IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ALASKA LEGISLATIVE COUNCIL, Plaintiff, v. GOVERNOR BILL WALKER, in his official capacity as Governor of Alaska, and VALERIE DAVIDSON, in her official capacity as Commissioner of Health and Social Services, Defendants.	)	Case No. 3AN-15-9208 CI

AMICUS BRIEF SUPPORTING MEDICAID COVERAGE FOR J.K. AND U.R.

Through counsel, Jennifer Kettleson and Ursula Rudy submit the following amicus brief to support coverage under the Medicaid expansion, 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII), for themselves and for people like them. The controlling state statute is AS 47.07.020(a), which provides,

> All residents of the state for whom the Social Security Act requires Medicaid coverage are eligible to receive medical assistance under 42 U.S.C. 1396-1396p (Title XIX, Social Security Act).

Because the Medicaid Act title of "the Social Security Act requires Medicaid coverage" for people like amici, the Commissioner of Health and Social Services' decision to implement the expansion by submitting a Medicaid state plan amendment to the Federal Government was correct, and this Court should sustain it.

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INTEREST OF AMICI

Jennifer Kettleson, an Anchorage resident, qualified for Medicaid for the first time under the expansion. She benefits from secure, comprehensive health care under Medicaid because, once she qualified for Medicaid, she has been able to get often-postponed dental care – teeth pulled, on a waiting list for dentures -- which, among other things, makes it easier for her to look for work. In addition, she has been able to get physical therapy and medical bills are no longer piling up. "It has given me a relief knowing I can finally see a doctor for everything."

Ursula Rudy, also an Anchorage resident, similarly qualified for Medicaid for the first time under the expansion. She benefits from secure, comprehensive health care under Medicaid because now that she is eligible, she no longer has to choose between paying for medications and paying her space rent. Before becoming eligible for Medicaid, she was slightly over-income for the State's CAMA program, which meant that she did not have any insurance for the medications she needed for her heart, for her diabetes, and for her anxiety. If she was unable to take her anti-anxiety medications, she was not going to be functional. Also, she has needed to pay out of pocket for anti-allergy medications and medications to help with her acid reflux. Now that she gets Medicaid, she can use her modest income to pay space rent instead of having to spend it on medications. "The security of my having Medicaid has helped my mental health. I am not as anxious now as I was before."

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Amici file this brief in support of the Medicaid expansion not to duplicate the arguments presented by the Governor, but to emphasize several points that were not emphasized in the Administration's brief opposing the Legislative Council's proposed preliminary injunction. These are that our state statutes create an entitlement to Medicaid for amici and for people like them, an entitlement that no one can take away without giving them due process of law; that amici and people like them fit within a "mandatory categorically needy" Medicaid eligibility category, a category that our state law already automatically accepts; that the text of the Social Security Act requires Medicaid coverage for them; that the Supreme Court did not mean in its *NFIB* decision to disturb settled readings of states' existing Medicaid statutes, or require states to go through a new process in order to make choices about the Medicaid expansion; and that under the circumstances of this case, Commissioner Davidson's interpretations of Alaska statutes deserve deference.

LEGAL ARGUMENT

The statutory argument for the Medicaid expansion is a straightforward one, although it is necessary closely to examine the technical details of the statutes. AS 47.07.020(a) and 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) establish an entitlement to Medicaid on the part of people who would qualify for the expansion, an entitlement that may not be denied or taken away without due process of law.[1] They establish this

[1] See, e.g., *State v. Almen*, 480 P.2d 695, 697 n.7 (Alaska 1971) ("We decline to adopt a statutory interpretation urged by the State which would engraft new requirements on entitlement for extended benefits which were not required for original benefits in the absence of clear legislative intent in view of the announced purposes of these statutes");

entitlement because the expansion is a "mandatory categorically needy" category that Alaska law automatically accepts, just as a similar statute in Washington State automatically accepts the expansion. In any event, the federal Medicaid Act "requires coverage" of the expansion population, which is enough to satisfy our Alaska statute. Nothing in the Supreme Court's opinion in *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566 (2012), requires Alaska law to be read differently. Finally, under the distinctive circumstances presented by this case, Commissioner Davidson's interpretation of the state Medicaid statutes deserves deference from this Court.

