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| **SUPREME COURT, STATE OF COLORADO**<br>**2 East 14th Avenue**<br>**Denver, Colorado 80203** | |
| **On Certiorari to the Colorado Court of Appeals**<br>**Court of Appeals Case No. 2014 CA 1816** | |
| Petitioner: **JANE E. NORTON**<br><br>v.<br><br>Respondents: **ROCKY MOUNTAIN PLANNED PARENTHOOD, INC., a/k/a PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS, INC.**, a Colorado nonprofit corporation; **JOHN W. HICKENLOOPER**, in his official capacity as Governor of the State of Colorado; **SUSAN E. BIRCH**, in her official capacity as Executive Director of the Colorado Department of Health Care Policy and Financing; and **LARRY WOLK**, in his official capacity as Executive Director of the Colorado Department of Public Health & Environment | ▲COURT USE ONLY▲ |
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**ANSWER BRIEF**
**OF ROCKY MOUNTAIN PLANNED PARENTHOOD, INC.**

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that the brief complies with C.A.R. 28(g). It contains 7,756 words.

Further, the undersigned certifies that the brief complies with C.A.R. 28(k).

For the party raising the issue:

☐It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R.__, p.__), not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

☑It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.AR. 32.

By: s/Kevin C. Paul

## TABLE OF CONTENTS

Page(s)

## TABLE OF AUTHORITIES

Page(s)

**Cases**

**Statutes**

**Other Authorities**



**Rules**



**Constitutional Provisions**

## STATEMENT OF THE ISSUE

[REFRAMED] Whether the court of appeals erred in interpreting Colo. Const. art. V, section 50 to bar the use of state funds to pay for the performance of any induced abortion only to the extent that the performance of an induced abortion is the purpose for which the state makes the payment.

## STATEMENT OF THE CASE

On October 17, 2013, Jane Norton ("Norton") filed her Verified Complaint in this matter against Planned Parenthood of the Rocky Mountains, Inc. ("PPRM"), the Governor of Colorado (the "Governor"), the Colorado Department of Health Care Policy and Financing ("HCPF"), and the Colorado Department of Public Health and Environment ("CDPHE") in the District Court for the City and County of Denver (the "District Court"). Court File ("CF"), pp. 26-38.

The Governor, HCPF, CDPHE, and PPRM moved the District Court to dismiss Norton's Complaint on the grounds that she lacked standing to pursue her claims and that her Complaint failed to state a claim upon which relief could be granted. CF, pp. 72-91; 208-219.

On August 11, 2014, the District Court entered its order dismissing Norton's Complaint for failure to state a claim. CF, pp. 378-88. Norton appealed to the Court of Appeals, which affirmed the District Court's order. *Norton v. Rocky Mt. Planned Parenthood, Inc.*, 2016 COA 3, 2016 Colo. App. LEXIS 13 (January 14,

2016). Norton then petitioned for, and was granted, a writ of certiorari by this Court. 2016 Colo. LEXIS 1081 (October 17, 2016).

## STATEMENT OF FACTS

In this action against the Governor, HCPF, CDPHE (collectively the "State"), and PPRM, Norton alleges violations of Article V, Section 50 of the Colorado Constitution, which provides, in relevant part:

> No public funds shall be used by the State of Colorado, its agencies or political subdivisions to pay or otherwise reimburse, either directly or indirectly, any person, agency or facility for the performance of any induced abortion.

Colo. Const. Art. V, § 50 ("Section 50"). CF, pp. 30-31.

### Norton's Complaint

In her Verified Complaint (the "Complaint"), Norton asserted that HCPF and CDPHE violated Section 50 by contracting with, and paying, PPRM to provide medical services through the Colorado Medical Assistance Program administered by HCPF and through health care programs administered by CDPHE. CF, pp. 29-34. Nowhere in her Complaint, however, did Norton assert that PPRM at any time requested payment or reimbursement from the State for providing an abortion. Likewise, Norton nowhere asserted that the State ever paid or reimbursed PPRM, directly or indirectly, for providing an abortion.

Instead, Norton contended that the State cannot contract with, or pay, PPRM for any purpose because PPRM is "conjoined, interrelated, and integrated" with a

Colorado nonprofit corporation called Planned Parenthood of the Rocky Mountains Services Corporation ("Services Corporation"). CF, p. 29. According to Norton, Services Corporation, which is not a party to this action, offers abortion care. CF, p. 29. Therefore, Norton asserted, because of the alleged relationship between PPRM and Services Corporation, and because Services Corporation allegedly provides abortion care, any payment from the State to PPRM – no matter the purpose for which that payment is made – necessarily "subsidizes" abortion services and violates Section 50. CF, pp. 29-30.

**The Motions to Dismiss**

The State and PPRM moved the District Court for an order dismissing Norton's claims in accordance with C.R.C.P. 12 (b) (1) and 12 (b) (5) (the "Motions"). CF, pp. 72-91; 208-19. The Motions asserted that: (1) Norton had no standing to challenge the State's expenditure of federal funds; (2) Norton's interpretation of Section 50 directly contravened federal Medicaid requirements; (3) Norton's "subsidization" theory was contrary to the plain meaning of Section 50; and (4) PPRM had not requested, and the State had not issued, any payment or reimbursement in any amount, either directly or indirectly, for any abortion procedure. As a consequence, Norton was without standing to proceed and her Complaint failed to state a claim upon which the Court could grant relief.

