IN THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA AND THE COMMISSIONER OF THE DEPARTMENT OF HEALTH AND SOCIAL SERVICES, Appellants, v. PLANNED PARENTHOOD OF THE GREAT NORTHWEST, Appellee.	)	Supreme Court No. S-16123 Trial Court Case No. 3AN-14-04711 CI

APPEAL FROM THE SUPERIOR COURT,
THIRD JUDICIAL DISTRICT,
THE HONORABLE JOHN SUDDOCK, PRESIDING

REPLY BRIEF OF APPELLANTS STATE OF ALASKA AND THE COMMISSIONER OF DHSS

JAHNA LINDEMUTH
ATTORNEY GENERAL

Margaret Paton Walsh (ABA # 0411074)
Assistant Attorneys General
1031 West Fourth Avenue, Suite 200
Anchorage, AK 99501
(907) 269-5100

Filed in the Supreme Court
of the State of Alaska
on August 31, 2016

MARILYN MAY, CLERK
Appellate Courts

By: Beth A Pechota
Deputy Clerk

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

ALASKA STATUTES

ALASKA REGULATIONS

AUTHORITIES PRINCIPALLY RELIED UPON

Alaska Law

Alaska Constitution, Article I, § 1

This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

AS 47.07.010. Purpose

It is declared by the legislature as a matter of public concern that the needy persons of this state who are eligible for medical care at public expense under this chapter should seek only uniform and high quality care that is appropriate to their condition and cost-effective to the state and receive that care, regardless of race, age, national origin, or economic standing. It is equally a matter of public concern that providers of services under this chapter should operate honestly, responsibly, and in accordance with applicable laws and regulations in order to maintain the integrity and fiscal viability of the state's medical assistance program, and that those who do not operate in this manner should be held accountable for their conduct. It is vital that the department administer this chapter in a manner that promotes effective, long-term cost containment of the state's medical assistance expenditures while providing medical care to recipients. Accordingly, this chapter authorizes the department to apply for participation in the national medical assistance program as provided for under 42 U.S.C. 1396--1396p (Title XIX, Social Security Act).

AS 47.07.068. Payment for abortions

(a) The department may not pay for abortion services under this chapter unless the abortion services are for a medically necessary abortion or the pregnancy was the result of rape or incest. Payment may not be made for an elective abortion.

(b) In this section,

(1) "abortion" has the meaning given in AS 18.16.090;

(2) "elective abortion" means an abortion that is not a medically necessary abortion;

(3) "medically necessary abortion" means that, in a physician's objective and reasonable professional judgment after considering medically relevant factors, an

abortion must be performed to avoid a threat of serious risk to the life or physical health of a woman from continuation of the woman's pregnancy;

(4) "serious risk to the life or physical health" includes, but is not limited to, a serious risk to the pregnant woman of

(A) death; or

(B) impairment of a major bodily function because of

(i) diabetes with acute metabolic derangement or severe end organ damage;

(ii) renal disease that requires dialysis treatment;

(iii) severe pre-eclampsia;

(iv) eclampsia;

(v) convulsions;

(vi) status epilepticus;

(vii) sickle cell anemia;

(viii) severe congenital or acquired heart disease, class IV;

(ix) pulmonary hypertension;

(x) malignancy if pregnancy would prevent or limit treatment;

(xi) kidney infection;

(xii) congestive heart failure;

(xiii) epilepsy;

(xiv) seizures;

(xv) coma;

(xvi) severe infection exacerbated by pregnancy;

(xvii) rupture of amniotic membranes;

(xviii) advanced cervical dilation of more than six centimeters at less than 22 weeks gestation;

(xix) cervical or cesarean section scar ectopic implantation;

(xx) any pregnancy not implanted in the uterine cavity;

(xxi) amniotic fluid embolus; or

(xxii) another physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy that places the woman in danger of death or major bodily impairment if an abortion is not performed.