I. THE EXPANSION IS A "MANDATORY CATEGORICALLY NEEDY" CATEGORY THAT ALASKA LAW AUTOMATICALLY ACCEPTS.

Under the Medicaid Act, the expansion is a "mandatory categorically needy" eligibility category. See 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) and 42 C.F.R. § 435.119.[2]

Estate of Miner v. CFEC, 635 P.2d 827, 831-32 (Alaska 1981) ("the statute and the regulations lay out clear, specific, objective, nondiscretionary rules by which one's entitlement to a permit is determined, and thus her right cannot be abridged without due process"); *Heitz v. State, DHSS*, 215 P.3d 302, 305-06 (Alaska 2009) (footnote omitted) ("Foster care maintenance reimbursements therefore satisfy the criterion for a protected property interest we adopted in *Campbell:* they are 'an individual entitlement grounded in state law, which cannot be removed except for cause.'").

[2] Medicaid is a federal program that States can choose to participate in or not to participate in. If they participate, they must find eligible for Medicaid people who are "mandatorily categorically needy" [42 U.S.C. §§ 1396a(a)(10)(A)(i) and parts of (10)(E); see 42 C.F.R. §§ 435.100-.170], and may find eligible for Medicaid people who are "optionally categorically needy" [see primarily 42 U.S.C. § 1396a(a)(10)(A)(ii), and 42 C.F.R. §§ 435.200-.236] or "medically needy" [42 U.S.C. § 1396a(a)(10)(C); see 42 C.F.R. §§ 435.300-.350]. See generally *Coye v. U.S. D.H.H.S.*, 973 F.2d 786, 789-90 (9th Cir. 1992); see also, e.g., *State of Mississippi v. Sullivan*, 951 F.2d 80, 81 (5th Cir. 1992). A formal distinction between mandatory and optional categorically needy categories has been explicit in federal regulations since the very early 1970s, compare former 45 C.F.R. § 248.10(b)(1) with former 45 C.F.R.

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The Alaska statutory scheme automatically accepts mandatory categorically needy categories, but deals with optional categorically needy categories one by one. Contrast AS 47.07.020(a) with AS 47.07.020(b), and see *Peura v. Mala*, 977 F.2d 484, 486 n.2 (9th Cir. 1992) (citing AS 47.07.020(b), 42 U.S.C. § 1396a(a)(10)(A)(ii), and 42 C.F.R. pt. 435, subpt. C to support proposition that Alaska had elected to cover a particular optional categorically needy group.) Therefore, AS 47.07.020(a) automatically accepts the expansion, along with the other eight mandatory categories.

State remedial statutes meant to give legal rights to the poor should be liberally construed to further that purpose. See *State, DHSS, DPA v. Gross*, 347 P.3d 116, 125 (Alaska 2015) (footnotes omitted, emphasis in original):

> Also aiding our analysis is the rule "that a remedial statute is to be liberally construed to effectuate its purposes." [footnote omitted] Federal courts have recognized that the Social Security Act is remedial and must therefore be liberally construed. [footnote omitted] We recognize the same remedial purposes in Alaska's interim assistance program, which—as part of

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§ 248.10(b)(2), both as added to the Code of Federal Regulations at 36 Fed. Reg. 3870 (Feb. 27, 1971). This distinction was in effect when Alaska first signed on to Medicaid, ch 182 SLA 1972, and a different form of the distinction was in effect when the State amended its eligibility statutes to distinguish between "required" and "optional" categories. Compare former 45 C.F.R. § 248.1(b) with former 45 C.F.R. § 248.1(c), both added to the Code of Federal Regulations at 38 Fed. Reg. 9514-15 (March 11, 1974), and see ch 105, SLA 1974 (effective date, May 16, 1974). So far as the Medicaid Act itself is concerned, the formal placement of mandatory categories in 42 U.S.C. § 1396a(a)(10)(A)(i) and optional categories in 42 U.S.C. § 1396a(a)(10)(A)(ii) has been in effect since 1982. See TEFRA, Pub. L. No. 97-248, § 137(b)(7).

