plaintiffs' abortion patients qualify for MaineCare, PSMF ¶ 60, but due to the Regulation they can utilize this coverage for abortion services only in extremely limited circumstances, JSUMF ¶ 125. Plaintiffs' poor and low-income patients routinely tell them that they do not have and will not be able to find the money they need for the abortion procedure and associated costs. PSMF ¶ 72. Many poor and low-income patients do not own a car, or face other obstacles finding transportation to their appointment. *Id*.¶¶ 22–26; *see also id.* ¶¶ 90–91. While Plaintiffs provide extensive financial counseling to try to help patients find the necessary funds, these efforts are not always successful. *See, e.g.*, JSUMF ¶¶ 117, 118; PSMF ¶¶ 72–77, 82; Pls.' Resp. to DSMF ¶¶ 8, 12, 13, 15, 16, 18–20. There are some sources of private funding available to help poor and low-income women obtain abortions, however these funds are not available to all women. PSMF ¶ 74.<sup>5</sup> Moreover, none of the funds from these sources will cover the entire cost of the procedure, JSUMF ¶¶ 20–21; PSMF ¶ 73, nor do the funds usually cover travel expenses, JSUMF ¶ 118. The amount of money available to patients has also decreased in recent years. PSMF ¶ 77.

Even with financial counseling and outside assistance, some of Plaintiffs' patients still cannot raise enough money to afford their procedures. *See, e.g., id.* ¶¶ 70, 72, 81–82, 110–11. As discussed further *infra*, by the time others are able to raise enough money, they are too far in their pregnancy to obtain an abortion anywhere in the state other than Portland; some are too far in their pregnancy to obtain an abortion in Maine at all. *Id.* ¶¶ 80–84, 86, 88, 91, 111. While Plaintiffs offer discounted services or rate-reductions to patients in truly desperate circumstances, they cannot afford to do this for every patient and cannot afford to provide procedures free of charge. *See* Pls.' Resp. to DSMF ¶¶ 8, 15–21. Plaintiff MFP, for example, has had to turn away patients who show up for their appointments without enough money to cover their portion of the procedure, rescheduling them for a future date so that they have more time to try to come up with the money. PSMF ¶ 83; Pls.' Resp. to DSMF ¶¶ 18–21.

#### III. THE CHALLENGED REGULATION HARMS PLAINTIFFS' PATIENTS

# A. <u>Restricting Women's Access to Abortion Damages Their Health and Well-Being.</u>

Abortion is almost always safer for a woman than carrying a pregnancy to term. JSUMF ¶¶ 119, 124; PSMF ¶ 116. The physical and mental health risks posed by pregnancy disproportionately affect MaineCare-eligible women. JSUMF ¶¶ 112, 136, 152–61; PSMF ¶¶ 39, 43. Even for a healthy woman, an uncomplicated pregnancy can be extremely stressful, painful

<sup>&</sup>lt;sup>5</sup> For example, the primary source of outside funding for Plaintiffs Mabel Wadsworth's and MFP's patients is only available to women earning less than 110% of the FPL. PSMF ¶ 75. By contrast, MaineCare covers pregnant women earning up to 209% of the FPL. *See* Pls.' Reply to Def.'s Denial of PSMF ¶ 60.

and physically taxing. JSUMF ¶ 112; PSMF ¶ 117–18. Pregnancy poses challenges to a woman's entire physiology. JSUMF ¶ 126. Almost all pregnant women experience conditions such as fatigue, headaches, backaches, difficulty sleeping and other physical symptoms that can cause discomfort, pain, stress and anxiety and increase the difficulty of work, child care and other daily tasks. *Id.* Pregnancy also stresses most major organs, including the heart, liver, intestines, lungs and kidneys, increasing a woman's risk of developing medical issues such as blood clots, thrombosis, hyperemesis gravidarum, urinary tract infections, and sepsis. *Id.* ¶¶ 127–131. In every pregnancy, there is a 15-20% risk of a miscarriage and with it the associated risks of infection, hemorrhage, surgery and death. *Id.* ¶ 132. And even when a woman successfully carries her pregnancy to term, the process of labor and delivery—which may include a C-section—carries with it the risks of blood clots, embolism, infection, injuries to internal organs or the pelvic floor, hemorrhage and death. *Id.* ¶ 133–135.

The health risks associated with pregnancy are magnified for women with pre-existing medical conditions. Diabetes, hypertension, asthma, heart disease, lupus, Grave's disease, rheumatoid arthritis, renal disease, and other health conditions may be exacerbated by pregnancy. *Id.* ¶ 136. Women living with these medical conditions may choose to terminate their pregnancies to avoid the risk that their conditions may worsen during pregnancy and the disease progression may be irreversible. *Id.* ¶ 84; PSMF ¶ 121. A pregnancy may also interfere with the ability to treat these conditions. JSUMF ¶ 156. For example, some drugs—such as those used to control hypertension or heart disease—pose a risk to the developing fetus. *Id.* A pregnant woman taking these drugs faces a difficult choice of whether to discontinue the medication and risk harm to herself, continue the medication and risk harm to the fetus, or terminate the pregnancy. *Id.* Because certain pre-existing medical conditions may worsen during pregnancy and the disease

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progression may be irreversible, it is important that women have the option to terminate the pregnancy before progressing to a more severe health state. PSMF ¶ 121.

An unwanted pregnancy can cause or exacerbate mental health issues as well. JSUMF ¶ 85. These symptoms may be worsened by additional stressors relating to poverty. Id. ¶ 154. For women with pre-existing mental health disorders, there is the danger that hormone fluctuations, stress, modifications to established medication regimens and other physiological and lifestyle changes associated with pregnancy may cause the woman to relapse or to enter a psychotic episode. Id. ¶ 143; see also id. ¶¶ 138-41, 144-51. Even where a woman's symptoms do not meet the criteria for a formal diagnosis, pregnancy can destabilize a woman's mental health by causing sadness, anxiety, and/or compulsions that can compromise a woman's mental health and well-being, impair her functioning, and require treatment. *Id.* ¶ 138.<sup>6</sup> The sacrifices a pregnant woman may be forced to make in her efforts to raise funds for an abortion procedure, see infra Facts, Section III.B, as well as the unrelenting uncertainty as to whether she will nevertheless be forced to continue the pregnancy, are also likely to increase her level of stress to the point where it may manifest in physical or psychological symptoms and cause long-term, irreversible damage to her overall health. PSMF ¶¶ 79, 106; JSUMF ¶¶ 126, 143, 168. It is undisputed that abortion can relieve these pregnancy-related debilitating conditions. JSUMF ¶ 164.

# B. <u>Plaintiffs' Patients Have Been Forced To Make Significant Sacrifices to Raise</u> the Funds for Their Abortion.

<sup>&</sup>lt;sup>6</sup> The same is true for women with substance abuse disorders ("SUD"), such as alcohol and drug addiction. For these women, a pregnancy may exacerbate their SUDs, *id.* ¶ 86, can present a barrier to effective treatment, *id.* ¶ 155, and can pose serious health risks to both the woman and the embryo or fetus she is carrying, *id.* ¶¶ 157, 160. Abortion can allow a woman to feel comfortable pursuing the most effective treatment for her mental health disorder or SUD and make it easier for her to become sober and stable. *Id.* ¶¶ 163, 165.

To afford an abortion, Plaintiffs' patients have had to reduce already-limited budgets for food, clothing and other essentials for themselves and their families; delay or forego payment of rent and utility bills, putting them at risk of eviction or losing power or heat; delay or forego 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 families significant harm. *See* JSUMF ¶ 114; PSMF ¶¶ 94–103.<sup>7</sup> MaineCare coverage for abortion would mitigate the painful and dangerous sacrifices required to obtain this care. PSMF ¶ 107.

### C. <u>Plaintiffs' Patients Have Been Forced To Delay Their Abortions, Increasing</u> <u>The Risks to Their Health and Lives.</u>

Due to the extensive time this fundraising often takes, some of Plaintiffs' patients are also forced to delay their abortion procedures. PSMF ¶¶ 80–81. These delays not only increase the risk (because, while abortion is very safe, the risk of medical complications increases as pregnancy advances), JSUMF ¶ 119, 124, cost, *id.* ¶ 20, and length of the abortion procedure, PSMF ¶ 92, they also create new attendant 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 they would have to if MaineCare covered their abortion. *See* JSUMF ¶ 114; PSMF ¶¶ 24, 27–28, 72, 84, 86, 89. Plaintiffs regularly get calls from and perform ultrasounds for MaineCare-eligible women who are past the clinic's gestational age limit but delayed calling or coming in for their

<sup>&</sup>lt;sup>7</sup> Plaintiffs' patients are also sometimes forced to sacrifice their privacy in their efforts to raise the funds, as asking for and obtaining a loan often requires a patient to disclose the fact of her pregnancy and planned abortion to a family member, sexual partner or other individual. JSUMF ¶ 120. Yet for some women, disclosure of the pregnancy may jeopardize their safety. PSMF ¶¶ 104–105.

appointment until they could raise funds for the procedure. PSMF ¶ 111. For example, one such patient suffered such extreme morning sickness that she could no longer work. Id. ¶ 87. However, she kept cancelling and rescheduling her appointment until it was almost too late for her to obtain an abortion because she could not even come up with \$20 to contribute to the cost of the procedure. Id. Another patient who was hoping to have a medication abortion had to wait to save up enough paychecks in order to pay for the procedure. Id. ¶ 86. However, by the time she got to the clinic, she was outside the clinic's gestational age limit for abortion altogether. Id. Because of the delay, she could only get an abortion at PPNNE; given the later stage of pregnancy, the procedure carried increased risks, see JSUMF ¶ 119, was far more expensive, and since it had to be performed over two days, the patient also had to raise money to pay for a hotel in Portland, PSMF ¶ 86. Still another patient who scrimped and saved just to pay for her portion of the procedure 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 and had to be referred to New Hampshire; she asked for help affording gas money, but the clinic was unable to secure additional financial assistance for her. PSMF ¶ 82. MaineCare coverage for abortion would ensure that poor and low-income women are not delayed in or prevented from receiving care because of the need to raise funds for their abortion and associated travel. Id. ¶ 93.

### D. <u>The Regulation Forces Maine Women To Carry Unwanted Pregnancies to</u> <u>Term, Increasing the Risks to Their Lives and Health.</u>

Finally, in the absence of MaineCare assistance, some women have been prevented from getting an abortion altogether. *Id.* ¶¶ 108–112.<sup>8</sup> For these women, the consequences of being

<sup>&</sup>lt;sup>8</sup> Defendant appears to dispute that any woman in Maine has ever been unable to obtain an abortion because of inability to pay. *See, e.g.*, Def.'s Br. 6–8. Plaintiffs assert that the facts speak for themselves: For example, Plaintiffs have submitted undisputed expert testimony that decades of social science research shows that bans on Medicaid funding for abortion force some women to carry their pregnancies to term against their will. *See* PSMF ¶ 109 (citing Henshaw Aff. ¶¶ 13–14); *see also id.* ¶ 110. Defendant

forced to carry an unwanted pregnancy to term are long-term and significant. *Id.* ¶¶ 120–21, 123, 125–130. As set forth above, their physical and mental health may suffer. Some women's ability to complete their education or obtain long-term employment will be curtailed, JSUMF ¶ 83, and some will face diminished prospects of escaping poverty, JSUMF ¶ 168; PSMF ¶¶ 127, 129, 131. Indeed, studies show that women denied an abortion are more likely to fall below the poverty line and rely on public assistance, and less likely to have full-time jobs, than women who are able to obtain an abortion. PSMF ¶ 127. If a woman living in poverty wants but cannot get an abortion, she is subject to extraordinary stress of having a child that she did not want to have and may not have the resources to care for. *Id.* ¶ 130. MaineCare coverage for abortion would make it far more likely that these women would be able to access the care they need to avert these significant harms to their health and well-being. *Id.* ¶¶ 110, 113, 131.

#### IV. THE HYDE AMENDMENT

The Hyde Amendment, a federal law, prohibits federal Medicaid funds from being used to cover the cost of abortions except where necessary to save the life of the woman, or in cases where the pregnancy resulted from rape or incest. Pub. L. 115-31, div. H. tit. V § 507 (2017). In 1976, the Hyde Amendment was challenged in federal court under, *inter alia*, the federal constitution's due process and equal protection clauses. In 1980, by a 5-4 vote, the Supreme Court upheld the federal funding restriction under the due process clause, reasoning that "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation." *Harris*, 448 U.S. at 316; *see also id*. at 314–15. The Supreme Court also stated that because the Hyde Amendment discriminated on

did not submit any expert testimony that might contradict this evidence and did not even depose Plaintiffs' expert. However, even if the Court should find that there is a material dispute over whether the Regulation has ever prevented a woman from obtaining an abortion outright, this dispute does not preclude the grant of summary judgment here, as there is ample undisputed evidence that the Regulation harms poor and low-income women seeking abortions in other respects. *See* Section III. A-C *supra*.

the basis of indigency, which is not a suspect class, it was subject to mere rational basis review under the equal protection clause. *Id.* at 322–23. Applying rational basis review, the Supreme Court upheld the law holding that the federal constitution permits the government to further its interest in promoting childbirth over abortion by the discriminatory allocation of public funds. *Id.* at 324–25.

