IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

FEMINIST WOMEN'S HEALTH CENTER, *et al.*	)	
	)	CIVIL ACTION
Plaintiffs,	)	FILE NO. 2003-CV-78487
	)	
v.	)	
	)	
TIM BURGESS, *et al.*	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OF LAW
IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

PRELIMINARY STATEMENT

The restrictions on abortion coverage in the Georgia Medicaid program threaten women's health and violate their rights under the state constitution. In general, Georgia Medicaid pays for covered services when they are medically necessary.[1] Abortion, however, is singled out for special restrictions. Medicaid coverage for abortion is available only when the pregnancy is life-threatening or results from rape or incest.[2] Low-income women are denied coverage for abortions when their pregnancies threaten their health, but not their life. In contrast, poor women in Georgia who carry their pregnancies to term receive coverage for medically necessary prenatal care, delivery, and associated services.[3] Georgia Medicaid does not condition the provision of any pregnancy-related service other than abortion on a showing that the pregnancy is life-threatening or results from rape or incest. Furthermore, Georgia Medicaid does not condition the provision of covered services for eligible men on a showing that the man's life is endangered or

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[1] Div. of Med. Assistance, Ga. Dep't of Cmty. Health, Policies and Procedures for Medicaid/Peachcare for Kids Definition 15 and § 105(k) (July 1, 2004).

[2] Div. of Med. Assistance, Ga. Dep't of Cmty. Health, Policies and Procedures for Physician Services § 904.2 and App. H (July 1, 2004) (attached to Compl. as Ex. B); Div. of Med. Assistance, Ga. Dep't of Cmty. Health, Policies and Procedures for Advanced Nurse Practitioner Services § 904.2 and App. G (July 1, 2004) (attached to Compl. as Ex. C); Div. of Med. Assistance, Ga. Dep't of Cmty. Health, Policies and Procedures for Hospital Services § 911.1 and App. I (July 1, 2004) (attached to Compl. as Ex. D); Div. of Med. Assistance, Ga. Dep't of Cmty. Health, Policies and Procedures for Family Planning Clinic Services § 903 (July 1, 2004) (attached to Compl. as Ex. E); Policies and Procedures for Nurse-Midwifery Services § 904.2 and App. I (July 1, 2004) (attached to Compl. as Ex. F); Ga. Dep't of Cmty. Health, Billing Manual § 6.5 (July 1, 2004) (attached to Compl. as Ex. G).

[3] 42 U.S.C. § 1396a(e)(5); Div. of Med. Assistance, Ga. Dep't of Cmty. Health, Policies and Procedures for Presumptive Eligibility 1, 20 (July 1, 2004).

otherwise deny reimbursement for covered services when necessary for a man's health. Rather, Georgia Medicaid provides covered services for men based on the general standard of medical necessity.

This discriminatory exclusion of medically necessary abortions from the State's Medicaid program violates the broad guarantees of privacy and equal protection found in the Georgia Constitution. Plaintiffs rely on their initial Memorandum of Law (filed 12/2/03) for arguments advancing these constitutional claims.

Here Plaintiffs address only those arguments Defendants have advanced in an effort to persuade this Court to dismiss the case before reaching its constitutional merits. Defs.' Initial Resp. to Pls.' Mot. for T.R.O. and Prelim. Inj. (filed 12/15/03). These arguments have no force. Plaintiffs have standing to maintain this action, both in their own right and on behalf of their patients. Neither the separation of powers doctrine nor any Georgia statute prevents this Court from remedying the personal and constitutional violations that low-income pregnant women in Georgia are suffering. Plaintiffs need not exhaust administrative remedies in this facial, constitutional challenge, and the relief they request is proper.

As the affidavits submitted in support of both this Motion and Plaintiffs' Motion for a Temporary Restraining Order attest, the denial of Medicaid coverage leaves many women no alternative but to continue risky pregnancies, sometimes all the way to term, to the detriment of their health. On behalf of these women, Plaintiffs request that this Court issue a judgment declaring invalid under the Georgia Constitution any policies or procedures issued by the Division of Medical Assistance and/or the Georgia Department of Community Health, and any

other provision of Georgia law, insofar as they deny Medicaid coverage for an abortion necessary to protect a woman's health. Plaintiffs also request that this Court permanently enjoin the Defendants, and all others acting in concert or participation with them, from enforcing any provision of Georgia law so as to deny such coverage.

ARGUMENT

To prevail on a motion for summary judgment, the moving party must demonstrate that there is no genuine issue of material fact and that the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law. O.C.G.A. § 9-11-56(c); Home Builders Ass'n of Savannah, Inc. v. Chatham County, 276 Ga. 243, 245, 577 S.E.2d 564, 565 (2003); Lau's Corp. v. Haskins, 261 Ga. 491, 491, 405 S.E.2d 474, 475 (1991); Smith v. Lewis, 259 Ga. App. 548, 548, 578 S.E.2d 220, 221 (2003). Once the moving party makes a prima facie showing that it is entitled to judgment as a matter of law, the burden of proof shifts. Coleman v. McDonald's Corp., 185 Ga. App. 628, 629, 365 S.E.2d 282, 283 (1988) (citing Kelly v. Am. Fed. Savings & Loan Ass'n, 178 Ga. App. 542, 543, 343 S.E.2d 755, 756 (1986)). The opposing party must then come forward with rebuttal evidence or suffer judgment against him. Id. at 629; 365 S.E.2d at 283-84 (citing Kelly, 178 Ga. App. at 542-43, 343 S.E.2d at 756). Conclusory statements are insufficient to establish a genuine issue. O.C.G.A. § 9-11-56(e); Lau's Corp., 261 Ga. at 491, 405 S.E.2d at 476; Smith, 259 Ga. App. at 548, 578 S.E.2d at 221; Tallman Pools of Ga., Inc. v. James, 181 Ga. App. 341, 343, 352 S.E.2d 179, 180 (1987). If "'the defendant fails to respond with specific facts showing a genuine issue for trial, summary

judgment is properly granted.'" Coleman, 185 Ga. App. at 629, 365 S.E.2d at 284 (quoting Kelly, 178 Ga. App. at 543, 343 S.E.2d at 756); O.C.G.A. § 9-11-56(e).

I. THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT.

Plaintiffs rely on and incorporate the Statement of Undisputed Facts filed in support of this Motion. The facts are set forth in that statement in numbered paragraphs so that those facts, if any, that Defendants controvert, can be readily and precisely identified.

II. PLAINTIFFS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW.

A. The Discriminatory Denial of Medicaid Coverage for Medically Necessary Abortions Violates Georgia's Constitutional Guarantees of Privacy and Equal Protection**.**

Plaintiffs rely on and incorporate here by reference the state constitutional arguments they made in their Memorandum of Law in Support of Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction at 15-39 (filed 12/2/03).

B. Defendants' Preliminary Arguments Have No Merit.

1. Plaintiffs have standing to maintain this action.

The physician and clinic Plaintiffs in this action have standing in their own right because the challenged policies disrupt their relationships with their patients and deprive them of reimbursement for the abortion services they provide to Medicaid-eligible women. In addition, Dr. Malloy and the clinics have third-party standing to represent the interests of their patients in challenging Defendants' deprivation of their constitutional rights.

a. <u>Plaintiffs have standing in their own right.</u>

The doctor and clinics have standing to assert their own rights in this case. Here in Georgia, as elsewhere, it is the usual rule that,

> Before a statute can be attacked by anyone on the ground of its unconstitutionality, he must show that its enforcement is an

> infringement upon his right of person or property, and that such infringement results from the unconstitutional feature of the statute upon which he bases his attack.

South Georgia Natural Gas Co. v. Georgia Pub. Serv. Comm'n, 214 Ga. 174, 175, 104 S.E.2d 97, 99 (1958). To comply with this rule, Plaintiffs must show that they themselves are injured by the unconstitutional operation of the law or policy they challenge.

Dr. Malloy testifies by affidavit submitted with this Motion that he is an enrolled Medicaid provider in this State and that he performs abortions for Medicaid-eligible patients who need the procedure to protect their health but not to save their lives. Malloy Aff. (date) ¶ . He says that Defendants' discriminatory denial of Medicaid coverage for such abortions renders him unable to provide his sick, pregnant, low-income patients the care that comports with his best clinical judgment and their treatment decisions based on his advice. Id. ¶ . He recounts the histories of several patients who decided, in consultation with him, to end dangerous pregnancies, but who endured painful delays or unwillingly continued their pregnancies to term, all at Medicaid's expense, because they lacked the independent funds to obtain a medically necessary abortion. Id. ¶ ; Malloy Aff. (11/11/03) ¶¶ 17, 25, 26. He testifies further that the clinic he owns and those at which he works sometimes treat such patients at reduced or no expense in an effort to prevent unnecessary suffering. Malloy Aff. (Date) ¶ . He thus foregoes income he would receive but for the policies he challenges here.

The clinic administrators testify to similar facts. **[Several/Most]** either are enrolled or have applied to become Medicaid providers. Others are Medicaid payees. **[Add citations from new affs.]** Collectively, the clinics spend hundreds of hours assisting Medicaid-eligible patients

in gathering money for their abortions, Dudley Aff. (11/24/03) ¶¶ 7, 9; Gelberg Aff. (12/1/03) ¶¶ 11-13, 15, 17, 19, 21; Hawkins Aff. (11/17/03) ¶¶ 7, 9, 15, 17, and offering counseling to patients in physical and emotional distress because of their inability to afford medically necessary abortions, Dudley Aff. (11/24/03) ¶¶ 6-7; Gelberg Aff. (12/1/03) ¶¶ 15-21; Hawkins Aff. (11/17/03) ¶¶ 17-18 **[note: more about patients' distress than clinics' counseling role]**. They reduce their fees and undertake additional fund-raising on behalf of patients who have no other means to obtain abortions. Dudley Aff. (11/24/03) ¶¶ 7, 9; Gelberg Aff. (12/1/03) ¶¶ 4, 11-13, 15, 17-19, 21; Hawkins Aff. (11/17/03) ¶¶ 5, 9, 15, 17. The clinics thus expend considerable resources and forego significant income to meet the needs the State leaves unmet by virtue of the policies at issue. These resource drains and financial losses are harms that result directly from Defendants' unconstitutional denial of Medicaid coverage for medically necessary abortions.

In a case strikingly similar to this one, the United States Supreme Court concluded that the doctors had shown "injury in fact" and could therefore maintain the action in their own right.

> [T]here is no doubt now that the respondent-physicians suffer concrete injury from the operation of the challenged statute. Their complaint and affidavits . . . allege that they have performed and will continue to perform operations for which they would be reimbursed under the Medicaid program, were it not for the limitation of reimbursable abortions to those that are "medically indicated." If the physicians prevail in their suit to remove this limitation, they will benefit, for they will then receive payment for the abortions. The State (and Federal Government) will be out of pocket by the amount of the payments. The relationship between the parties is classically adverse, and there clearly exists between them a case or controversy in the constitutional sense.

Singleton v. Wulff, 428 U.S. 106, 112-13 (1976).[4] Like the doctors who sued in Singleton, Dr.