The Medicaid expansion is in the "mandatory categorically needy" part of the Medicaid Act because Congress put it in 42 U.S.C. § 1396a(a)(10)(A)(i). The Medicaid expansion is not in the "optional categorically needy" part of the Medicaid Act, subparagraph (10)(A)(ii), because Congress defined that group to exclude "individuals described in clause (i) of this subparagraph."

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> Alaska's adult public assistance statutes—is intended "to furnish financial assistance *as far as practicable* to needy aged, blind, and disabled persons, and to help them attain self-support and or self-care." [footnote omitted]

See also *Moore v. Beirne*, 714 P.2d 1284, 1287 & n.7 (Alaska 1986) ("The clear purpose of the interim assistance statute was to remove interim assistance from the state's discretion and make payments in accordance with the statute mandatory").[3] A court

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[3] This general principle applies to unemployment compensation, e.g., *State v. Almen*, 480 P.2d at 696 (footnote omitted) ("However, because of the obvious intention expressed by the legislature in AS 23.20.005(b), incorporated into the extended coverage statute, AS 23.20.352, the latter should be liberally construed to promote the purposes of the act"); *Estes v. Department of Labor*, 625 P.2d 293, 295 (Alaska 1981) (footnotes omitted) ("The Alaska Employment Security Act is a remedial statute with the primary purpose of 'ameliorat(ing) the negative effects that involuntary unemployment has on both the unemployed individual and society as a whole.' *State v. Boucher*, 581 P.2d 660, 662 (Alaska 1978). The Act specifically provides that its terms are to be liberally construed toward accomplishment of its purposes. [footnote omitted]"); workers' compensation, e.g., *S.L.W. v. Alaska Workmen's Compensation Board,* 490 P.2d 42, 43 (Alaska 1971) ("normally the Alaska Workmen's Compensation Act is read liberally to effectuate its beneficent purposes"); *Forest v. Safeway Stores, Inc.*, 830 P.2d 778, 781 (Alaska 1992) (footnote omitted) ("we have consistently held that the Workers' Compensation Act should be liberally construed in favor of the employee in accordance with its humanitarian purposes"); wage and hour laws, *Whitesides v. U-Haul Company of Alaska*, 16 P.3d 729, 732 (Alaska 2001) (footnotes omitted) ("Like the federal Fair Labor Standards Act (FLSA), the terms of the AWHA, a remedial statute designed to effectuate the legislature's goal of providing broad employment protection, are to be liberally construed."); exemption statutes, *Gutterman v. First Nat'l Bank of Anchorage*, 597 P.2d 969, 972 (Alaska 1979) (footnote omitted) ("It is an accepted general rule that "'exemption laws are remedial in character and should be liberally construed in favor of the debtor.'"); *Ilardi v. Parker*, 914 P.2d 888, 890 (Alaska 1996) (same); and landlord-tenant law, e.g., *Sullivan v. Subramanian*, 2 P.3d 66, 69 (Alaska 2000) (footnotes omitted) ("Adopted in 1974, [footnote omitted] the 'Uniform [Residential Landlord and Tenant] Act constitutes a basic reform of landlord-tenant law, according tenants previously unrecognized rights by recognizing the contractual nature of the landlord-tenant relationship.' [footnote omitted] By its own terms, the act is to be 'liberally

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should interpret a statute according to its remedial purposes even when it does not defer to an agency's construction of that statute. E.g., *Alaska Contracting and Consulting, Inc., v. Alaska Dep't of Labor*, 8 P.3d 340, 346 (Alaska 2001).

