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MEDICAID AND THE FUNDAMENTAL RIGHT TO REPRODUCTIVE CHOICE: ALASKA SUPREME COURT HOLDS RESTRICTIONS ON MEDICAID FUNDING FOR ABORTIONS UNCONSTITUTIONAL

STATE V. PLANNED PARENTHOOD OF THE GREAT NW., 436 P.3D 984 (ALASKA 2019).

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I. INTRODUCTION

On June 24, 2022, the United States Supreme Court overturned long-standing precedent establishing a federal constitutional right to reproductive choice, giving the decision of whether to protect such a right entirely to the states and leaving the country's abortion rights landscape in flux.[1] As a result, state constitutional interpretations of the right to

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1. *See* Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228, 2242 (2022) ("We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision[.]").

reproductive choice are exceedingly significant in determining abortion rights throughout the country. Even prior to the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization*, state governments consistently attempted to burden the right to reproductive choice in a variety of ways, and state courts were frequently called upon to determine whether such attempts were valid under state constitutional laws. Such was the case in *State v. Planned Parenthood of the Great Northwest*.[2]

In *State v. Planned Parenthood of the Great Northwest*, the Supreme Court of Alaska considered whether a statute and regulation that restricted Medicaid funding for abortions violated Alaska's equal protection clause.[3] This Comment will first discuss the factual and procedural history of this case, including a brief look at the history of the right to reproductive choice in the United States and how it relates to Medicaid funding. Then, this Comment will address the court's extensive examination of both the statute and regulation and the court's three-part equal protection analysis of the statute's and regulation's constitutionality under Alaska's equal protection clause. Last, this Comment will conclude not only that the court came to the correct decision in holding both the statute and regulation unconstitutional, but also that this case serves as an example to other states of the proper basis for the equitable and constitutional Medicaid funding of abortions.

II. STATEMENT OF THE CASE

Medicaid is a federal program that provides health insurance to low-income individuals throughout the country.[4] As long as a state complies with federal rules and standards, it is authorized to decide the additional healthcare benefits or limits it will offer or impose.[5] The Alaska Medicaid program, administered by the Department of Health and Social Services ("DHSS"), pays for medical services deemed "'medically necessary . . . by' statute, regulation, 'or by the standards of practice applicable to the provider.'"[6] Usually, once requested, the DHSS will give Medicaid reimbursement to doctors who provide services to Medicaid eligible individuals.[7] Doctors in Alaska can use this method for abortion

2. 436 P.3d 984 (Alaska 2019).
3. *Id.* at 988.
4. *Id.* at 988–89.
5. *Id.* at 989.
6. *Id.* (quoting ALASKA ADMIN. CODE tit. 7, § 105.100(5) (2019)).
7. *Id.*

reimbursement as long as they submit "additional documentation of the need for the treatment" with their payment requests.[8]

In 1998, however, the DHSS limited Alaska's Medicaid funding of abortions with a regulation consistent with the Federal Hyde Amendment.[9] The Hyde Amendment allowed the use of federal funds for abortions only where "the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest."[10] In effect, the regulation called for a stricter and more specific standard for abortion funding than the Alaska Medicaid's original "medically necessary" standard.[11]

In 2001, the Alaska Supreme Court affirmed the superior court's invalidation of this 1998 regulation.[12] Based on Alaska's equal protection clause, the court held that the departure from the "medically necessary" standard was discriminatory and in violation of Alaska's Constitution.[13] Specifically, the court explained that "'a woman who carries her pregnancy to term and a woman who terminates her pregnancy exercise the same fundamental right to reproductive choice' and that 'Alaska's equal protection clause does not permit governmental discrimination against either woman.'"[14] Applying strict scrutiny, the court found no compelling state interest that would justify the regulation and it was struck down.[15] The court reinstated the standard of "medical necessity" according to either the Alaska Medicaid regulations or "the standards of practice applicable to the provider."[16]

In 2013, however, the DHSS again attempted to limit what sort of abortions qualify for Medicaid funding by enacting a new regulation requiring more detailed certification from doctors.[17] In order for doctors to receive funding for abortions, the regulation required them to certify either that an abortion met the requirements set forth in the Hyde Amendment, or, that in the doctor's "professional medical judgment[,] the abortion procedure was medically necessary to avoid a threat of serious risk to the physical health of the woman from continuation of her

8. *Id.*
9. *Id.*
10. *Id.* (citing Harris v. McRae, 448 U.S. 297, 302 (1980)).
11. *Id.* at 989–90.
12. *Id.*; *see also* State v. Planned Parenthood of Alaska, Inc., 28 P.3d 904, 906 (Alaska 2001).
13. *Planned Parenthood of the Great Nw.*, 436 P.3d at 989–90.
14. *Id.* (quoting *Planned Parenthood of Alaska, Inc.*, 28 P.3d at 913).
15. *Id.*
16. *Id.*
17. *Id.* at 990.