Malloy has standing to assert his own interest in receiving reimbursement for the medically necessary abortions he provides to Medicaid-eligible patients. Because clinics have an identical interest and face an identical injury, the courts have also granted them standing in their own right to challenge abortion restrictions.[5] This Court should follow this consistent line of authorities.

b. Plaintiffs have standing to represent the interests of their patients.

Federal and state courts throughout the nation have also allowed doctors and clinics to represent the interests of their patients in challenging abortion restrictions. Plaintiffs in this case satisfy the relevant test for such third-party standing.

The Georgia courts have never explicitly addressed the issue of third-party standing.[6] In the absence of Georgia precedent, Georgia courts borrow from federal standards when they are just and sound. When Georgia law was silent with respect to the related concept of associational standing, for example, the Georgia Supreme Court turned to federal law. In Aldridge v. Georgia Hospitality & Travel Association, 251 Ga. 234, 304 S.E.2d 708 (1983), an unincorporated trade association, whose members included restaurants, hotels, and other travel-related businesses, sued to prevent the county board of health from charging fees for legally mandated inspections. The threshold issue was the standing of the association to represent the interests of its members in avoiding the fees. With no relevant state precedent, the Georgia Supreme Court adopted the federal test for associational standing.[7] Based on this test, the Court allowed the association to

sue on behalf of its members. Id., 251 Ga. at 236, 304 S.E. at 710-11. See also Georgia Power Co. v. Campaign for a Prosperous Georgia, 255 Ga. 253, 258, 336 S.E.2d 790, 794 (1985) (holding that an advocacy organization, representing the interests of its members in avoiding a rate increase, could maintain a suit against the power company).[8]

Like the Georgia Supreme Court in Aldridge, this Court should turn to federal rules on third-party standing to resolve the issue. Again, Singleton v. Wulff, 428 U.S. 106, is the leading case. After the Court concluded that the physician-plaintiffs in that case had standing in their own right, a plurality held that the doctors could assert the rights of their patients as well. Id. at 113-18 (plurality opinion).

The plurality looked at two factors in reaching this decision. First, it inquired into the "relationship of the litigant to the person whose right he seeks to assert." Singleton, 428 U.S. at 114. The litigant should be so good a stand-in for the third party that he is "fully, or very nearly, as effective a proponent of the right as the latter." Id. at 115. The plurality found that the "closeness of the [doctor-patient] relationship is patent. . . . A woman cannot safely secure an abortion without the aid of a physician, and an impecunious woman cannot easily secure an abortion without the physician's being paid by the State. . . . Moreover, the constitutionally protected abortion decision is one in which the physician is intimately involved." Id. at 117. The plurality therefore concluded that the doctors would faithfully and assiduously represent the interests of their patients in pressing for Medicaid coverage of abortion.

Second, the plurality asked whether there were obstacles that would deter the third party from asserting her rights herself. Id. at 115-16. In the abortion context, the plurality noted that

the woman "may be chilled . . . by a desire to protect the very privacy of her decision from the publicity of a court suit." Id. at 117. The plurality also recognized the discouraging effect of the "imminent mootness" of any individual woman's claim. Id. A poor, pregnant woman who needs an abortion must act immediately to try to gather the necessary funds or "her right thereto will have been irrevocably lost." Id. During this intensely stressful and fleeting period, she may simply be unable to contemplate initiating or joining a lawsuit.

For these reasons, the plurality concluded "that it generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision." Id. at 118. The United States Supreme Court has consistently followed this rule, as have the lower federal and state courts.[9] Indeed, the courts have extended the rule to clinic plaintiffs asserting the interests of their abortion patients. Deerfield Med. Ctr. v. City of Deerfield Beach, 661 F.2d 328, 333-34 (5th Cir. 1981) ("We conclude that [clinic] plaintiffs have standing to assert the claims of pregnant women whose privacy rights would be 'diluted or adversely affected' should defendants' actions go unchallenged.") (citation omitted); Planned Parenthood Ass'n v. Harris, 670 F. Supp. 971, 981 & n.15 (N.D. Ga. 1987) (same).[10]

Plaintiffs in this case easily meet this test for third-party standing. As in Singleton, the physician and clinics here are "intimately involved" in their patients' abortion decisions. 428 U.S. at 117. See Malloy Aff. (11/11/03) ¶¶ 14, 17, 25-27, 30, 33; Malloy Aff. (date) ¶¶ ; Gelberg Aff. (12/1/03) ¶¶ 16-21; Hawkins Aff. ¶¶ 8-9, 13, 16-18. Because of these close relationships, Dr. Malloy and the clinics are dedicated to vindicating their patients' rights and fully prepared to represent them. As to the obstacles their patients face, they are higher here than

in Singleton. The doctors in Singleton sued for Medicaid coverage of "nonmedically indicated abortions," 428 U.S. at 110 (emphasis added); the physician and clinics here sue for coverage of medically necessary abortions, Compl. ¶¶ (tt), (ddd). The patients represented in this case confront not only the loss of privacy and the difficulty of raising the necessary funds in time to obtain an abortion, 428 U.S. at 117, but also the deterioration of their health while the pregnancy advances. In these circumstances, the barriers to participation in a lawsuit are too high. For these reasons, Plaintiffs must be allowed to assert the deprivation of constitutional rights on their patients' behalf.

2. Georgia's separation of powers doctrine reinforces the authority of this Court to grant Plaintiffs' request.

Under Georgia's separation of powers doctrine, the judiciary has the power – and the duty – to order that Georgia's Medicaid program cover medically necessary abortions. Defendants maintain that granting Plaintiffs relief would violate Georgia's separation of powers doctrine because "[t]here is no specific appropriation to pay for all 'medically necessary' abortions" and "the raising and spending of public money is solely a legislative power." Def. Br. at 10-11. While a court might overstep its authority if it ordered a legislature to enact a specific appropriation, no such order is necessary here. Furthermore, when faced with an unconstitutional law, it is the judiciary's responsibility to declare the law unconstitutional and to redress the constitutional violation, even if the remedy requires expenditures.

a. Plaintiffs do not seek forced appropriations.