Furthermore, the Medicaid Act is part of the Social Security Act, and there is federal authority for the proposition that "the Social Security Act is remedial and must therefore be liberally construed." *State, DHSS, DPA v. Gross*, 347 P.2d at 125 & n.57 (citing *Doran v. Schweiker*, 681 F.2d 605, 607 (9th Cir.1982) ("The Social Security Act is remedial, to be construed liberally."); *Haberman v. Finch*, 418 F.2d 664, 667 (2d Cir.1969) ("[T]he Social Security Act is a remedial statute, to be broadly construed and liberally applied.").)

Nor is our state alone in the way its Medicaid eligibility statutes work. Washington State, in Revised Code of Washington § 74.09.510, has an eligibility statute patterned like Alaska's: automatically accepting mandatory categorically needy categories, but accepting options one by one. There is a short paragraph on what is explicitly described as mandatory categorically needy eligibility, and then there are some eleven paragraphs on options.[4]

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construed and applied to promote its underlying purposes and policies,' one of which is 'to encourage landlord and tenant to maintain and improve the quality of housing.'").

[4] RCW 74.09.510 Medical assistance -- Eligibility

Medical assistance may be provided in accordance with eligibility requirements established by the authority, as defined in the social security Title XIX state plan for mandatory categorically needy persons and:

(1) Individuals who would be eligible for cash assistance except for their

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institutional status;

(2) Individuals who are under twenty-one years of age, who would be eligible for medicaid, but do not qualify as dependent children and who are in (a) foster care, (b) subsidized adoption, (c) a nursing facility or an intermediate care facility for persons with intellectual disabilities, or (d) inpatient psychiatric facilities;

(3) Individuals who:

(a) Are under twenty-one years of age;

(b) On or after July 22, 2007, were in foster care under the legal responsibility of the department or a federally recognized tribe located within the state; and

(c) On their eighteenth birthday, were in foster care under the legal responsibility of the department or a federally recognized tribe located within the state;

(4) Persons who are aged, blind, or disabled who: (a) Receive only a state supplement, or (b) would not be eligible for cash assistance if they were not institutionalized;

(5) Categorically eligible individuals who meet the income and resource requirements of the cash assistance programs;

(6) Individuals who are enrolled in managed health care systems, who have otherwise lost eligibility for medical assistance, but who have not completed a current six-month enrollment in a managed health care system, and who are eligible for federal financial participation under Title XIX of the social security act;

(7) Children and pregnant women allowed by federal statute for whom funding is appropriated;

(8) Working individuals with disabilities authorized under section 1902(a)(10)(A)(ii) of the social security act for whom funding is appropriated;

(9) Other individuals eligible for medical services under RCW 74.09.700 for whom federal financial participation is available under Title

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When Washington State decided to implement the expansion, it did not amend this statute to tack on an optional category (12). Instead, it relied on the existing statute's reference to the "social security Title XIX state plan for mandatory categorically needy persons." Because Washington State had always implemented changes in mandatory categories administratively, without need for statutory changes, it did not make any changes in its eligibility statutes this time either.

Washington State uses the term "mandatory categorically needy persons," while AS 47.07.020(a) uses the language "residents of the State for whom the Social Security Act requires Medicaid coverage," but the term and the language mean the same thing. To accept the expansion, Alaska has not needed to do anything more or less than what Washington State did.

II. THE MEDICAID ACT TITLE OF THE SOCIAL SECURITY ACT "REQUIRES COVERAGE" OF THE EXPANSION POPULATION.

Contrary to the Legislative Council's arguments, neither the text, the legislative

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XIX of the social security act;

(10) Persons allowed by section 1931 of the social security act for whom funding is appropriated; and

(11) Women who: (a) Are under sixty-five years of age; (b) have been screened for breast and cervical cancer under the national breast and cervical cancer early detection program administered by the department of health or tribal entity and have been identified as needing treatment for breast or cervical cancer; and (c) are not otherwise covered by health insurance. Medical assistance provided under this subsection is limited to the period during which the woman requires treatment for breast or cervical cancer, and is subject to any conditions or limitations specified in the omnibus appropriations act.