pregnancy due to the impairment of a major bodily function including but not limited to one of' [twenty-one] listed conditions."[18]

Soon after the DHSS enacted the regulation, Planned Parenthood brought suit, challenging the regulation's constitutionality under Alaska's equal protection clause.[19] Less than a year later, while the original suit was still pending, the Alaska State legislature enacted a statute that "codified a definition of 'medically necessary' similar to that" in the regulation.[20] Under the statute, Medicaid funding for abortions was limited only to those that were "medically necessary" or "the pregnancy was the result of rape or incest."[21] The statute further defined the meaning of a "medically necessary" abortion as "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."[22]

In response, Planned Parenthood amended its complaint to include the statute.[23] Planned Parenthood brought a facial challenge, arguing that the regulation and statute discriminated disproportionately against women who choose to have abortions versus those who do not.[24] Finding that the statute and regulation were discriminatory against Medicaid eligible individuals seeking abortions, the Superior Court of Alaska struck down both the statute and regulation, permanently enjoining their enforcement.[25] Specifically, the court held that, because the "statute's definition of 'medically necessary' covered 'only abortions required to avoid health detriments attributable to the enumerated conditions, either fully realized or demonstrably imminent[,]'" the legislature intended to create a "high-risk, high-hazard standard that would preclude funding for most Medicaid abortions."[26] The State appealed.[27]

18. *Id.* (quoting ALASKA ADMIN. CODE tit. 7, § 160.900(d)(30) (2019)).
19. *Id.*
20. *Id.* at 991 (citing ALASKA STAT. § 47.07.068 (2019)).
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 990.
26. *Id.* at 991.
27. *Id.*

III. BACKGROUND

In *State v. Planned Parenthood of the Great Northwest*, the Supreme Court of Alaska was again called upon to determine whether restrictions imposed by the State on Medicaid funding of abortions violated the equal protection clause of the Alaska State Constitution.[28] The part of the Alaska State Constitution containing the equal protection clause reads:

> 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.[29]

Like the Equal Protection Clause in the Fourteenth Amendment to the United States Constitution, the Alaska equal protection clause "limits the government from discriminating, positively or negatively, against different groups without good reason."[30] The equal protection clause is often invoked where an individual's rights are being infringed by state actions.

When some sort of state action is challenged as unconstitutional under the equal protection clause, the Alaska state courts have their own method of constitutional analysis. Tending to be a bit "more flexible" than the federal courts, Alaska courts employ a typical three-tiered equal protection analysis, but under a "sliding scale" approach.[31] First, the court determines the nature of the constitutional interest at stake in order to decide the appropriate standard of review, with strict scrutiny being at the higher end of the scale.[32] Second, the court examines the purpose of the challenged act, requiring it to be merely legitimate at the lower end of the scale, but to serve a compelling state interest at the higher end of the scale.[33] Third, the courts evaluate whether the means employed by the State are merely substantially related to its goals, or

28. *Id.* at 988; *see also* State v. Planned Parenthood of Alaska, Inc., 28 P.3d 904 (Alaska 2001).

29. ALASKA CONST. art.1, § 1 (2020); *see also* GERALD A. MCBEATH, THE ALASKA STATE CONSTITUTION 32 (G. Alan Tarr ed., 1997).

30. MCBEATH, *supra* note 29, at 32. For background information on and landmark cases regarding Alaska's equal protection clause, see generally *id.* at 26–32.

31. *Id.* at 33–34; *see also Planned Parenthood of the Great Nw.*, 436 P.3d at 992 ("[W]e use a 'sliding-scale approach' to interpret the language.").

32. MCBEATH, *supra* note 29, at 34.

33. *Id.*

much closer.[34] This was the approach taken by the Supreme Court of Alaska in *State v. Planned Parenthood of the Great Northwest*.[35]

A. The Right to Reproductive Choice in Alaska

At the federal level, the fundamental right to reproductive choice was overturned by *Dobbs v. Jackson Women's Health Organization* on June 24, 2022.[36] Prior to *Dobbs*, the standing precedent was established by two landmark cases: *Roe v. Wade*[37] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[38] These two cases established that a woman's right to choose to get an abortion was a fundamental privacy right protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[39] As such, it required application of the strictest scrutiny when infringed.[40]

Consistent with *Roe* and *Casey*, Alaska recognizes the right to reproductive choice, or, in other words, the right to abortion, as fundamental under its state constitution.[41] Providing even stronger protections than those previously established by the United States Constitution,[42] the Alaska Constitution's due process right to privacy and guarantee of equal protection encompass this fundamental right.[43] Thus, equal protection challenges to measures restricting the right to reproductive choice are examined at the higher end of the "sliding-scale" in Alaska, and therefore can only be justified by a compelling state interest.[44]

34. *Id.*

35. *Planned Parenthood of the Great Nw.*, 436 P.3d at 992, 1000–05.

36. Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228, 2242 (2022).

37. 410 U.S. 113 (1973).

