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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

PLANNED PARENTHOOD OF THE GREAT NORTHWEST, Plaintiff, v. WILLIAM J. STREUR, COMMISSIONER OF THE DEPARTMENT OF HEALTH AND SOCIAL SERVICES, AND STATE OF ALASKA DEPARTMENT OF HEALTH AND SOCIAL SERVICES, Defendants.	Case No. 3AN-14-471CI

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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INTRODUCTION

In 2001, the Alaska Supreme Court held that the Alaska Legislature's attempt to eliminate Medicaid coverage for medically necessary abortions for low-income women who choose to terminate a pregnancy while maintaining coverage for low-income women who choose to continue a pregnancy violates the equal protection clause of the Alaska Constitution.[1] The Department of Health and Social Services has adopted a regulation (hereinafter "the Regulation") intended to accomplish an end run around the Supreme Court's decision. The Regulation creates a narrow and restrictive definition of "medically necessary" that will prevent most low-income women in Alaska who are seeking abortion services from receiving Medicaid coverage. Absent an order from this court, the Regulation will take effect on February 2, 2014.[2]

The Regulation, which erects barriers to Medicaid coverage for abortions that do not exist for other services, violates the equal protection clause of the Alaska Constitution. It does so by imposing stringent criteria for medical assistance for women who choose to terminate a pregnancy, while women who choose to continue a pregnancy face no such obstacles. More specifically, through its discriminatory allocation of medical assistance, the State will force women to delay seeking care while they raise

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1 *State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 906 (Alaska 2001).

2 7 AAC 160.900(d)(30).

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funds to pay for the procedure, risking their health further by doing so, or to carry their pregnancies to term despite threats to their health.

Absent relief from this court, low-income women who depend on the Alaska Medicaid program for their health care will be irreparably harmed. The Regulation will preclude coverage for many Medicaid-eligible women who seek a medically necessary abortion. By definition, these are low-income women and, without Medicaid coverage, many of them will be prevented altogether from obtaining an abortion, because they lack the funds to pay for the procedure and – for those women who do not live near an abortion provider – the considerable costs of transportation, lodging, and other related expenses. Other women will be delayed while they attempt to raise the funds, which can push women later into pregnancy, increasing both the medical risks associated with the procedure and the procedure's cost. The Regulation will be particularly detrimental to Alaska's most vulnerable women, including women who live in rural areas far from most health care providers.

Accordingly, Planned Parenthood seeks a temporary restraining order and a preliminary injunction to prevent immediate and irreparable harm to the health and rights of Alaska women seeking medically necessary abortions. Issuance of the injunction will harm neither the State nor the public interest. Instead, it will preserve the status quo by allowing women to make the fundamental choice of whether or not to continue a pregnancy free from government discrimination.

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STATEMENT OF THE CASE

I. REGULATORY FRAMEWORK

Alaska provides general medical assistance for the poor through its Medicaid Program, a cooperative federal-state funded program.[3] Federal law does not permit federal Medicaid dollars to be used for abortions except when a woman's life is at risk or the pregnancy is the result of rape or incest.[4] However, by order of the Alaska Supreme Court in *Planned Parenthood of Alaska*, Alaska is required to use State funds to pay for abortions for eligible women.

While current State law does not explicitly define "medically necessary" or specify standards for providing medical assistance, it does give general guidance. The statute authorizing the Department to adopt rules "establishing standards for determining the amount of assistance that an eligible person is entitled to receive" specifies that "the amount of the assistance is sufficient when . . . it provides the individual with a reasonable subsistence compatible with health and well-being."[5] The "Purpose" section of Alaska's Medicaid chapter "declare[s] . . . 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

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[3] AS 47.07.010 *et seq.*

[4] *See, e.g.*, Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 (1976); Pub. L. No. 106-554, §§ 508-509, 114 Stat. 2763 (2000).

[5] AS 47.05.010(9).

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should seek only uniform and high quality care that is appropriate to their condition and cost-effective to the state . . . ."[6] And, to "assure that medical and remedial care and services are of high quality," the Alaska Medicaid State Plan promises that:

> [t]he entire range of medical services which are included in the plan will be available as determined necessary by qualified physicians and other practitioners . . . . The decision to provide medical care will always be made by a qualified physician or other practitioner.[7]

In addition, regulations adopted by the Department define "medically necessary" services as "determined by criteria established under 7 AAC 105 - 160 or by the standards of practice applicable to the provider."[8]

II. ABORTION SERVICES IN ALASKA

Abortions are available in Alaska almost exclusively at Planned Parenthood's health centers located in Anchorage, Fairbanks, and Juneau, and they are available at those sites only until 13 weeks following the first day of the woman's last menstrual period ("lmp").[9] A first trimester abortion at Planned Parenthood of Alaska costs

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6 AS 47.07.010 (emphasis added).

7 State of Alaska, State Plan Under Title XIX of the Social Security Act: Medical Assistance, at Attach. 3.1-C, *available at* http://dhss.alaska.gov/Commissioner/Pages/MedicaidStatePlan/stateplan_sec_3.aspx (last visited Jan. 24, 2014) [hereinafter "Alaska Medicaid State Plan"].

8 7 AAC 105.100(5). The provisions of 7 AAC 105 - 160 do not, however, further define medically necessary.