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history, nor the more than 40-year implementation of the 1972 and 1974 state Medicaid statutes suggests that state officials must make an ad hoc, provision-by-provision examination of the 'required' nature of mandatory categorically needy categories. Instead, the text of AS 47.07.020, what insight may be derived from the legislative history, and, importantly, the way administrators and legislators have implemented our Medicaid statutes over the years, all show that the word "requires" in AS 47.07.020(a) maps to the mandatory categorically needy categories established as required by the Medicaid title of the Social Security Act.

The Alaska Legislature's crucial structural move was in 1974, when it specified the mandatory federal eligibility categories that would be covered by replacing the list of covered persons that had been in the 1972 legislation[5] with a more general reference to "[a]ll residents of the state for whom the Social Security Act requires Medicaid coverage." As Commissioner McGinnis's March 22, 1974 letter explained,

> Alaska's Medicaid Statute currently ties eligibility for Medicaid to discontinued adult public assistance programs. It is recommended that AS 47.07.020 be amended to provide Medicaid to the same groups of people presently covered and to bring Alaska into conformity with federal requirements.

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[5] Between 1972 and 1974, AS 47.07.020 had read,

ELIGIBLE PERSONS. A resident of the state who is eligible to receive financial assistance under titles I (Old Age Assistance), IV (Aid to Families with Dependent Children), X (Aid to the Blind), XIV (Aid to the Permanently and Totally Disabled), or XVI (the combined program for Aid to the Aged, Blind and Disabled) of the Social Security Act as those programs are administered by the state, including a person now in a nursing home who, if he left the nursing home, would be eligible to receive medical assistance under title XIX of the Social Security Act. Receipt of medical assistance under this chapter is considered to be an additional benefit to these individuals and does not affect other assistance payments, federal or state, for which the recipient is eligible.

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> In sec. 1 of the bill, the persons specified in AS 47.07.020(a) are those required by federal law to be covered.

From then on, AS 47.07.020(a) automatically accepted everyone who Congress added to the list of mandatory categorically needy people.

Because the committee minutes and the consultants' testimony the Legislative Council cites pertained to the 1972 legislation, which used a different way of referring to mandatory eligibility categories, they provide little direct insight into what the 1974 Legislature did by enacting AS 47.07.020(a) in its current form. The most important place where our current Medicaid law reflects the warnings in the 1972 consultants' testimony is in Alaska's specification of the optional *services* -- not eligibility categories, but categories of *services* -- that will be covered, see AS 47.07.030(b). As Commissioner McGinnis put it,

> Medicaid had gotten other states into great trouble. ... [M]any other states have had problems by going into all options available under the medicaid program, but Alaska would not request anything more than the mandated options under Title XIX. There are 8 mandated services and 14 optional.
>
> Mr. McGinnis said that they [the Department and Touche Ross] also think that any addition of an optional service should be a matter determined by legislative action rather than an agency determination. They would propose to deal with that shortcoming.

House Finance minutes, 5/7/72, at 609-10. Unexpected expenditures for people described in one of the optional categorically needy categories, on the other hand, was not part of the problem. In fact, one member of the House Finance Committee observed

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that "when they stayed in 'categorically needy' they were staying in federal funds." 6/13/72 minutes at 677.[6]

Finally, as detailed at pages 41-43 of the Governor's opposition to the Legislative Council's preliminary injunction motion, the more than 40-year history of Alaska's automatic acceptance of mandatory categorically needy categories shows that our statutes must be read to accept the expansion.