38. 505 U.S. 833 (1992).

39. *Roe*, 410 U.S. at 165–66 (holding that the right to terminate a pregnancy is rooted in the Due Process Clause of the Fourteenth Amendment); *Casey*, 505 U.S. at 846 (finding that the right to terminate a pregnancy derives from the Due Process Clause of the Fourteenth Amendment).

40. *Roe*, 410 U.S. at 155; *Casey*, 505 U.S. at 934.

41. *See, e.g.*, Valley Hosp. Ass'n, Inc. v. Mat-su Coal. for Choice, 948 P.2d 963, 968 (Alaska 1997) ("[T]he right to an abortion is the kind of fundamental right and privilege encompassed within the intention and spirit of Alaska's constitutional language."); *see also* State v. Planned Parenthood of Alaska, Inc., 28 P.3d 904, 909 (Alaska 2001).

42. ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 114 (2009) ("[S]tate judges in numerous cases have interpreted their state constitutional rights provisions to provide *more* protection than the national minimum standard guaranteed by the [F]ederal Constitution.").

43. *Building Protections for Reproductive Autonomy*, CTR. FOR REPROD. RTS., https://reproductiverights.org/state-constitutions-abortion-rights/ (last visited Sept. 13, 2022).

44. MCBEATH, *supra* note 29, at 34.

B. Medicaid Funding of Abortions

In 1976, Congress enacted the Hyde Amendment, which excludes abortions from the health care services provided to low-income women by the federal government through Medicaid except in cases of rape, incest, or if a pregnant woman's life is endangered by physical disorder, illness, or injury.[45]

While most states have adopted this federal standard, some created their own standards for abortion funding more similar to that required for general health services.[46] Alaska is currently only one of the sixteen states that allows for abortions to be funded according to its general Medicaid standard for all health services, which, as discussed, covers medical services deemed "'medically necessary as determined by' statute, regulation, 'or by the standards of practice applicable to the provider.'"[47] The Alaska legislature has, however, tried to restrict abortion funding with various statutes and regulations, as evidenced by the 2001 case and this case.[48]

In both instances, Planned Parenthood challenged the constitutionality of the acts, generally arguing that they discriminated against women who chose to get abortions by making it more difficult for them to meet the standard for Medicaid eligibility.[49] By discriminating against women who sought abortions, Planned Parenthood argued that the acts infringed upon the right to reproductive choice, and could only be justified under a standard of strict scrutiny, by a compelling state interest and means narrowly tailored to meet that interest.[50]

IV. THE COURT'S REASONING

Affirming the Alaska Superior Court's decision, the Supreme Court of Alaska in *State v. Planned Parenthood of the Great Northwest* applied strict scrutiny and held that the challenged statute and DHSS regulation

45. *See* Jaweer Brown, *It's Time to Go, Hyde Amendment*, ACLU (Sept. 29, 2016, 4:15 PM), https://www.aclu.org/blog/reproductive-freedom/abortion/its-time-go-hyde-amendment; *State Funding of Abortion Under Medicaid*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/state-funding-abortion-under-medicaid (last visited Sept. 13, 2022).

46. *See State Funding of Abortion Under Medicaid*, *supra* note 45.

47. *See id.*; State v. Planned Parenthood of the Great Nw., 436 P.3d 984, 989 (Alaska 2019) (quoting ALASKA ADMIN. CODE tit. 7, § 105.100(5) (2019)).

48. *See* State v. Planned Parenthood of Alaska, Inc., 28 P.3d 904, 906–07 (Alaska 2001); 436 P.3d at 990–91.

49. *See* 28 P.3d at 905–07; 436 P.3d at 990–91.

50. *See* 28 P.3d at 909; 436 P.3d at 1001–02.

were not narrowly tailored to meet the State's goal of preserving Medicaid funds, and therefore violated Alaska's equal protection clause.[51]

A. Majority

In a four to one opinion authored by Justice Carney,[52] the court addressed Planned Parenthood's constitutional challenge in two steps.[53] First, the court analyzed the challenged statute and regulation to interpret and determine their meanings.[54] Then, based on its interpretation of the statute and regulation, the court analyzed whether they were constitutional under Alaska's equal protection clause.[55] Though the court began with and focused primarily on the statute, it held that its "conclusions apply equally" to the regulation.[56]

1. Analysis of the Statute and Regulation

Planned Parenthood and the State had different interpretations of the statute's meaning and intent, but both argued that the statute unambiguously supported their respective side.[57] Planned Parenthood argued that the statute was very limiting, only allowing abortions when it is the "sole treatment available" to avoid death or impairment.[58] The State, however, argued that the statute contained a "broad and inclusive" definition of medical necessity, allowing doctors to use their "professional judgment" in order to provide funding for women "when one of 'a wide range of ailments and conditions' elevates the health risks pregnancy poses."[59]