Although a court-ordered appropriation may run afoul of the separation of powers doctrine, the doctrine does not prevent a court from ordering that previously appropriated funds

be paid without regard to an invalid restriction. Here, Plaintiffs do not seek any forced appropriation of funds. To the contrary, the Georgia legislature has already made a general appropriation to Medicaid: under Georgia's General Appropriations Act for fiscal year beginning July 1, 2003 and ending June 30, 2004, the General Assembly appropriated over $1.7 million dollars of Georgia state funds to the Department for "Medicaid Benefits, Penalties, and Disallowances." 2004 Georgia Laws Act 430, section 8 (H.B. 1180). **[Update as necessary.]** Plaintiffs merely request that, after striking down the unconstitutional restrictions, the court order the Department to use its already appropriated monies without regard to these restrictions.

Courts in at least four other states, considering this exact argument in the context of a challenge to restrictions on Medicaid coverage for abortion, have rejected a separation of powers argument for the very reason that plaintiffs sought only that existing appropriations be paid without regard to an unconstitutional restriction. For example, the Supreme Judicial Court of Massachusetts held that covering medically necessary abortions could not be characterized as a "forced appropriation of funds" because "the Legislature has already exercised its unquestioned power to appropriate funds." Moe v. Sec'y of Admin. & Fin., 282 Mass. 629, 642, 417 N.E.2d 387, 395 (1981). The Alaska Supreme Court concluded that "[w]hen there is an unconstitutional restriction in an existing appropriation, it offends no constitutional principle to direct that the disputed payments be made from funds already appropriated for the same general purpose." Alaska v. Planned Parenthood of Alaska, 28 P.3d 904, 914 (Alaska 2001) (internal citation and quotations omitted).[11]

Indeed, the Eleventh Circuit has already rejected a separation of powers argument identical to the one Defendants make here. Georgia v. Heckler, 768 F.2d 1293 (11th Cir. 1985). Before the U.S. Supreme Court upheld the Hyde Amendment under the Federal Constitution in Harris v. McRae, 448 U.S. 297 (1980), Georgia's Medicaid program had covered all medically necessary abortions. At issue in Heckler was whether the U.S. Department of Health and Human Services (HHS) must reimburse Georgia for pre-Harris v. McRae abortions the Hyde Amendment did not cover. Like the Department today, HHS argued that regardless of any substantive merit to Georgia's claim, it had not been appropriated money to pay for abortions disallowed by the Hyde Amendment. See Heckler, 768 F.2d at 1296. The Eleventh Circuit summarily rejected this argument, holding that "[t]here is no doubt that if this Court decided that these payments were legally required, HHS would be authorized to make them." Id. Similarly, there can be no doubt that if this Court holds that the Georgia Constitution requires Defendants to cover all medically necessary abortions, the Department would be authorized to pay for them.

Finally, though unconstitutional restrictions must be struck down regardless of the financial impact, here the Department's existing Medicaid appropriations would cover the costs of all medically necessary abortions without the need for additional expenditures. In fact, granting Plaintiffs relief would actually cut Georgia's overall Medicaid expenditures because the expenses associated with prenatal care, childbirth, and infant care are greater than the cost of an abortion. See Henshaw Aff. ¶¶ 19-20. Indeed, every court to have considered the question has rejected a claim that the relief Plaintiffs seek would cost the state money. See, e.g., Moe, 282 Mass. at 642, 417 N.E.2d at 395 (holding that if it ordered Massachusetts to cover all medically

necessary abortions, "it is undisputed that the net effect would be to reduce the Commonwealth's Medicaid expenditures, not increase them"); Comm. to Defend Reprod. Rights v. Cory, 132 Cal. App. 3d 852, 855, 183 Cal. Rptr. 475, 478 (1982) (Cal. Ct. App. 1982).

b. This Court has the duty and power to order the relief Plaintiffs seek.

Even if striking down the unconstitutional restrictions were to result in additional expenditures, the judiciary's role under the separation of powers doctrine – to protect individuals' constitutional rights – requires that it grant Plaintiffs' request. "The judiciary has always borne the basic responsibility for protecting individuals against unconstitutional invasion of their rights by all branches of the Government." Smith v. Meese, 821 F.2d 1484, 1493 (11th Cir. 1987).

Defendants do not – and cannot – contest that it is the judiciary's responsibility to review laws, including appropriation laws, that are alleged to violate the Constitution. Georgia's Constitution plainly provides that "[l]egislative acts in violation of this Constitution or the Constitution of the United States are void, and the judiciary shall so declare them." Ga. Const. of 1998, Art. I, § 2, ¶ 5; see also Barge v. Camp, 209 Ga. 38, 43, 70 S.E.2d 360, 364 (1952) ("The judiciary has the power and duty to declare void legislative acts in violation of the Constitution of this State or of the United States."). Courts have had this responsibility since the Supreme Court decided McCulloch v. Maryland in 1819. Peltier v. Assumption Parish Police Jury, 638 F.2d 21, 22 (5th Cir. 1981).

No court addressing the issue in this exact context has disagreed. In requiring Alaska to fund all medically necessary abortions, for example, the Alaska Supreme Court held that "the

mere fact that the legislature's appropriations powers underlies Medicaid funding cannot insulate the program from constitutional review." Planned Parenthood of Alaska, 28 P.3d at 914; see also Moe, 382 Mass. at 642, 417 N.E.2d at 396 ("[W]e have never embraced the proposition that merely because a legislative action involves an exercise of the appropriations power, it is on that account immunized against judicial review."); Planned Parenthood of Idaho v. Kurtz, No. CV-01-03909, 2001 WL 34157539, at * 18 (Idaho Dist. Ct. Aug 17, 2001) ("The Legislature's exercise of its appropriations powers cannot restrict the Court from determining or protecting a citizen's constitutional rights.").

