



February 27, 2013

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The Honorable John Coghill, Chair
The Honorable Lesil McGuire, Vice-Chair
Senate Judiciary Committee
Alaska State Senate
State Capitol
Juneau, AK 99801

via email: Sen.John.Coghill@akleg.gov
Sen.Lesil.McGuire@akleg.gov

**Re: SB 49: Reproductive Health Funding
ACLU Review of Constitutional Issues**

Dear Chair Coghill and Vice-Chair McGuire:

Thank you for the opportunity to provide written testimony about Senate Bill 49, which strips public funds from an important area of women's health.

The American Civil Liberties Union of Alaska represents thousands of members and activists throughout Alaska who seek to preserve and expand the individual freedoms and civil liberties guaranteed by the United States and Alaska Constitutions. In that context, we write to advise you that this bill is unconstitutional or, at best, an academic nullity.

**SB 49 Cannot Narrow or Further Define the Current Constitutional
Right to Medicaid-Funded Medically Necessary Abortions**

The ability of all women in Alaska to make their own medical decisions, including reproductive ones, is a fundamental right guaranteed by the Alaska

Constitution.¹ “Reproductive rights are fundamental . . . [and] include the right to an abortion.”²

This fundamental right of reproductive choice is specifically protected by the “state constitutional guarantee of ‘equal rights, opportunities, and protection under the law,’”³ and Alaska may not “selectively exclude from [its Medicaid] program women who medically require abortions.”⁴ The requirement to publicly fund medically necessary abortions “affects the exercise of a constitutional right”⁵ and thus it may not be narrowed or otherwise altered through legislation.⁶

The contours of this right are clear, but even if, as the Sponsor Statement provides, “the term ‘medically necessary abortion’ has acquired a constitutional component of unknown scope,” this Bill may not delimit that right in any manner that narrows its original constitutional contours.⁷ At best, this Bill is a nullity that simply mirrors what the Supreme Court required in *State, Department of Health & Social Services*.

But, the Bill’s text and purpose belie this anodyne construction: it is narrower than the constitutional right announced by the Supreme Court and, aside from its separation of powers infirmity, it is substantively unconstitutional.

SB 49 Is Unconstitutional On Its Face

SB 49’s definition of “medically necessary abortion” is dramatically narrower than the Alaska Constitution’s. First, the Bill subjects “medically necessary abortions” to an after-the-fact, second-guessing scrutiny, linking it to “a physician’s objective and reasonable professional judgment after considering medically relevant factors[.]”

¹ *State, Dept. of Health & Soc. Services v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 913 (Alaska 2001).

² *Id.* at 907 (quoting *Valley Hosp. Ass’n, Inc. v. Mat-Su Coal. for Choice*, 948 P.2d 963, 969 (Alaska 1997)) (omission and alteration in *id.*).

³ *Id.* at 908 (quoting Alaska Const. art. I, § 1).

⁴ *Id.* at 906.

⁵ *Id.* at 909.

⁶ *Valley Hosp. Ass’n Inc.*, 948 P.2d at 972 (“However, we cannot defer to the legislature when infringement of a constitutional right results from legislative action.”); *Dickerson v. United States*, 530 U.S. 428, 437 (2000) (“But Congress may not legislatively supersede our decisions interpreting and applying the Constitution.”).

⁷ *Dickerson*, 530 U.S. at 437 (overturning legislation that sought to overrule the *Miranda v. Arizona*, 384 U.S. 436 (1966) decision, which “interpret[ed] and appl[ied] the Constitution.”). Emphasis of the Sponsor Statement’s quote omitted.

Second, and more worrisome, the Bill exclusively limits “medically necessary abortion” to “avoid[ing] a threat of serious risk to the life or physical health” of the pregnant woman. Subpart (b)(4)’s list does not save the Bill, because though it attempts to tie the Bill’s narrower scope to the Supreme Court’s examples of medically necessary abortions,⁸ SB 49’s touchstone is still just “life or physical health,” which impermissibly omits mental health from medical need. **This squarely and unconstitutionally contradicts the Supreme Court, which recognized that mental health, such as “bipolar disorders,” is a constitutionally protected and medically necessary basis for an abortion.**⁹ This omission makes SB 49 unconstitutional on its face.