The four dissenting Justices argued vigorously that the majority's opinion could not be squared with the Supreme Court's previous decisions "invalidat[ing] any scheme of granting or withholding financial benefits that incidentally or intentionally burden[] one manner of exercising a constitutionally protected choice." Id. at 334 (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."), 345 (Marshall, J., dissenting), 348 (Blackmun, J., dissenting). The dissents also stressed the extent to which the Hyde Amendment did infringe upon a woman's constitutional right to abortion, see, e.g., id. at 336 ("The indigent woman who chooses to assert her constitutional right to have an abortion can do so only on pain of sacrificing health-care benefits to which she would otherwise be entitled."), as evidenced by the law's "devastating impact on the lives and health of poor women," id. at 348; see also id. at 338 ("The legislation before us is the product of an effort to deny to the poor the constitutional right [to abortion], even though the cost may be serious and long-lasting health damage."); 348–49 (noting "condescension' in the Court's holding that '[a woman] may go elsewhere for her abortion" and "there truly is 'another world out there,' the existence of which the Court . . . either chooses

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to ignore or fears to recognize") (internal citations omitted); 353 ("It cannot be denied that the harm inflicted upon women in the excluded class is grievous.").<sup>9</sup>

Since 1980, courts in the overwhelming majority of states to address the question have rejected the federal analysis and struck similar (or less burdensome) state Medicaid restrictions, relying on both the persuasive strength of the *Harris* dissents and independent state constitutional provisions.<sup>10</sup> Only a small minority of states to consider the constitutionality of state Medicaid restrictions under their state constitutions has actually followed *Harris. See, e.g.*, Def.'s Br. 4.

#### ARGUMENT

# I. LEGAL STANDARD

<sup>&</sup>lt;sup>9</sup> Numerous scholars and commentators have since criticized the majority's decision. *See, e.g.*, Leslie F. Goldstein, *A Critique of the Abortion Funding Decisions: On Private Rights in the Public Sector*, 8 Hastings Const. L.Q. 313 (1981); Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 Harv. L. Rev. 330 (1985); 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 (1980); Kenneth Agran, *When Government Must Pay: Compensating Rights and the Constitution*, 22 Const. Comment. 97 (2005); Jill E. Adams and Jessica Arons, *A Travesty of Justice: Revisiting Harris v. McRae*, 21 Wm. & Mary J. Women & L. 5 (2014); Alyssa Engstrom, Note, *The Hyde Amendment: Perpetuating Injustice and Discrimination After Thirty-Nine Years*, 25 S. Cal. Interdisc. L.J. 451 (2016).

 <sup>&</sup>lt;sup>10</sup> See Humphreys v. Clinic for Women, Inc., 796 N.E.2d 247, 260 (Ind. 2003); Simat Corp. v. Ariz. Health Care Cost Containment Sys., 203 Ariz. 454, 460 (Ariz. 2002); 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, 119 S.Ct. 1256, 143 L.Ed.2d 352 (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); Moe v. Sec'y of Admin. & Fin., 417 N.E.2d 387, 390 (Mass. 1981); Jeannette R. v. Ellery, No. BDV-94-811, 1995 Mont. Dist. LEXIS 795, at \*20 (Mont. Dist. May 19, 1995) (attached hereto as Exh. A); Doe v. Wright, No. 91-CH-1958, slip op. at 1 (III. Cir. Ct. Dec. 2, 1994) (attached hereto as Exh. B); Roe v. Harris, NO. 96977, slip op. at 1–2 (Idaho Dist. Ct. Feb. 1, 1994) (attached hereto as Exh. C); 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 hereto as Exh. D); 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).

Summary judgment is appropriate when "review of the parties' statements of material facts and the referenced record evidence indicates no genuine issue of material fact that is in dispute, and, accordingly, the moving party is entitled to judgment as a matter of law." Dyer, 2008 ME 106, ¶ 14, 951 A.2d 821 (internal citations omitted). "An issue is genuine if there is sufficient evidence supporting the claimed factual dispute to require a choice between the differing versions; an issue is material if it could potentially affect the outcome of the matter." *Cookson v. Brewer Sch. Dep't*, 2009 ME 57, ¶ 11, 974 A.2d 276 (internal citations omitted). While the Court must view the evidence and any reasonable inferences that the evidence produces in the light most favorable to the nonmoving party, "when the facts offered by a party in opposition to summary judgment would not, if offered at trial, be sufficient to withstand a motion for summary judgment as a matter of law, summary judgment should be granted." Welch v. State, No. RE-02-60, 2006 WL 381766, at \*2 (Me. Super. Jan. 19, 2006), aff'd, 2006 ME 121, 908 A.2d 1207 (citing Rodrigue v. Rodrigue, 1997 ME 99 ¶ 8, 694 A.2d 924). Here, the undisputed facts in the parties' CSMF, and the legal arguments set forth below, entitle Plaintiffs to summary judgment as a matter of law.

#### II. PLAINTIFFS' CLAIMS ARE JUSTICIABLE

The Court should reject Defendant's arguments that Plaintiffs' claims are not justiciable. Def.'s Br. 9–13.

### A. <u>Plaintiffs Have Third-Party Standing to Assert The Rights of Their Patients</u> <u>Who Are Harmed By The Regulation.</u>

Unlike in the federal system, "standing jurisprudence [in Maine] is prudential, rather than constitutional." *Roop v. City of Belfast*, 2007 ME 32, ¶ 7, 915 A.2d 966 (internal citations and quotations omitted). While "there is no set formula for determining standing," *id.*, the Law Court has recognized that "[t]he basic premise underlying the doctrine of standing is to 'limit access to

the courts to those best suited to assert a particular claim," *id.* (quoting *Halfway House, Inc. v. City of Portland,* 670 A.2d 1377, 1380 (Me. 1996)).

As the sole abortion clinics in the state, Plaintiffs have third-party standing on behalf of their patients to challenge the Regulation under the Maine Administrative Procedure Act ("APA") and the Maine Constitution. For as long as the right to access abortion care has been litigated, state and federal courts have unanimously recognized that abortion providers have standing to challenge abortion restrictions on behalf of their patients. *See, e.g., Singleton v. Wulff*, 428 U.S. 106, 116–17 (1976).<sup>11</sup> This is so due to the special relationship that exists between medical providers and patients, the understandable desire of a woman seeking an abortion to protect the privacy of her decision from the publicity of a lawsuit, and because of the fleeting nature of pregnancy relative to the interminable pace of civil litigation. *Id.* at 117–18.

While the Law Court has not yet considered third-party standing in the context of abortion specifically, the Law Court has already recognized that it is appropriate in circumstances such as these for litigants to assert the constitutional claims of absent third-parties who might otherwise be denied a judicial forum and/or who have a special relationship with the litigant. *See Common Cause v. State*, 455 A.2d 1, 7 (Me. 1983) (citing *Eisenstadt v. Baird*, 405 U.S. 438, 445 (1972)). Under state law, third-party standing is appropriate where, as here,

<sup>&</sup>lt;sup>11</sup> See also Planned Parenthood of Ne. Pa. v. Casey, 505 U.S. 833, 845 (1992); Deerfield Med. Ctr. v. City of Deerfield Beach, 661 F.2d 328, 333–34 (5th Cir. 1981); Mahoning Women's Ctr. v. Hunter, 610 F.2d 456, 458 n.2 (6th Cir. 1979), vacated on other grounds, 447 U.S. 918 (1980); Planned Parenthood of Minn., Inc. v. Citizens for Cmty. Action, 558 F.2d 861, 865 n.3 (8th Cir. 1977); Friendship Med. Ctr., Ltd. v. Chicago Bd. of Health, 505 F.2d 1141, 1145–46 (7th Cir. 1974); Pilgrim Med. Grp. v. N.J. State Bd. of Med. Exam'rs, 613 F. Supp. 837, 848 (D.N.J. 1985); Women's Med. Ctr. of Providence, Inc. v. Roberts, 512 F. Supp. 316, 320–24 (D.R.I. 1981); Mobile Women's Med. Clinic, Inc. v. Bd. of Comm'rs, 426 F. Supp. 331, 334–35 (S.D. Ala. 1977); N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So. 2d 612, 615 (Fla. 2003); State v. Planned Parenthood of Alaska, 35 P.3d 30, 34 (Alaska 2001); N.M. Right to Choose/NARAL, 1999-NMSC-005, ¶ 14, 126 N.M. at 794, 975 P.2d at 847; Gomez, 542 N.W.2d at 20 n.2; Pro-Choice Miss. v. Fordice, 95-CA-00960-SCT (¶¶ 59–68) (Miss. 1998), 716 So. 2d 645, 662–64; Panepinto, 446 S.E.2d at 661–662.

"'practical obstacles prevent a party from asserting rights on behalf of itself' and where the litigant 'can reasonably be expected to frame the issues and present them with the necessary adversary zeal." *Proctor v. Baldacci*, No. CV-90-546, 1992 Me. Super. LEXIS 152 at \*10 (June 22, 1992) (attached hereto as Exh. E), *aff'd*, *Proctor v. County of Penobscot*, 651 A.2d 355 (Me. 1994) (quoting *Sec'y of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984)). There is no serious question that Plaintiffs satisfy these criteria in this case.

Furthermore, Defendant's argument that Plaintiffs' patients have not been harmed because "there is no admissible evidence that establishes any instance in which a Medicaid eligible woman has been denied an abortion due to lack of funds," Def.'s Br. 9, is not only factually incorrect, but also misses the legal point. To begin with, notwithstanding Defendant's insistence to the contrary, Plaintiffs have provided undisputed expert testimony showing that restrictions like the Regulation force some poor and low-income women to carry their pregnancies to term against their will. PSMF ¶ 109. Moreover, Plaintiffs have also provided undisputed testimony about numerous instances their poor and low-income patients have told them they do not have and will not be able to find the money they need for the abortion procedure and associated costs, PSMF ¶ 72; about patients who show up for their appointments without enough money to cover their portion of the procedure, and have to be turned away and rescheduled for a future date, see Pls.' Resp. to DSMF ¶¶ 8, 18-20; and about women who have to be turned away from clinics altogether because they are too far in their pregnancy to obtain an abortion, either at that specific clinic or anywhere in Maine at all, PSMF ¶¶ 82–84, 86, 88, 91, 111.

More importantly, however, Defendant is incorrect in arguing that only the outright denial of an abortion constitutes sufficient harm to present a justiciable controversy. *See* Def.'s

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Br. 9. The record shows that the Regulation also causes concrete and cognizable physical, financial, and psychological harm to women and their families by delaying access to abortion, thus increasing costs and risk of the procedure to the woman's health, *see* PSMF ¶¶ 79–80, 88; JSUMF ¶ 119; by forcing women to make harmful sacrifices in order to raise money for the abortion, *see* PSMF ¶¶ 96–103; and forcing them to reveal personal medical details to other family members, sexual partners, friends, neighbors and/or acquaintances, *see* JSUMF ¶ 120; PSMF ¶ 105. These harms are sufficient to confer standing.

#### B. Plaintiffs' Claims Are Ripe.

To determine whether an issue is ripe for review, courts look to the fitness of the issue for judicial decision and the hardship to the parties of withholding court consideration. *Me. AFL-CIO v. Superintendent of Ins.*, 1998 ME 257, ¶ 8, 721 A.2d 633; *Me. Pub. Serv. Co. v. Public Utils. Comm'n*, 524 A.2d 1222, 1226 (Me. 1987). "An issue is fit for review if the agency's action presents a concrete and specific legal issue that has a direct, immediate and continuing impact on" the plaintiff. *Me. AFL-CIO*, 1998 ME 257, ¶ 8, 721 A.2d 633 (quotation marks and citation omitted).