9 Declaration of Anita Owings ("Owings Decl."), ¶ 9. Attached as Exhibit 1.

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between $650 and $900; after 13 weeks, the cost ranges from $865 to $1,340.[10] Planned Parenthood provides abortions to women from Alaska who are up to 18 weeks lmp at Planned Parenthood's health center in Seattle, Washington.[11]

In addition to the cost of the procedure, many women must travel to access abortion services, including by airplane, and must stay overnight at least one night.[12] Many of these women are low- income and eligible for Medicaid.[13] If Medicaid does not cover the travel costs, traveling to a health center is prohibitively expensive.[14] This is especially so if a woman must travel to Seattle, where airfare costs at least $600 for flights without advance booking.[15] In addition, abortions after 14 weeks are two-day procedures, meaning that women must secure lodging in the Seattle area for at least 2-3 nights.[16]

It is inconsistent with good medical practice and the standard of care for physicians, including those who provide medically necessary services to Medicaid

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10 *Id.* ¶¶ 7, 9.

11 *Id.* ¶ 9.

12 *Id.* ¶ 8.

13 *Id. See also* Affidavit of Jan Whitefield, M.D., Ph.D. ("Whitefield Aff."), ¶ 11. Attached as Exhibit 2.

14 Owings Decl. ¶ 8; Whitefield Aff. ¶¶ 10-11.

15 Owings Decl. ¶ 9.

16 *Id.*

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patients, to withhold treatment for health conditions that do not rise to the level of a "serious risk to the physical health of the women . . . due to the impairment of a major bodily function."[17] Rather, physicians provide all treatment that is, in the physician's professional opinion, "medically necessary."[18] This includes treatment for the patient's mental, as well as physical health.[19] Likewise, good medical practice dictates that a physician should not delay treatment until the condition becomes so advanced that it poses a serious risk of impairment to a major bodily function.[20] If a physician determines that an abortion is medically necessary, and the patient wishes to terminate the pregnancy, the physician should perform the abortion at the earliest opportunity.[21] For example, for a diabetic patient seeking a medically necessary abortion to end the risk to her health, the physician should not wait until "severe end organ damage" occurred to perform the abortion procedure.[22]

III. LITIGATION HISTORY OF MEDICAID COVERAGE OF ABORTION

This is not the State of Alaska's first attempt to restrict low-income women's access to medically necessary abortions. Up to 1998, the State covered abortion services

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17 Whitefield Aff. ¶¶ 20-21.

18 *Id.*

19 *Id.* ¶ 25.

20 *Id.* ¶ 23.

21 *Id.* ¶¶ 23-24.

22 *Id.* ¶ 23.

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through its General Medical Relief (GRM) program. In 1998, the Alaska Legislature defunded the State's GRM Program. In its place, the Legislature created a new program called Chronic or Acute Medical Assistance (CAMA) that provided the same medical services formerly provided under the GRM, with the sole exception of abortions which it restricted to those situations where the life of the mother was at risk or the pregnancy resulted from rape or incest.

Planned Parenthood of Alaska challenged the State's decision to deny Medicaid coverage for medically necessary abortions as a violation of women's constitutional rights to equal protection and privacy.[23] The superior court granted summary judgment to Planned Parenthood on the ground that the refusal to fund medically necessary abortions on par with all other medically necessary services covered by Medicaid violates the Alaska Constitution's express privacy clause.[24] When the State failed to resume Medicaid coverage for abortions, the court issued a new order, making clear that the State must cover medically necessary abortions as defined in its Order: "For purpose of this Order, the terms medically necessary abortions or therapeutic abortions are used interchangeably to refer to those abortions . . . necessary . . . *to ameliorate a condition harmful to the women's physical or psychological health, as determined by the treating*

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[23] *Planned Parenthood of Alaska v. Perdue*, No. 3AN-98-7004 CI.

[24] *Planned Parenthood of Alaska v. Perdue,* No. 3AN-98-7004 CI, 1999 WL 34793393 (Alaska Super. Ct. March 16, 1999).

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physician performing the abortions services in his or her professional judgment."[25] The Supreme Court affirmed the superior court's decision, holding the State's refusal to fund medically necessary abortions violates the Alaska Constitution's equal protection clause.[26]

In 2012, the Department adopted a regulation that requires physicians who seek reimbursement from Medicaid for providing abortion services to sign and submit a "Certificate to Request Funds for Abortion" attesting that (1) the "pregnancy was the result of an act of rape or incest, or the abortion procedure on the above patient was performed due to physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would place the woman in danger of death unless an abortion was performed"; or (2) "the abortion procedure was medically necessary."[27] The purported justification for the 2012 Certificate was to enable the Department to know whether the abortion met the criteria for federal funding.[28]

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25 *Planned Parenthood of Alaska v. Perdue*, No. 3AN-98-07004 CI, Order at ¶ 11 (Alaska Super. Ct. Sept. 18, 2000) (emphasis added). Attached as Exhibit 3.

26 *Planned Parenthood of Alaska*, 28 P.3d at 905-06.

27 7 AAC 145.695, adopting the "2012 Certificate" (attached as Exhibit 4).

28 Planned Parenthood has been complying with the Department's requirement to use that form. Nevertheless, Planned Parenthood challenges in this case the Department's use of any form that requires the disclosure of the patient's name and identifies the

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IV. THE CHALLENGED REGULATION

On August 16, 2013, the Department proposed a new regulation that radically changes the definition of a medically necessary abortion. For a woman's abortion to be covered by Medicaid, the physician must now certify that an abortion is "medically necessary to avoid a threat of serious risk to the physical health of the woman from continuation of her pregnancy due to the impairment of a major bodily function." The physician must then check a box to explain the condition the woman has that meets this standard by choosing from a list of 21 enumerated conditions, or indicating that she either has "another physical disorder, physical injury, physical illness, including a physical condition arising from the pregnancy" or "a psychiatric disorder that places the woman in imminent danger of medical impairment of a major bodily function if an abortion is not performed."