In fulfilling its role as protector of individual rights, the judiciary must not only review but also redress constitutional violations, regardless of the financial impact. In fact, the judiciary's constitutional rulings routinely affect funding. "Many of the most heralded constitutional decisions of the past century have, as a practical matter, effectively required state expenditures." Planned Parenthood of Alaska, 28 P.3d at 914. As the Alaska Supreme Court noted,

> Legislative exercise of the appropriations power has not in the past, and may not now, bar courts from upholding citizens' constitutional rights. Indeed, constitutional legal rulings commonly affect state programs and funding. . . . In *Green v. County School Board*, the United States Supreme Court ordered effective desegregation of public schools; in *Gideon v. Wainwright*, it required funding of counsel for indigent criminal defendants; and in *Shapiro v. Thompson*, it required states to give newcomers to the jurisdiction equal welfare benefits. In each of these cases, a judicial decision upholding constitutional rights required state expenditures to support those rights.

Planned Parenthood of Alaska, 28 P.3d at 914 (internal footnotes omitted). The State would be hard-pressed to find a single case holding that the separation of powers doctrine precludes a court from directing that a state cover medically necessary abortions consistent with its constitution. This is because requiring coverage of these abortions "is squarely within the authority of the court, not in spite of, but because of, the judiciary's role within our divided system of government." Id.

3. There is no statutory bar to the relief Plaintiffs seek under the Georgia Constitution.

Nothing in Georgia law limits Medicaid coverage to services eligible for federal matching funds. Defendants' claim to the contrary is based on a misreading of three statutory provisions. Even if Defendants' interpretation were correct, it would simply mean that this Court should declare those provisions unconstitutional and unenforceable.

According to Defendants, Georgia law provides that the Department may use Georgia dollars only for medical services that the federal government also covers. And because the federal government does not reimburse states for abortions unless the woman's life is at risk or in cases of rape or incest, Defendants maintain that Georgia must likewise limit its coverage. Defendants cite three statutory provisions for this argument, none of which actually supports it. Two of the provisions emphasize that the Department should maximize federal financial assistance. The first authorizes the Department to "establish such rules and regulations as may be necessary or desirable in order to execute the state plan and to receive the maximum amount of federal financial participation available." O.C.G.A. § 49-4-142 (a). The second states "it is the intention of the General Assembly . . . to authorize [the Department] within the

appropriations provided to it, to administer the state plan in a manner so as to receive the maximum amount of federal financial aid participation available in expenditures made under the state plan." O.C.G.A. § 49-4-157. Under the third provision, "medical assistance" is available only when "such items are rendered and received in accordance with such provisions of Title XIX of the federal Social Security Act of 1935, as amended . . . ." O.C.G.A. § 49-4-141(5). Defendants' reading of these provisions is inconsistent with both a prior decision and basic canons of statutory construction.

A Georgia federal court has already considered and rejected Defendants' construction of the language on maximizing federal financial participation. In Doe v. Busbee, 471 F. Supp. 1326 (N.D. Ga. 1979), the court addressed identical language: a Georgia statute authorized the state Medicaid agency "to establish such rules and regulations as may be necessary or desirable in order to execute the State plan and to receive the maximum amount of Federal financial participation as is available in expenditures made pursuant to the State plan." 471 F. Supp. at 1331. As in the instant case, the State contended that the language authorizing it to maximize federal financial participation limited abortion coverage to those abortions reimbursable by the federal government. Id. The court disagreed:

> [T]his contention is not explicitly supported by the language of the authorization, which does not limit services provided by the State plan to those in which there is Federal financial participation; nor is it implicitly supported . . . absent a showing that reimbursement by the state for medically necessary abortions, outside those instances in which Federal funds are available, would result in the State's loss of federal funds for which it would otherwise qualify.

Id. at 1331-32.

Georgia's rules of statutory construction support this interpretation. Under Georgia law, if a statute is susceptible to more than one meaning, one constitutional and one not, then the statute should be interpreted consistently with the Constitution. City of Columbus v. Rudd, 229 Ga. 568, 569, 193 S.E.2d 11, 13 (1972).[12] Defendants' interpretation – which violates the rights to privacy and equal protection guaranteed under Georgia's Constitution – is not the only or even most plausible interpretation. Nowhere does either of the provisions explicitly require that the Department limit its coverage to medical services qualifying for federal money. See Busbee, 471 F. Supp. at 1331-32. To avoid the constitutional problems raised by Defendants' interpretation, these provisions are best understood as exhorting the Department to maximize federal financial participation but only within constitutional boundaries.

Nor does the third provision, which defines "medical assistance," bar the Department from covering all medically necessary abortions. "Medical assistance" is available only when "such items are rendered and received in accordance with such provisions of Title XIX of the federal Social Security Act of 1935, as amended, ..." O.C.G.A. § 49-4-141(5). Title XIX, the federal Medicaid statute, allows state medical assistance plans to pay for services the federal government does not reimburse. In particular, although the Supreme Court has held that Title XIX as amended by the Hyde Amendment does not require states to pay for all medically necessary abortions, the Supreme Court has also held that the Hyde Amendment does not forbid states from doing so: "[a] participating State is free, if it so chooses, to include in its Medicaid plan those medically necessary abortions for which federal reimbursement is unavailable."

Harris v. McRae, 448 U.S. 297, 311 n. 16 (1980). Thus, a state can pay for all medically necessary abortions and be in perfect accord with Title XIX as amended.