To interpret the meaning of the statute, the court said it would "consider its language, its purpose, and its legislative history, in an attempt to 'give effect to the legislature's intent, with due regard for the meaning the statutory language conveys to others.'"[60] In doing so, the court examined the "plain meaning" of the statutory text and used a "'sliding-scale' approach to interpret the language."[61] Under that

51. 436 P.3d at 1004–05.
52. *Id.* at 987–88.
53. *Id.* at 992.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* at 992–93.
58. *Id.* at 992.
59. *Id.*
60. *Id.* (quoting Alyeska Pipeline Serv. Co. v. DeShong, 77 P.3d 1227, 1234 (Alaska 2003)).
61. *Id.*

approach, the clearer the language is, the greater the burden on the party asserting a contrary legislative intent.[62]

To determine whether the language of the statute was clear or ambiguous, the court began by looking directly to the text.[63] Section 47.07.068(a) of the Alaska Code read:

> (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 . . . .[64]

The rest of subsection (b)(4) included a list of twenty-one serious health conditions and a "catch-all" provision that additionally included "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."[65] Because the "threat of serious risk" standard in subsection (b)(3) was not exactly defined in the statute, the

62. *Id.* ("'[T]he plainer the statutory language is, the more convincing the evidence of contrary legislative purpose or intent must be.' When 'a statute's meaning appears clear and unambiguous, . . . the party asserting a different meaning bears a correspondingly heavy burden of demonstrating contrary legislative intent.'" (alterations in original) (footnote omitted) (quoting State v. Fyfe, 370 P.3d 1092, 1095 (Alaska 2016))).

63. *Id.* at 993.

64. ALASKA STAT. § 47.07.068 (2019).

65. *Id.*; *Planned Parenthood of the Great Nw.*, 436 P.3d at 993.

court concluded that the statute was, in fact, ambiguous.[66] Because of this ambiguity, the court explained that it was justified in applying its own interpretive aids and canons when analyzing the parties' arguments.[67]

The court first set out to interpret the list of conditions and "catch-all" provision in subsection (b)(4) of the statute.[68] According to the language of subsection (b)(4), "serious risk to the life or physical health" of a pregnant woman meant "a serious risk to the pregnant woman of . . . death[ ] or . . . impairment of a major bodily function because of" one of the twenty-one listed conditions.[69] Planned Parenthood argued that subsection (b)(4) was narrowly restrictive, requiring women who sought abortions to "presently suffer from one of the listed conditions and to be at risk of impairment of a major bodily function because of that condition" to qualify for Medicaid coverage.[70] The State, however, asserted that the list of conditions in subsection (b)(4) merely served to "illuminate the concept of 'serious risk' by providing examples of the very serious complications that can develop during pregnancy[,]" [71] and that the "catch-all" provision broadened the permissive scope of the statute.[72]

After looking closely at the exact language of subsection (b)(4), the court concluded that it was narrowly restrictive and that the "catch-all" provision did not "meaningfully expand the permissive scope of the statute."[73] The court first held that the phrase "impairment of a major bodily function" was restrictive because "a condition might have a permanent effect on physical health without being fairly characterized as causing 'impairment of a major bodily function.'"[74] The court then held that the twenty-one listed conditions further restricted and narrowed the possibility of Medicaid coverage because the statute's language required women to face more than just a "serious risk to her life or physical health," or "a serious risk of acquiring one of the conditions listed."[75] Rather, the statute's language required women "to face 'a serious risk of death or [of] impairment of a major bodily function' *caused by* one of those conditions."[76] The court noted that its interpretation was supported by

66. 436 P.3d at 993.

67. *Id.* This is where the court mentions the doctrine of constitutional avoidance at issue in the dissent. *Id.* at 992.

68. *Id.* at 993.

69. *Id.* at 993–94 (alterations in original).

70. *Id.* at 993.

71. *Id.*

72. *Id.* at 995.

73. *Id.* at 993–94.

74. *Id.*

75. *Id.* at 994.

76. *Id.* (alteration in original) (quoting ALASKA STAT. § 47.07.068 (b)(4)(B)(xxii) (2019)).

the statute's legislative history.[77] The court additionally held that the language of the "catch-all provision" after the list of twenty-one conditions still required "another physical disorder, physical injury, or physical illness" to be life-threatening and severe to qualify for Medicaid coverage, and therefore did not expand the narrow scope of the statute set out in subsection (b)(4).[78]

The court then turned to address the meaning of "threat of serious risk" in subsection (b)(3).[79] In subsection (b)(3), the statute defines a "medically necessary abortion" as one that, "in a physician's objective and reasonable professional judgment after considering medically relevant factors . . . 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."[80] While the statute clearly defined "serious risk to the life or physical health" in subsection (b)(4),[81] the court found that the statute did not necessarily define the meaning of "threat of serious risk."[82] The State argued that the words "threat" and "risk" actually lessened the severity of the statute because they "entail probabilities," meaning that a woman only has to face a *threat* of "serious risk," not just "serious risk."[83] Planned Parenthood argued, however, that the State's interpretation would render the statute "superfluous," because "all pregnant women face an elevated health risk."[84]