The 21 enumerated physical conditions listed on the 2014 Certificate are: "diabetes with acute metabolic derangement or severe end organ damage, renal disease that requires dialysis treatment, severe preeclampsia, eclampsia, convulsions, status epilepticus, sickle cell anemia, severe congenital or acquired heart disease class IV, pulmonary hypertension, malignancy where pregnancy would prevent or limit treatment, severe kidney infection, congestive heart failure, epilepsy, seizures, coma, severe

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woman as having had an abortion. This violates a women's right to privacy. However, Planned Parenthood does not at this time seek injunctive relief on this issue.

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infection exacerbated by the pregnancy, rupture of amniotic membranes, advanced cervical dilation of more than six centimeters at less than 22 weeks gestation, cervical or cesarean section scar ectopic implantation, pregnancy not implanted in the uterine cavity, [and] amniotic fluid embolus." Having one of these conditions alone is insufficient unless, as explained above, the abortion is "medically necessary to avoid a threat of serious risk to the physical health of the woman from continuation of her pregnancy due to the impairment of a major bodily function."

No other provider in Alaska is required to submit a similar certificate attesting to the fact that a service was medically necessary as a condition for his or her patient to receive Medicaid coverage. Medicaid-eligible women who choose to continue a pregnancy, as well as individuals seeking coverage for other physician services, do not have to meet the criteria in the Regulation to receive Medicaid coverage for medically necessary services.

In promulgating the Regulation, the Department accepted written comments, but did not hold a public hearing on the proposed regulatory change. As a result, citizens did not have an opportunity to orally express their views or to hear the Department's reasons for selecting the new criteria for abortion services. Except for minor changes to the format, the 2014 Certificate is unchanged from the Department's initial proposal. The Certificate states that its purpose is to "permit the program to determine the proper source of funds" – meaning whether the abortion must be paid for only by the State, or whether

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it falls into the limited circumstances for which federal funding is allowed. The Department has provided no other official explanation of its reasons for creating new criteria for Medicaid coverage of abortion services, or why these particular criteria are necessary and appropriate. The Department did not issue a decisional document or any other type of written findings explaining why it perceived a need for this significant change, or why it rejected all public comments calling for substantive amendments to the 2014 Certificate.

ARGUMENT

"The purpose of a preliminary injunction is to maintain the status quo."[29] The showing needed to support the issuance of a preliminary injunction varies depending on the nature of the threatened injury.[30] Where, as here, a plaintiff has demonstrated irreparable harm and the opposing party can be protected from harm, the injunction should issue if the plaintiff "raise[s] serious and substantial questions going to the merits of the case."[31] If the threat of harm that the plaintiff faces is "less than irreparable or if the opposing party cannot be adequately protected," then a plaintiff seeking a preliminary injunction must instead meet "the heightened standard of a clear showing of probable

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29 *Martin v. Coastal Villages Fund*, 156 P.3d 1121, 1126 (Alaska 2007).

30 *City of Kenai v. Friends of Recreation Ctr., Inc.*, 129 P.3d 452, 456 (Alaska 2006).

31 *Id.* (quoting *State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 978 (Alaska 2005) (internal quotation marks and citations omitted)).

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success on the merits."[32] The required showing of harm is the same whether the relief sought is a temporary restraining order or a preliminary injunction.[33] Here, because Planned Parenthood's Medicaid patients will suffer irreparable harm, the Defendants will not be harmed by maintenance of the status quo, and Planned Parenthood has established "serious and substantial questions" going to the merits of its claims, injunctive relief should issue. Moreover, as shown below, Planned Parenthood also satisfies the heightened standard by showing probable success on the merits of its claims.

I. ABSENT IMMEDIATE INJUNCTIVE RELIEF, PLANNED PARENTHOOD'S PATIENTS WILL FACE IRREPARABLE HARM.

The elimination of coverage for medically necessary abortions, except in the very limited circumstances covered under the Regulation's criteria, will cause immediate and irreparable harm to the health of Alaska women who depend on Medicaid. Because the Regulation precludes all but the most severely ill women from qualifying for coverage, many otherwise eligible women will not be covered by Medicaid for abortion services.[34] A pregnancy can affect a woman's health and well-being in a number of ways that, while significant, do not rise to the level of the serious health conditions described in the Regulation. Women with a variety of physical conditions, including hypertension and

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32 *Id.* (quoting *State, Div. of Elections v. Metcalfe,* 110 P.3d 976, 978 (Alaska 2005) (internal quotation marks and citations omitted)).

33 *See State v. United Cook Inlet Drift Ass'n*, 815 P.2d 378, 378-79 (Alaska 1991).

34 Whitefield Aff. ¶ 26.

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diabetes, and psychological conditions such as depression and bipolar disorder, who currently would be eligible for coverage of a medically necessary abortion, will likely be denied coverage under the Regulation.[35] The Alaska Supreme Court has highlighted the "particularly brutal dilemma" faced by Medicaid-eligible women with mental health issues if they are denied abortion coverage: "Without funding for medically necessary abortions, pregnant women with these conditions must choose either to seriously endanger their own health by forgoing medication, or to ensure their own safety but endanger the developing fetus by continuing medication."[36]

Many of Planned Parenthood's patients in Alaska have existing medical issues and health issues related to their pregnancy that do not meet the Regulation's narrow criteria. Some have an underlying medical issue that does not rise to the level of severity defined in the Regulation but that may be incompatible with a healthy pregnancy.[37] Likewise, some patients may develop complications during pregnancy that pose a risk to their health, but not to the extreme degree required by the Regulation in order to be eligible for coverage.[38]

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35 Whitefield Aff. ¶¶ 15-17, 20.