**The State's Motion & Affidavits**

In its challenge to Norton's standing, the State detailed the source of payments CDPHE and HCPF made to PPRM. CF, pp. 77-81. As permitted by C.R.C.P 12 (b) (1), *see City of Boulder v. Public Serv. Co. of Colorado*, 996 P.2d 198, 203 (Colo. App. 1999) (trial court may consider facts outside complaint to resolve challenge to subject matter jurisdiction), the State attached the affidavit of CDPHE Fiscal Services and Contracting Branch manager, Danielle Shoots. CF, pp. 204-07. Ms. Shoots explained that, with the exception of State Fiscal Year 2009, CDPHE paid PPRM only for its participation in the Women's Wellness Connection program (the "WWC"), which was formerly known as the Colorado Women's Cancer Control Initiative. CF, p. 205. Ms. Shoots further explained that: (i) the WWC is funded exclusively by the federal Centers for Disease Control and Prevention (the "CDC"); (ii) CDPHE maintains these CDC funds in a separate account that includes no state funds; (iii) CDPHE uses these federal funds to reimburse PPRM for providing breast and cervical cancer screening to eligible women; and (iv) CDPHE does *not* use WWC funds to pay PPRM for abortion services. CF, pp. 205-06.

The State also attached the affidavit of HCPF Legal Division Director Robert C. Douglas, Jr. CF, pp. 120-22. Mr. Douglas explained that PPRM is enrolled as a provider in the Medicaid program and, as such, submits claims for

reimbursement to HCPF. Mr. Douglas further explained that, during the period of time relevant to Norton's complaint, HCPF reimbursed PPRM, in its capacity as a Medicaid provider, "for non-abortion family planning services and other types of non-abortion services. During the timeframe in question, [HCPF] has not paid or reimbursed [PPRM], either directly or indirectly, for abortion services." CF, p. 121.

**PPRM's Motion**

PPRM joined the State in asserting that, under settled Colorado law, Norton had no standing to challenge the State's disbursement of federal funds, such as those used to reimburse PPRM for WWC cancer screening services. CF, pp. 211-12. PPRM further asserted that, in accordance with decisions rendered by the Seventh, Ninth, and Tenth federal circuits, the federal Medicaid statute preempts Section 50 and prohibits the State from refusing to contract with PPRM as a Medicaid provider. CF, pp. 212-13. Finally, PPRM argued that Section 50 must be read in accordance with its plain meaning, which prohibits the State from paying or reimbursing a health care provider, either directly or indirectly, for providing an abortion. Given that plain meaning, and even taking every material fact Norton pled as true, Section 50 does not permit Norton's "abortion subsidy" theory. CF, pp. 213-17.

**The District Court Order**

Following a hearing on the Motions, the District Court issued its Order dismissing Norton's claims as a matter of law. CF, p. 388. In doing so, the District Court acknowledged that Norton had narrowed the scope of her claims from *all* State payments made to PPRM for medical services to only those payments and related expenditures involving purely *state* funds. CF, p. 382. The District Court thus concluded that Norton had standing to pursue her claims as so limited. CF, p. 382.

With respect to Norton's "abortion subsidization" theory, the District Court explained:

> [Norton] contends that any state funding provided to Planned Parenthood violates the Amendment because of the close connection it has with Services Corp. Plaintiff's claims depend on the meaning of the term "indirectly" as it is used in [Section 50].

CF, p. 382 (citations omitted). Setting aside all of the extraneous material submitted by the parties as to the meaning of the term "indirectly," the Court reasoned that any payment made by the State, whether directly or indirectly, to a health care provider must be connected to the performance of an abortion in order to fall within the clearly defined scope of Section 50. CF, p. 384. Given that Norton nowhere alleged that the State made any direct or indirect payment or reimbursement to PPRM for providing an abortion, and that the State confirmed

this with unrebutted affidavits, the Court concluded that Norton's claims based upon her "subsidization" theory failed as a matter of law. CF, p. 384.

The District Court also specifically addressed Norton's assertion that reimbursements paid to PPRM from the Colorado Medicaid program violated Section 50. Acknowledging that three federal circuits had addressed – and rejected – similar claims, the Court likewise declined to adopt Norton's "subsidization" theory as a basis for concluding that Section 50 could be employed to bar any portion of HCPF's Medicaid reimbursements to PPRM. CF, pp. 385-86.

As a consequence of both the plain meaning of Section 50 and the requirements imposed by applicable federal Medicaid statutes, the District Court dismissed Norton's claims as a matter of law. CF, p. 388.

**The Court of Appeals Opinion & Order**

On Norton's appeal, the Court of Appeals affirmed the District Court's Order dismissing her Complaint. The Court acknowledged that Norton's Complaint was rooted in her "subsidization" theory, which turned on her allegation that each and every payment or reimbursement to PPRM served to "subsidize" abortions provided by Services Corporation. *Norton v. Rocky Mt. Planned Parenthood, Inc.*, 2016 Colo. App. Lexis 13 (January 14, 2016) ("*Norton*") at *8, 16, 20.