To resolve the dispute, the court looked to the definitions of "risk" and "threat," and to the text of the rest of the statute.[85] Agreeing with Planned Parenthood, the court held that the State's reading of the statute would, in fact, render the "limiting language" of subsection (b)(4) superfluous because it would provide coverage for abortions "even when there is a relatively low absolute risk of serious harm."[86] The court found that neither the statute itself nor the relevant legislative history supported the State's attenuated reading of the phrase.[87] Instead, the court interpreted "threat of serious risk" to mean "impending hazard consisting of a serious probability of death, or of impairment because of a listed harm."[88] In other words, for an abortion to be eligible for Medicaid

77. *Id.* at 994–95.
78. *Id.* at 995–96.
79. *Id.* at 996–97.
80. ALASKA STAT. § 47.07.068 (b)(3).
81. *See id.* § 47.07.068 (b)(4).
82. 436 P.3d at 996–97.
83. *Id.* at 996.
84. *Id.*
85. *Id.* at 996–97.
86. *Id.* at 997.
87. *Id.*
88. *Id.* at 998.

funding, the pregnant woman "must suffer a threat of serious risk of death or impairment of a major bodily function *caused by* one of the listed medical conditions."[89]

In regard to the statute, the court lastly addressed whether the statute's Medicaid coverage of abortions included situations where the woman suffers a mental health condition or "the fetus suffers from a fatal anomaly."[90] The court found, based on the text of the statute and legislative history, that the statute only covered "a very extreme mental health condition" such as "suicidal ideation where there was a risk of death," and that it did not cover situations where the "fetus suffers from a fatal anomaly."[91]

The court then briefly turned to the DHSS regulation and applied similar methods of interpretation.[92] The court listed three differences between the DHSS regulation and the statute but ultimately held that the "differences [were] not sufficiently less restrictive to meaningfully differentiate coverage under the statute and the regulation."[93] The first difference the court listed was regarding the list of medical conditions provided in the regulation.[94] The regulation provided Medicaid funding for an abortion if it "was medically necessary to avoid a threat of serious risk to the physical health of a woman from continuation of her pregnancy due to the impairment of a major bodily function including but not limited to one of the following" conditions.[95] So, under the regulation, every listed condition was considered, *in itself*, an "impairment of a major bodily function."[96] Under the statute, by contrast, merely suffering from a listed condition was not sufficient *unless* there was also a threat of serious risk of "impairment of a major bodily function."[97] Like with the statute, however, the court found that the risk posed to a pregnant woman under the regulation still must be greater than the normal health risk associated with pregnancy, or else the regulation would be superfluous.[98]

The second difference the court notes is the regulation's "catch-all" provision.[99] The regulation similarly covers "another physical disorder,

89. *Id.* at 998–99.
90. *Id.* at 997–98.
91. *Id.*
92. *Id.* at 998–99.
93. *Id.* at 999.
94. *Id.*; *see also* ALASKA ADMIN. CODE tit. 7, § 160.900(d)(30) (2013).
95. 436 P.3d at 999 (citing tit. 7, § 160.900(d)(30)).
96. *Id.*
97. *Id.*; *see also* ALASKA STAT. § 47.07.068 (2019).
98. 436 P.3d at 999.
99. *Id.*

physical injury, [or] physical illness, including a physical condition arising from the pregnancy," but does not include the additional limiting language requiring severity included in the statute's "catch-all" provision.[100] The court held that the regulation, therefore, was "somewhat less restrictive than the statute."[101] Third, the court noted a slight difference in the regulation's coverage of mental health conditions.[102] While the statute limits its coverage of mental health conditions to a risk of suicide, the regulation seems to stretch coverage a bit further to a risk of "imminent and serious self-harm."[103]

Overall, the court held that the slightly less restrictive differences in the regulation were not sufficient enough to "meaningfully differentiate coverage under the statute and the regulation."[104] Having fully interpreted the meanings of the statute and regulation, the court next turned to its equal protection analysis in order to determine whether they violated Alaska's Constitution.[105]

2. Equal Protection Analysis

Before employing its three-part equal protection analysis, the court first addressed the nature of the comparison classes involved.[106] The court concluded that, because the statute and regulation specifically targeted the Medicaid eligibility of pregnant women *who choose to get abortions*, "[t]he . . . appropriate comparison classes are . . . Medicaid-eligible women who seek funding for abortion and Medicaid-eligible women who seek funding for natal and prenatal care."[107] In other words, the court compared the treatment of women who choose to get abortions versus women who choose to carry their pregnancies to full term. The court then implemented its three-part equal protection analysis to determine whether the differential treatment of these two classes of women imposed by the statute and regulation was constitutional.[108]

As the first step in its analysis, the court set out to determine the applicable standard of scrutiny.[109] The court noted that "it has long been established that a law burdening the fundamental right of reproductive