SB 49’s Impetus Violates Equal Protection

SB 49 stands alone in the Alaska Medicaid scheme. “Medically necessary” is a common term, scattered throughout the Medicaid regulations. The State specifically lists “medically necessary” in the regulations for

- hospital stays,¹⁰
- eye care,¹¹
- emergency air or ground ambulances,¹²
- mental health treatment,¹³
- community behavioral health services providers,¹⁴
- enteral and oral nutritional products,¹⁵
- B-complex vitamins,¹⁶ and
- podiatry services¹⁷

and “medically necessary” is a blanket prerequisite for each and every Medicaid claim: “[t]he department will pay for a service only if that service . . . (5) is *medically necessary*[.]”¹⁸

⁸ *State, Dept. of Health & Soc. Services*, 28 P.3d at 907.

⁹ *Id.*

¹⁰ 7 Alaska Admin. Code § 140.325.

¹¹ 7 Alaska Admin. Code § 110.715(a)(1).

¹² 7 Alaska Admin. Code § 120.415(a).

¹³ 7 Alaska Admin. Code § 110.445(a)(1).

¹⁴ 7 Alaska Admin. Code § 135.230(a)(1).

¹⁵ 7 Alaska Admin. Code § 120.240.

¹⁶ 7 Alaska Admin. Code § 120.110(e)(6)(H).

¹⁷ 7 Alaska Admin. Code § 110.505(a).

¹⁸ 7 Alaska Admin. Code § 105.100 (emphasis added).

Yet, despite its ubiquity, “medically necessary” is not defined in the Alaska Statutes or the Administrative Code. And, given that Alaska administers a functional Medicaid program, “medically necessary” is not vague, unwieldy, or cumbersomely overbroad.

The explicit purpose of SB 49, as announced in the Sponsor Statement, is to “provide[] a neutral definition for a ‘medically necessary abortion,’” because there is insufficient “guidance as to how broadly the term ‘medically necessary abortion’ is to be construed.”

In a constitutional challenge of SB 49, the courts will note that “medically necessary” permeates the Medicaid regulations and that its lack of an exhaustive SB 49-like definition has not caused the State to lack “guidance” on how it “is to be construed.” Rather, courts will probably acknowledge that SB 49’s extensive definition is unique in Alaska law and will then likely conclude that this Bill is “based on criteria unrelated to the purposes of the public health care program,”¹⁹ namely, that it is “based solely on political disapproval of the medically necessary procedure.”²⁰

This Bill, which is not rooted in “neutral criteria” that have a “fair and substantial relation to the object of the legislation,”²¹ but is grounded instead in a political desire to reduce publicly funded abortions, violates equal protection.²²

Conclusion

We appreciate the opportunity to share our concerns about Senate Bill 49. We hope that our comments were helpful in identifying the Bill’s constitutional infirmities; because it violates the Equal Protection Clause and the separation of powers, we oppose it.

We further hope that this Committee will refrain from approving legislation that squarely violates the Alaska Constitution and would entangle the State in expensive, needless litigation.

¹⁹ *State, Dept. of Health & Soc. Services*, 28 P.3d at 915.

²⁰ *Id.* at 905.

²¹ *Id.* at 910–11.

²² *See id.* at 912 n.59 (noting by example that a “bare congressional desire to harm a politically unpopular group cannot constitute a legitimate government interest,” and that a “purpose to discriminate against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest” satisfy equal protection) (internal quotation omitted and alteration in original).

Please feel free to contact the undersigned should you have any questions or seek additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "J. A. Mittman", with a long horizontal flourish extending to the right.

Jeffrey Mittman
Executive Director
ACLU of Alaska

cc: Senator Fred Dyson, Sen.Fred.Dyson@akleg.gov
Senator Donald Olson, Sen.Donald.Olson@akleg.gov
Senator Bill Wielechowski, Sen.Bill.Wielechowski@akleg.gov