Other courts interpreting similar language have reached the same conclusion. For example, the New Mexico Supreme Court in New Mexico Right to Choose v. Johnson, 126 N.M. 788, 975 P.2d 841, 858 (1998), interpreted a statute providing that "medical assistance" is available only to "persons eligible for public assistance under the federal act." The court held that the law "does not expressly prohibit funding medically necessary abortions for Medicaid-eligible women, nor does it explicitly state that funding for this particular medical procedure is contingent on federal reimbursement." Id.; see also Boley v. Miller, 187 W.Va. 242, 248, 418 S.E.2d 352, 358 (1992) (refusing to construe statute mandating that welfare funds be distributed "consistent with applicable federal laws, rules, and regulations" as precluding state funding for medically necessary abortions disallowed by the Hyde Amendment); Dodge v. Dep't of Social Servs., 657 P.2d 969, 976 (Colo. Ct. App. 1983) (disagreeing that statutory provisions limited state's medical assistance program to "only those services categorized in the federal Medicaid legislation"). Likewise, no Georgia statute prohibits the abortion coverage Plaintiffs seek here.

Even if Defendants were right, however, that some Georgia statute or statutes limited Medicaid coverage to those items reimbursable by the federal government, then these provisions would be invalid under Georgia's Constitution. As discussed above, the judiciary has the power and the duty to void unconstitutional laws. "An unconstitutional law is no law and no court is bound to enforce it." Payne v. Griffin, 51 F. Supp. 588, 592 (M.D. Ga. 1943).

4. Plaintiffs need not exhaust administrative remedies

Georgia law does not require plaintiffs to exhaust administrative remedies in facial constitutional challenges to State policies or statutes. Moreover, the courts relax otherwise applicable exhaustion requirements when the available administrative remedies are inadequate. Because this is a facial constitutional challenge and because the relevant administrative remedies would be inadequate even if they applied in this case, Plaintiffs are not required to exhaust these remedies.

a. This facial constitutional challenge is not subject to an exhaustion requirement.

The Georgia Supreme Court has repeatedly held that exhaustion requirements do not apply in facial constitutional challenges. For example, although plaintiffs must exhaust administrative remedies before they "'seek a declaration by a court of equity that [a zoning] ordinance is unconstitutional as applied to their property,' . . . [f]acial challenges . . . have no [such] ripeness requirement." Greater Atlanta Homebuilders Ass'n v. DeKalb County, 277 Ga. 295, 296-97, 588 S.E.2d 694, 696 (2003) (citation omitted). "'There is . . . no exhaustion requirement when . . . the property owner challenges the constitutionality of an ordinance on its face.'" King v. City of Bainbridge, 272 Ga. 427, 428, 531 S.E.2d 350, 351 (2000) (citation omitted).

Underlying this rule is a fundamental separation of powers principle. The resolution of cases concerning the facial constitutionality of state policies is quintessentially a judicial function. See supra Part II.B.2. The Georgia Supreme Court has therefore held that the exhaustion rule "does not apply where the defect urged by the complaining party goes to the jurisdiction or power of the agency to issue the order." Cravey v. Southeastern Underwriters

Ass'n, 214 Ga. 450, 457, 105, S.E.2d 497, 502 (1958) (holding that associations of rate-making insurance companies were not required to exhaust administrative appeals to the Insurance Commissioner before challenging his authority to suspend rate increases without notice and a hearing). A facial constitutional challenge by definition rests on the assertion that the agency lacks the power to issue the offending rule or policy. Because courts are the appropriate forum for deciding such controversies, the state Supreme Court has ruled that "administrative zoning agencies and officials [for example] do not have the jurisdiction or authority to determine the constitutionality of a zoning ordinance." City of Rome v. Pilgrim, 246 Ga. 281, 283, 271 S.E.2d 189, 191 (1980).

In this case, Plaintiffs assert the facial unconstitutionality of the Department's policy of denying Medicaid coverage for medically necessary but nonlifesaving abortions. Compl. ¶¶ 39-44. Because it violates the state constitution, this policy is void and has been void since its inception. The Department thus lacks the authority to have issued or to implement it. These claims, like other claims of facial constitutional invalidity, are beyond the agency's power to resolve and are not subject to any exhaustion requirement. See, e.g., Greater Atlanta Homebuilders Ass'n, 277 Ga. at 296-97, 588 S.E.2d at 696; Cravey, 214 Ga. at 457, 105 S.E.2d at 502.

The statutes and regulations that govern the administrative process for Medicaid claims acknowledge the limits of the Department's adjudicative authority. The statute that creates the process for administrative review entitles a Medicaid recipient to a hearing if she alleges that "any medical or remedial care or service . . . should be reimbursed under the terms of the state

plan which was in effect on the date on which such care or service was rendered or is sought to be rendered." O.C.G.A. § 49-4-153(b)(1) (emphasis added); see also Ga. Comp. R. & Regs. r. 350-4-.02(1)(a) **(year)** (same). A recipient may not assert that a provision of the state plan is invalid. Instead, the statute and regulation allow her to pursue administrative remedies when she accepts the terms of the state plan but claims that it has been improperly applied to deny reimbursement.

The provisions for administrative appeals by Medicaid providers (as opposed to recipients) contain a similar limitation. Like recipients, providers may seek administrative review, not based on claims that existing Departmental policies are invalid, but based instead on claims that payment is due "in accordance with" such policies. See Ga. Comp. R. & Regs. r. 350-4-01(1)(a) **(year)** (allowing providers to seek administrative review when they are aggrieved by the denial of "medical assistance" for services rendered); O.C.G.A.. § 49-4-141(5) (defining "medical assistance" as payment to a provider of the cost of services rendered "in accordance with . . . all applicable laws of this state, the state plan, and regulations of the department which are in effect on the date on which the items are rendered") (emphasis added); Ga. Comp. R. & Regs. r. 350-1-.01(12) **(year)** (same).