100. *Id.*; *see also* ALASKA ADMIN. CODE tit. 7, § 160.900(d)(30)).
101. 436 P.3d at 999.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 1000–01.
107. *Id.*
108. *Id.* at 1001–05.
109. *Id.* at 1001–02.

choice demands strict scrutiny."[110] Planned Parenthood asserted that strict scrutiny should apply on the premise that "by creating a unique, more onerous, and abortion-specific definition of medical necessity that departs from the physician-discretion standard applied to other Medicaid services,"[111] Alaska "selectively den[ied] a benefit to those who exercise a constitutional right."[112] Alaska argued that the statute did not "selectively deny a benefit" because it still funded abortions that met Medicaid's standard requirement that "the service is needed to protect the patient's health."[113]

The court concluded that strict scrutiny did, in fact, apply because the statute and regulation discriminated against pregnant women who choose to have abortions "in a manner that deter[red] the free exercise of that choice."[114] The court reasoned:

> Disparate restrictions on government funding for women based on their choice of either abortion or childbirth deter the exercise of a fundamental right because pregnant women in that position are locked in a binary dilemma: the rejection of one option inevitably entails the embrace of the other. Few other Medicaid treatments present this dilemma.[115]

Because the restrictions imposed by the statute and regulation made it more difficult for indigent pregnant women to receive Medicaid funding for abortions, they deterred those women from exercising their fundamental right to reproductive choice.[116]

Applying strict scrutiny, the court proceeded with the second step of its equal protection analysis, which was to determine whether there was a compelling state interest.[117] The State argued that it had an interest in limiting Medicaid funding to those services that are "medically necessary" in order to "ensur[e] the financial viability of the Medicaid program as a whole."[118] Though the court was not necessarily convinced that this interest was compelling, it moved forward with the analysis

110. *Id.* at 1001 (quoting Planned Parenthood of the Great Nw. v. State, 375 P.3d 1122, 1137–38 (Alaska 2016)); *see also* sources cited *supra* note 37–38.
111. 436 P.3d at 1001.
112. *Id.* (quoting State v. Planned Parenthood of Alaska, Inc., 28 P.3d 904, 908 (Alaska 2001)).
113. *Id.* at 1001–02.
114. *Id.* at 1002.
115. *Id.* at 1003.
116. *Id.*
117. *Id.* at 1003–04.
118. *Id.* at 1003.

under the assumption that it was compelling, noting that it would not change the outcome of the case either way.[119]

Last, the court set out to determine whether the means employed by the State were narrowly tailored to meet its compelling interest, or, in other words, if the statute and regulation were narrowly tailored to meet the State's goal of preserving Medicaid funds.[120] The court was ultimately not convinced that the statute and regulation served their alleged financial purpose, as they were not only counterproductive, but definitely under-inclusive to serve that goal.[121] The court noted that abortions actually cost the State significantly less than hospital deliveries, but the statute and regulation "divert" Medicaid-eligible women toward childbirth.[122] Further, there are other elective procedures available to pregnant women aside from abortions, but "the statute and regulation single out only one . . . for restrictive funding requirements."[123]

At the conclusion of its equal protection analysis, the court ultimately held that the "statute and regulation [were] not narrowly tailored to meet the ends of preserving Medicaid funds, and the State [had] not shown that the differences between the affected classes justif[ied] the discriminatory treatment imposed by" the statute and regulation.[124] The court affirmed the decision of the superior court striking down the statute and regulation as unconstitutional.[125]

B. Dissent

Chief Justice Stowers wrote the only dissent, primarily focusing on the doctrine of constitutional avoidance.[126] According to the doctrine, if there are "two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid," it is the court's "plain duty" to adopt the interpretation that is valid and saves the statute.[127] Chief Justice Stowers argued that, even though the State offered an interpretation of the statute that would "save" it, or maintain its constitutionality, the majority chose to construe the statute's language as unconstitutional.[128] Applying the doctrine of constitutional avoidance,

119. *Id.* at 1003–04.
120. *Id.* at 1004.
121. *Id.* at 1004–05.
122. *Id.*
123. *Id.* at 1005.
124. *Id.*
125. *Id.*
126. *Id.* (Stowers, C.J., dissenting).
127. *Id.* (quoting Estate of Kim *ex rel.* Alexander v. Coxe, 295 P.3d 380, 388 (Alaska 2013)).
128. *Id.* at 1007–08.