To the extent that it is necessary to determine whether the expansion is "required" by the Medicaid Act, the answer to that question is "yes," because the Medicaid Act says the expansion is mandatory, see Governor's Preliminary Injunction Opposition at 40; the *NFIB* decision says the expansion is 'required';[7] and the *NFIB* remedy was not to delete the requirement, but to delete one possible remedy the Federal Government might employ to enforce the requirement, see Governor's Preliminary Injunction Opposition at 43-47.

III. *NFIB* DOES NOT REQUIRE STATES TO IGNORE THEIR EXISTING STATUTORY STRUCTURES.

There should be general agreement that if the Supreme Court had not acted, no one would be disputing whether Ms. K and Ms. R were among AS 47.07.020(a)'s "[a]ll residents of the state for whom the Social Security Act requires Medicaid coverage." In its original preliminary injunction paperwork, the Legislative Council said, "[L]ooking at

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[6] The Legislative Council repeatedly erroneously cites 1972 legislative history regarding the adoption of certain Medicaid services in AS 47.07.030 as authority for its claims regarding the history of the 1974 eligibility amendments in AS 47.07.020. See Summary Judgment Memorandum at 7-8, 20-24.

[7] See pages 13-14 infra.

the statutory text, one understandably might come to the conclusion that covering the Medicaid expansion population is a requirement, not an option." Preliminary Injunction Memorandum at 13. Indeed, the Legislative Council's current memorandum observes that "*As enacted, the ACA required* States to cover that [expansion] group as a condition of continued participation in Medicaid and receipt of federal Medicaid funding." Summary Judgment Memorandum at 3 (emphasis furnished). But, contrary to the Legislative Council's position, the *NFIB* decision did not change the way the expansion provision in the federal Medicaid Act interacts with Alaska's Medicaid statutes. The Supreme Court wanted to make sure states had a choice about the expansion, but it did not prescribe a procedure for states to make that choice, and it did not analyze how any particular state would make that choice or had made that choice in the past.

Our statute does not refer to "requirements" in the air, but to the "requirements" of the "Social Security Act." The Supreme Court's decision did not change the Social Security Act so that this Act no longer "requires Medicaid coverage" for the expansion population. Most obviously, the *NFIB* plurality did not invalidate the expansion statute itself, although the joint dissent would have done that. Compare 132 S.Ct. 2566, 2607 (2012) ("Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use. What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding.") with id. at 2666 (joint dissent) ("In sum, it is perfectly clear from the goal and structure of the ACA that the offer of the Medicaid

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Expansion was one that Congress understood no State could refuse. The Medicaid Expansion therefore exceeds Congress' spending power and cannot be implemented.").

What does the *NFIB* opinion say about the "requirements" of Social Security Act's Medicaid Title XIX, as modified by the Affordable Care Act? Citing 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII), the *NFIB* plurality opinion directly explains that "the Act requires state programs to provide Medicaid coverage to adults with incomes up to 133 percent of the federal poverty level." 132 S.Ct. 2566, 2581-82 (2012). See also id. at 2601 ("The Medicaid provisions of the Affordable Care Act, in contrast, require States to expand their Medicaid programs by 2014 to cover *all* individuals under the age of 65 with incomes below 133 percent of the federal poverty line. § 1396a(a)(10)(A)(i)(VIII)."); cf. id. at 2582 ("If a State does not comply with the Act's new coverage requirements, it may lose not only the federal funding for those requirements, but all of its federal Medicaid funds. See § 1396c.") and 2607 (" Section 1396c gives the Secretary of Health and Human Services the authority to do just that. It allows her to withhold *all* 'further [Medicaid] payments ... to the State' if she determines that the State is out of compliance with any Medicaid requirement, including those contained in the expansion. 42 U.S.C. § 1396c. In light of the Court's holding, the Secretary cannot apply § 1396c to withdraw existing Medicaid funds for failure to comply with the requirements set out in the expansion.") In short, according to *NFIB*, the Social Security Act requires States to cover the expansion population.