36 *Planned Parenthood of Alaska,* 28 P.3d at 907.

37 Whitefield Aff. ¶ 15.

38 *Id.* ¶ 16.

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The result of this denial of coverage will be that many women will not be able to obtain a medically necessary abortion. In 2012, Medicaid paid for more than 500 abortions for Alaskan Medicaid-eligible women.[39] Medicaid-eligible women are, by definition, low-income, and, due to financial and logistical burdens, the Regulation will result in many women being prevented altogether from having an abortion.[40] These women will be forced to carry to term, causing both pre-existing and pregnancy-induced conditions to worsen.[41] Other women may forgo paying for rent, utilities, and even food for themselves and their families to scrape together the necessary funds.[42] The women who may be able to raise the money themselves will invariably have abortions at a later stage in pregnancy, increasing both the costs and the risks of the procedure.[43] If the Regulation is not enjoined, Alaskan Medicaid-eligible women will face varied yet equally devastating harms that are neither reversible nor compensable.

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39 State of Alaska, Induced Termination of Pregnancy Statistics 2012, *available at* http://dhss.alaska.gov/dph/VitalStats/Documents/PDFs/itop/2012_ITOP_Report.pdf.

40 Whitefield Aff. ¶¶ 26-27.

41 *Id.* at ¶¶ 20, 27.

42 *Id.* at ¶ 11; Owings Decl. ¶ 10.

43 Whitefield Aff. ¶ 24; Owings Decl. ¶ 10; *see also Planned Parenthood of Alaska*, 28 P.3d at 907.

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In addition, the elimination of coverage for medically necessary abortions will result in the deprivation of Alaskan women's constitutional rights.[44] The Alaska Constitution protects reproductive rights, including the right to an abortion, as a fundamental right.[45] Deprivation of a constitutional right constitutes *per se* irreparable harm.[46] In particular, the harm that results from denial of reproductive rights "is as irreparable as any that can be imagined: not only does it flow from the deprivation of constitutional rights, but it also creates a situation which is irreversible and not compensable."[47] Thus, Planned Parenthood has demonstrated that its patients will suffer immediate and irreparable harm in the absence of an injunction.

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44 *See infra* at pp. 18-20.

45 *Valley Hosp. Ass'n v. Mat-Su Coalition for Choice*, 948 P.2d 963, 969 (Alaska 1997) ("[R]eproductive rights are fundamental . . . [and] include the right to an abortion."); *Planned Parenthood of Alaska*, 28 P.3d at 907, 909.

46 *See Klein v. City of San Clemente,* 584 F.3d 1196, 1208 (9th Cir. 2009) (the loss of constitutional rights, "for even minimal periods of time, unquestionably constitutes irreparable harm") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976))).

47 *Pilgrim Med. Grp. v. N.J. State Bd. of Med. Exam'rs*, 613 F. Supp. 837, 848-49 (D.N.J. 1985) (issuing preliminary injunction against requirement that abortions be performed in hospitals); *see also Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981) (finding that the constitutional right of reproductive choice is threatened or impaired "mandates a finding of irreparable injury").

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II. PLANNED PARENTHOOD HAS RAISED SERIOUS AND SUBSTANTIAL QUESTIONS ON THE MERITS, AND ALSO HAS DEMONSTRATED PROBABLE SUCCESS ON THE MERITS.

A. The Challenged Regulation Violates The Equal Protection Guarantee Of The Alaska Constitution.

The Regulation violates the Alaska Constitution's guarantee of equal protection by treating women who seek Medicaid coverage for abortion care differently than women seeking other pregnancy-related care, and imposing different procedures and standards for abortion care than for any other covered service. Indeed, the Regulation is just one in a long line of attempts to deny Medicaid coverage for medically necessary abortions, and is an unmistakable attempt to evade the Supreme Court's decision in *Planned Parenthood of Alaska*. Because Planned Parenthood has also established irreparable harm to its patients, it need make no stronger showing.[48] However, here Planned Parenthood has also made a clear showing of probable success on the merits of its claims.

1. The Regulation Fails Under Equal Protection By Imposing Discriminatory Criteria On Women Seeking Medically Necessary Abortions.

This case is controlled by the Supreme Court's decision in *Planned Parenthood of Alaska*. As in that case, the Regulation is subject to strict scrutiny. It cannot survive

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[48] *See Friends of Recreation Ctr.*, 129 P.3d at 456.

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unless it serves a compelling State interest and no less restrictive means could accomplish the asserted interest.[49]

In *Planned Parenthood of Alaska*, the Court made clear that Alaska may not discriminate against women seeking abortions: "[W]hen state government seeks to act for the common benefit, protection, and security of the people in providing medical care for the poor, it has an obligation to do so in a neutral manner so as not to infringe upon the constitutional rights of our citizens."[50] Thus, "[t]he State, having undertaken to provide health care for poor Alaskans, must adhere to neutral criteria in distributing that care. It may not deny medically necessary services to eligible individuals based on criteria unrelated to the purposes of the public health care program."[51] By imposing different and more restrictive criteria for demonstrating medical necessity on women who need abortions than women who need other pregnancy-related care, the Regulation violates the requirement of neutrality in the administration of government benefits. No other medical procedure covered by Medicaid, including childbirth and pre- and post-

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[49] *See Planned Parenthood of Alaska*, 28 P.3d at 909; *see also Valley Hosp. Ass'n*, 948 P.2d at 968-69 (holding that restrictions on the exercise of reproductive rights are subject to strict scrutiny).