Here, the Regulation at issue has been in effect continuously, in one form or another, for nearly forty years. *See* Stipulation ¶ 3. There can be no doubt that the terms of the Regulation are "sufficiently definitive to be suited to a judicial evaluation and determination of the constitutional issues it precipitates." *Lewiston, Greene & Monmouth Tel. Co. v. New England Tel. & Tel. Co.*, 299 A.2d 895, 908 (Me. 1973). For example, the parties agree that the terms of the Regulation currently operate to "exclude[] coverage for abortions that are necessary for a woman's physical and mental health and well-being." JSUMF ¶ 125. Likewise, there is no dispute that Plaintiffs see hundreds of MaineCare-eligible patients per year who, but for the Regulation, would be able to rely on MaineCare to cover the cost of their abortion. JSUMF ¶¶ 33–37; PSMF ¶ 60. As it stands, however, these women are left with no choice but to try to raise enough funds for the procedure themselves, enduring significant physical, psychological, and financial harm in the process, or forego exercise of their right to abortion altogether. *See* PSMF ¶¶ 94–103, 105, 106, 108–110. This evidence belies any suggestion that this case turns on "a state of facts that may or may not arise in the future." *Connors v. Int'l Harvester Credit Corp.*, 447 A.2d 822, 824 (Me. 1982).<sup>12</sup> Accordingly, the Regulation "presents a concrete and specific legal issue" that has a "direct, immediate and continuing impact" and is ripe for review. *Id*.<sup>13</sup>

Defendant's related argument that Plaintiffs are not aggrieved parties under the APA because the case is not ripe is also meritless. *See* Def.'s Br. 11–13. But for the Regulation, Plaintiffs would not have to devote several hours of staff time and resources each week to providing financial counseling and helping patients fundraise for their abortions, *see* JSUMF ¶ 117; Plaintiffs would not have to pay out of pocket for services, such as translators for non-English-speaking patients, that would be paid for by MaineCare if abortions were covered, *see* JSUMF ¶ 115; Plaintiffs would not have to turn patients away because, by the time they came up with the money to pay for their abortion, they were too far along in pregnancy to obtain an abortion at Plaintiffs' clinics, *see* PSMF ¶¶ 82–84, 86, 88, 90, 111; and Plaintiffs would not be faced with a choice between discounting their rates, incurring financial loss, for women in

<sup>&</sup>lt;sup>12</sup> *Maine AFL-CIO*, the primary case relied on by the Defendant, *see* Def.'s Br. 11–12, is not to the contrary. There, unlike here, the Law Court found that a dispute over a pilot program *that had not yet been created* was not ripe for adjudication because the court could not determine the nature and extent of the harm caused by a program that did not yet exist. *See Me. AFL-CIO*, 1998 ME 257, ¶ 8, 721 A.2d 633.

<sup>&</sup>lt;sup>13</sup> In arguing that this case is not ripe because Plaintiffs have not identified a specific woman who was denied an abortion—rather than denied *coverage* for abortion—due to the Regulation, Defendant once again misses the point. Def.'s Br. 10–11. Even if Defendant were correct that there was no evidence that the Regulation prevents women from obtaining abortions, there is still ample, undisputed evidence of the harms it nonetheless continues to inflict on women and their families, year after year. *See supra* Facts, Section III.A-D.

particularly desperate circumstances or turning them away altogether, *see* Pls.' Resp. to DSMF ¶¶ 8, 18–20. Thus, Plaintiffs' harms are not speculative, their claims are ripe, and they plainly constitute aggrieved parties for purposes of the APA. *See Gross v. Sec'y of State*, 562 A.2d 667, 670 (Me. 1989) (parties are aggrieved when an agency action operates prejudicially upon their property, pecuniary, or personal rights).

#### C. <u>This Court Has Subject Matter Jurisdiction To Consider The</u> Constitutionality Of The Regulation.

Finally, Defendant is mistaken that this Court has no subject matter jurisdiction to consider Plaintiffs' constitutional claims. Def's Br. 9–10. Indeed, the contention is belied by Law Court decisions examining the constitutionality of state laws in challenges arising under the state constitution too numerous to list. In effect, Defendant's argument confuses claims against individual state actors for individual actions alleged to be unconstitutional, which must be brought under the Maine Civil Rights Act, 5 M.R.S.A. § 4682, *see, e.g., Andrews v. Dep't of Environmental Protection*, 1998 ME 198, 716 A.2d 212, with facial challenges to statutes or regulations alleged to violate the state constitution, which may be brought under the state Declaratory Judgment Act, 14 M.R.S. § 5951, *et seq., see, e.g., Friedman v. Pub. Utilities Comm'n*, 2012 ME 90, ¶ 12–13, 48 A.3d 794 (explaining state constitutional challenge to agency action properly brought under Uniform Declaratory Judgments Act); *In re Dunleavy*, 2003 ME 124, ¶ 33, 838 A.2d 338 (explaining state constitutional challenge to judicial code of conduct properly brought as declaratory judgment action).

To seek review under the Uniform Declaratory Judgments Act, litigants must satisfy the requirements of ripeness and standing, discussed more fully *supra*, as well as demonstrate that there is a genuine controversy and that the relief sought is not merely advisory in nature. *See Wagner v. Sec'y of State*, 663 A.2d 564, 567 (Me. 1995) ("The declaratory judgment statute is

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operative only in cases where a genuine controversy exists.") (internal citations omitted). Contrary to Defendant's argument, Def.'s Br. 10–11, this case is based on a "genuine controversy and a concrete, certain, and immediate legal problem." *Clark v. Hancock Cty. Comm'rs*, 2014 ME 33, ¶ 19, 87 A.3d 712 (citation omitted). There is no genuine dispute that Plaintiffs provide abortions to a significant number of MaineCare-eligible women. *See* JSUMF ¶¶ 46, 50, 52, 54, 60–62, 76–78; PSMF ¶ 60. And, Defendant concedes that the Regulation currently prevents these women from using MaineCare to pay for "abortions that are necessary for a woman's physical and mental health and well-being." JSUMF ¶ 125. As Justice Blackmun recognized in *Singleton*, a justiciable case or controversy existed between similarly-situated abortion providers and the state in a challenge to an earlier state Medicaid restriction (pre-Hyde Amendment), where the plaintiffs alleged

that they have performed and will continue to perform operations for which they would be reimbursed under the Medicaid program, were it not for the limitation of reimbursable abortions . . . If the physicians prevail in their suit to remove this limitation, they will benefit, for they will then receive payment for the abortions. The State (and Federal Government) will be out of pocket by the amount of the payments.

428 U.S. at 113. Therefore, just as in *Singleton*, "[t]he relationship between the parties is classically adverse, and there clearly exists between them a case or controversy in the constitutional sense." *Id.; see also Hatfield v. Comm'r of Inland Fisheries and Wildlife*, 566 A.2d 737, 739–40 (Me. 1989) ("Justiciability requires that there be a real and substantial controversy, admitting of specific relief through a judgment of conclusive character as distinguished from a judgment merely advising what the law would be if certain events should occur in the future.") (quotation marks and citation omitted).

# III. THE REGULATION VIOLATES MAINE'S ADMINISTRATIVE PROCEDURE ACT AS A MATTER OF LAW

Under the APA, a DHHS 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 (2016); *see also* 22 M.R.S. § 3173 (authorizing DHHS to issue rules and regulations for the administration of MaineCare that are "consistent with the laws of the State"). By withholding coverage for abortion from MaineCare-eligible patients in all but three narrow circumstances, DHHS exceeds the limits placed on its rulemaking authority by the Reproductive Privacy Act, 22 M.R.S. § 1598(1) (2016), and DHHS's own authorizing and enabling statutes, 22-A M.R.S. § 202 (2016); 22 M.R.S. §§ 42, 3173. Furthermore, the Regulation directly conflicts with those statutes, as well as the public policy of the State of Maine.<sup>14</sup> Accordingly, Plaintiffs are entitled to summary judgment as a matter of law on their APA claim. *See* Compl. ¶¶ 93–96, 104.

# A. <u>The Regulation Exceeds DHHS's Rulemaking Authority and/or Is Not In</u> <u>Accordance With Law Because It Violates the Reproductive Privacy Act.</u>

1. The public policy of the State of Maine is not to restrict the exercise of a woman's decision to have an abortion.

DHHS rules and regulations must comply with state law and public policy. *See, e.g.*, 5 M.R.S. § 8058; 22 M.R.S. § 3173; 2 Am. Jur. 2d *Administrative Law* § 218 (2017) ("administrative regulations in conflict with the constitution or statutes are generally declared to be null or void"). The Reproductive Privacy Act, 22 M.R.S. § 1598(1), 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," except to the extent already provided in subsection 3(A) of § 1598 (requirement that physicians provide abortions) and 22 M.R.S. § 1597-A (relating to consent to abortion by minor). Maine is one of only six states that have

<sup>&</sup>lt;sup>14</sup> As discussed *infra* Arg., Section IV, the Regulation also violates the Maine Constitution. Because, by its own terms, the APA mandates that regulations issued by the DHHS must be "in accordance with law," 5 M.R.S. § 8058, if this Court finds that the Regulation violates Maine's Constitution, the Regulation necessarily fails as a matter of both constitutional *and* administrative law.

enshrined such protection from state interference with the right to abortion in law. *See e.g.*, Cal. Health & Safety Code §§ 123462, 123466 (West 2017); Conn. Gen. Stat. Ann. § 19a-602(a) (2017); Haw. Rev. Stat. § 453-16 (2017); Md. Code Ann., Health-Gen. § 20-209 (West 2017); Wash. Rev. Code Ann. § 9.02.100 (2017). Of these six states, however, Maine is the only one that prohibits state Medicaid funding for abortion.

When interpreting a statute, this Court must "ascertain the intent of the Legislature from the plain language," *Conservation Law Found., Inc. v. Dep't of Envtl. Prot.,* 2003 ME 62, ¶ 23, 823 A.2d 551, and "words must be given their plain ordinary meaning," *Mullen v. Liberty Mut. Ins. Co.,* 589 A.2d 1275, 1277 (Me. 1991). The ordinary meaning of the word "restrict" is "to subject [something] to bounds or limits," suggesting "a narrowing or tightening or restraining."<sup>15</sup> Under the Reproductive Privacy Act, therefore, "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." *Harris*, 448 U.S. at 330 (Brennan, J., dissenting). Because the Regulation operates to restrict poor and low-income women's ability to exercise their right to abortion, it directly contravenes the Reproductive Privacy Act as a matter of law.

# 2. The undisputed facts show that by withholding MaineCare funding for abortion (but not for medical care related to continuing a pregnancy), the Regulation restricts the exercise of the abortion decision.

The Regulation must be understood in the specific context of pregnancy. Every pregnant woman faces two constitutionally-protected choices: 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."). The decision not to have an abortion *is* simultaneously a decision

<sup>&</sup>lt;sup>15</sup> See, e.g., "Restrict." Merriam-Webster website, https://www.merriam-

webster.com/dictionary/restrict?utm\_campaign=sd&utm\_medium=serp&utm\_source=jsonld, (last visited July 20, 2017).

to continue the pregnancy to term and give birth and *vice versa*. Regardless of her decision, it is undisputed that a pregnant woman will need medical care. JSUMF ¶ 123; PSMF ¶¶ 114–15; *see also Harris*, 448 U.S. at 332–333 (Brennan, J., dissenting) ("Treatment for [pregnancy] may involve medical procedures for its termination, or medical procedures to bring the pregnancy to term, resulting in a live birth. . . . In every pregnancy, one of these two courses of treatment is medically necessary.") (Brennan, J., dissenting) (internal citations and quotations omitted).<sup>16</sup>

Therefore, "from a realistic perspective, [this Court] cannot characterize the [MaineCare] statutory scheme as merely providing a public benefit which the individual recipient is free to accept or refuse without any impairment of her constitutional rights." *Myers*, 625 P.2d at 793 (1981). Instead, because of the Regulation, Defendant "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. Whether or not the ultimate effect is to prevent a woman from obtaining an abortion, "the state is utilizing its resources to ensure that women who are too poor to obtain medical care on their own will exercise their right of procreative choice only in the manner approved by the state." *Myers*, 625 P.2d at 793.

The record in this case bears this out. 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

<sup>&</sup>lt;sup>16</sup> Defendant's aside that Plaintiffs' claims "do not appear to be limited to medically necessary abortions," but also extend to "elective" abortions is a red herring. Def.'s Br. 30. While Defendant offers no expert testimony to define these terms in any way, it is undisputed that MaineCare covers both elective and non-elective services that meet the following criteria: "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 which are necessary for health and well-being." 10-144 C.M.R. Ch. 101(II), § 90.04; *see also id.* at § 90.02 (defining elective surgery); PSMF ¶ 2 (citing Nadeau Dep. 25:12-14 ("Q: Does MaineCare cover services that meet [the definition of elective surgery]? A. Yes, we do.")). Further, having conceded that continuing a pregnancy is virtually always more dangerous to a woman's health than abortion, *see* JSUMF ¶¶ 124–25, and having no expert medical evidence of its own, Defendant cannot now argue that Plaintiffs seek MaineCare coverage for abortions that do not protect women's health.

afford. *See* JSUMF ¶ 91; *see also id.* at ¶¶ 92–93. Therefore, as described *supra* Facts, Section III.A-C, the Regulation forces poor and low-income women suffering from serious pregnancy-related physical and mental health issues who wish to exercise their right to abortion to make harmful sacrifices to raise their own funds for the procedure, PSMF ¶¶ 79, 94, 95, and to continue to live with their often worsening health conditions longer than they would have to if MaineCare covered their abortion. PSMF ¶¶ 80–81, 89; JSUMF ¶¶ 119. The only way for a MaineCare-eligible pregnant woman to avoid these physical, psychological, and financial harms to herself and her family is to forego the right to abortion altogether. The undisputed testimony in this case demonstrates that, to avoid the serious financial, physical and psychological repercussions of the sacrifices necessary to pay for their own abortion procedures, some women do just that and carry their pregnancies to term. *See supra* Facts, Section III.D.