Thus, both the case law and the governing statute and regulations confine the administrative process to the adjudication of complaints about the manner in which existing rules and policies are applied. Litigants like the Plaintiffs in this case remain free to go to court for resolution of facial constitutional challenges to such policies without first having to exhaust administrative remedies.

b. Even if administrative review were appropriate in this kind of case, the available remedies are so inadequate that the exhaustion requirement should be suspended.

In addition to holding exhaustion requirements inapplicable in facial constitutional challenges, the Georgia Supreme Court also suspends these requirements when the available administrative remedies are not adequate. "Where the remedy is inadequate, exhaustion is not required." Glynn County Bd. of Educ. v. Lane, 261 Ga. 544, 546, 407 S.E.2d 754, 756 (1991). The remedies available here are inadequate for two independent reasons. First, the available process offers no remedy at all for some of the women who need it. Second, the Defendant Commissioner of the Department of Community Health cannot be an impartial judge of his own policy.

The Georgia Supreme Court has held that an administrative remedy must be "'the substantial equivalent of the equitable relief. . . . It must be . . . as practical and as effective to the ends of justice and its prompt administration as the remedy in equity.'" Cravey, 214 Ga. at 457, 105 S.E.2d at 502 (citation omitted). An administrative process falls far short of this standard when it "exacts a price which causes it to be no remedy at all." Moss v. Central State Hosp., 255 Ga. 403, 404, 339 S.E.2d 266, 227 (1986). Thus a public employee cannot be made to "risk dismissal" from his job in order to pursue administrative remedies. Id. Nor can a dentist be required to risk "criminal prosecution for the felony offense of practicing medicine without a license and/or the initiation of administrative proceedings to revoke his license to practice dentistry." Thomas v. Georgia Bd. of Dentistry, 197 Ga. App. 589, 590, 398 S.E.2d 730, 732

(1990). In such circumstances, it is as if "an agency imposed an exorbitant fee as a prerequisite to a remedy," making it "useless." Moss, 255 Ga. at 404, 339 S.E.2d at 277.

For many Medicaid-eligible women who need abortions to protect their health but not to save their lives, the administrative process here is "useless" in just this sense. The "exorbitant fee" imposed is the price of the abortion and associated services. If the recipient or the provider is to seek reimbursement after the abortion is performed, see O.C.G.A. § 49-4-145 (providing that claims must be submitted "not more than six months after the month in which the service is rendered") (emphasis added), either the patient must be able to pay or the provider must be willing and able to offer the service free or at reduced cost. Yet in the majority of cases, a Medicaid-eligible patient cannot pay; that is why the Medicaid program exists. Nor can the provider have any expectation of reimbursement by the Department, which adheres to the policies challenged here. Plaintiffs testify that, while they provide financial assistance to indigent patients whenever possible, this assistance is inadequate to meet the need, leaving many women without access to an abortion even when the pregnancy threatens their health. Dudley Aff. (11/24/03) ¶¶ 9-14; Gelberg Aff. (12/1/03) ¶¶ 4-13; Hawkins Aff. (11/17/03) ¶¶ 5, 13-16, 19; Malloy Aff. (1/11/03) ¶ 7. Women who are so sick that they must be treated in the hospital have especially dim prospects for receiving abortions because, even if the doctor is willing to waive his fee, the associated hospital costs are prohibitive. Some of these women simply cannot obtain abortions and end up spending the duration of their high-risk pregnancies in the hospital at Medicaid's expense. Malloy Aff. (11/11/03) ¶¶ 17, 25; see also Gelberg Aff. (12/1/03) ¶¶ 14, 19; Dudley Aff. (11/24/03) ¶ 6. A post-abortion administrative remedy is "no remedy at all" for a

Medicaid-eligible woman who cannot get an abortion in the first place. Moss, 255 Ga. at 404, 339 S.E.2d at 227.

The administrative process is inadequate in this case for an additional reason. Glynn County Board of Education v. Lane establishes that "a judicial decision maker [must] not have a predisposition as to the matters to be adjudicated so as to impair its ability to consider the matter before it fairly and impartially." 261 Ga. at 545, 407 S.E.2d at 755. In Glynn County the Court considered a challenge to a school board's refusal to submit its financial records to an audit by an independent certified public accountant. The board argued that the superior court had erred in assuming jurisdiction over the case because the plaintiffs had not exhausted administrative remedies. The Supreme Court rejected this argument: "The sole issue in this case involves conduct of the Board. It is unreasonable to require of appellees the futile act of participating in a hearing before that body on the question of its own conduct." 261 Ga. at 546, 407 S.E.2d at 755-56.[13]

The Commissioner of the Department of Community Health, the ultimate administrative arbiter of Medicaid appeals, O.C.G.A.. §§ 49-4-153(b)(1), (b)(2)(D); Ga. Comp. R. & Regs. rr. 350-4-.29 **(year)** (provider appeals), 290-1-1-.01 **(year)** (recipient appeals), stands in no better position than the school board in Glynn County to pass judgment on the validity of his own policy. The abortion restrictions at issue in this case are contained primarily in Policies and Procedures Manuals issued by the Department under the direct authority of the Commissioner. See supra n.1 & Compl. Exs. A-G (containing the relevant provisions of the Manuals); Ga. Comp. R. & Regs. r. 350-1-.02(3) **(year)** (requiring the Department to publish Policies and

Procedures Manuals setting forth terms and conditions for receipt of medical assistance), r. 350-1-.03 (designating the Commissioner as chief administrative officer of the Department). While in the standard Medicaid appeal the Commissioner is called upon to judge the soundness of his subordinates' application of the rules and policies governing the Department, here he would be asked to pass upon the validity of a policy promulgated under his direction. Yet in this latter circumstance, his unavoidable "predisposition as to the matter [] to be adjudicated" must necessarily "impair [his] ability to consider the matter . . . fairly and impartially," rendering the administrative process inadequate. Glynn County, 261 Ga. at 545, 407 S.E.2d at 755.