In reaching its conclusion, the Court of Appeals focused on the plain meaning of Section 50, as well as on its twin obligations to render every word of a constitutional provision meaningful and to avoid unreasonable interpretations that give rise to absurd results. *Norton* at *14-15. The Court explained that "Section 50 is explicit that State funds may not be used to pay or reimburse anyone 'for the performance of any induced abortion.'" Therefore, the Court reasoned, Section 50 requires analysis of the purpose for which the State has made a particular payment. *Id.*at *17-18.

Undertaking this analysis, the Court determined that Norton did not allege anywhere in her Complaint that the State ever made a payment to either PPRM or Services Corporation "for the purpose of reimbursing them for performing abortion services." *Id*. *18. Moreover, the State "submitted proof that it made payments to [PPRM] only for nonabortion services, such as cancer screenings, office visits, copies of medical records, birth control, and testing for infections." *Id*.

Against this backdrop, the Court reasoned, Section 50 does not address what a particular payment from the State is ultimately used for, but rather, restricts the purpose for which that payment can be made. *Id*. at *22-23. In particular, Section 50 expressly prohibits the State from using public funds to pay a health care provider, whether directly or indirectly, for providing an abortion, but does not

prohibit the State from paying a health care provider, who provides abortion care, for non-abortion services. *Id*. at *25.

## SUMMARY OF THE ARGUMENT

The Court of Appeals and the District Court correctly construed Section 50 in accordance with its plain and common sense meaning. As a consequence, both Courts below recognized that Section 50, by its terms, prohibits the State from using public funds for the purpose of compensating, whether directly or indirectly, a health care provider for performing an induced abortion. Contrary to Norton's assertions, the language of Section 50 does not permit the conclusion that it can be read to bar the State from paying or reimbursing a hospital, health system, physician practice, or other provider of abortion care for non-abortion services. While other states have adopted such broad funding prohibitions, Colorado has not.

To the extent that Norton continues to assert that Section 50 limits the State's use of public funds to compensate PPRM as a Medicaid provider, her contention directly conflicts with settled federal law and should, therefore, be dismissed.

Finally, Norton's own, particular and non-contemporaneous interpretation of Section 50 is entitled to no deference from this Court.

For all of these reasons, this Court should affirm the decision of the Court of Appeals dismissing Norton's Complaint.

## ARGUMENT

### I. The Court of Appeals correctly construed Section 50 to prohibit the State from using public funds to pay for the performance of abortions only to the extent that the performance of an abortion is the purpose for which the State makes such a payment.

Standard of Review & Preservation: This issue involves interpretation of the State Constitution and is therefore subject to this Court's *de novo* review. *See Lobato v. State*, 304 P.3d 1132, 1137-38 (Colo. 2013). The issue presented on appeal was preserved below. CF, p. 399.

Section 50 provides, in relevant part that "[n]o public funds shall be used by the State . . . *to pay* or otherwise reimburse, either *directly or indirectly*, *any person*, agency or facility *for the performance of any induced abortion*." Colo. Const. Art. V, § 50 (emphasis added). Norton has not once contended that the State ever paid PPRM, directly or indirectly, for performing an abortion. CF, p. 379, ¶¶ 2-4 (District Court Order); *Norton* at *16, 18. Rather, Norton has consistently asserted that Section 50 can be stretched so far as to prohibit the State from ever contracting for any reason with any health care provider who performs abortion procedures. This assertion directly contravenes the plain and common sense meaning of Section 50 and both the District Court and the Court of Appeals were correct in rejecting it. *See Lobato*, 304 P.3d at 1138 (constitutional provision must be construed in accordance with plain and common sense meaning); *People v. Rodriguez*, 112 P.3d 693, 696 (Colo. 2005) (courts afford language of the

Constitution its ordinary and common meaning and give effect to every word whenever possible).

### A. The Court of Appeals and the District Court correctly construed Section 50 in accordance with the plain and common sense meaning of its terms.

Norton acknowledges that her "subsidization" theory turns entirely on the meaning of the word "indirectly." *Norton* at *23-24. She further acknowledges that the language of Section 50, including the term "indirectly," is clear, unambiguous, and requires no "resort to other modes of interpretation." Opening Brief of Petitioner at p. 17. The District Court, the Court of Appeals, the State, and PPRM have all agreed that this is true.

In its Order, the District Court recognized that the terms "directly" and "indirectly," as used in Section 50, unambiguously relate to the flow of public funds from the State to a health care provider as compensation for providing an abortion to a patient. CF, p. 384; *accord Urbish v. Lamm*, 761 P.2d 756, 760 (Colo. 1988) (Section 50, taken as a whole, expresses intention that no abortion shall be paid for with public funds). Likewise, the Court of Appeals acknowledged that the words "directly" and "indirectly," as used in Section 50, "modify the words 'pay or . . . reimburse . . . for,' and thus are focused on the actions of the *payor*, and not on what is done with the funds after they have been received by the

payee. Those words do not divert the focus of the analysis away from the purpose for which the State made the payment." *Norton* at *23.

In keeping with the plain meaning of Section 50, payments from the State to a health care provider *for performing an abortion* clearly constitute "direct" payments prohibited by Section 50. Likewise, a payment from the State to a health care provider *for performing an abortion* that flows through an intermediary – such as a health insurance plan or a hospital system – would just as clearly constitute an "indirect" payment *for the performance of an induced abortion* and would also be prohibited by Section 50. In either case, the State's payment would be made *for the performance of an induced abortion* and would therefore fall within the clearly defined scope of Section 50.