In view of the above, it is not surprising that nearly every court that has considered a similar Medicaid Regulation—regardless of its ultimate decision with respect to the ban's legality—has recognized the inherently coercive effect of withholding Medicaid coverage for abortion, while providing coverage for prenatal care and childbirth. *See, e.g., Moe*, 417 N.E.2d at 402 ("By thus injecting coercive financial incentives favoring childbirth into a decision that is constitutionally guaranteed to be free from governmental intrusion, [this restriction] deprives the indigent woman of her freedom to choose abortion over maternity, thereby impinging on the due process liberty right recognized in *Roe v. Wade*.") (quoting *Harris*, 448 U.S. at 333 (Brennan, J., dissenting)); *Byrne*, 450 A.2d at 935–936 ("[T]he State may not use its treasury to persuade a poor woman to sacrifice her health by remaining pregnant. Statutes such as [the challenged funding ban] 'can be understood only as an attempt to achieve with carrots what government is

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forbidden to achieve with sticks." (quoting Laurence H. Tribe, *American Constitutional Law*, § 15–10 at 933 n.77 (1st ed. 1978)).<sup>17</sup>

Yet of those courts, including the U.S. Supreme Court, that have upheld similar funding bans, notwithstanding their inherently coercive nature, *there is not a single one that did so in the face of a statute that expressly declared a public policy against restricting the exercise of the right to abortion*. To the contrary, those decisions upholding similar funding bans have all done so precisely because they have deemed it to be appropriate to employ "unequal subsidization of abortion and other medical services" for the express purpose of "encourag[ing] alternative activity deemed in the public interest": childbirth. *Harris*, 448 U.S. at 315. The same cannot be true here where "state encouragement of an alternative [to abortion]," is not "consonant with legislative policy." *Id*.

Indeed, "[i]t is critical to note that the right of privacy under [the Reproductive Privacy Act] protects not simply the right to an abortion, but rather it protects the woman's *decision* to abort." *Gomez*, 542 N.W. 2d at 31; *see also* 22 M.R.S. § 1598(1) ("It is the public policy of the State that the State *not restrict a woman's exercise of her private decision* to terminate a pregnancy.") (emphasis added). Therefore,

<sup>&</sup>lt;sup>17</sup> See also Myers, 625 P.2d at 799 ("[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."); *Panepinto*, 446 S.E.2d at 665–66 ("This disparity in funding [between childbirth and abortion] . . . clearly operates to coerce indigent pregnant women to bear children they would not otherwise choose to have, and just as clearly, this coercion can only operate upon the poor, who are uniquely the victims of this form of financial pressure." (internal citations and quotations marks omitted)); *Dep't of Human Res.*, 663 P.2d at 1256 n.14 (acknowledging that the challenged regulation's provision of "childbirth expenses for women who are not entitled to a funded abortion under its terms . . . undoubtedly would have an effect on the woman's choice"); *Planned Parenthood of Idaho, Inc. v. Kurtz*, No. CVOC0103909D, 2002 WL 32156983, at \*4 (Idaho Dist. June 12, 2002) (recognizing that "there may be some coercive effect of the funding"); *Renee B. v. Fla. Agency for Health Care Admin.*, 790 So. 2d 1036, 1040–41 (Fla. 2001) (citing *Harris*, 448 U.S. at 314–17, in acknowledging that the funding restriction "may have made childbirth a more attractive alternative, thereby influencing the woman's decision"); *Doe v. Dep't of Soc. Servs.*, 487 N.W.2d 166, 178 (Mich. 1992) (same).

[i]n the present case, the infringement is the state's offer of money to women for health care services necessary to carry the pregnancy to term, and the state's ban on health care funding for women who choose therapeutic abortions. 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. We simply cannot say that an indigent woman's decision whether to terminate her pregnancy is not significantly impacted by the state's offer of comprehensive medical services if the woman carries the pregnancy to term.

*Gomez*, 542 N.W.2d at 31. Under the Reproductive Privacy Act, once a state actor, such as DHHS, enters "the constitutionally protected area of choice, it must do so with genuine indifference. It may not weight the options open to the pregnant woman by its allocation of public funds." *Moe*, 417 N.E.2d at 402. Because the Regulation so plainly weighs the options open to MaineCare-eligible pregnant women in a manner that restricts a woman's ability to exercise her right to abortion, it "exceeds the rule-making authority of [DHHS]" and is "otherwise not in accordance with law." 5 M.R.S. § 8058; *see also* 22 M.R.S. § 3173.

# 3. Defendant fails as a matter of law to demonstrate that the Regulation is consistent with the Reproductive Privacy Act.

Unable to contend with the plain language of the Reproductive Privacy Act, Defendant makes two unavailing arguments. First, Defendant makes the remarkable assertion that, despite the plain language setting forth the express public policy of the state, the Reproductive Privacy Act is actually but one of many state laws that reflect "sometimes competing" state policies on abortion. Def.'s Br. 18–19. This argument is flatly contrary to principles of statutory construction, which dictate that a court must "examine the plain meaning of the statutory language seeking to give effect to the legislative intent," "construe the statutory language to avoid absurd, illogical, or inconsistent results," and "construe the whole statutory scheme of which the section at issue forms a part so that a harmonious result, presumably the intent of the

Legislature, may be achieved." *Hickson v. Vescom Corp.*, 2014 ME 27, ¶ 15, 87 A.3d 704 (internal citations and quotations omitted). Here, every purportedly "competing" statute cited by Defendant is part of the same statutory section as the Reproductive Privacy Act—22 M.R.S. Subt. 2, Pt. 3, Ch. 263-B. Therefore, this Court should not accept Defendant's invitation to construe the unambiguous language of the Reproductive Privacy Act to be inconsistent or otherwise out of harmony with the plain language of the rest of the statutes in that section.<sup>18</sup>

Second, Defendant argues that because the Regulation does not expressly prohibit a woman from obtaining an abortion, it does not "restrict" a woman's ability to exercise her right to abortion. Def.'s Br. 19. This extremely narrow interpretation belies the ordinary meaning of the word "restrict" and therefore violates principles of statutory construction.<sup>19</sup> *See supra* Arg.,

<sup>&</sup>lt;sup>18</sup> Indeed, this Court would have to go to great lengths to find any purported conflict between the Reproductive Privacy Act and these other statutes. For example, 22 M.R.S. §1599-A, requires a woman provide informed consent prior to abortion. Meanwhile, 22 M.R.S. §1591 and 22 M.R.S. § 1592, protect individuals who do not wish to perform or assist with abortions from liability, adverse employment action and discrimination, and are unrelated to the obligations of a state actor to administer a public benefits program in accordance with public policy. And, as Plaintiffs have already explained, the restrictions set forth in 22 M.R.S. § 1597-A(2) are explicitly permitted by the Reproductive Privacy Act and, therefore, cannot be in conflict with it. In short, Defendant cites no law expressing that it is the public policy of the state to promote childbirth over abortion, protect fetal life, or adopt anything other than a policy of non-restriction and non-coercion with respect to abortion.

<sup>&</sup>lt;sup>19</sup> The Maine Legislature is well versed in choosing words to effectuate its intent. If the Legislature had intended "restrict" to mean something narrower than the common definition, it would have used the word "prohibit," as it did when it declared it the public policy of the state to "prohibit the occasion of violence and disorder and . . . prohibit the recruitment and furnishing of professional strikebreakers to replace the employees involved in labor strikes or lockouts." See 26 M.R.S. § 851. The Legislature's use of both words in many other statutes, often separated by an "or," is further evidence that the Legislature views the word "prohibit" as distinct from the word "restrict." See, e.g. 38 M.R.S. § 3006 ("An environmental covenant may *prohibit or restrict* uses of real property that are authorized by zoning or by law other than this chapter.") (emphasis added); 38 M.R.S. § 1864 ("The commissioner and the Commissioner of Inland Fisheries and Wildlife may jointly issue an emergency order to restrict access to or restrict or prohibit the use of any watercraft on all or a portion of a water body that has a confirmed infestation of an invasive aquatic plant.") (emphasis added); 23 M.R.S. § 56 ("The department may appoint any person in its employ whose special duty it shall be to enforce the statutes and orders promulgated thereunder which prohibit or restrict the passage of vehicles and trailers over ways and bridges, or designated sections thereof, under such conditions or in such manner as may cause undue damage to any such way or bridge.") (emphasis added). Accordingly, the Legislature's choice of the word "restrict" in the Reproductive Privacy Act must reflect an intent to encompass actions beyond outright prohibitions.

Section III.A.1 More fundamentally, though, Defendant is urging this Court to engraft the flawed logic the U.S. Supreme Court applied nearly forty years ago to the constitutional claims in *Harris* onto a different law in a different statutory context. But, as explained above, no such federal statutory protections existed at the time the U.S. Supreme Court decided *Harris* (nor do they today). 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.

# B. <u>The Regulation Violates DHHS's Authorizing or Enabling Statutes as a</u> <u>Matter of Law.</u>

# 1. DHHS's rulemaking authority is constrained by its authorizing or enabling statutes.

In assessing the validity of a challenged agency rule or regulation under the APA, courts routinely look to the statutes that authorize or enable the agency to take action, as well as to other language setting forth the agency's mission and statutory guidance for agency decision-making. *See, e.g., Doucette v. Hallsmith/Sysco Food Servs., Inc.*, 2011 ME 68, ¶ 13, 21 A.3d 99 (considering the statutory mission and authorizing statute when evaluating agency action); *Normand v. Baxter State Park Auth.*, 509 A.2d 640, 646 (Me. 1986) (rule that conflicts with authorizing statute may be "otherwise not in accordance with law"); *Conservation Law Found., Inc. v. State, Dep't of Envtl. Prot.*, No. CIV.A. AP-98-45, 2000 WL 33675692, at \*5–6 (Me. Super. Aug. 4, 2000) (rule that is "adopted without reference to the standards articulated in the enabling statutes" is in excess of agency's statutory authority and ultra vires).

The DHHS's general authority to issue rules and regulations permits the Department to "issue rules and regulations considered *necessary and proper* for the *protection of life, health* 

*and welfare*, and the successful operation of the health and welfare laws. . . . pursuant to the requirements of the [APA]." 22 M.R.S. § 42 (emphases added). DHHS's rulemaking authority with respect to MaineCare specifically states that "[t]he department is authorized and empowered to make all necessary rules and regulations *consistent with the laws of the State* for the administration of these programs including, but not limited to, establishing conditions of eligibility and types and amounts of aid to be provided, and defining the term 'medically indigent,' and the type of medical care to be provided." 22 M.R.S. § 3173 (emphasis added).

DHHS's mission is also set out by statute:

The mission of the department is to provide health and human services to the people of Maine so that *all persons may achieve and maintain their optimal level of health and their full potential for economic independence and personal development. Within available funds*, the department *shall provide* supportive, preventive, protective, public health and intervention services . . . The department shall endeavor to assist individuals in meeting their needs and families in providing for the developmental, health and safety needs of their children, *while respecting the rights and preferences of the individual* or family.

22-A M.R.S. § 202(1) (emphases added); *see also* PSMF ¶ 4. Section 202 also sets forth a series of "principles" intended to guide the Department "[i]n the performance of its duties." 22-A M.R.S. § 202(2). Chief among these is the DHHS's goal of "[i]mprov[ing] the health and well-being of Maine residents," which the statute instructs should "guid[e] *all* decisions, programs and services of the department." 22-A M.R.S. § 202(2)(A) (emphasis added).

This is not merely hortatory language. In *Cumberland Farms Northern, Inc. v. Maine Milk Commission ("Cumberland I")*, 377 A.2d 84 (Me. 1977), the Law Court invalidated minimum milk pricing orders set by the Maine Milk Commission on the basis that they were not established in compliance with the Commission's statutory mandate. The relevant authorizing statute required the Milk Commission to set minimum milk prices for milk produced, distributed and sold in Maine, taking into account a number of statutory factors, including what was "just and reasonable," in accord with "public health and welfare," and aimed at "insuring [] an adequate supply of pure and wholesome milk." *Id.* at 86–87, 92. In the litigation, one group of dairy farmers had argued that these broad statutory factors were "virtually meaningless as a group." *Id.* at 92. The Law Court disagreed, concluding that because the purpose of the statutory language was to give "specific guidance in setting prices to [the] Commission," and because "statutes are to be read to give effect to every part," the Commission was "required to consider those factors when [] set[ting] prices under the statute." *Id.* at 92–93. The Court went on to specify ways in which the Commission could apply the broad guidelines and maintained that, in order for a reviewing court to determine whether those guidelines had indeed been met, the Commission was required to make specific findings to justify its actions. *Id.* at 93; *see also Cumberland Farms N., Inc. v. Maine Milk Comm'n ("Cumberland II")*, 428 A.2d 869, 877–78 (Me. 1981) (invalidating subsequent pricing order under the APA because Commission failed to consider factors in authorizing statute). This Court should similarly scrutinize Defendant's justification for the Regulation here.