7 AAC 105.100. Covered services.

The department will pay for a service only if that service

(1) is identified as a covered service in accordance with AS 47.07 and 7 AAC 105 - 7 AAC 160;

(2) is provided to an individual who is eligible for Medicaid under 7 AAC 100 on the date of service;

(3) is ordered or prescribed by a provider authorized to order or prescribe that service under applicable law;

(4) is provided by a person who is enrolled as a Medicaid provider or rendering provider under 7 AAC 105.210, or otherwise eligible to receive payment for services under 7 AAC 105 - 7 AAC 160;

(5) is medically necessary as determined by criteria established under 7 AAC 105 - 7 AAC 160 or by the standards of practice applicable to the provider;

(6) has received prior authorization from the department, if prior authorization is required under 7 AAC 105 - 7 AAC 160; and

(7) is not specifically excluded as a noncovered service under 7 AAC 105 - 7 AAC 160

7 AAC 105.110. Noncovered services.

Unless otherwise provided in 7 AAC 105 - 7 AAC 160, the department will not pay for a service that is

(1) not reasonably necessary for the diagnosis and treatment of an illness or injury, or for the correction of an organic system, as determined upon review by the department;

(2) not properly prescribed or medically necessary in accordance with criteria established under 7 AAC 105 - 7 AAC 160 or by standards of practice applicable to the prescribing provider;

(3) incurred for an evaluative or periodic checkup, examination, or immunization

(A) that is in connection with the participation, enrollment, attendance, or accomplishment of a program or activity unrelated to the recipient's physical or mental health or rehabilitation; or

(B) unless it is

(i) for a mammogram;

(ii) part of an EPSDT screening; or

(iii) required by the department for the purpose of determining eligibility for Medicaid;

(4) for or in connection with cosmetic therapy or plastic or cosmetic surgery, including rhinoplasty, nasal reconstruction, excision of keloids, augmentation mammoplasty, silicone or silastic implants, facioplasty, osteoplasty (prognathism and micronathism), dermabrasion, skin grafts, and lipectomy; however, coverage is available if required for the following corrective actions if performed within the normal course of treatment or otherwise beginning no later than one year after birth or the event that caused the need for the corrective action:

(A) repair of an injury;

(B) improvement of the functioning of a malformed body member;

(C) correction of a visible disfigurement that would materially affect the recipient's acceptance in society;

(5) a nonmedical charge imposed by a recipient's friend or relative;

(6) for a person who is in the custody of federal, state, or local law enforcement, including a juvenile in a detention or correctional facility, except as an inpatient in a medical institution;

(7) for an experimental or investigational service, including one

(A) that is in a phase I or II clinical trial as defined in the United States Department of Health and Human Services, National Institutes of Health, Glossary of Terms for Human Subjects Protection and Inclusion Issues, adopted by reference in 7 AAC 160.900;

(B) for which inadequate available clinical or preclinical data exists to provide a reasonable expectation that the proposed service is at least as safe and effective as one not under experiment or investigation;

(C) for which an expert has issued an opinion that additional information is needed to assess the safety or efficacy of the proposed service;

(D) for which final approval from the appropriate governmental body has not been granted for the specific indications for which the use of the service is being proposed; however, if a drug has received final approval from the United States Food and Drug Administration (FDA) for any indication, final approval is not required for the specific indication for which use is being proposed if

(i) the prescription or order was issued by a licensed health care provider within the scope of the provider's license;

(ii) prior authorization was obtained from the department if required under 7 AAC 105 - 7 AAC 160; or

(iii) the condition being treated with the drug is not otherwise excluded as a use of the drug; or

(E) whose use is not in accordance with customary standards of medical practice;

(8) for missed appointments; however, the provider may charge the recipient;

(9) for interpreter services;

(10) for infertility services;

(11) for impotence therapy and services;

(12) for treatment, therapy, surgery, or other procedures related to gender reassignment;