Shortly after Section 50 was adopted in 1984, the Colorado Attorney General reached this very conclusion in an Advisory Opinion that Norton mistakenly cites in support of her "subsidization" theory. *See* 1985 Colo. AG LEXIS 28 (February 6, 1985) (the "AG Opinion"). Responding to questions from the State Employees and Officials Group Insurance Board, the Attorney General addressed the applicability of Section 50 to the State's payment of its employees' health care costs and health insurance premiums.

The Attorney General first took into account that the State operated a self-funded group health insurance program (the "Self-Funded Plan") through which it

paid health care providers who treated State employees, and paid a portion of the premiums for its employees who chose to participate in selected health maintenance organizations (the "HMOs"). AG Opinion at p. 2, § 1. The Attorney General then explained that Section 50 would bar the Self-Funded Plan from paying or reimbursing a physician for abortion care, as doing so would constitute the use of public funds to "*directly*" pay for an induced abortion. *Id*. at p. 3, § 1. Likewise, the Attorney General explained, Section 50 would prohibit the State from using public funds to pay the premium for an HMO that paid for abortion care as a benefit to State employees, because the State would, by doing so, "*indirectly*" pay for induced abortions. *Id*. In either case, whether "directly" to a health care provider from the Self-Funded Plan, or "indirectly" to that provider via an HMO, the payment at issue would be made *for the performance of an induced abortion* and would, as a consequence, contravene the express terms of Section 50.

It is noteworthy that the AG Opinion does not conclude that the Self-Funded Plan would be prohibited from paying PPRM, or any other health care provider that offered abortion care, for non-abortion services. Similarly, the Attorney General did not advise the Board that Section 50 would prohibit the State from paying premiums to an HMO that included PPRM, or any other abortion care provider, on its panel of approved providers for general health care services. Rather, the Attorney General construed the terms "directly" and "indirectly" in

accordance with their plain and commonplace meanings, and advised that Section 50 only prohibits payments to health care providers and HMOs for the performance of abortions.

In sharp contrast to the AG Opinion, Norton's "subsidization" theory takes no account of the plain and common sense meaning of the terms "directly" and "indirectly." Rather than acknowledging Section 50 as a bar to directly or indirectly paying for abortion procedures with public funds, Norton twists Section 50 into a prohibition against the State paying PPRM for providing cancer screening and annual gynecologic exams because, according to Norton, an organization affiliated with PPRM provides abortion care. As both the District Court and the Court of Appeals recognized, Norton's theory thereby effectively writes the words "for the performance of an induced abortion" completely out of Section 50.

Given that Section 50 actually includes these words, the Court of Appeals and the District Court were correct to conclude that Section 50 requires a nexus between the State's payment to a health care provider and the performance of an induced abortion by that health care provider. Regardless of whether the State pays or reimburses a physician practice, hospital, or health system directly or indirectly for providing abortion services, the purpose of that payment or reimbursement must be *for the performance of an induced abortion.* To argue, as does Norton, that paying a health care provider *for the performance of cancer*

*screening services* triggers Section 50 is to render a substantial part of that provision completely meaningless.

Moreover, the Court of Appeals and the District Court correctly rejected Norton's assertion that Section 50 can be employed to regulate a health care provider's use of the funds it is paid for the medical services it performs. By its terms, Section 50 expressly regulates the *State's* use of public funds and prohibits the *State* from using those funds to pay *for* abortion procedures. As both the Court of Appeals and the District Court recognized, Section 50, as written, has nothing to do with the decisions a health care provider makes regarding how it uses the revenues it earns.

In essence, Norton argues that Section 50 prohibits every hospital, health system, HMO, medical school, residency program, outpatient clinic, and physician or advanced practice nursing practice that provides abortion care paid for by health insurance plans, by self-funded plans, or by patients themselves, from participating in any program funded or administered by the State. Such an assertion not only contradicts the plain and common sense meaning of Section 50, but is also patently absurd. *See Patterson Recall Comm., Inc. v. Patterson*, 209 P.3d 1210, 1215 (Colo. App. 2009); *Norton* at *24.

In conclusion, Section 50 unambiguously prohibits the use of public funds to pay health care providers, directly or indirectly, for the performance of abortion

procedures. As a consequence, Section 50 requires an analysis of the purpose for which the State makes a particular payment to a health care provider. Where the State does not make a payment or a reimbursement, directly or indirectly, to a health care provider *for an induced abortion*, Section 50 is not triggered. The Court of Appeals and the District Court correctly concluded that Norton's "subsidization" theory attempts to extend the reach of Section 50 well beyond the plain meaning of its terms. Therefore, the Court of Appeals made no error in affirming the District Court's Order dismissing Norton's Complaint as a matter of law.

### B. Norton's "subsidization" theory finds no support in *Taxpayers for Public Education v. Douglas County*.

In her Opening Brief, Norton relies upon this Court's decision, and upon the dissenting opinion of Judge Bernard in the Court of Appeals, in *Taxpayers for Pub. Educ. v. Douglas County Sch. Dist.*, 356 P.3d 833 (Colo. App. 2013), *rev'd*, 351 P.3d 461 (Colo. 2015). Neither, however, affords support for Norton's "subsidization" theory.