# 2. The Regulation contravenes DHHS's authorizing and enabling statutes as a matter of law because the undisputed facts show it compromises MaineCare beneficiaries' health and well-being and undermines their economic independence and personal development.

Far from advancing DHHS's goals and mission, the undisputed facts demonstrate that the Regulation undermines them. Defendant concedes that even for a healthy woman, continuing a pregnancy can be extremely stressful, physically taxing, and painful, JSUMF ¶¶ 112, 126–135, and carries with it numerous risks, including organ damage, infection, and hemorrhage and even death, *id.* at ¶¶ 127–135. Defendant also concedes that an abortion is almost always safer than continuing a pregnancy, *id.* at ¶¶ 119, 124, and that some women end their pregnancies to remedy medical problems arising from the pregnancy itself and/or prevent the development of serious health complications in the future, *id.* at ¶¶ 84, 125. This is especially true for

MaineCare-eligible women who, because of the stresses of poverty, are more likely to already have or to develop the underlying physical and/or mental health conditions that may be exacerbated by pregnancy. *Id.* at ¶¶ 112, 136, 142–56. By compelling these low-income women to delay or forgo the medical care necessary to end their pregnancy, *supra* Facts, Section III.C-D the Regulation directly compromises their physical and mental "health and well-being," PSMF ¶¶ 80, 81, 89, 106; DSMF ¶ 19; JSUMF ¶ 154, in direct contravention of the Department's statutory mandate. 22-A M.R.S § 202(1)-(2).

The Regulation further violates the DHHS's mission by failing to "respect" MaineCare beneficiaries' "rights and preferences" and undermining their ability to "achieve and maintain ... their full economic independence and personal development." 22-A M.R.S. § 202(1). It is undisputed that women cannot maximize their potential for economic independence and personal development without access to abortion. JSUMF ¶ 162. An unintended pregnancy can derail a woman's best-laid plans for escaping poverty, persistent underemployment, and/or an abusive relationship. *Id.* at ¶ 166. Access to abortion can help a woman obtain or continue with higher education, retain steady employment with opportunities for career growth, leave an abusive relationship, and/or prevent or relieve the often incapacitating physical and mental health conditions associated with pregnancy detailed *supra* Facts, Section III.A.<sup>20</sup> JSUMF ¶¶ 83, 87, 161–162, 167.

For these reasons, the Regulation is "in excess of [DHHS's] rulemaking authority" and/or "otherwise not in accordance with the law" and is invalid under the APA. *See Conservation Law Found., Inc.*, 2000 WL 33675692, at \*7; 5 M.R.S. § 8058.

 $<sup>^{20}</sup>$  Indeed, the evidence shows that the availability of abortion allows women to feel comfortable pursuing the most effective treatment for mental health disorders and/or substance abuse problems that may be interfering with their ability to lift themselves out of poverty and fully pursue personal development goals. JSUMF ¶¶ 163–165.

# 3. Defendant fails to demonstrate that the Regulation is consistent with DHHS's statutory mission and mandate as a matter of law.

Defendant does not attempt to argue that the Regulation in any way advances its statutory mandate to protect and improve public health. The record reveals the sole justification for the Regulation is and always has been the following: consistency with federal law and "maximizing" federal reimbursement for Medicaid services. DSMF ¶ 28; *see also* Def.'s Br. 5, 15–18; Stipulation ¶ 3. However, given that DHHS is under no legal obligation to follow the Hyde Amendment and that there is no evidence that the Regulation in any way "maximizes" federal funds this is insufficient to justify the Regulation as a matter of law. *See, e.g., Celani*, slip op. at 15 ("An administrative desire to synchronize funding with that reimbursable with federal funds, simply because a federal statute restricts reimbursement, is not within authorized bounds when that action is not expressly permitted by the enabling legislation."). Accordingly, this Court should not ignore the regulatory history of the Regulation, the express public policy of the State, and testimony from Department itself, to *sua sponte* "consider[] other purposes" that might justify a regulation such as the Regulation that only undermines public health. Def.'s Br. 32 n. 20.

Indeed, to the extent Defendant is implying that federal law *requires* DHHS to withhold state coverage for abortion in all but three circumstances in order to receive federal matching funds for federally-covered services, *see, e.g.*, Def.'s Br. 5, 14, 16, 19, this is incorrect. *Harris*, 448 U.S. at 311 n.16 ("A participating State is free, if it so chooses, to include in its Medicaid plan those medically necessary abortions for which federal reimbursement is unavailable."); PSMF  $\P$  5.<sup>21</sup> Simply put, there is no law that penalizes states for using state funds to provide

<sup>&</sup>lt;sup>21</sup> See, e.g., Gomez, 542 N.W.2d at 22 ("[S]tates are free to fund medically necessary abortions at their own expense . . . ."); *Maher*, 515 A.2d at 145 ("Surely, the state is free to include in its program medically necessary abortions, whether or not it is subject to federal reimbursement. Federal law merely sets the

coverage for abortion (or any other service the federal government has elected not to fund) in their state Medicaid programs. Just like the seventeen other states that provide broader coverage for abortion in their state Medicaid program, Maine's ability to participate in the federal Medicaid program would be completely unaffected if it did the same.

Likewise, notwithstanding its purported interest in "maximizing" federal funding, DHHS concedes that it is not aware of any data showing that withholding coverage for abortions, except when federal matching funds are available, actually provides any fiscal benefit to the State. JSUMF ¶ 95. This is not surprising: Even with federal matching funds, the cost to the State of prenatal, labor and delivery, postpartum, and newborn care (for at least the infant's first year of life), plus any additional costs to the state in social welfare programs, for a MaineCare-eligible woman who carries a pregnancy to term exceeds the cost to the State of an abortion. PSMF ¶ 8–9.<sup>22</sup>

*minimum* which the state must provide." (internal citations omitted) (emphasis added)); *Moe*, 417 N.E.2d at 391 ("It 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. Thus, the relief sought here would not jeopardize Federal reimbursement for other services provided by the Massachusetts Medicaid program." (internal citation omitted)); *Byrne*, 450 A.2d at 935 (acknowledging that, as per *Harris*, the state legislature "could include in its Medicaid plan medically necessary abortions for which federal reimbursement is not available"); *Bell v. Low Income Women of Tex.*, 95 S.W.3d 253, 255–56 (Tex. 2002) (same); *Boley v. Miller*, 418 S.E.2d 352, 355 (W. Va. 1992) (same); *Renee B.*, 790 So. 2d at 1039 (same); *N.M. Right to Choose/NARAL*, 1999-NMSC-005, ¶ 5, 126 N.M. at 792 (same); *Humphreys*, 796 N.E.2d at 250 (same).

<sup>22</sup> The other state Medicaid cases cited by Defendant on this point, *see* Def.'s Br. 33, do not actually support Defendant's argument. In *Bell*, the Texas statute that created the state Medicaid program in 1967 (prior to the legalization of abortion) expressly stated that it "may not authorize the provision of any service to any person under the program unless federal matching funds were available." 95 S.W.3d at 256. There was also a provision in the Texas Constitution authorizing the Legislature to alter constitutional limits on spending for medical care for the indigent "in order that . . . federal matching money will be available." *Id.* at 261. In *Dep't of Soc. Servs.*, the Michigan Supreme Court did not hold that conformity with federal law was a legitimate state interest, but that withholding state benefits for abortion – *in order to further the state's interest in promoting childbirth and fetal life* – was rational. 487 N.W.2d at 179. As discussed *supra*, this is not a relevant state interest here. Finally, in stating that "limiting services to those which are federally reimbursable" is a legitimate state purpose, the Florida Court of Appeals was clearly referring to an interest in the "containing the cost," not conformity for conformity's sake. *A Choice for* 

Unlike Congress, which promulgated the Hyde Amendment not for any administrative or fiscal reasons, but purely to advance the federal government's interest promoting childbirth over abortion, DHHS conceded at deposition that this is not one of the objectives of the MaineCare program. *See e.g.*, PSMF ¶ 3; *McRae v. Califano*, 491 F. Supp. 630, 641 (E.D.N.Y. 1980), *rev'd sub nom. Harris*, 448 U.S. 297 ("The debates made clear that the [Hyde] amendment was intended to prevent abortions, not shift their cost to others, and rested on the premise that the human fetus was a human life that should not be ended. Both houses viewed the issue as a moral and not a financial issue."). Even under Defendant's inappropriately narrow construction of the Reproductive Privacy Act, *see supra* Arg., Section III.A.1, 3, it would violate the express public policy of the State for a state agency to *intentionally* use its regulatory power to make it more difficult for poor and low-income women to obtain abortions. 22 M.R.S. § 1598.<sup>23</sup>

In a final attempt to elide its statutory mandate, Defendant argues that "[t]o the extent the statutes at issue are ambiguous, this Court should defer to the Department's reasonable policy determinations in its administration of the MaineCare program." Def.'s Br. 16. But this argument misses the point. While the language in the authorizing statutes is undoubtedly broad, it is not ambiguous. *See, e.g., Brooks v. Carson*, 2012 ME 97, ¶ 19, 48 A.3d 224 ("We also recognize that a statute is not ambiguous simply because a court must exercise its function to interpret the statute's plain meaning."). Where, as here, a "statute is in the nature of remedial legislation," it "must be liberally construed in furtherance of the beneficent purposes for which it was enacted."

*Women, Inc. v. Fla. Agency for Health Care Admin.*, 872 So. 2d 970, 973 (Fla. Dist. Ct. App. 2004). It is unclear whether there was any evidence before the court in *A Choice for Women*, that the funding ban did, in fact, help the state contain costs, but it is clear that there is no such evidence in the record in this case.

<sup>&</sup>lt;sup>23</sup> Defendant's counsel can neither dispute or undermine the testimony given by their own client in a M.R. Civ. P. 30(b)(6) deposition, nor otherwise justify the promulgation and enforcement of the Regulation by invoking the anti-abortion views expressed by some individual legislators—in 1979—in connection to a separate bill (that never became law). *See* Def.'s Br. 32 n. 20; *see also Mahaney v. Miller's, Inc.*, 669 A.2d 165, 169 (Me. 1995) ("[L]egislative inaction is indicative of nothing.").

*Brooks v. Smith*, 356 A.2d 723, 729 (Me. 1976) (construing state and federal Medicaid program). DHHS "has considerable discretion in placing *appropriate* limitations on services rendered under a State Medicaid plan," *Biewald v. State*, 451 A.2d 98, 100 (Me. 1982) (emphasis added), but that does not relieve it of its obligation to demonstrate—with specific findings that may be reviewed by a court—that such limitations are consistent with its statutory mission and guidelines, *see Cumberland I*, 377 A.2d at 86–93; *Cumberland II*, 428 A.2d at 877–78. If the Law Court may require the Maine Milk Commission to demonstrate that it considered such broad factors as, *e.g.*, "public health and welfare" and ensuring "pure and wholesome milk" when setting milk prices, *Cumberland I*, 377 A.2d at 92, then surely before granting Defendant's motion for summary judgment, this Court may expect Defendant to provide some showing that DHHS considered such factors, *inter alia*, as Mainers' "optimal level of health" and "full potential for economic independence and personal development," 22-A M.R.S. § 202(1), in promulgating the Regulation. Without such evidence it is Plaintiffs who are entitled to summary judgment.

Further, even if the language were ambiguous, courts only "defer to the interpretation of a statutory scheme by the agency charged with its implementation *as long as the agency's construction is reasonable.*" *See Conservation Law Found., Inc.*, 2003 ME 62, ¶ 23, 823 A.2d 551 (emphasis added); *see also Cumberland I*, 377 A.2d at 92–93. Here, Defendant appears to argue that the Regulation is "within the Department's broad rulemaking authority" because it is "consistent" with the federal Hyde Amendment. Def.'s Br. 15–16. However, as Plaintiffs have already demonstrated, achieving this "consistency" is not a reasonable interpretation of the relevant statutes, particularly when the Hyde Amendment itself does not even encourage, must less require, such "consistency." And, it cannot be a reasonable interpretation of the relevant

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statutes when "consistency" would be contrary to the state law and public policy of not restricting a woman's access to abortion, as well as detrimental to public health.