(13) for sterilization for recipients under 21 years of age and hysterectomies performed solely for sterilization purposes;

(14) for nonsurgical weight reduction or maintenance treatment programs and products;

(15) for nonmedical fitness maintenance centers and services;

(16) for educational services or supplies that are separately identifiable in

(A) the United States Department of Health and Human Services, Centers for Medicare and Medicaid Services' (CMS) Healthcare Common Procedure Coding System (HCPCS), adopted by reference in 7 AAC 160.900; or

(B) Alternative Link's ABC Coding Manual for Integrative Healthcare, adopted by reference in 7 AAC 160.900;

(17) an alternative therapy or other service including acupuncture, homeopathic or naturopathic remedy, or Ayurvedic medicine;

(18) an outpatient drug for which payment under the United States Department of Health and Human Services, Centers for Medicare and Medicaid Services' drug rebate program established in 42 U.S.C. 1396r-8 is not available;

(19) for which the recipient does not meet the eligibility requirements for that service under 7 AAC 100; or

(20) after the recipient's date of death.

7 AAC 110.280. Nutrition services for pregnant women.

(a) The department will pay for outpatient nutrition services provided to a recipient who is

(1) pregnant;

(2) consistent with the criteria in (b) of this section, determined to be at high risk nutritionally by

(A) a physician, an advanced nurse practitioner, or a physician assistant who may order those services within the scope of the practitioner's license or certification; or

(B) a licensed dietitian or nutritionist employed by a hospital or the state's Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) under 42 U.S.C. 1786.

(b) A pregnant recipient is at high risk nutritionally if the recipient

(1) has a chronic or metabolic disease;

(2) has a disease or condition that requires a prescribed therapeutic diet;

(3) was underweight before conception;

(4) has inadequate or excessive weight gain during pregnancy;

(5) has a history of substance abuse;

(6) has a history of low birth-weight infants;

(7) has multiple fetuses;

(8) has anemia;

(9) has intrauterine growth retardation; or

(10) is less than 16 years of age.

(c) The department will pay for the following nutrition services provided to a pregnant woman who meets the requirements of (a) and (b) of this section:

(1) one initial assessment in a calendar year;

(2) up to 12 hours of services in a calendar year for counseling and follow-up care after the initial assessment;

(3) more than 12 hours of service in a calendar year if those hours are

(A) medically justified and prescribed by a physician, an advanced nurse practitioner, or a physician assistant who may order those services within the scope of the practitioner's license; and

(B) given prior authorization by the department.

ARGUMENT

This appeal presents the question of whether the Alaska Constitution permits the State's Medicaid program to fund only those abortions that are necessary to protect a woman's health, or whether the State must pay for every abortion sought by a Medicaid-eligible woman, whatever her reason for terminating her pregnancy. The superior court held that the State may not constitutionally impose a standard for when an abortion is medically necessary, which (as the court acknowledged) mandates state funding for all abortions for Medicaid-eligible women.

The Alaska Constitution does not require this. The Court's precedents recognize that some women choose to terminate their pregnancies for reasons that are social or economic rather than health-related. Nothing in Alaska's equal protection clause requires the State to subsidize non-medically necessary abortions for Medicaid-eligible women simply because it provides them with medically-necessary healthcare. Nor does this Court's jurisprudence require the Legislature to draw a perfect line to distinguish between elective and medically-necessary abortions. Instead, to defeat Planned Parenthood's facial challenge, the State need only establish that the law has a "plainly legitimate sweep."[1] If the State's line fails in any specific circumstance, an as-applied challenge to

---

[1] *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 268 (Alaska 2004) ("[P]laintiffs seeking facial invalidation of a law must establish that the law does not have a 'plainly legitimate sweep.'")

the denial of reimbursement offers an adequate remedy because the issue would be reimbursement for medical treatment already provided.[2]

I. The superior court's interpretation of the statute ignores the plain language of the law and defies the rules of statutory construction.