Chief Justice Stowers concluded that he would adopt the State's broad interpretations of the statute and regulation in order to avoid any constitutional issues.[129] In particular, Chief Justice Stowers said that he would have held that the "catch-all" provision did, in fact, broaden the permissive scope of the statute.[130]

Chief Justice Stowers also made a separation of powers argument, claiming, per state policy, that it should have been up to the legislature to determine what is "'medically necessary' for [the] purpose[] of expenditure of limited state dollars" and that the court "fail[ed] to give respect to the legislature's proper role but instead substitute[d] its judgment for that of the legislature."[131] Further, Chief Justice Stowers felt that Alaska's equal protection clause did not require the State to pay for "non-medically-necessary" abortions merely because it paid for "medically-necessary" healthcare.[132]

V. ANALYSIS AND IMPLICATIONS

In *State v. Planned Parenthood of the Great Northwest*, the Supreme Court of Alaska properly identified the enactment of section 47.07.068 of the Alaska Code, and title 7, section 160.900(d)(30) of the Alaska Administrative Code as an attack on the fundamental right of reproductive choice protected under the Alaska Constitution.[133] Recognizing that the statute and regulation were more restrictive on Medicaid-eligible women who choose to have abortions, the court correctly concluded that the statute and regulation were unconstitutional under Alaska's equal protection clause.[134] In striking down the statute and regulation, the court ensured that low-income women in Alaska would have equal access to Medicaid funding for abortions, and in doing so, also ensured that low-income women in Alaska would be able to exercise the state constitutional right to reproductive choice.[135]

Though lengthy and detailed, the court's careful analysis and interpretation of the statute and regulation correctly identified their restrictive natures.[136] Medicaid funding in Alaska pays for services that are "medically necessary" according to Alaska Medicaid regulations, or deemed necessary by "the standards of practice applicable to the

129. *Id.* at 1008.
130. *Id.*
131. *Id.* at 1009.
132. *Id.*
133. *Id.* at 1005 (majority opinion).
134. *Id.*
135. *See id.* at 1003.
136. *Id.* at 992–99.

provider."[137] The statute and regulation, however, imposed a separate definition of "medically necessary" on women seeking Medicaid coverage for abortions.[138] The State argued that the abortion-specific definition was "broad and inclusive."[139] But, as demonstrated by the court, the abortion-specific definition was clearly more strict than the original definition of "medically necessary" applicable to pregnant women seeking natal or prenatal care, and was therefore more restrictive on women seeking abortions.[140]

Writing the only dissent, Chief Justice Stowers's main concern was the fact that the court interpreted the statute and regulation at all.[141] Chief Justice Stowers argued that the doctrine of constitutional avoidance should have stopped the court from applying its own interpretive canons and that the court went "to great lengths in construing the statute and regulation to ensure that the conclusion of unconstitutionality is inevitable."[142] It was through those great lengths, however, that the court unveiled the superfluous nature of the State's interpretation of the statute.[143] The court held that the State's interpretation of the statute, which was that it provided Medicaid coverage for all women merely facing greater health risks than the baseline risks of pregnancy, actually rendered the clearly limiting language and narrow list of conditions superfluous.[144] The doctrine of constitutional avoidance directs the court to choose an unconstitutional interpretation only if it is valid,[145] and the court made clear that it would only apply the doctrine of constitutional avoidance if the unconstitutional interpretation in question was reasonable.[146] Therefore, in proving that the statute was superfluous under the State's interpretation,[147] the court was free to proceed without applying the doctrine of constitutional avoidance.

137. *Id.* at 989 (quoting ALASKA ADMIN. CODE tit. 7, § 105.100(5) (2019)).
138. *Id.* at 988.
139. *Id.* at 992.
140. *Id.* at 993–98.
141. *Id.* at 1007–09 (Stowers, C.J., dissenting).
142. *Id.* at 1007–08.
143. *Id.* at 996–97 (majority opinion).
144. *Id.* at 997.
145. *Id.* at 1005 (Stowers, C.J., dissenting) ("Under this tool, 'as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, [our] plain duty is to adopt that which will save the Act.'" (alteration in original)).
146. *Id.* at 992 (majority opinion) ("If an ambiguous text is susceptible to more than one reasonable interpretation, of which only one is constitutional, the doctrine of constitutional avoidance directs us to adopt the interpretation that saves the statute.").
147. *Id.* at 996–97.

Though Chief Justice Stowers would have avoided a constitutional analysis, as the doctrine of constitutional avoidance allows for unconstitutional acts to survive,[148] the majority diligently conducted its equal protection analysis both clearly and efficiently. The court properly employed strict scrutiny, recognizing that imposing more restrictive criteria on pregnant women seeking abortions versus pregnant women seeking natal and pre-natal care infringed upon a fundamental state right to reproductive choice.[149] Medicaid exists to assist low-income individuals in gaining access to healthcare. Making it more difficult to receive an abortion under Medicaid makes it much less possible for low-income women to afford abortions. More restrictive, abortion-specific Medicaid funding, therefore, makes it much more difficult for low-income women to exercise their fundamental rights to reproductive choice. [150]

Additionally, in searching for a compelling state interest, which is required under a standard of strict scrutiny, the court was understandably unconvinced.[151] The State argued that it was interested in preserving Medicaid to "ensur[e] the financial viability of the Medicaid program as a whole" because it was concerned that Medicaid had "been paying for non-medically necessary abortions."[152] Given that there was no evidence that Medicaid had been paying for non-medically necessary abortions, and no evidence regarding the "bill's fiscal impact," it is doubtful that the statute and regulation were "intended to resolve a fiscal problem."[153]