Notably, the *NFIB* decision did not say, or imply, that it was converting the expansion into an optional categorically needy category. The decision's only reference to

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the optional categorically needy statute, 42 U.S.C. § 1396a(a)(10)(A)(ii), was to support the statement that under pre-ACA law "[t]he States also enjoy considerable flexibility with respect to the coverage levels for parents of needy families." 132 S.Ct. at 2601. Nor did it use the terms "opts" or "option" to describe the choices States would be making after its own decision went into effect. Contrast 132 S.Ct. at 2604 ("A State that opts out of the Affordable Care Act's expansion in health care coverage thus stands to lose not merely 'a relatively small percentage' of its existing Medicaid funding, but *all* of it") and 2605 ("The threatened loss of over 10 percent of a State's overall budget, in contrast, is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion") with id. at 2608, where the decision referred alternately and rather imprecisely to States' "accept[ing] the terms," "choos[ing] to reject the expansion," "declin[ing] to participate," "voluntarily sign[ing] up," "accept[ing] the terms," and "choos[ing] not to participate." The variations in this language indicate that the Court did not have either an opt-in or an opt-out process in mind as something that all States would be following.

Nor do the Court's suggestions that requiring States to provide Medicaid to low-income people on the basis of income was a new idea that States had had no reason to anticipate at the time Medicaid was first enacted, 132 S.Ct at 2605-06, mean that the Court was requiring States to go through a new process of signing up for a new program. The only change the *NFIB* opinion made to the Medicaid Act was to invalidate some applications of the defunding statute, 42 U.S.C. § 1396c. If it had meant to set out a procedure through which States would sign on to expanded Medicaid, it would have set

the procedure out. If, more drastically, the plurality opinion had meant to prevent States from covering the Medicaid expansion population on the basis of their existing Medicaid statutes, it certainly would have said so. Yet there are not any references in the plurality opinion to the mechanisms through which States have made and continue to make choices about Medicaid, statutory or otherwise.[8]

The *NFIB* decision could have invalidated the expansion. It didn't, although four members of the Court would like to have invalidated it. The *NFIB* decision could have

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[8] It would not actually be correct to say that States had *no* reason to anticipate that the Medicaid program might eventually require them to cover all low-income people. Congress anticipated in the original Medicaid Act that states would move towards systems in which substantially everyone with a certain level of income and resources would be eligible for comprehensive care and services. See Pub. L. 89-97, § 121(a), enacting, inter alia, section 1903(e) of the Social Security Act, 42 U.S.C. § 1396b(e), not repealed until October 1972, Pub. L. 92-603, § 230, which was after Alaska began to participate in Medicaid:

> (e) The Secretary shall not make payments under the preceding provisions of this section to any State unless the State makes a satisfactory showing that it is making efforts in the direction of broadening the scope of the care and services made available under the plan and in the direction of liberalizing the eligibility requirements for medical assistance, with a view toward furnishing by July 1,1975, comprehensive care and services to substantially all individuals who meet the plan's eligibility standards with respect to income and resources, including services to enable such individuals to attain or retain independence or self-care.

Over time, mandatory (or "required") Medicaid eligibility for children and pregnant women, and for elders and people with disabilities has indeed shifted towards being income-based. See 42 U.S.C. §§ 1396a(a)(10)(A)(i)(III)-(VII) (income-based eligibility for children and pregnant women) and 1396a(a)(10)(E) (income-based Medicare cost sharing for elders and people with disabilities). Also, the *NFIB* decision was careful to select the narrowest possible remedy. 132 S.Ct. at 2607. So the proposition that the expansion involves a whole new deal distinct from existing Medicaid must not be over-read.