The first step in analyzing the constitutionality of a statute is to determine what the statute means.[3] Although the statute at issue here—AS 47.07.068—authorizes funding for an abortion when a woman faces a "threat of a serious risk to [her] life or physical health" from pregnancy, Planned Parenthood asserts that this language covers abortions only when a woman's life or health is *already* at serious risk because she *already* has one of the enumerated conditions identified in the statute. [Ae. Br. 40] Planned Parenthood claims that any other reading would "essentially mean that all pregnant women would be eligible for coverage, because all women are at risk for developing conditions such as preeclampsia during pregnancy." [Ae. Br. 40] But this binary reading of the statute—either almost no abortions are covered or all of them are—is extreme and unsupported by the text. The State's interpretation provides a reasonable middle ground that recognizes that "some women—particularly those who suffer from pre-existing health problems—face significant risks if they cannot obtain abortions,"[4] and provides reimbursement for

---

[2] The superior court suggested that such a challenge would have to be brought by the patient, but that is incorrect. Providers, not patients, request reimbursement and contest DHSS decisions about whether treatment meets Medicaid's coverage requirements.

[3] Tellingly, Planned Parenthood first undertakes its constitutional analysis by assuming the superior court's tortured interpretation of the statute is correct and buries its attempt to justify that interpretation towards the back of its brief.

[4] *State, Dep't of Health & Social Servs. v. Planned Parenthood of Alaska, Inc.* (*Planned Parenthood 2001*), 28 P.3d 904, 907 (Alaska 2001).

any woman who faces an elevated risk to her health as a result of pregnancy—that is, a risk greater than the baseline risks of pregnancy.

Planned Parenthood contends that the State's explanation of the phrase "threat of a serious risk" renders superfluous the statute's "meticulously crafted list of conditions." [Ae. Br. 41] But that is not so. The list serves to illuminate the concept of "serious risk" by providing examples of the very serious complications that can develop during pregnancy, and that purpose is not negated by giving meaning to the word "threat" in the prefatory language. Ironically, Planned Parenthood relies on the "cardinal rule of construction presuming that 'every word, sentence, or provision of a statute . . . ha[s] some purpose, force, and effect," [Ae. Br. 41] while at the same time arguing that this Court cannot reasonably give any meaning to the word "threat."

In adopting Planned Parenthood's interpretation of the law, the superior court also has erased the word "threat" from the statutory definition of medically necessary abortion, finding that the statute would not cover an abortion for a woman with pre-existing kidney disease that might deteriorate during pregnancy "because the health detriment did not arise from 'renal disease that requires dialysis.'" [Exc. 107] Further, the superior court imposes this strained, implausible reading on the law even though it makes the statute unconstitutional. This turns the rules of statutory construction inside out.[5]

---

[5] *State, Dept. of Revenue v. Andrade*, 23 P.3d 58, 71 (Alaska 2001) (recognizing "the well-established rule of statutory construction that courts should if possible construe statutes so as to avoid the danger of unconstitutionality." (quoting *Kimoktoak v. State*, 584 P.2d 25, 31 (Alaska 1978)); *see also, Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 192 (Alaska 2007) ("Our precedent clearly establishes that 'courts should if possible construe statutes so as to avoid the danger of unconstitutionality.'")

Instead, the most reasonable reading of the phrase "threat of a serious risk" requires that a woman face some greater-than-normal danger of a serious complication from her pregnancy. This interpretation both gives meaning to all parts of the statute and avoids unnecessary invalidation of a statute.