In *Taxpayers*, the plaintiffs challenged a Douglas County School District scholarship program (the "CSP") through which the District directed public funds to both religious and non-sectarian private schools to pay a portion of eligible students' tuition. 351 P.3d at 465. The plaintiffs asserted that the CSP violated Article IX, Section 7 of the Colorado Constitution, which provides that:

> [neither] the general assembly, nor any county, city, town, township, school district or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, *or to help support* or sustain *any school*, academy, seminary, college, university or other literary or scientific institution, *controlled by any church or sectarian denomination whatsoever*. . . .

Colo. Const. art IX, § 7 ("Section 7") (emphasis added).

On appeal from the District Court's order permanently enjoining the CSP, the Colorado Court of Appeals concluded that the program did not violate Section 7. Relying in part upon this Court's decision in *Americans United for Separation of Church & State Fund, Inc. v. State*, 648 P.2d 1072 (Colo. 1982), in which this Court approved a college scholarship program that provided public funds directly to students for use, in limited circumstances, at religion-affiliated institutions that were not "pervasively sectarian," the Court of Appeals determined that "the CSP is neutral toward religion, and funds make their way to private schools with religious affiliation by means of personal choices of students' parents." 356 P.3d 851.

In dissent, Judge Bernard reasoned that the Court reached the wrong result because it failed to focus on the plain meaning of Section 7 and to enforce that provision as it was written, without appeal to technical rules of construction. *Id.* at 857-58. Acknowledging that the *Americans United* distinction between "sectarian" and "pervasively sectarian" institutions had been prohibited by subsequent federal decisions, Judge Bernard explained,

> Section 7's language is unambiguous. In my view, it prohibits public school districts from channeling public money *to private religious schools.*
>
> I think that the [CSP] is a pipeline that violates this direct and clear constitutional command. I would follow this command, and I would conclude that section 7 . . . bars transferring public funds *to private religious elementary, middle, and high schools*. . . .
>
> * * *
>
> My reading of section 7 is that it denies funding *to all private religious schools*. . . .
>
> * * *
>
> In my view, section 7 does not focus on differences among religious doctrines, but on whether *the controlling entity* is a church or sectarian denomination.

*Id.* at 855, 862 (emphasis added).

On certiorari review, a plurality of this Court reversed the Court of Appeals and held the CSP to be a violation of Section 7. *See* 351 P.3d at 475 (Justice Marquez concurring in the judgment based upon the CSP's violation of the Public School Finance Act). Adopting essentially the same position as did Judge Bernard in his dissent, the plurality concluded that the plain meaning of Section 7 "makes one thing clear: A school district may not aid religious schools. * * * Yet aiding religious schools is exactly what the CSP does." 351 P.3d at 470. The fact that the CSP directed District funds to the school of a particular student's choice in the form of a restrictively endorsed check made out to the student's parent that was

delivered directly to the school did not cure the program's constitutional infirmity. *Id*. 465, 470. Rather, in keeping with the plain and common sense meaning of Section 7, the plurality concluded that the CSP amounted to an impermissible use of public funds to support religious schools. *Id.* at 471, 475.

Contrary to Norton's contentions, both this Court's plurality opinion, and Judge Bernard's dissent, in *Taxpayers* clearly support the Court of Appeals' construction of Section 50 at issue here. As the plurality and Judge Bernard both concluded, Section 7 expressly and unambiguously prohibits the use of "any public fund or moneys whatever" to aid or support, for any purpose, a defined class of *entities* – that is, sectarian institutions, such as religious schools. *See* 356 P.3d at 857; 351 P.3d at 470.

By contrast, Section 50 contains *no* such prohibition against the payment of public funds to a class of health care providers. Rather, Section 50, by its terms, plainly and unambiguously prohibits the State from using public funds to pay for, either directly or indirectly, one particular medical *procedure* – an induced abortion. As the Court of Appeals' opinion, in which Judge Bernard joined, correctly concluded, Section 50, as written, reaches only a payment made by the State for the purpose of compensating a health care provider for performing an abortion procedure.

As this Court recognized in *Taxpayers*, *see* 351 P.3d at 470, and the Court of Appeals similarly acknowledged below, *see Norton* at *23, a prohibited payment can be "direct" – as would occur where a school district aids a religious school by paying a student's tuition, or where the State's self-funded health plan pays a physician for providing an abortion to a state employee. Likewise, a prohibited payment can be "indirect" – as when a school district awards a scholarship to a student who can then use those funds to attend a private religious school, or the State pays the premium for an HMO that compensates its medical staff for providing abortion care to state employee participants. In either case, the prohibited payment must fall within the scope of the applicable constitutional language.

With respect to Section 50, that language clearly prohibits the State from paying health care providers, whether directly or indirectly, for performing induced abortions. Just as clearly, Section 50 cannot be read to prohibit the State from making payments to health care providers of any sort for providing non-abortion care to their patients. This Court should, therefore, construe Section 50 in accordance with its plain and common sense meaning and affirm the Court of Appeals decision dismissing Norton's Complaint.