Defendant also argues that the Regulation is "consistent with the Department's statutory mission and duties" because it reflects the Department's exercise of discretion as to what services to cover "[w]ithin available funds." Def.'s Br. 19. But this is not a reasonable construction where Defendant has admitted that it actually has no idea whether the Regulation saves the state any money and when the undisputed expert evidence suggests otherwise. JSUMF ¶ 95; PSMF ¶ 8–9.<sup>24</sup> Indeed, DHHS "has considerable discretion in placing *appropriate* limitations on services rendered under a State Medicaid plan," *Biewald*, 451 A.2d at 100 (emphasis added), but that does not relieve it of its obligation to demonstrate—with specific findings that may be reviewed by a court—that such limitations are consistent with its statutory mission and guidelines, *see Cumberland I*, 377 A.2d at 86–93; *Cumberland II*, 428 A.2d at 877–78.<sup>25</sup>

Plaintiffs are not seeking to compel the DHHS to "guarantee[]" each MaineCare beneficiary "a level of health care precisely tailored to meet [his/her] needs." Def.'s Br. 20. Nor are they contesting the DHHS's general authority to promulgate rules and regulations necessary

<sup>&</sup>lt;sup>24</sup> By the same token, Defendant has submitted no evidence that there are insufficient funds in the state Medicaid program to provide coverage for abortion, should this Court strike the Regulation. Moreover, the Regulation was not created by state legislative mandate and therefore does not need to be lifted by any such mandate: Defendant promulgated the Regulation through normal rulemaking, relying entirely on its general rulemaking authority, Def.'s Br. 16, and this Court has the power to strike that rule as unlawful. Thus, Defendant's assertion that "[i]f the Legislature wished to create a separate state-funded program for abortion services, it knows how to do so," is irrelevant. Def.'s Br. 22.

<sup>&</sup>lt;sup>25</sup> And, if the Law Court may require the Maine Milk Commission to demonstrate that it considered such broad factors as, *e.g.*, "public health and welfare" and ensuring "pure and wholesome milk" when setting milk prices, *Cumberland I*, 377 A.2d at 92, then surely before granting Defendant's motion for summary judgment, this Court may expect Defendant to provide some showing that DHHS considered such factors, *inter alia*, as Mainers' "optimal level of health" and "full potential for economic independence and personal development," 22-A M.R.S. § 202(1), when justifying the removal of coverage for a particular health care service.

for the administration of the MaineCare program, or suggesting that the DHHS lacks any discretion in exercising this authority.<sup>26</sup> Plaintiffs merely assert that where: (1) undisputed evidence shows that a Department regulation withholding coverage for a *particular* service is *actively harming* the health and well-being of Maine residents, *supra* Facts, Section III.A-D, thereby undermining the Department's own statutory mission duties, and guiding principles, *supra* Arg., Section III.B.1-2, and (2) the Department has failed to explain how and why this decision reflects a "reasonable" interpretation of that mission and those duties and guiding principles, *supra* Arg., Section III.B.3, the Regulation is invalid under the APA. Under the APA, "[t]he onus is not on the Commissioner to *find* authority to fund medically necessary abortions"; rather, "[t]he onus is on her to *provide a purpose* for which [the Medicaid restriction] is *expressly authorized* and *reasonably related* to the purpose of the medical assistance." *Celani*, slip op. at 17 (emphasis added). In the absence of that relationship, "Defendant is exercising power beyond that delegated to her under the enabling act." *Id*.

<sup>&</sup>lt;sup>26</sup> Defendant's list of the "other medical services" that MaineCare either does not cover or covers with restrictions, Def.'s Br. 19-20, is another red herring. Most of the restrictions Defendant cite are not categorical exclusions of medical procedures when there is undeniably a medical need, like the Regulation, but merely requirements that such medical need or informed consent be documented. See, e.g., 10-144 C.M.R. ch. 101(II), § 90.05-2(B) (providing full MaineCare coverage for sterilization and hysterectomies so long as the patient satisfies an informed consent procedure required by federal law); id. § 90.05-2(D) (providing full MaineCare coverage for cochlear impacts so long as they are medically necessary and certain other medical interventions (e.g., hearing aids) have proven unsuccessful; *id.* § 90.05-3 (providing coverage for chiropractic and speech therapy services when a physician has documented medical necessity or rehabilitation potential); id. § 90, App. A (providing coverage for organ transplants so long as there is medical need, a Department-approved transplant center recommends that the transplant be performed, and proper documentation is submitted); id. \$ 90.05-1(B)(2) (providing coverage for services related to gastric bypass so long as the surgery has been recommended, the requisite documentation has been submitted, and prior approval has been granted by the Department); id. § 90.05-1(A)(1) (providing coverage for out-of-state services so long as prior approval has been granted by the Department); id. § 75.03-1 (2012) (providing coverage for medically necessary vision services); id. § 60.05 (2015) (providing coverage for medical supplies and durable medical equipment where medically necessary); id. § 96.02-4, 96.03 (2017) (providing coverage for private nursing care so long as such care is medically necessary and prior approval has been granted by the Department). Moreover, as noted supra, Plaintiffs do not contend that the Department must cover every medical service through the MaineCare program, just that the decision to exclude services must satisfy certain legal criteria.

\* \* \*

In sum, because the challenged Regulation contravenes the public policy of the State of Maine against restricting women's exercise of their abortion decision, 22 M.R.S. § 1598, and directly conflicts with the Department's explicit statutory mission, duties, and guiding principles, as set forth in its authorizing and enabling statutes, it is invalid under the APA as a matter of law.

### IV. THE REGULATION VIOLATES THE MAINE CONSTITUTION AS A MATTER OF LAW

As the Law Court has recognized, the right to make intensely personal decisions about one's body, one's health, and one's intimate relationships, free from unwarranted government interference is a fundamental constitutional right protected by the Maine Constitution. *See Doe I v. Williams*, 2013 ME 24, ¶¶ 64–65, 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."); *cf. Danforth v. State Dept. of Health and Welfare*, 303 A.2d 794, 800 (Me. 1973) ("It seems clear beyond the possibility of dispute that the Constitution of Maine recognizes this right of the parent to custody of his child and affords it its protection."). The decision to continue or terminate a pregnancy lies at the core of that right. *See Doe I*, 2013 ME 24, ¶ 65, 61 A.3d 718; *see also 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."); *Myers*, 625 P.2d at 793 (characterizing the right of reproductive choice as "clearly among the most intimate and fundamental of all constitutional rights").

Even though the U.S. Supreme Court held nearly four decades ago that the Hyde Amendment did not violate, *inter alia*, the federal substantive due process right to abortion or the equal protection right to be from discrimination on the basis of poverty that case does not control the outcome here. *See Harris*, 448 U.S. 297. First, as set forth above, 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," except to the limited extent already set forth in statute. Though the Law Court has construed the state and federal guarantees of substantive due process as co-extensive in non-abortion cases, it has never done so when the express policy of the State distinguishes a state restriction from a federal one. *See e.g., State v. Collins*, 297 A.2d 620, 626 (Me. 1972).

Second, Plaintiffs' case is also based on independent state constitutional provisions that have no federal counterparts. *See* Compl. ¶¶ 98 (citing Me. Const. art. 1, § 1) ("Section 1"), 101 (citing Me. Const. art. 1, § 6-A) ("Section 6-A"). These independent state constitutional provisions were certainly not considered by the U.S. Supreme Court in *Harris*, and reflect statespecific policy determinations that are separate and apart from those considered by the drafters of the Fourteenth Amendment.

#### A. <u>The Public Policy of the State of Maine Provides More Expansive Protection</u> <u>For the Substantive Due Process Right to Abortion Than is Guaranteed By</u> <u>The Federal Constitution.</u>

Defendant is incorrect in arguing that just because the Law Court has held in some cases that the state constitutional right to substantive due process is co-extensive with its federal counterpart, *see e.g.*, *Doe I.*, 2013 ME 24, ¶ 65, 61 A.3d 718, *Harris* controls. *See* Def.'s Br. 4–5, 36–37. 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). As the Law Court has explained, "to construe such opinions as expressing a limitation upon the scope of" a state constitutional provision "would be to stand the state-federal relationship . . . on [its] head[]." *State v. Caouette*, 446 A.2d 1120, 1122 (Me. 1982). Rather, where the Law Court "cites federal opinions in interpreting a provision of [state] law, it does so because it finds the views there expressed persuasive, not because it considers itself bound to do so by its understanding of federal doctrines." *Flick*, 495 A.2d at 343 n.2 (quoting *State v. Kennedy*, 666 P.2d 1316, 1321 (Or. 1983)).

Even where the drafters of parallel provisions plainly sought the same objectives, this "proposition does not support the non sequitur that the United States 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 (quoting *Kennedy*, 666 P.2d at 1322); *see also State v*. *Bouchles*, 457 A.2d 798, 801–02 (Me. 1983) ("[W]e reject any straitjacket approach by which we would automatically adopt the federal construction of the fourth amendment ban of 'unreasonable searches and seizures' as the meaning of the nearly identical provision of the Maine Constitution.").

Indeed, the Law Court has instructed that state courts should not follow federal precedent where the express public policy of the State of Maine compels a different result. A key factor in these decisions is the recognition that the Federal Constitution must be read as setting the floor, not the ceiling, when it comes to the protection of individual rights. *See, e.g., Caouette*, 446 A.2d at 1122 ("The Fifth Amendment is a limitation upon the federal government and has no direct reference to state action except to the extent incorporated as a requirement of due process under the Fourteenth Amendment. The maximum statement of the substantive content of the privilege and the requirements of voluntariness must be decided by this Court—as a matter of Maine law."). For example, in *State v. Collins*, the Law Court considered the evidentiary standard that should apply to the admissibility of a confession in state courts. 297 A.2d at 625–26. The Law Court recognized that the U.S. Supreme Court had previously held that the prosecution bore the

burden of establishing the voluntariness of a confession by preponderance of the evidence, but not beyond all reasonable doubt. *Id.* As the Law Court explained, the U.S. Supreme Court had reached that result by determining that while federal Fourth and Fifth Amendment exclusionary rules were aimed at deterring lawless conduct by police, the public interest still weighed more heavily in placing potentially probative evidence in front of juries. *Id.* at 626.

Despite the overarching similarities between the state and federal constitutional provisions at issue, the Law Court in *Collins* refused to adopt the U.S. Supreme Court's approach. In so doing, the Law Court recognized that federal decisions on this matter were merely intended to "prescribe[] a mandatory minimum standard," and that States were "free, pursuant to their own law, to adopt a higher standard." *Id.* (quoting *Lego v. Twomey*, 404 U.S. 477, 489 (1972)). Therefore, quoting dissenting opinions from the Supreme Court, the Law Court held that

[i]n assessing public policy for the State of Maine and "the appropriate resolution of the values (we) find at stake," we go beyond the objective of deterrence of lawless conduct by police and prosecution. We concentrate, additionally, upon the primacy of the value . . . of safeguarding ". . . the right of an individual, entirely apart from his guilt or innocence, not to be compelled to condemn himself by his own utterances."

*Id.* (quoting *Lego*, 404 U.S. at 491 (Brennan, J., dissenting)). "Since this value has been endowed with the highest propriety by being embodied in a constitutional guarantee," the Law Court held "that it must be taken heavily into account in the formulation of the public policy of this State." *Id.*; *see also Caouette*, 446 A.2d at 1122 (relying on Maine "values" expressed in *State v. Collins* to depart from federal precedent and suppress defendant's inculpatory statements even in the absence of police conduct); *cf. Bates v. Dept. of Behavioral and Developmental Servs.*, 2004 ME 154, ¶¶ 43–46, 863 A.2d 890 (terms of consent decree required more than compliance with minimum federal constitutional standards when "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]").

Here, as in *Lego*, the Supreme Court never intended *Harris* to set a universal standard to which all state Medicaid programs must adhere. *See Harris*, 448 U.S. at 311 n.16. Indeed, the decision in *Harris* cannot be divorced from the express purpose and policy driving the Hyde Amendment—preventing abortions. *See id.* at 325. By contrast, the Defendant admits that promoting childbirth is not one of the objectives of the MaineCare program, *see* PSMF ¶ 3, and Maine's express public policy espouses neutrality towards women's reproductive decisions, *see* 22 M.R.S. § 1598. Accordingly, the "the appropriate resolution of the values . . . at stake" in this case warrant heightened scrutiny review of Plaintiffs' substantive due process claim, not the rational basis review applied in *Harris*. *See Collins*, 297 A.2d at 626.

# B. <u>The Regulation Violates Article 1, § 1 of the Maine Constitution as a Matter</u> <u>of Law.</u>

Article 1, Section 1 ("Section 1") of the Maine Constitution 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. The decision whether to bear a child is a deeply personal matter that fundamentally affects a woman's life and her health. By withholding MaineCare coverage for abortion (except in extremely limited circumstances), but providing MaineCare coverage for care related to continuing a pregnancy to term, Defendant places its thumb firmly on one side of the scale. Courts in California, New Jersey, Vermont, West Virginia, and Massachusetts have all held that similar (or less burdensome) state Medicaid restrictions infringe upon a woman's fundamental liberty interests and threaten her health and safety, relying on state constitutional provisions identical or virtually identical to Section 1. Having held that such bans interfere with a woman's

fundamental rights to liberty and safety, these courts then proceeded to apply heightened scrutiny—not the rational basis review applied in *Harris*—and strike these restrictions. This Court should follow the persuasive reasoning of these sister courts.