To defend the superior court's departure from this Court's clear guidance as to statutory construction, Planned Parenthood emphasizes the same selective legislative history that the superior court relied on. But the cited testimony—Dr. Thorp's explanation of why he chose the medical conditions included in the list of serious pregnancy complications—tells this Court nothing about what the Legislature intended by the crucial prefatory phrase "threat of a serious risk to the life or physical health" of the pregnant woman. Nor does it make sense for Planned Parenthood to argue that legislators' and aides' statements that they intended the law to comply with the mandate of *Planned Parenthood 2001* should be dismissed as attempts "to manipulate the legislative record in anticipation of litigation" [Ae. Br. 45] in order to justify a harsh and unconstitutional interpretation of the statute that the State itself rejects. And the superior court's assertion that "[t]here is no indication in the legislative history that 'a threat of a serious risk' means anything less than 'a serious risk,'" [Exc. 109] simply ignores the Legislature's plainly stated purpose to draw a line between elective and medically necessary abortions.[6] Because that purpose is reflected in the State's reading of the statute, this Court should decline to force an unnatural and unconstitutional interpretation on the language of AS 47.07.067.

---

6 *See* Appellant's Opening Brief at 27-28.

II. Properly interpreted, AS 47.07.067 does not violate equal protection.

In arguing that the statute violates equal protection, Planned Parenthood addresses the statute as the superior court interpreted it and makes little attempt to argue that the State's interpretation also violates equal protection. But, interpreted correctly, the law draws a reasonable line between elective and medically necessary abortions, a line that bears a fair and substantial relationship to the purpose of the Medicaid program.

A. Alaska Statute 47.07.067 does not deny physicians the discretion that they are free to exercise in prescribing other treatments.

The heart of Planned Parenthood's equal protection claim is the assertion that "[f]or abortion, and only abortion, the Funding Restrictions prohibit physicians from using their discretion to determine medical necessity; the opposite is true for other types of medical care." [Ae. Br. 18, *see also* Ae. Br. 27 n. 42] But this statement is plainly untrue. For example, Medicaid covers nutrition services for pregnant women if they meet specified criteria.[7] The relevant regulation lists ten factors that would make a pregnant woman eligible for nutrition services; it includes no catch-all provision; and it does not refer to the discretion of the physician, dietitian or nutritionist.[8] Instead, nutrition services are medically necessary when—and only when—enumerated objective circumstances exist. And the State defers to physician discretion even less for the variety of medical

---

7 7 AAC 110.280.

8 7 AAC 110.280(b).

services that require prior authorization, which Medicaid will fund only if a provider's determination of medical necessity is approved before services are provided.[9]

In contrast, AS 47.07.067 refers to "a physician's objective and reasonable professional *judgment* after considering medically relevant factors" that a woman faces a "threat of a serious risk to [her] life or physical health."[10] Judgment implies discretion. And the statute's specification that a physician's judgment should be "objective and reasonable" and should consider "medically relevant factors" does not undermine discretion; deference to a physician's discretion obviously assumes that medical recommendations are based on these factors, under any circumstances.

Planned Parenthood's emphasis on discretion is thus a distraction from the real issue—whether the statute's definition of medical necessity "has a plainly legitimate sweep." As interpreted by the superior court, it plainly does not. But neither Planned Parenthood nor the superior court may render the statute unconstitutional by ignoring the statutory language that saves it from this fate. And when a party obtains an injunction preventing implementation of a statute or regulation, it should not be permitted to impose an extreme and unconstitutional interpretation of that law on an agency offering an alternative, plausible, and constitutional interpretation.

---

9 *See, e.g.*, 7 AAC 110.153 (prior authorization required for orthodontic services); 7 AAC 140.320 (prior authorization for extended post-delivery hospitalization).

10 AS 47.07.067(b)(3) (emphasis added).

B. Alaska Statute 47.07.067 reasonably excludes mental health conditions because abortion is not a treatment for mental illness and Medicaid does not provide medical coverage to relieve distress.