### C. Norton's "subsidization" theory likewise finds no support in *Keim v. Douglas County School District.*

In *Keim v. Douglas Cnty. Sch. Dist.*, 2015 Colo. App. LEXIS 689 (May 7, 2015)[1], the Court of Appeals reviewed an Administrative Law Judge's determination that the Douglas County School District violated the Colorado Fair Campaign Practices Act (the "FCPA") by making a contribution to candidates for election to the Douglas County School Board. *Id*. at *P1. The alleged contribution consisted of the cost of a report supporting the work of the school board and its reform agenda that the District distributed to 85,000 Douglas County residents via its weekly e-newsletter. *Id*. at *P12.

On appeal, the Court reversed the ALJ based upon its conclusion that the District did not make an impermissible candidate contribution. In doing so, the Court looked to the applicable definition of the term "contribution:"

> (a) "Contribution" means:
>
> * * *
>
> (IV) Anything of value given, directly or indirectly, to a candidate for the purpose of promoting the candidate's nomination, retention, recall, or election.

[1] Complainant Keim petitioned for and was granted a writ of certiorari by this Court. The issues to be addressed do not touch on the necessity that a payment or gift be made "for the purpose of" promoting a candidate's election in order to constitute a contribution. *See* 2015 Colo. LEXIS 1217 (December 21, 2015).

*Id*. at *23-24 (citing Colo. Const. art XXVIII, § 2(5)). Noting the dictionary definition of the term "indirectly" as "not proceeding straight from one point to another," the Court explained that the definition of "contribution" requires that "(1) a thing of value (2) be put into the possession of or provided to a candidate or someone acting on the candidate's behalf (3) with the intention that the candidate receive or make use of the thing of value provided (4) in order to promote the candidate's election" *Id*. at *39. The Court reasoned that the District's payment for, and dissemination of, the report did not constitute a contribution because the District did not intend that any candidate in particular receive the report and, just as important, did not pay for and distribute the report for the prohibited purpose of promoting a candidate's election. *Id.* at *40; *accord Colo. Ethics Watch v. City & County of Broomfield*, 203 P.3d 623, 625 (Colo. App. 2009) ("for the purpose of" does not mean "with the effect of;" Petitioner's interpretation of FCPA "contribution" definition improperly equates knowledge of possible effects with intent to achieve a particular result). Thus, even if the District had given the report "indirectly" to a candidate, doing so could not generate a "contribution" unless the District acted with the purpose of promoting that candidate's election.

Similar to its analysis in *Keim*, the Court of Appeals here recognized that the plain meaning of Section 50 requires not only that a payment or reimbursement be directly or indirectly made to a provider of abortion care, but also that the payment

or reimbursement be made *"for the purpose of* compensating someone for performing an induced abortion." *Norton* at *2. As the Court of Appeals correctly recognized, payment or reimbursement by the State to a health care provider for performing a non-abortion medical service does not fall within the clearly defined scope of Section 50. Therefore, Norton's "subsidization" theory, which seeks to write the phrase "for the performance of any induced abortion" out of Section 50, finds no support in *Keim* and should be rejected by this Court.

**D. States other than Colorado have adopted prohibitions against "subsidizing" abortions that are substantially different from Section 50.**

This Court may look to the laws of states other than Colorado for examples of the prohibition that Norton mistakenly contends Section 50 imposes. In *Planned Parenthood of Indiana, Inc. v. Comm'r of the Ind. State Dep't of Health*, 699 F.3d 962 (7th Cir. 2011), for example, the Seventh Circuit considered an Indiana statute entitled "Contracts with and grants to abortion providers prohibited." *See* Ind. Code § 5-22-17-5.5. This provision expressly states that:

> (b) An agency of the state may not:
>
> (1) enter into a contract with; or
>
> (2) make a grant to;
>
> any *entity* that performs abortions or maintains or operates a facility where abortions are performed that involves the expenditure of state funds or federal funds administered by the state.

Ind. Code § 5-22-17-5.5 (b) (emphasis added). In sharp contrast to Section 50, this provision prohibits state agencies from contracting with or granting funds to a class of *entities* – that is, providers of abortion care. The Seventh Circuit explained that, in adopting this broadly worded statute, Indiana "aims to prevent the indirect subsidization of abortion by stopping the flow of all state-administered funds to abortion providers." 699 F.3d at 970.

In her Opening Brief, Norton points to the Eighth Circuit's decision in *Planned Parenthood of Mid-Missouri & E. Kan., Inc. v. Dempsey*, 167 F.3d 458 (8th Cir. 1999) in support of her "subsidization" theory. That decision addressed a Missouri statute, adopted in 1998, H.B. 1010, § 10.715(1), 89th Leg., 2d Sess. (Mo. 1998), which stated, in relevant part, that state funding for family planning services could not be expended

> for the purpose of performing, assisting or encouraging for abortion, and further . . . none of these funds may be expended to directly or indirectly subsidize abortion services or administrative expenses, as verified by independent audit. None of these funds may be paid or granted to *organizations or affiliates of organizations* which provide or promote abortions.

*Id*. at 463 (emphasis added).

Like the statute addressed in *Planned Parenthood of Indiana*, the Missouri funding statute at issue in *Planned Parenthood of Mid-Missouri* barred the state from paying its family planning funds to any entity that provided, or promoted, abortion services. Further, the Missouri statute expressly prohibited the use of

state funds to "directly or indirectly subsidize abortion services or administrative expenses." *Id*.