[50] *Planned Parenthood of Alaska*, 28 P.3d at 908 (quoting *Women's Health Ctr. of W. Va., Inc. v. Panepinto,* 446 S.E.2d 658, 667 (W. Va. 1993) (alteration in original)).

[51] *Id.* at 915. *See also Valley Hosp. Ass'n*, 948 P.2d at 971-72 (to the extent that public hospitals receive government funds, they are not permitted to dispense their resources in a non-neutral manner by banning the performance of abortions).

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natal care, requires additional documentation from a patient's physician certifying that the patient has a serious health condition in order to obtain coverage.[52]

The Regulation interferes with the fundamental right to choose between abortion and childbirth by excluding coverage for Medicaid-eligible women in all but the most extreme circumstances that can threaten a woman's health, while imposing no such restrictions on other Medicaid services. Women who decide to terminate their pregnancies and women who decide to continue their pregnancies "exercise the same fundamental right to reproductive choice," and the Alaska Constitution "does not permit governmental discrimination" as to either group.[53] The challenged Regulation violates this clear mandate by imposing onerous criteria for Medicaid coverage of abortion that are not required for women who continue a pregnancy. Consequently, it will effectively deny coverage for many women who seek abortions to protect their health, while providing coverage for all women who carry to term.

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[52] The Division of Legal and Research Services, Legislative Affairs Agency, also determined that the Regulation is unlikely to pass constitutional muster. *See* Legislative Counsel Memorandum, August 22, 2013, to Senator Hollis French (The challenged Regulation "does not provide a justification, compelling or otherwise, for creating a standard for medical necessity that is far more restrictive than for any other type of service, even very expensive services, or for deviating from its current generally applicable standard based on professional standards of practice. Without a compelling state interest, it seems likely that a court would find the restrictive standard for covered care unconstitutionally discriminatory."). Attached as Exhibit 5.

[53] *Planned Parenthood of Alaska*, 28 P.3d at 913.

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The Regulation discriminates against women who seek abortions by taking away a physician's ability to provide treatment to women in accordance with his or her professional medical judgment. The Alaska Medicaid State Plan and applicable regulations acknowledge that a woman's physician is the most appropriate person to determine what services and treatment are "medically necessary" in order to protect her health and well-being.[54] But the Regulation takes away a physician's discretion to determine what is best for his or her patient, limiting the physician to consideration of only those circumstances that pose "a threat of serious risk to the physical health of the woman . . . due to the impairment of a major bodily function."[55] Moreover, the Regulation directly conflicts with accepted medical practice, which is to provide treatment to a patient when a condition or illness is diagnosed, rather than waiting to see whether the patient's health condition becomes "severe."[56] As a result, if the Regulation is allowed to take effect, women who seek medically necessary abortions will not be covered by Medicaid, including those with underlying medical conditions that may

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54 *See* Alaska Medicaid State Plan ("[T]he entire range of medical services which are included in the plan will be available as determined necessary by qualified physicians and other practitioners . . . . The decision to provide medical care will always be made by a qualified physician or other practitioner."); 7 AAC 105.100(5) (noting the Department will pay for covered services that are "medically necessary" as determined by the Medicaid regulations or "the standards of practice applicable to the provider").

55 Whitefield Aff. ¶¶ 21-22.

56 *Id.* ¶ 23.

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worsen during pregnancy, those who develop health problems during the pregnancy, and those for whom drug treatments to control various medical issues could expose the developing fetus to an increased risk of fetal anomaly.[57]

For decades, Medicaid-eligible women have been able to rely upon their physicians to exercise appropriate professional medical judgment and determine whether an abortion is "medically necessary."[58] The Regulation's differential treatment, based upon how women exercise their fundamental constitutional right to reproductive choice, is plainly not permitted under the Alaska Constitution.[59]

2. No Compelling Interest Justifies The Discriminatory Classification Imposed By The Regulation.

The Regulation's disparate treatment of Medicaid-eligible women seeking abortion coverage substantially interferes with the fundamental constitutional right to

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[57] *Id.* ¶ 23; *see also Planned Parenthood of Alaska*, 28 P.3d at 907 ("pregnant women with [pre-existing health problems] must choose either to seriously endanger their own health by forgoing medication, or to ensure their own safety but endanger the developing fetus by continuing medication").

[58] The Regulation's definition of the term "medically necessary" also directly contravenes previous court orders in *Planned Parenthood v. Perdue*, No. 3AN-98-0074 CI, which remain in effect and adopts a much broader understanding of "medically necessary." *See supra* at n.25.

[59] *See Planned Parenthood of Alaska*, 28 P.3d at 913 (requiring Medicaid-eligible women seeking abortion care to "be granted access to state health care under the same terms as any similarly situated persons").

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reproductive choice; therefore, it can only be justified by a compelling governmental interest.[60] The State cannot meet its heavy burden of justifying the Regulation.[61]

For the past 43 years, the Alaska Medicaid program, which "funds virtually all necessary medical services for poor Alaskans," has provided coverage for medically necessary abortions.[62] The State has articulated no legitimate reason, let alone a compelling one, why it must create a restrictive definition of medically necessary abortion or why it must impose criteria for women seeking to terminate an abortion that are more onerous than the criteria used for women who continue a pregnancy.