Planned Parenthood also argues that the exclusion of mental health conditions from the definition of medical necessity for abortion makes the statute constitutionally infirm. [Ae. Br. 3, 9-10 n.15, 43] But the Legislature's decision to exclude all but the most severe mental illness is justified because neither empirical evidence nor any group of medical professionals supports abortion as a treatment for mental illness. [*See* At. Br. 50-51] Medicaid expressly does not cover any treatment that is "not reasonably necessary for the diagnosis and treatment of an illness or injury, or for the correction of an organic system."[11] Covering abortion as a treatment for mental illness would violate rather than comply with this Court's instruction that Medicaid cover all eligible persons equally.

Moreover, this Court has recognized—in a different context—that "mental injuries are more difficult to verify because the patient's description of his or her condition is often the sole basis for a physician's diagnosis. Consequently, the difficulty in proving the existence of such an injury makes mental injury claims more susceptible to fraud and abuse."[12] Here, the superior noted that there is no "recognized articulable standard to distinguish psychiatrically significant mental distress from normal sadness" and that "the determination is made experientially by a treater." [Exc. 94] As a result, as Planned Parenthood's physicians' practice undisputedly established, every abortion can be justified as medically necessary under the rubric of treating mental distress. By definition,

---

11 7 AAC 105.110(1).

12 *Williams v. State, Dep't of Revenue*, 895 P.2d 99, 103 (Alaska 1995).

an unwanted pregnancy will cause some level of distress and anxiety. If any degree of mental distress is sufficient to make an abortion medically necessary—even one sought to allow a woman to complete her college education, or to avoid a career interruption or future interaction with a partner—then all abortions will be deemed medically necessary, contrary to this Court's recognition that some abortions are elective. The Legislature thus could reasonably determine that covering mental illness would thwart the purpose of the legislation.

III. The superior court's expansive reading of *Planned Parenthood 2001* was incorrect and will have unintended consequences.

In striking down AS 47.07.067's definition of medical necessity for abortion, the superior court went much further than necessary. Not only did it find the statute to be unconstitutional, it also concluded that the Alaska Constitution does not permit the State to distinguish between medically necessary and elective abortions for purposes of Medicaid reimbursement. [Exc. 129-30] In so doing, the court recognized that its ruling, "if upheld, means as a practical matter than virtually all indigent Alaskan women seeking abortions will receive state Medicaid funding." [Exc. 129-30] In effect, the superior court ruled that the Alaska Constitution requires state funding for abortion regardless of the reason.

Planned Parenthood defends this position without acknowledging it as clearly as the superior court did. After all, if the superior court correctly interpreted the statute as only "a minimal tweak to the restrictive Hyde Amendment standard" [Exc. 118], the law clearly fails under any standard of review based on this Court's holding in

Planned Parenthood 2001.[13] Perhaps recognizing the fundamentally flawed nature of the superior court's statutory analysis, Planned Parenthood asks this Court to apply strict scrutiny on the ground that the lack of state subsidy "would deter and/or prevent women from accessing abortion . . . [and] therefore infringe upon the fundamental right to abortion." [Ae. Br. 26]

But if any attempt to limit Medicaid funding for abortion is subject to strict scrutiny in an equal protection context because abortion is a fundamental right under Alaska's privacy clause,[14] then the Court's promise that state-funded health care may be limited on the basis of neutral criteria like medical necessity is an empty one.[15] Despite the broad language found in certain paragraphs of *Planned Parenthood 2001*, this Court's jurisprudence does not compel this result. And even if it did, the Court should disavow the holding that funding restrictions that "affect" constitutional privacy rights are subject

---

13 *Planned Parenthood 2001*, 28 P.3d at 911 (" Under the regulation, the State grants needed health care to some Medicaid-eligible Alaskans, but denies it to others, based on criteria entirely unrelated to the Medicaid program's purpose of granting uniform and high quality medical care to all needy persons of this state. Thus, even if 7 AAC 43.140 did not affect constitutional privacy rights and we applied our most deferential standard of review, the regulation still could not withstand equal protection challenge.")