By contrast, Section 50 expressly bars the use of public funds to pay or reimburse a health care provider for performing an abortion procedure. Unlike the Missouri statute addressed in *Planned Parenthood of Mid-Missouri*, nothing in Section 50 prohibits the State from paying or reimbursing any class of health care providers, including those that offer abortion care, for non-abortion services.

Finally, this Court may wish to consider Arizona's statutory prohibition on public funding for abortion care, which was at issue in *Planned Parenthood Arizona, Inc. v. Betlach*, 727 F.3d 960 (9th Cir. 2013). The relevant Arizona statute provided that: "[t]his state or any political subdivision of this state may not enter into a contract with or make a grant to any person that performs nonfederally qualified abortions or maintains or operates a facility where nonfederally qualified abortions are performed for the provision of family planning services." *Id*. at 964. The Ninth Circuit explained that the purpose of this provision "is to exclude concededly qualified medical providers from eligibility for public funds unless they decline to perform elective abortions." *Id*. at 975.

As with the Indiana and Missouri statutes described above, the Arizona statute prohibited the payment of any public funds to an entire class of health care providers – that is, those who performed abortion services – for providing non-

abortion, family planning services. As such, the Arizona statute was far broader and more sweeping than Section 50, which only prohibits the State of Colorado from expending public funds to compensate health care providers for the performance of induced abortions. Contrary to Norton's allegations, Section 50 cannot be understood to sweep so broadly as does the Arizona statute. As a consequence, this Court should affirm the Court of Appeals' determination that Section 50 cannot, and should not, be construed to prohibit the State from paying or reimbursing health care providers for non-abortion services solely because those providers offer non-State-funded abortion care.

**II. To the extent that Section 50 is ambiguous, the circumstance surrounding its adoption supports the Court of Appeals' plain meaning interpretation.**

PPRM joins the State and Norton in urging this Court to conclude, as did the District Court and the Court of Appeals, that Section 50 is clear and unambiguous as written and can be construed in accordance with its plain meaning. However, to the extent that this Court determines otherwise, PPRM joins in the State's thorough discussion of the historical context in which Section 50 was adopted. *See* State Defendant's Answer Brief at 20-28 (II. D.). The history surrounding the federal Hyde Amendment, the 1982 Court of Appeals' decision in *Dodge v. Department of Social Services,* 657 P.2d 969 (Colo. App. 1982), approving the use of state funds to pay for medically necessary abortions beyond those mandated by the Hyde

Amendment, and the statements published in the 1984 Blue Book all suggest that voters would have understood Section 50 as, in essence, a state law corollary to the Hyde Amendment that significantly limited those abortion procedures for which state funds could be used. At the same time, little, if anything, in either the debates regarding the Hyde Amendment or the published arguments for and against Section 50 would have indicated to voters that, contrary to its express terms, Section 50 would prohibit the State from contracting with or paying, for any purpose, any hospital, health system, or physician who provided abortion care. As a consequence, this Court should conclude that Norton's "abortion subsidization" interpretation is without merit and should, instead, construe Section 50 in accordance with the plain and unambiguous meaning of its terms.

**III. Norton's interpretation of Section 50 as a prohibition against all State payments to providers of abortion care would violate federal Medicaid requirements.**

Standard of Review: This issue turns on a question of law involving the District Court's interpretation of a federal regulation, which this Court should review *de novo*. *See Asphalt Specialties, Co. v. City of Commerce City*, 218 P.3d 741, 744-45 (Colo. 2009).

Norton's Complaint asserted that Section 50 barred HCPF from reimbursing PPRM for medical services it provided to Medicaid recipients. Further, Norton contended before the District Court that Section 50 prohibited HCPF from

expending "public funds" to pay administrative and other costs related to PPRM's participation in the Medicaid program. CF., pp. 29, 231, n.6, 233. To the extent that Norton continues to assert that Section 50 should be interpreted to impose any prohibition against or limitation on PPRM's participation in, and reimbursement from, the Medicaid program, her assertion directly conflicts with settled federal law and should be rejected by this Court.[2]

To participate in the Medicaid program, a state *must* abide by the federal Medicaid Act and its implementing regulations. *See* 42 U.S.C. § 1396a(a); *Hern v. Beye*, 57 F.3d 906, 913 (10th Cir. 1995), *cert. denied, Weil v. Hern*, 516 U.S. 1011 (1995) (Section 50 would violate federal Medicaid law if used to deny funding to Medicaid-eligible women seeking Medicaid-covered abortions to end pregnancies that are the result of rape or incest). Under these federal requirements, State Medicaid programs must offer their beneficiaries a free choice of qualified health care providers. *See* 42. U.S.C. §§ 1396a(a)(23); 1396d(4)(C); *Planned Parenthood*

[2] PPRM recognizes Norton's assertion in her Opening Brief that her Complaint "does not challenge the use by the State Defendants of public funds, whether paid to Planned Parenthood or another, as Colorado's required match under federal Title XIX-Medicaid program or even to administer the federal Medicaid program." Opening Brief at p. 6, n. 4. This assertion, however, is contrary to the allegations and claims set forth in her Complaint, with the Exhibits to her Complaint, and with her prior arguments in this matter. *See*, *e.g.*, CF, p. 233 ("What Plaintiff does challenge, however, is the expenditure of Public Funds, including the disbursement of Public Funds to Planned Parenthood in connection with the federal Title XIX-Medicaid program and the expenditure of Public Funds for State personnel, equipment, and facilities in connection with the State's management of, e.g., the federal Title XIX-Medicaid program.").