The only justifications the Department has offered for this drastic policy change, as stated in the 2014 Certificate and the Regulation's adoption order, are that it will

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60 *See id.* at 909; *Valley Hosp. Ass'n*, 948 P.2d at 969.

61 Even if analyzed under the rational basis standard, the Regulation violates the Alaska Constitution's right to equal protection. *See Planned Parenthood of Alaska*, 28 P.3d at 911 ("[E]ven if . . . we applied our most deferential standard of review, the regulation still could not withstand equal protection challenge. Under Alaska's rational basis standard, differential treatment of similarly situated people is permissible only if the distinction between the persons 'rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation.' DHSS provides necessary medical care to all Medicaid-eligible Alaskans except women who medically require abortions. This differential treatment lacks a fair and substantial relation to the object of the Medicaid program, and therefore violates equal protection.") (internal citation omitted)).

62 *Planned Parenthood of Alaska*, 28 P.3d at 905.

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"permit the program to determine the proper source of funds" for payment of abortion services.[63]

The State's purported interest in conserving its fiscal resources by eliminating coverage for the vast majority of abortions sought by Medicaid-eligible women, and/or by allocating a greater share of costs for abortion coverage to the federal Medicaid program, fails the strict scrutiny test mandated here. First, there are no cost-savings to be had by excluding coverage for abortion care; the State has previously admitted that denial of coverage for medically necessary abortions will cost much more than if the State continues to pay for such abortions, because, by denying abortions, the State pays more for prenatal care, delivery, and the child's medical care.[64] Second, as explained by the Alaska Supreme Court, "considerations of expense, medical feasibility, or the necessity of particular services" are "irrelevant" where the regulation at issue implicates the exercise of constitutional rights.[65] Thus, while "the State . . . may legitimately attempt to

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63 7 AAC 160.900(d)(30); *see also* Lisa Demer, *State proposing strict new definition of 'medically necessary' abortion,* ANCHORAGE DAILY NEWS, Aug. 16, 2013, *available at* http://www.adn.com/2013/08/16/3028583/state-proposing-strict-new-definition.html (last visited Jan. 25, 2014) (Commissioner Streur stated that the goal of the Regulation is to "reduce the number of state-paid abortions").

64 *Planned Parenthood of Alaska*, 28 P.3d at 911 ("The State itself stated that eliminating public assistance for medically necessary abortions would cause about thirty-five percent of women who would otherwise have obtained abortions to instead carry their pregnancies to term.").

65 *Id.* at 910.

limit its expenditures, whether for public assistance, public education, or any other program . . . , [it] may not accomplish such a purpose by invidious distinctions between classes of citizens."[66]

Moreover, the Regulation conflicts with the express purpose of the Alaska Medicaid program to provide "uniform and high quality medical care" to needy Alaskans.[67] Singling out women seeking abortions and applying a different set of criteria for coverage undermines the Medicaid program's overarching purpose.[68] If allowed to take effect, the Regulation will "deny assistance to eligible women whose health depends on obtaining abortions."[69] Such a perverse result cannot be what the State intended when it declared that poor Alaskans should "seek only uniform and high quality care that is appropriate to their condition and cost-effective to the state . . . ."[70]

In sum, nothing has changed in the past 13 years since the Supreme Court issued its opinion in *Planned Parenthood of Alaska* that would justify the State's attempt to exclude the vast majority of Medicaid-eligible women from receiving coverage for

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66 *Id.* (quoting *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969)); *see also Herrick's Aero-Auto-Aqua-Repair Serv. v. State*, 754 P.2d 1111, 1114 (Alaska 1988) ("[C]ost savings alone are not sufficient government objectives under our equal protection analysis.").

67 AS 47.07.010.

68 *See Planned Parenthood of Alaska*, 28 P.3d at 911.

69 *Id.* at 905.

70 AS 47.07.010.

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abortion care. Then, as now, no "sufficiently compelling" interest exists "to justify denying medically necessary care to women who need abortions."[71] Planned Parenthood has established not only that the Regulation raises serious and substantial equal protection issues, but also probable success on the merits of its equal protection claim.

B. The Regulation Violates The Administrative Procedure Act.

A regulation is valid only if it satisfies three criteria: First, the agency must not "exceed[] . . . its statutory authority in promulgating the regulation."[72] Second, the regulation must be "reasonable and not arbitrary."[73] Third, the regulation must not "conflict[] with other statutes or constitutional provisions."[74] Moreover, the Department's rule-making authority is limited to adopting regulations that are "not inconsistent with law."[75] The Regulation fails each of these criteria and is therefore invalid under the APA.

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71 *Planned Parenthood of Alaska*, 28 P.3d at 913 (holding that the Court "need not consider the means-ends fit of the challenged regulation" in order to conclude that it "violates equal protection under the Alaska Constitution").

72 *Wilber v. State, Commercial Fisheries Entry Comm'n*, 187 P.3d 460, 464 (Alaska 2008).

73 *Id.*

74 *Id.* at 464-65.

75 AS 47.05.010.

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1. The Regulation Is Invalid Because It Is Inconsistent With The Statute Authorizing Its Adoption.