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declared that the expansion was optional. It didn't. The *NFIB* decision could have laid out a system through which states, no matter what their statutes had said, would go through an opt-in process in order to implement the expansion. It didn't. The choice is up to us, and as it turns out, under our statutes the choice is whether to opt out, as opposed to whether to opt in. Alaska could pass a statute that opts out, and that is what the Administration's pending legislation, cited below, effectively would do – opt out if the Federal Government reduces the matching percentage below 90%. But unless and until the Legislature makes that opt-out decision by enacting an amendment to AS 47.07.020, Alaska statutes continue automatically to accept the Medicaid expansion.

IV. COMMISSIONER DAVIDSON'S INTERPRETATION DESERVES JUDICIAL DEFERENCE.

If there is doubt about how to read this particular statute in this particular situation, there ought to be judicial deference to Commissioner Davidson's interpretation. Unlike *State, DPA v. Gross*, 347 P.3d 116 (Alaska 2015), this is not a case where the relevant statute has been interpreted before, using canons of construction that do not defer to the Commissioner.[9] Instead, AS 47.07.040 gives the Commissioner authority to submit plans that will receive optimum federal funding – meaning, contrary to the Legislative Council's reading, that if there is a close call it ought to be in favor of more federal funding – and the statutory check on the Commissioner's .040 authority is that her close call must be "not inconsistent with law," which is deferential in tone. Finally, if this is a

[9] See *Moore v. Beirne*, 714 P.2d 1284, 1286-87 & n.7 (Alaska 1986) (rejecting Department's interpretation of Interim Assistance statute and interpreting statute to further its "clear purpose").

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situation that the Alaska Medicaid statutes did not anticipate – a mandatory categorically needy category whose federal enforcement has been restricted by a judicial decision – under AS 47.07.040 the first call on what to do belongs to the Commissioner. Thus Commissioner Davidson's interpretation of this specific state statute deserves deference in this specific situation, but the Court does not need to address the circumstances under which State officials' interpretations of other statutes might or might not deserve deference.

In this case, the Commissioner's interpretation of Alaska's Medicaid statutes is that they automatically accept the Medicaid expansion, which may proceed even if the Legislature fails to amend the statutes explicitly to accept the expansion. This interpretation is fully consistent with the Administration's introduction of legislation that would have put references to the expansion into the optional categorically needy section of AS 47.07.020, AS 47.07.020(b). That is because that legislation, HB 148 and SB 78,[10] by providing for automatic termination of the Medicaid expansion if the Federal reimbursement percentage for the expansion population ever fell below 90%, would have classified the expansion as something the State could opt out of if that contingency came to pass – making it appropriate, from that perspective, for the reference to appear in AS 47.07.020(b).

[10] And legislation introduced by individual legislators in January, 2015, before Commissioner Davidson made any of the statements that the Legislative Council cites and before the Administration introduced its own legislation. See HB 18 (introduced January 21, 2015).

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Legislation formally implementing the expansion could have been drafted differently – specifically, as an AS 47.07.020(a)(2) setting out the 90% limitation – but the way unenacted legislation is drafted doesn't prove anything in particular about prior legislation that was enacted. See *State, Dep't of Revenue, v. OSG Bulk Ships, Inc.*, 961 P.2d 399, 406 & n.13 (Alaska 1998) ("ORS and AVA rely on comments at committee and subcommittee hearings regarding the proposed legislation .... Such comments, provided in [the] context of legislation which was not adopted, provide no insight into the thinking of the legislature when it enacted [the statute in question 16 or 17 years earlier].") See also *Hillman v. Nationwide Mutual Fire Insurance Co.*, 758 P.2d 1248, 1252 (Alaska 1988), and the other authorities quoted in footnote 13 of *OSG Bulk Ships*.

CONCLUSION

For the reasons set forth above, the Court should deny the Legislative Council's motion for summary judgment and, as authorized by Civil Rule 56(c), enter summary judgment for the State, holding that existing Alaska statutes have already accepted the Medicaid expansion. That would ensure that amici would retain the Medicaid insurance coverage they need.

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Respectfully submitted,

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