## **1.** The history and text of Section 1 warrant more expansive constitutional protections than the federal Constitution.

Section 1 has no textual parallel in the federal Constitution. Indeed, it predates the 14th Amendment by nearly half a century.<sup>27</sup> The provision was taken almost verbatim from John Adams's original draft for the Massachusetts Constitution, which was adopted in 1780—almost one hundred years before the 14th Amendment was ratified. *See* Mass. Const. Pt. 1, art. I; *see also* Tinkle, *The Maine State Constitution: A Reference Guide* 25 (1992). As such, the provision cannot be based on or derived from any *federal* constitutional standards. If anything, the opposite is true: as the Law Court recognized, it was the 14th Amendment that "add[ed] a federal sanction to the equality of right [already] embedded in the Maine bill of rights." *State v. Mitchell*, 97 Me. 66, 53 A. 887, 888 (1902); *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).

Courts in numerous states with the same—or virtually the same—provision have explicitly recognized that "[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 (quoting W.Va. Const. art. III, § 1); *see also Moe*, 417 N.E.2d at 399 ("[O]ur constitutional guarantee of due

<sup>&</sup>lt;sup>27</sup> The Maine Constitution was adopted in 1820, whereas the 14th Amendment was not ratified until 1868.

process has sometimes impelled us to go further than the United States Supreme Court."); *Byrne*, 450 A.2d at 933 (recognizing this language was "more expansive . . . than that of the United States Constitution").

As one commentator has observed, "Section I case law is distinctive in that it not only addresses the permissible limits to acknowledged rights, but also concerns the identification of unarticulated rights. Because of the generality and open-endedness of this section, it has been perceived as a catchall for fundamental rights not otherwise enumerated in Article I." Tinkle, supra, 24–25; see also Mitchell, 53 A. at 890 (holding Section 1 "guaranties to every person an equality of right with all other persons to pursue a lawful occupation"); State v. Mayo, 106 Me. 62, 75 A. 295, 297 (1909) (relying on Section 1 to hold "[i]t is an equal right of all to use the public streets for purposes of travel"). For instance, in Danforth, the Law Court considered whether the state and/or federal Constitutions guaranteed indigent parents a right to appointed counsel, at the State's expense, in neglect proceedings. 303 A.2d at 795–96. At the time the case was decided, the U.S. Supreme Court had not yet squarely addressed whether the federal Constitution protects a substantive constitutional right in parents to raise their children. After a lengthy analysis and evaluation of preexisting federal constitutional decisions, the Law Court concluded both that the right to parent was fundamental and protected by the 14th Amendment and, therefore, that federal due process principles mandated a right to state-appointed counsel in these proceedings. Id. at 797–800. With respect to the state constitutional claim, however, the Law Court recognized the question was much simpler and did not turn on federal precedent:

In determining whether the right of natural parents to custody of their children is protected by the Constitution of Maine, we are not confronted with the problems which faced us in determining whether the right was one protected against State impingement (except for vindication of a compelling State interest) under the U.S. Constitution. In our discussions relating to the Constitution of the United States, we had to give consideration to the nature of federalism. *Id.* at 800. Instead, citing Section 6-A and the full text of Section 1, the Law Court concluded: "It seems clear beyond the possibility of dispute that the Constitution of Maine recognizes this right of the parent to custody of his child and affords it its protection." *Id.* To the extent the Law Court considered federal precedent at all in reaching the state constitutional decision, it was to cite approvingly to a *dissent* by Justice Black. *Id.* at 800–01.<sup>28</sup>

Defendant's reliance on the Law Court's recent decision in *Doe I*, 2013 ME 24, 61 A.3d 718, to argue that Section 1 has no independent vitality is misplaced. Def.'s Br. 4–5, 36–37. In *Doe I*, the plaintiffs raised, *inter alia*, a substantive due process claim (under both the state and federal constitutions), as well as an independent state constitutional claim under Section 1, in a challenge to the 1999 Sex Offender Registration and Notification Act. The Law Court addressed the substantive due process and Section 1 claims separately. The Law Court disposed of the substantive due process claim on the threshold question of whether the plaintiffs' claim implicated any fundamental right or liberty interest in the first place. *Id.* ¶¶ 67–68. Thus, the Law Court never reached the question presented here: whether and when the State Constitution provides greater protection for a *recognized* fundamental right or liberty interest than the federal Constitution. Next, the Law Court construed the plaintiffs' Section 1 claim to be one asking the court to recognize "a fundamental right to privacy, a right to protection of reputation, and a right fundamental fairness" under the State Constitution. *Id.* ¶ 70. With respect to the rights to privacy and reputation, the Law Court reiterated its earlier holding that the specific interest asserted in

<sup>&</sup>lt;sup>28</sup> Notably, after *Danforth* was decided, the U.S. Supreme Court decided that the federal due process clause did not require appointment of counsel in *every* case that could result in the termination of parental rights. *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18 (1981). Thus, as the Law Court has acknowledged in later cases, that right has constitutional protection in Maine today solely as a matter of state constitutional law. *See State v. Cadman*, 476 A.2d 1148, 1152 n.6 (Me. 1984) ("For decisions where we have found that rights guaranteed by Maine's Declaration of Rights were more protective than those granted by the federal Bill of Rights, *see e.g. . . . Danforth.*")

this case—keeping private the fact of a conviction—did not rise to the level of a constitutionallyprotected interest. *Id.* ¶¶ 60–63, 67. With respect to the right of fundamental fairness, the Law Court "decline[d] to expand [its] interpretation of Maine's Constitution to include a generalized right to 'fundamental fairness.'" *Id.* ¶ 70.<sup>29</sup> In short, the Law Court did nothing more than answer the limited question presented. *Doe I* does not stand for the proposition that all Section 1 claims are subsumed within federal substantive due process clause analysis.

2. The Regulation violates Section 1 as a matter of law because withholding MaineCare coverage for abortion (but not for medical care related to continuing a pregnancy) infringes fundamental rights to liberty and safety.

Forcing or coercing a woman to carry her pregnancy to term against her will, delaying her access to necessary abortion care, and/or 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* Facts, Section III.A-D; *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. To deny this conclusion requires that we similarly deny the reality of being poor."). The crux of the parties' dispute is whether this interference violates any constitutional obligations the state owes to its citizens. Indeed, the question before this Court is not whether "the State is under an affirmative obligation to ensure access to abortions for all who may desire them." *Harris*, 448 U.S. at 330; *see also* Def.'s Br. 3–4. Rather, the relevant question is whether the State may interfere with constitutionally protected interests "through the coercive use of governmental largesse." *Harris*, 448 U.S. at 336 n.6. For the reasons discussed below, this Court should follow the overwhelming state judicial authority

<sup>&</sup>lt;sup>29</sup> The separate substantive due process and Section 1 analyses demonstrate that these are not the same claims. *See* Def.'s Br. 33–37.

answering that question in the negative. *See, e.g., Moe*, 417 N.E.2d at 402 ("[T]he 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 choice, it must do so with genuine indifference.") (quoting Tribe, *supra*, § 15–10, at 933 n.77); *Myers*, 625 P.2d at 799 (same); *Byrne*, 450 A.2d at 935 ("Concededly, the Legislature need not fund any of the costs of medically necessary procedures pertaining to pregnancy . . . . Once it [does so] . . . however, government must proceed in a neutral manner." (internal citation omitted)); *Panepinto*, 446 S.E.2d at 667 ("[W]hat is really at issue here is 'the right of the individual . . . [to be] free[] from undue government interference, not an assurance of government funding."") (quoting *Byrne*, 450 A.2d at 963 n.5)).

Here, Defendant reasons that "as long as the Government is not obligated to provide its citizens with certain benefits or privileges, it may condition the grant of such benefits on the recipient's relinquishment of his constitutional rights." 448 U.S. at 334 (Brennan, J., dissenting); *see also* Def.'s Br. 29–31. However, the dissents in *Harris* and numerous other state courts have all recognized that reasoning is not only logically flawed, but also entirely inconsistent with previous U.S. Supreme Court precedent.

First, as Justice Brennan explained, the *Harris* majority's analysis "overlooks the fact 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." 448 U.S. at 336 n.6. Indeed, this distinguishes this case from the public school cases cited by Defendant here. *See* Def.'s Br. 30–31. The cases cited by Defendant hold that the existence of public subsidies for education does not necessarily translate into an unlimited obligation of the state to subsidize the attendance of

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every child at any school, public or private, sectarian or non-sectarian.<sup>30</sup> But unlike with pregnancy, those cases do not present a "choice" between two mutually exclusive options, with only one of those choices subsidized by the state. In the public school cases, some children may not be able to attend the specific school of their choosing, but they all receive a publicly-funded education. By contrast, the Regulation flatly prohibits most MaineCare-eligible women from receiving public insurance coverage for abortion at all, coercing them into something quite different (and indisputably more dangerous, *see* JSUMF ¶ 119, 124): childbirth.<sup>31</sup>

Second, as numerous commentators and multiple courts have all recognized, the majority decision in *Harris* is not defensible even under the U.S. Supreme Court's own jurisprudence. The *Harris* majority completely ignored that the U.S. Supreme Court had "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 (citing cases); *see also Gomez*, 542 N.W.2d at 29 ("[W]e are unpersuaded by the [*Harris*] majority in that it failed to recognize that the infringement created by a statutory funding ban on abortion is indistinguishable from the infringement . . . found in earlier cases."). In *Harris*, just as in the Supreme Court's previous cases, "the government withholds financial benefits in a manner that discourages the exercise of a due process liberty." *Id.* at 336 (Brennan,

<sup>&</sup>lt;sup>30</sup> The sole decision Defendant cites from the Law Court, *Anderson v. Town of Durham*, 2006 ME 39, 895 A.2d 944, also arose in a completely different area of jurisprudence: the interplay between the two federal religion clauses, the Establishment Clause and the Free Exercise Clause. Def.'s Br. 30–31. In *Anderson*, the Law Court concluded that, even though the Establishment Clause did not categorically prohibit the payment of public tuition subsidies to religious schools, the legitimate state interest in maintaining neutrality with respect to the diversion of public funds to religious institutions—a consideration unique to the relationship between Church and State—was nevertheless a sufficient interest to uphold a law prohibiting the use of public tuition aid to religious schools under the Free Exercise Clause. *Anderson*, 2006 ME 39, ¶ 61, 895 A.2d 944. Moreover, even if *Anderson* was on point, it would not control the outcome here, as Defendant has not articulated any sufficient state interest to justify the infringement of Plaintiffs' patients' constitutional rights. *See infra* Arg., Section IV.D.

<sup>&</sup>lt;sup>31</sup> The comparison would be apt if, for example, Plaintiffs were asserting that Defendant could not limit MaineCare coverage to services provided by MaineCare-approved providers, but that is not the case here.

J., dissenting); *see also id.* at 347 (Marshall, J., dissenting) ("[T]he differential distribution of incentives—which the [Majority] concedes is present here—can have precisely the same effect as an outright prohibition."). Thus, contrary to what the majority had asserted, the Hyde Amendment simply could not "be distinguished from these other statutory schemes that unconstitutionally burdened fundamental rights." *Id.* at 335–36; *see also id.* at 336 n.6 ("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." (internal citations omitted)), 348 ("[T]he Court's holding … is disingenuous and alarming.").<sup>32</sup>

What is more, unlike the federal constitutional provisions before the U.S. Supreme Court in *Harris*, Section 1 explicitly "accords a high priority to the preservation of health." *Byrne*, 450 A.2d 925 at 934. Indeed, it is "a right recognized, needless to say, in almost the first words of [the state] Constitution." *Id.* (quoting *Tomlinson v. Armour & Co.*, 70 A. 314, 317 (N.J. 1908)). Therefore, as New Jersey Supreme Court has explained, "[g]iven the high priority accorded in this State to the rights of privacy and health, it is not neutral to fund services medically necessary for childbirth while refusing to fund medically necessary abortions." *Id.* at 936; *see also id.* at 937 ("The State may not jeopardize the health and privacy of poor women by excluding medically necessary abortions from a system providing all other medically necessary care for the indigent."); *Celani*, slip op. at 11 ("[The Medicaid funding ban] impinges directly on the

<sup>&</sup>lt;sup>32</sup> Defendant also argues that in other contexts the Law Court has found a distinction "between interference with a protected right *and state encouragement of an alternative activity.*" Def.'s Br. 30 (emphasis added). If Defendant is suggesting that it may use the Regulation to *intentionally* push poor and low-income pregnant women towards childbirth, as opposed to abortion, that argument is clearly foreclosed by the Reproductive Privacy Act. Even if it were not, Defendant conceded at deposition that it is not one of MaineCare's objectives to promote childbirth *as an alternative* to abortion. PSMF ¶ 3.

constitutionally guaranteed right to safety."); *cf. Panepinto*, 446 S.E.2d at 665, 667. The Connecticut Supreme Court reached a similar conclusion, recognizing that "the 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." *Maher*, 515 A.2d at 150.

