March 29, 2013

AMERICAN CIVIL LIBERTIES UNION OF ALASKA
1057 W. Fireweed, Suite 207
Anchorage, AK 99503
(907) 258-0044
(907) 258-0288 (fax)
WWW.AKCLU.ORG

The Honorable Wes Keller, Chair
The Honorable Bob Lynn, Vice-Chair
House Judiciary Committee
Alaska State House of Representatives
State Capitol
Juneau, AK 99801
via email: Rep.Wes.Keller@akleg.gov
Rep.Bob.Lynn@akleg.gov

Re: House Bill 173 – Defining "Medically Necessary"
ACLU Review of Constitutional Issues

Chair Keller, Vice-Chair Lynn:

Thank you for the opportunity to provide written testimony about House Bill 173, which seeks to impermissibly strip 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.

HB 173 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. 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.

HB 173 Is Unconstitutional On Its Face

HB 173's definition of "medically necessary abortion" is dramatically narrower than that guaranteed by the Alaska Constitution. 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[.]"

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

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[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."), (emphasis added).

[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.

(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] HB 173'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 HB 173 unconstitutional on its face.

HB 173's Impetus Violates Equal Protection

HB 173 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 services[17]

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]

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.

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[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).

The explicit purpose of HB 173, 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 HB 173, the courts will note that "medically necessary" permeates the Medicaid regulations and that its lack of an exhaustive HB 173-like definition has not caused the State to lack "guidance" on how it "is to be construed." Rather, courts will likely acknowledge that HB 173'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 is ***not*** rooted in "neutral criteria" that have a "fair and substantial relation to the object of the legislation,"[21] but instead, is grounded in a political desire to reduce publicly funded abortions, and thus violates equal protection.[22]

Conclusion

We appreciate the opportunity to share our concerns about House Bill 173. We hope that our comments will be helpful to the Committee in identifying the Bill's constitutional infirmities, specifically that is violates the Equal Protection Clause and the separation of powers. For these reasons the ACLU opposes this Bill, and urges the Committee to vote Do Not Pass.

We trust that the Judiciary Committee will not approve legislation that squarely violates the Alaska Constitution, and would also entangle the State in expensive, needless litigation.

Please feel free to contact the undersigned should you require any additional information. Again, we are happy to reply to any questions that Members of the Committee may have. Thank you again for the opportunity to share our concerns.

Sincerely,

Jeffrey Mittman
Executive Director
ACLU of Alaska

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[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).

cc: Representative Neal Foster, Rep.Neal.Foster@akleg.gov
Representative Gabrielle LeDoux, Rep.Gabrielle.LeDoux@akleg.gov
Representative Charisse Millett, Rep.Charisse.Millett@akleg.gov
Representative Lance Pruitt, Rep.Lance.Pruitt@akleg.gov
Representative Max Gruenberg, Rep.Max.Gruenberg@akleg.gov