The State's argument, however, really began to fall apart in the third step of the court's equal protection analysis, which under strict scrutiny is to determine whether the State's means are narrowly tailored to meet the State's interest. The State alleged that its interest in the statute and

148. *Id.* at 1000–05.
149. *Id.* at 1001–02.
150. In *Harris v. McRae*, 448 U.S. 297 (1980), Justice Brennan explained:

> 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. In the abstract, of course, this choice is hers alone, and the Court rightly observes that the Hyde Amendment "places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy." But the reality of the situation is that the Hyde Amendment has effectively removed this choice from the indigent woman's hands. By funding all of the expenses associated with childbirth and none of the expenses incurred in terminating pregnancy, the Government literally makes an offer that the indigent woman cannot afford to refuse.

Harris, 448 U.S. at 333–34 (Brennan, J., dissenting) (citation omitted).
151. 436 P.3d at 1004.
152. *Id.* at 1003–04
153. *Id.* at 1004.

regulation was to preserve Medicaid funding to only those services that are "medically necessary."[154] By making it more difficult to receive funding for an abortion, however, it is reasonable to believe that the statute and regulation would "divert a significant number of Medicaid-eligible women toward childbirth."[155] Medical care associated with childbirth, however, is *significantly* more expensive than abortion services.[156] If the State really wanted to preserve Medicaid funds, it would not make it more difficult for women to receive a much less expensive procedure. The State, to limit women's fundamental right to reproductive choice, hid its true intentions under the guise of preserving Medicaid funds. For whatever reason, be it political, religious, or ideological, it seems that the State of Alaska sought to burden the exercise of the right to reproductive choice, particularly for low-income women, with the statute and regulation. Unphased by the convoluted and confusing language of the statute, the court properly concluded that the statute and regulation were not narrowly tailored to meet the State's goal in a way that would justify their discriminatory nature and struck down both as unconstitutional.[157]

The court's decision in *State v. Planned Parenthood of the Great Northwest* serves as a good example to all states that equitable abortion funding that does not limit a woman's right to reproductive choice based on financial status is of vital importance.[158] The court in this case recognized that *all* women, including low-income women, should have equal access to abortions, which, in many states, is unfortunately not a reality. Only seventeen states, including Alaska, have extended coverage beyond the strict federal standard, which restricts Medicaid funding only to cases of rape or incest, as well as when a pregnant woman's life is endangered by a physical disorder, illness, or injury.[159] This case serves as persuasive authority for future litigation regarding Medicaid coverage

154. *Id.* at 1003–04.

155. *Id.* at 1005.

156. *Id.* at 1004–05 ("Evidence at trial established that abortions range in cost from $650-$750 during the first trimester to $900-$1,000 during the second trimester. In contrast the superior court found that '[a] typical hospital delivery costs Medicaid approximately $12,000.'" (alteration in original)).

157. *Id.* at 1005.

158. For more discussion on the example made by this case, see *Court Strikes Down Discriminatory Anti-Abortion Law in Alaska*, PLANNED PARENTHOOD (Feb. 16, 2019, 4:11 PM), https://www.plannedparenthoodaction.org/planned-parenthood-alliance-advocates/press-releases/court-strikes-down-discriminatory-anti-abortion-law-in-alaska.

159. *See Public Funding for Abortion*, ACLU, https://www.aclu.org/issues/reproductive-freedom/abortion/public-funding-abortion (last visited Sept. 13, 2022); *see also State Funding of Abortion Under Medicaid*, *supra* note 45.

of abortions and generally supports the furtherance of reproductive rights for all women.

VI. CONCLUSION

In *State v. Planned Parenthood of the Great Northwest*, the Alaska Supreme Court held that a statute and regulation creating abortion-specific criteria for Medicaid funding was unconstitutional.[160] To come to this conclusion, the court first meticulously interpreted the statute and regulation to establish their meanings.[161] Then, the court employed a three-tiered equal protection analysis to determine whether the statute and regulation were constitutional.[162] Because the statute and regulation were discriminatory against women seeking abortions in a way that infringed upon their fundamental right to reproductive choice, the court chose strict scrutiny as its standard of review.[163] In concluding that the State's compelling interest was not narrowly tailored to fit the State's goal of preserving Medicaid funds in a way that justified the discriminatory treatment, the court struck down the statute and regulation as unconstitutional, providing a win for the women of Alaska.[164] This case reinforces the concept that a woman should not be limited in exercising her right of reproductive choice simply because she cannot afford to, and serves as an example to other states of the proper way to address restrictions on Medicaid funding of abortions.

160. 436 P.3d at 1005.
161. *Id.* at 992–99.
162. *Id.* at 1000–05.
163. *Id.* at 1000–03.
164. *Id.* at 1005.