"To be within the agency's grant of rulemaking authority, a regulation must be 'consistent with and reasonably necessary to carry out the purposes of the statutory provisions conferring rule-making authority on the agency.'"[76] An agency exceeds its statutory mandate "by pursuing impermissible objectives or by employing means outside its powers."[77] In assessing whether a regulation "pursu[es] impermissible objectives," the court looks to the purpose of the authorizing statute.[78]

Here, the Regulation is inconsistent with the statutory objective articulated in AS 47.05.010, the authority for the rule.[79] That statute authorizes the Department to "adopt regulations, not inconsistent with law . . . establishing standards for determining the amount of assistance that an eligible person is entitled to receive."[80] The statute then explains that "the amount of the assistance is sufficient when . . . *it provides the*

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[76] *State, Dep't of Revenue v. OSG Bulk Ships, Inc.*, 961 P.2d 399, 407 (Alaska 1998) (quoting *State, Dep't of Revenue v. Cosio*, 858 P.2d 621, 624 (Alaska 1993)); AS 44.62.030.

[77] *Grunert v. State*, 109 P.3d 924, 929 (Alaska 2005).

[78] *See, e.g., id.* at 932-36 (invalidating regulation because it is "fundamentally inconsistent with the legislative intent underlying the controlling statute").

[79] Although the Department cites three other statutory sections as authority for the Regulation, AS 47.05.012, AS 47.07.030, and AS 47.04.040, none of these offers relevant authority for adopting the Regulation.

[80] AS 47.05.010(9).

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individual with a reasonable subsistence compatible with health and well-being."[81] This language on its face restricts the Department from enacting regulations that are contrary to beneficiaries' "health and well-being," which clearly encompasses more than the mere absence of a "serious risk of physical impairment of a major bodily function."[82] Moreover, the "Purpose" section of Alaska's Medicaid chapter provides further evidence that the Regulation is inconsistent with statutory objectives. In AS 47.07.010, the Legislature "declared . . . as a matter of public concern that the needy persons of this state . . . should seek only uniform and high quality care that is *appropriate to their condition* and cost-effective to the state . . . ."[83]

The Alaska Supreme Court's reasoning in *Madison v. Alaska Department of Fish & Game* is instructive.[84] In that case, the authorizing statute required the Board of Fisheries to adopt regulations permitting "subsistence uses" of fish stocks, and explained that "subsistence uses" were "customary and traditional uses . . . for direct personal or family consumption, and for the customary trade, barter or sharing."[85] The Board

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81 *Id.* (emphasis added).

82 The words "health" and "well-being" are not defined in Alaska law, so they should be interpreted in accordance with their common usage. *Wilson v. State, Dep't of Corr.*, 127 P.3d 826, 830 (Alaska 2006) (referring to dictionary definitions in interpreting whether a regulation was consistent with its authorizing statute).

83 AS 47.07.010 (emphasis added).

84 696 P.2d 168, 169-70 (Alaska 1985).

85 *Id.* at 171.

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subsequently enacted regulations that established ten criteria to determine "customary and traditional uses" eligible for the subsistence priority.[86] The Court concluded that the Legislature inserted the phrase "customary and traditional" in an effort "to protect subsistence use, not limit it."[87] In invalidating the regulation, the Court reasoned that the Board's "interpretation of 'customary and traditional' as a restrictive term conflicts squarely with the legislative intent."[88] The Court also found that the regulation "disenfranchise[d] many subsistence users whose interests the statute was designed to protect."[89]

The Regulation is similarly inconsistent with both the language of its authorizing statute, which is manifestly designed to protect beneficiaries from insufficient levels of assistance, and the purpose underlying the Medicaid program. Under the Regulation, a Medicaid-eligible pregnant woman would be denied medical assistance in some circumstances even if her doctor determines, based on his or her judgment, that the abortion is medically necessary. This narrow definition of "medically necessary" is plainly contrary to a woman's "health and well-being" and incompatible with the statutory mandate to provide assistance "appropriate to [the beneficiaries'] condition."

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86 *Id.* at 171-72.

87 *Id.* at 176.

88 *Id.*

89 *Id.* at 178.

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Because the Regulation is inconsistent with statutory language and contrary to legislative intent, it cannot stand.

2. The Regulation Is Invalid Because It Is Unreasonable And Arbitrary.

A regulation must be "reasonable and not arbitrary."[90] In determining whether an administrative regulation is arbitrary, courts look to the agency's process in adopting the regulation.[91] While courts review a "discretionary decision of [an] agency . . . deferentially,"[92] the Alaska Supreme Court has explained:

> The role of the court is to ensure that the agency has given reasoned discretion to all the material facts and issues. The court exercises this aspect of its supervisory role with particular vigilance if it becomes aware, especially from a combination of danger signals, that the agency has not really taken a *hard look* at the salient problems and has not genuinely engaged in reasoned decision making.[93]

The "danger signals" surrounding the adoption of the Regulation are rife. First, while the Department received hundreds of comments identifying problems with the Regulation, it made no substantive changes to the final form. The Alaska Supreme Court has

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90 *Wilber*, 187 P.3d at 464.

91 *State v. Kenaitze Indian Tribe*, 83 P.3d 1060, 1067 (Alaska 2004).

92 *Caywood v. State, Dep't of Natural Res.*, 288 P.3d 745, 748 (Alaska 2012).

93 *See Alaska Conservation Council, Inc. v. State*, 665 P.2d 544, 549 (Alaska 1983) (quotation marks and citation omitted) (emphasis in original), *superseded in part by* 2003 Alaska Sess. Laws, ch. 86, § 1(b); *see also Trustees for Alaska v. State, Dep't of Natural Res.*, 795 P.2d 805, 811 (Alaska 1990) (finding agency action arbitrary because agency failed to consider important factor).