14 *Valley Hosp. Ass'n v. Mat-Su Coalition for Choice*, 948 P.2d 963, 968 (Alaska 1997).

15 *See Planned Parenthood 2001*, 28 P.3d at 910 ("DHSS is constitutionally bound to apply neutral criteria in allocating health care benefits, even if considerations of expense, medical feasibility, *or the necessity of particular services* otherwise limit the health care it provides to poor Alaskans.") (emphasis added).

to strict scrutiny unless it is willing to create a dramatic new constitutional right to state-funded health care that goes well beyond abortion.[16]

A. Laws providing State subsidies create an economic interest and should be reviewed under a rational basis standard, even when the State is subsidizing the exercise of a fundamental right.

This case is about Medicaid reimbursement for health care services—that is, the availability of government benefits. This Court has held that "[e]conomic interests receive only minimal protection under equal protection analysis."[17] Consequently it has generally applied rational basis review to classifications affecting the entitlement to government benefits.[18] Indeed, in *Pfeifer v. State, Department of Health & Social Services, Division of Public Assistance*, this Court applied rational basis review to a classification affecting eligibility for Medicaid benefits.[19]

Against this established rule, Planned Parenthood and the superior court rely on language in *Planned Parenthood 2001* that suggests that this Court will apply strict, not rational basis, scrutiny to Medicaid reimbursement regulations because they "affect[]"

---

16 Moreover, if the Court holds that strict scrutiny applies to limits on abortion funding in the equal protection context because those limits "affect" fundamental rights, this opens the door to applying strict scrutiny to those limits in a privacy context too—which means that it would be unconstitutional to place limits on abortion subsidies even if there were no allegedly unequal treatment. In other words, even if Medicaid were eliminated entirely, under this framework the State would still be obligated to pay for abortions.

17 *L.D.G., Inc. v. Brown*, 211 P.3d 1110, 1132 (Alaska 2009).

18 *See, e.g., Sonneman v. Knight*, 790 P.2d 702, 705 (Alaska 1990) (unemployment benefits); *Williams*, 895 P.2d 99, 104 (Alaska 1995) (workers' compensation benefits).

19 260 P.3d 1072, 1083 (Alaska 2011).

fundamental rights."[20] But this interpretation of *Planned Parenthood 2001* is not required, because the outcome of that case did not depend on this expansive application of strict scrutiny. To the contrary, the *Planned Parenthood 2001* court expressly stated that the denial of state funding for women whose pregnancy threatened their health violated equal protection even under rational basis scrutiny.[21] As a result, the Court's strict scrutiny analysis in *Planned Parenthood 2001* is properly understood as dicta[22]and is not controlling.[23] Moreover, just months later, in another abortion case involving a challenge to the 1997 Parental Consent Act, this Court once again returned to the traditional formulation of the equal protection standard, which applies strict scrutiny only when government action "*directly infringes* a fundamental right."[24]

Although Planned Parenthood dismisses this different formulation as "mere semantics," it provides a principled basis to distinguish between situations in which government action affirmatively interferes with a fundamental right—by regulating the exercise of the right—and situations in which the government does not intervene to remove obstacles to the exercise of the right—such as a patient's private financial situation. If the Court fails to recognize that distinction through its standard of scrutiny, fundamental rights will be transformed into *fundamental rights to state subsidy.*

---

20 *Planned Parenthood 2001*, 28 P.3d at 909.

21 *Id.* at 912.

22 *Scheele v. City of Anchorage*, 385 P.2d 582, 583 (Alaska 1963).

23 *Joseph v. State*, 26 P.3d 459, 468-69 (Alaska 2001) ("Dictum is not holding.")

24 *State v. Planned Parenthood*, 35 P.3d 30, 42 (Alaska 2001)(emphasis added).