For these reasons, Plaintiffs need not exhaust administrative remedies. Exhaustion requirements are inapplicable in cases like this one, and the administrative process here is inadequate in any event.

5. Plaintiffs are entitled to declaratory and injunctive relief.

The grant of declaratory and injunctive relief is proper and necessary in this case. Georgia courts regularly grant these remedies together. See, e.g., State v. Café Erotica, 269 Ga. 486, 490, 500 S.E.2d 574, 577 (1998) (declaring unconstitutional a statute barring admission of persons under 21 into adult entertainment establishments and permanently enjoining statute's enforcement); Baranan v. Georgia State Bd. of Nursing Home Adm'rs, 239 Ga. 122, 123, 236 S.E.2d 71, 71 (1997) (holding that "[i]f the declaration is for the plaintiff, the [permanent] injunction will issue."); Gray v. City of Atlanta, 180 Ga. 409, 409, 179 S.E. 357, 358 (1935) (holding it was error not to enjoin enforcement of ordinance declared unconstitutional by Georgia

Supreme Court); see also Kane v. Fortson, 269 F. Supp. 1342, 1343-44 (N.D. Ga. 1973) (declaring certain Georgia voter registration statutes unconstitutional and permanently enjoining their enforcement).

The purpose of a declaratory judgment is "to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." O.C.G.A. § 9-4-1. Declaratory relief is granted "where interested parties are asserting adverse claims upon a state of facts wherein a legal judgment is sought that would control or direct future action." Atlanta Casualty Co. v. Fountain, 262 Ga. 16, 17, 413 S.E.2d 450, 451 (1992). In Macko v. City of Lawrenceville, 231 Ga. App. 671, 675, 499 S.E.2d 707, 712 (1998), for example, petitioners were tenants uncertain about their rights and their landlord's responsibilities relating to a drainage pipe that caused flooding in their home. The court held that the tenants were entitled to declaratory judgment regarding whether defendant landowners had a duty to maintain or improve the pipe. Id. Similarly, someone uncertain about the scope of his or her insurance policy may seek declaratory relief against the insurance company. See State Farm Mut. Auto. Ins. Co. v. Murray, 274 Ga. 498, 556 S.E.2d 114 (2001). Without a declaratory judgment, Plaintiffs here are in a similar position in that they lack clarity about their rights and the State's obligations regarding medically necessary abortions. As interested parties unsure about the legality of the challenged provisions under Georgia's Constitution, Plaintiffs satisfy the declaratory judgment requirements. See also, e.g., Cobb County v. Georgia Transmission Corp., 276 Ga. 367, 578 S.E.2d 852, 853 (2003) (for petitioner challenging constitutionality of an ordinance, declaratory

relief was appropriate to relieve petitioner of uncertainty and insecurity with regard to its economic rights); State v. Jackson, 269 Ga. 308, 312-13, 496 S.E.2d 912, 916-17 (1998) (petitioner alleging law violated his due process rights entitled to declaratory judgment). Unlike an interlocutory injunction, a permanent injunction "is not intended to preserve the status quo pending a final adjudication nor to balance the conveniences pending a final outcome, but to require a party to perform the . . . duties which the trial court has declared the party is obligated to perform. That is the function of a permanent rather than interlocutory injunction." State Farm, 274 Ga. at 509, 556 S.E.2d at 123 (declaring insurance company's obligations under insurance policy and granting insured permanent injunctive relief to make sure obligations met). Permanent injunctive relief is appropriate if a plaintiff prevails on the merits, has no adequate remedy at law, would suffer irreparable harm, and "in balancing the harm to the parties, if the superior court in the exercise of its discretion, found that equity demanded the grant of the injunction." City of Deluth v. Riverbrooke Properties, Inc., 233 Ga. App. 46, 55, 502 S.E.2d 806, 814 (1998).[14] Plaintiffs and their patients, who have no adequate remedy at law, would suffer the irreparable harms detailed supra Part I [or in the Statement of Undisputed Facts filed with this Memorandum]. See also Mem. Law Supp. Pls.' Mot. T.R.O. at 6-15 (filed 12/2/03). Meanwhile, Defendants would suffer no harm. Granting Plaintiffs relief would violate no Georgia law and would further rather than hinder the balance of powers in Georgia. See supra Parts II.B.2, 3. Moreover, it would save Georgia money. Finally, granting injunctive relief would advance the State's overriding interest in the enforcement of the Georgia Constitution. Therefore, the balance of equities favors a permanent injunction. Not surprisingly, Georgia

courts routinely subject illegal conduct and unconstitutional laws to permanent injunctions. See, e.g., Hirsh v. City of Atlanta, 261 Ga. 22, 28, 401 S.E.2d 530, 535 (1991) (enjoining anti-abortion protesters from conduct deemed a public nuisance); Regency Club v. Stuckey, 253 Ga. 583, 597, 324 S.E.2d 166, 169 (1984) (enjoining enforcement of licensing law held to be an unconstitutional special law).

CONCLUSION

In sum, it would be entirely appropriate for this Court to declare that Defendants' restrictions on reimbursing medically necessary abortions are unconstitutional, and then to enjoin permanently their enforcement so that Defendants fulfill their constitutional obligations.