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repeatedly cited the fact that an agency revised a regulation in response to public comments as evidence that the agency took a "hard look at the salient problems," evidence conspicuously missing in this case.[94]

Second, the Department neither held a public hearing to discuss the proposed regulation nor issued a decisional document explaining the reasoning behind the Regulation.[95] While agencies are not required to issue decisional documents before finalizing a regulation,[96] the absence of *both* a public hearing and written findings raises red flags. Indeed, in holding that a decisional document is not required when an agency issues a regulation, the Alaska Supreme Court made clear that the record should nonetheless explain the reasons why an agency promulgated a regulation, and observed

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[94] *See, e.g., Mech. Contractors of Alaska, Inc. v. State, Dep't of Pub. Safety*, 91 P.3d 240, 247 (Alaska 2004) (finding that regulations were not arbitrary where the agency adopted them "after a two-year process that included notification of other agencies, work sessions throughout the state, and two public notice and comment periods . . . [and] [t]he record . . . shows that DPS revised the proposed regulations after each comment period"); *O'Callaghan v. Rue*, 996 P.2d 88, 98 (Alaska 2000) (concluding that the regulation "clearly passe[d]" the "hard look" test where the Department "engaged in extensive correspondence with other state agencies regarding its proposed regulations, promulgated them under the [APA], revised the proposed regulations in response to public notice and comment, and formed a working group" on the topic).

[95] In failing to hold a public hearing, the Department also has not satisfied the APA's "public proceeding" requirement. AS 44.62.210. While the agency allowed for the submission of written comments, the statute's description of a "hearing" held "[o]n the date and at the time and place designated in the notice" suggests that a proceeding under this section must take the form of a public meeting, which the agency did not hold. *Id.*

[96] *See Johns v. Commercial Fisheries Entry Comm'n*, 758 P.2d 1256, 1260-61 (Alaska 1988).

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that such a record is likely to exist where the APA has been followed, "especially if the agency position is expressed at the hearing required under AS 44.62.210(a)."[97] Public hearings and decisional documents play important roles in ensuring that an agency considers all relevant criteria and acts within the scope of its authority.[98] The absence of any rational explanation from the Department – either at a hearing or in written findings – of its reasons for adopting the regulation demonstrates that the agency failed to take a "hard look" at the issue.[99]

3. The Regulation Is Invalid Because It Conflicts With The State Constitution.

As discussed *supra* at pages 15-23, the Regulation violates the equal protection guarantee of the Alaska Constitution by discriminating against Medicaid-eligible women seeking abortions without furthering a compelling government interest. Because a

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97 *Id.*

98 *See Ship Creek Hydraulic Syndicate v. State, Dep't of Transp. & Pub. Facilities*, 685 P.2d 715, 717 (Alaska 1984) (citation omitted) ("A decisional document, done carefully and in good faith . . . . tends to ensure careful and reasoned administrative deliberation . . . . And it tends to restrain agencies from acting beyond the bounds of their jurisdiction."); *State v. Morry*, 836 P.2d 358, 363 (Alaska 1992) (invalidating regulation under APA where "the APA rule-making hearing, which would have provided a record demonstrating careful consideration of the applicable . . . laws, was never held").

99 The Department cannot plausibly argue that the Regulation is necessary in order to distinguish between abortions for which federal funding is available and those which must be covered by State funds, given that the 2012 Certificate accomplishes this goal without restricting the provision of medically necessary abortions.

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regulation is invalid under the APA if it conflicts with the Constitution,[100] the Regulation fails both as a matter of constitutional *and* administrative law. Moreover, the Regulation violates the express terms of its authorizing statute, since AS 47.05.010(9) only empowers the Department to "adopt regulations, *not inconsistent with law*,"[101] and the restrictive definition of "medically necessary abortions" that the Department seeks to adopt is plainly inconsistent with the terms of the superior court's Order in *Planned Parenthood of Alaska v. Perdue*.[102] In attempting to narrow Alaska's Medicaid coverage of abortion in violation of the State Constitution, court order, and the terms of the authorizing statute, the Department has exceeded its statutory authority. Planned Parenthood has therefore demonstrated both serious and substantial questions and probable success on the merits of its APA claims.

III. DEFENDANTS WILL NOT BE HARMED IF PRELIMINARY INJUNCTIVE RELIEF IS GRANTED.

In stark contrast to the irreparable and immediate harm faced by Planned Parenthood's patients, preliminarily enjoining the Regulation will cause no harm to Defendants. An injunction will merely preserve the status quo of coverage for medically

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100 *Grunert*, 109 P.3d at 929 (holding that a regulation is not "consistent with and reasonably necessary to implement the statutes authorizing [its] adoption" if it "conflicts with any other state statutes or constitutional provisions").

101 AS 47.05.010(9) (emphasis added).

102 No. 3AN-98-07004 CI, Order at ¶ 11 (Alaska Super. Ct. Sept. 18, 2000); *see supra* at n.25.

necessary abortions to Medicaid-eligible women that has existed for decades.[103] Furthermore, an injunction will prevent harm to the State because the public, and thus the State, is harmed by the deprivation of the constitutional rights of Alaskans.

CONCLUSION

For the foregoing reasons, Planned Parenthood respectfully requests that this court issue a Temporary Restraining Order and a Preliminary Injunction restraining enforcement of the Regulation and enjoining Defendants, their employees, agents, appointees, and successors from enforcing, threatening to enforce, or otherwise applying the Regulation until this case is finally resolved or upon further order of this court.

Dated this 29th day of January, 2014.

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[103] *See Martin*, 156 P.3d at 1127 (the purpose of a preliminary injunction is to preserve the status quo).

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