Planned Parenthood argues that this "slippery slope argument" need not concern the Court because other types of medical care have not "been deemed a fundamental right like abortion," [Ae. Br. 28, n.49] but that is not so. In *Huffman v. State*, this Court held that "controlling one's medical treatment falls into the same category of personal physical autonomy" as making one's "own reproductive choices" and is a fundamental right.[25] If state action limiting subsidies for abortion infringes on a woman's fundamental right to reproductive choice, then limiting any Medicaid coverage would similarly infringe on indigent Alaskans' ability to "control [their] own medical treatment."[26] And if the Constitution requires that such an action be subjected to strict scrutiny, then the State would have difficulty limiting any healthcare coverage provided under the Medicaid program.

Nor may Planned Parenthood simply dismiss this danger on the ground that "no slippery slope has materialized since the Court's decision in 2001." [Ae. Br. 28, n. 49] *Planned Parenthood 2001* expressly contemplated that the State could attempt to allocate health care benefits based on "neutral criteria" like "considerations of expense, medical feasibility, or the necessity of particular services."[27] But the superior court's decision found that any such attempt would violate the Constitution. [Exc. 129-30] Applying strict scrutiny to invalidate a regulation attempting to allocate health care benefits based on

---

25 *Huffman v. State*, 204 P.3d 339, 346 (Alaska 2009).

26 *Id.*

27 *Planned Parenthood 2001*, 28 P.3d at 910.

medical necessity substantially alters the landscape, with unknown and unpredictable consequences.

No Alaska precedent compels this result. This Court has not—and should not now—hold that the State is constitutionally prohibited from placing limits on subsidies for indigent citizens' exercise of their fundamental right to control their medical treatment. Instead, the Court should adhere to its formulation of the standard for strict scrutiny in an equal protection case that requires that state action "directly infringe" on a fundamental right; and it should clarify that declining to subsidize the exercise of a fundamental right does not directly infringe on that right.

B. Planned Parenthood's definition of medical necessity is inconsistent with *Planned Parenthood 2001*.

In *Planned Parenthood 2001*, the Court described the case as concerning "the State's denial of public assistance to eligible women *whose health is in danger*."[28] The Court held that "[o]nce the State undertakes to fund medically necessary services for poor Alaskans, it may not selectively exclude from that program women who medically require abortions."[29] Despite this Court's focus on the equal protection requirement that Medicaid-eligible women receive all medically-necessary treatment, the superior court concluded that *Planned Parenthood 2001* does not permit *any* standard that would prohibit state funding for any abortion. [Exc. 129-30] The superior court's ruling endorsed Planned Parenthood's practice of finding an abortion to be medically necessary any time a patient wishes to terminate her pregnancy. [Exc. 130]

---

28 *Id.* at 906 (emphasis added).

29 *Id.*

But a standard that finds abortion medically necessary whenever a patient wants one is no standard at all. And this Court should reject the superior court's conclusion that *Planned Parenthood 2001*'s repeated references to dangers to women's health are nothing more than window-dressing to disguise the true import of the Court's holding. Under *Planned Parenthood 2001*, the State must pay for medically necessary abortions, but not elective ones.

Because the undisputed evidence is that Judge Tan's 2001 definition of medical necessity—under which every abortion is found medically necessary—effectively eliminates the distinction recognized by this Court, it creates a de facto right to a state-funded abortion for Medicaid eligible women regardless of their reason for terminating their pregnancy. The Alaska Constitution does not require this and the State should be permitted to enact a definition of medical necessity for abortion.

CONCLUSION

Based on the foregoing, this Court should reverse the superior court and allow the State to limit Medicaid funding to medically-necessary abortions as defined by AS 47.07.067.

DATED August 22, 2016.

JAHNA LINDEMUTH
ATTORNEY GENERAL

Margaret Paton Walsh (ABA # 0411074)
Assistant Attorney General
1031 West Fourth Avenue, Suite 200
Anchorage, AK 99501
(907) 269-5100