This Court should not ignore language that has existed in the paramount declaration of the rights of Mainers for nearly 200 years, solely to adopt the widely criticized rationale applied by the majority in *Harris*. Given the explicit state constitutional protections for liberty and safety set forth in Section 1, this Court should join the majority of state courts that have considered the question and hold that "the appropriate resolution of the values . . . at stake" warrants heightened scrutiny review of Plaintiffs' Section 1 claim. *State v. Collins*, 297 A.2d at 626.

#### C. <u>The Regulation Violates Article 1, § 6-A of the Maine Constitution As a</u> <u>Matter of Law.</u>

The Regulation also contravenes the plain language of Section 6-A, of the Maine Constitution by withholding coverage for appropriate medical care from eligible pregnant women who exercise their right to abortion, but not from those who exercise their right to continue their pregnancies to term.

# 1. The history and text of Section 6-A warrant more expansive constitutional protections than the federal Constitution.

In 1963, Maine adopted Article 1, Section 6-A, of the Maine Constitution, which provides:

*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, <u>nor be denied the enjoyment of that person's civil rights or be discriminated against in the exercise thereof.</u>

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.

To Plaintiffs' knowledge, the Law Court has never directly considered whether the unique language of Section 6-A implicates distinct state constitutional protections. As a basic matter of constitutional interpretation, however, this language must be considered independently. *See Bureau of Emp. Relations v. Me. Labor Relations Bd.*, 611 A.2d 59, 61 (Me. 1992) ("The Legislature joined the subsections at issue with the disjunctive 'or.' As a general rule, the use of a disjunctive in a statute indicates alternatives and requires that those alternatives be treated separately.").<sup>33</sup> It must be presumed that, in amending the constitution to add explicit protections that have no federal counterpart, the people intended those protections to have independent meaning and force. *See generally 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."") (quoting *Allen v. Quinn*, 459 A.2d 1098, 1100 (Me. 1983)). 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." *Finks v. Me. State Highway Comm* 'n, 328 A.2d 791, 799 (Me.

<sup>&</sup>lt;sup>33</sup> "The same principles employed in the construction of statutory language hold true in the construction of a constitutional provision." *Voorhees v. Sagadahoc Cty.*, 2006 ME 79,  $\P$  6, 900 A.2d 733.

1974). Any other view would mean the people intended to accomplish no change in the existing constitutional law when they enacted Section 6-A.

2. The Regulation discriminates on the basis of the exercise of the constitutional right to abortion as a matter of law because it withholds MaineCare coverage for abortion, but not for medical care related to continuing a pregnancy.

The discrimination here is so obvious that, as one court put it, "[t]o state the issue is to answer it." *Simat Corp.*, 56 P.3d at 32. 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.<sup>34</sup>

Therefore, because this Court is not bound by *Harris*, and in view of Maine's explicit state constitutional protection against discrimination on the basis of the exercise of a constitutional right, "the appropriate resolution of the values . . . at stake" in this case warrants heightened scrutiny review of Plaintiffs' Section 6-A claim. *Collins*, 297 A.2d at 626.

### D. The Regulation Fails Any Level of Scrutiny as a Matter of Law.

<sup>&</sup>lt;sup>34</sup> Defendant offers no real response to this claim, ignoring this unique constitutional language altogether. *See* Def.'s Br. 27–28. Instead, DHHS analyzes Plaintiffs' equal protection claim as if it is a claim of discrimination on the basis of indigence (which it is not). *See* Def.'s Br. 28–29. Such an analysis simply does not extend to an equal protection claim based on completely different grounds and arising under a state constitutional provision with no federal counterpart, which explicitly prohibits discrimination on the basis of the exercise of a constitutional right. *Cf. N.M. Right to Choose/NARAL*, 1999-NMSC-005, ¶ 29, 126 N.M. at 798, 975 P.2d at 851 ("This lack of a federal counterpart to New Mexico's Equal Rights Amendment renders the federal equal protection analysis inapposite in this case.").

Typically, whenever 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." Rideout v. Riendeau, 2000 ME 198, ¶¶ 19-22, 761 A.2d 291; see also State v. Old Tavern Farm, 133 Me. 468, 180 A. 473, 477 (1935) (holding under Section 1 that "every partial or private law which directly proposes to destroy or modify personal rights, or does the same thing by restricting the privileges of certain classes, and not of others, where there is no public necessity therefor, is unconstitutional and void"); id. at 474 ("When, from perusal, there is no fair, just, and reasonable connection between a statute and the common good, and it is manifest that such was not the object of the statute, it will not be sustained."); Mayo, 75 A. at 297 (holding under Section 1 that personal rights may be "limited and controlled by the sovereign authority—the state—whenever *necessary* to provide for and promote the safety, peace, health, morals, and general welfare of the people") (emphasis added). "Even compelling state interests must be achieved by means that cause the least possible intrusion upon constitutionally protected interests." Dotter v. Me. Emp't Sec. Comm'n, 435 A.2d 1368, 1374 (Me. 1981).

Whether it is strict scrutiny, or some other form of heightened review that applies, the Regulation fails as a matter of law. The undisputed evidence in the record overwhelmingly shows that the Regulation inflicts physical, psychological, and financial harm on Maine's most vulnerable women and families. *See supra* Facts, Section III.A-D. In addition, the undisputed evidence demonstrates that the cost of prenatal care, labor and delivery, postpartum care, care for a newborn for at least its first year of life, if not longer, and any other relevant social services far outweighs the cost of an abortion. *See supra* Arg., Section III.B.3. Even if Defendant could articulate some manner of compelling, or even legitimate, interest in maintaining the Regulation

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(which it cannot), Defendant certainly cannot show that the Regulation—withholding MaineCare funding for abortion from nearly every eligible woman—is the most narrowly tailored or least restrictive means of serving that interest.

Yet even if this Court declines to hold that this case warrants heightened scrutiny review, Plaintiffs are entitled to summary judgment, because the Regulation cannot even withstand the deferential rational basis review applied in *Harris*. Def's Br. 23–24, 28–33.<sup>35</sup>

As Defendant has correctly noted, in *Harris*, the U.S. Supreme Court premised its finding of a rational basis to support the constitutionality of the Hyde Amendment on Congress's decision to make "childbirth a more attractive alternative than abortion." Def's Br. 32 (citing *Harris*, 448 U.S. at 325). Here, Defendant has disavowed, under oath, any interest in promoting pregnancy over abortion in the administration of its Medicaid program (though that is a disavowal it apparently wishes it could retract). *See* PSMF ¶ 3. But that is not all: Unlike the federal government, by statute Maine adopts a policy of governmental indifference regarding a woman's exercise of her private decision to terminate a pregnancy before viability (except as concerns minors). *See* 22 M.R.S. § 1598(1). Therefore, the sole rational basis for the Hyde Amendment identified in *Harris*—promoting or encouraging childbirth over abortion—is not a legitimate state interest in Maine.

<sup>&</sup>lt;sup>35</sup> Although Defendant attempts a bit of sleight-of-hand, trying to construe the *absence* of any legislative repeal of the Regulation as some sort of evidence that DHHS had a rational reason for promulgating the ban and continuing to enforce it today, the ruse is unsuccessful. *See, e.g.*, Def.'s Br. 31 ("As was the case in *Harris v. McRae*, the Maine Legislature has chosen not to establish a state program . . . to provide state funds to pay for abortions for Medicaid eligible women . . . . Instead, they chose to leave in place [the Regulation], which is supported by legitimate state purposes."); *id.* at 32 (Defendant's 30(b)(6) witness's "understanding of the stated objective of the state Medicaid agency would not limit the Court's consideration of other plausible reasons for the *Legislature's* decision.") (emphasis added). Putting aside the canon of statutory construction that "legislative action is indicative of nothing," *Mahaney*, 669 A.2d at 169, the failure of the Legislature to repeal the Regulation (or any regulation) is not itself evidence there was a rational basis for the Regulation in the first place. If that were so, every regulation would be *ipso facto* rational unless and until the Legislature repealed it, at which point judicial review would be irrelevant.

The evidence irrefutably proves that the Regulation is not "rationally related" to any other "legitimate state interest" either. MacImage of Maine, LLC v. Androscoggin Ctv., 2012 ME 44, ¶ 33, 40 A.3d 975; see also Beaulieu v. City of Lewiston, 440 A.2d 334, 339 (Me. 1982) ("The Equal Protection Clause is not offended by the systematic denial of public assistance to a particular group of applicants if the identification of that group and the treatment to which it is exposed enjoys a reasonable basis and does not result in invidious discrimination.") (emphasis added).<sup>36</sup> Whatever presumption of constitutionality may apply, 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) (internal citations omitted). The only genuine justification-meaning a justification not otherwise foreclosed by the law or facts-that Defendant has proffered to support the Regulation is conformity with federal law and regulations. See DSMF ¶ 28. But the record demonstrates that this justification is irrational—the undisputed evidence shows the state gains no benefit and avoids no burden by imposing the same restriction on Medicaid funding for abortion that is imposed under federal law. Federal law is indifferent to whether state Medicaid programs provide coverage for abortions that are not federally reimbursable, and prenatal, pregnancy, and postnatal care (even with federal reimbursement) are significantly more costly for the state than abortion care without any federal reimbursement.<sup>37</sup> As such, "[t]he discrimination is unwarranted and arbitrary," the benefit to the

<sup>&</sup>lt;sup>36</sup> Defendant does not appear to dispute that "similarly situated persons are not treated equally under" the Regulation. *MacImage*, 2012 ME 44, ¶ 33, 40 A.3d 975; Def.'s Br. 23–33.

<sup>&</sup>lt;sup>37</sup> Notwithstanding Defendant's unsubstantiated objections, this evidence is clear and undisputed. *See* PSMF ¶ 9 (citing Henshaw Aff. ¶ 20). While, under rational basis review, it is the burden of the party challenging the regulation to establish by "clear and irrefutable" evidence that the regulatory classification is irrational, once that burden has been met, the opposing party cannot save the regulation by reliance on willful blindness alone.

state "illusory," and the Regulation "bears no genuine relationship to the obvious purpose to be achieved . . . and must be declared unconstitutional." *Ace Tire Co., Inc. v. Mun. Officers of City of Waterville*, 302 A.2d 90, 100 (Me. 1973).

## V. PLAINTIFFS ARE ENTITLED TO FACIAL RELIEF AS A MATTER OF LAW

Plaintiffs are entitled to facial relief because there is no set of factual circumstances under which it is lawful to categorically withhold coverage for all abortions from individuals who, but for the Regulation, would be qualified and eligible to receive MaineCare coverage for abortions.<sup>38</sup> Contrary to what Defendant seems to believe, the test is not whether, notwithstanding the state's unlawful actions, any given individual woman is ultimately able to obtain an abortion. *See* Def.'s Br. 24–25. Indeed, if the State enacted a law withholding MaineCare coverage from African-Americans, the plaintiffs would not have to prove that every single African-American in Maine has been unable to obtain any health care because of the law in order to obtain facial relief. Rather, the unconstitutional application of the law is the discriminatory *withholding* of funds based on impermissible grounds; since it would never be lawful to exclude African-Americans from the MaineCare program on the basis of race, such a law would always be unconstitutional.

In any event, "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United v. FEC*, 558 U.S. 310, 331 (2010). The distinction "goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Id.* Should this Court hold that the Regulation is unlawful

<sup>&</sup>lt;sup>38</sup> Because Plaintiffs have not pled an "undue burden" under the Fourteenth Amendment, the "large fraction test," Def.'s Br. 25, does not apply here.

in only certain circumstances, Plaintiffs would be entitled to relief for those unconstitutional applications. *See Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 323 (2006) ("When confronting a constitutional flaw in a statute, we try to limit the solution to the problem."); *see also U.S. v. Shields*, 522 F. Supp. 2d 317, 331–32 (D. Mass. 2007) (declining to provide facial relief and enjoining only unconstitutional applications of criminal statute).<sup>39</sup>

#### **CONCLUSION**

For the reasons set forth above, this Court should grant Plaintiffs' cross-motion for summary judgment on all counts in the Complaint, and deny Defendant's motion for summary judgment.

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Respectfully submitted,

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<sup>&</sup>lt;sup>39</sup> As in *Ayotte*, Plaintiffs have sought any relief "the Court may deem just and proper." Compl. ¶ 108; *see Ayotte*, 546 US. at 331.

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