*of Ind.*, 699 F.3d at 979 (Section 1396a(a)(23) of Medicaid Act guarantees every Medicaid beneficiary right to choose any qualified provider). Colorado has expressly adopted this "free-choice-of-provider" requirement with respect to managed care contracting and is prohibited from requesting the federal government to waive that requirement with respect to family planning services. *See* Colo. Rev. Stat. §§ 25.5-5-319 (2) and 25.5-5-404 (4) (a).

The United States Courts of Appeals for the Seventh and Ninth Circuits have each rejected state efforts to override the federal free-choice-of-provider mandate and to exclude health care providers who offer abortion services from state Medicaid programs. Both Circuits concluded, in no uncertain terms, that the federal free-choice-of-provider mandate supersedes *all* contrary state law, including prohibitions against the use of state funds to pay for abortion services. As a consequence, each court held that a state is *not* permitted to exclude health care providers from its Medicaid program because those providers offer abortion care. *See Planned Parenthood Arizona, Inc. v. Betlach*, 727 F.3d 960, 974-75; *Planned Parenthood of Ind.*, 699 F.3d at 962, 978.

As the District Court pointed out, the Seventh Circuit decision in *Planned Parenthood of Indiana* is particularly instructive. As explained in Section I.D., above, the State of Indiana adopted a statute in 2011 that prohibited all state agencies from providing state or federal funds to "'any entity that performs

abortions or maintains or operates a facility where abortions are performed.'" *Planned Parenthood of Ind.*, 699 F.3d at 967 (quoting Ind. Code § 5-22-17-5.5(b)). Subsequently, the state went further, adopting a statute that prohibited "abortion providers from receiving *any* state-administered funds, even if the money is earmarked for other services." *Id*. The point, the Seventh Circuit explained, "is to eliminate the indirect subsidization of abortion." *Id*. Both the federal district court for the Southern District of Indiana and the Seventh Circuit held that this prohibition against "indirect subsidization" of abortion care directly contravened the Medicaid free-choice-of-provider requirement and was, therefore, unenforceable for the purpose of barring Planned Parenthood from participating in the state Medicaid program. *Id.* at 980.

More recently the Fifth Circuit adopted the same reasoning with respect to Louisiana's attempt to prohibit a Planned Parenthood affiliate from participating in that State's Medicaid program. *See Planned Parenthood of Gulf Coast, Inc. v. Gee*, 837 F.3d 477 (5th Cir. 2016). Noting that the State attempted to terminate Planned Parenthood of the Gulf Coast's Medicaid provider agreement for reasons wholly unrelated to its qualifications as a health care provider, the Fifth Circuit concluded that "'the free-choice-of-provider provision unambiguously requires that states participating in the Medicaid program allow covered patients to choose among the family planning medical practitioners they could use were they paying

out of their own pockets.'" *Id.* at 500 (quoting *Planned Parenthood of Arizona*, 727 F.3d at 971).

Norton's assertion that the State should be compelled to prohibit *all* health care providers who offer abortion services from enrolling in the Medicaid program not only conflicts with the federal free-choice-of-provider mandate, but also would completely eliminate the State's ability to comply with the federal Hyde Amendment, which *requires* state Medicaid programs to pay for abortion services when a woman's life is at risk, or when she was the victim of rape or incest. *See* Pub. L. 103-112, § 509, 107 Stat. 1113 (the federal "Hyde Amendment"); *Hern* at 911. As the Tenth Circuit made clear in *Hern*, the State may not require that physicians and nurses stop providing abortion care in order to participate, to any extent, in the Medicaid program. *See Hern* at 913.

In conclusion the District Court was correct to determine that Norton's challenge to PPRM's participation in the Medicaid program contravened established federal law and was therefore without merit. This Court should conclude likewise. Further, PPRM joins the State in requesting that, irrespective of this Court's determination as to the proper construction of Section 50, it should deem Norton to have waived her claims against HCPF and should affirm the Court of Appeals' dismissal of those claims.

## IV. Norton's interpretation of Section 50 is entitled to no deference from this Court.

PPRM joins the State is requesting that this Court afford Norton's interpretation of Section 50, issued 17 years after it became effective, no deference. "[A] *contemporaneous* interpretation of a statute by an administrative body charged with the responsibility of applying that enactment. . . should normally be granted significant weight by the courts." *Adams v. Colorado Dep't of Social Services*, 824 P.2d 83, 88 (Colo. App. 1991) (citations omitted). By her own admission, Norton's decision that Section 50 prohibited CDPHE from continuing its longstanding practice of contracting with PPRM and other providers of abortion care for non-abortion, family planning services was neither an administrative nor a procurement rule adopted in accordance with the Administrative Procedure Act. Rather, her constitutional interpretation was nothing more than a "response to questions" from offerors seeking to contract with her department. *See* CF, pp. 299-306. Moreover, Norton announced her new determination as to the scope of Section 50 approximately 17 years after the provision became affective. That determination is therefore entitled to no deference in this appeal.

Additionally, Norton's interpretation of Section 50 conflicted with CDPHE's prior determinations that PPRM and other providers of abortion care were eligible to contract with the department and to receive payment for providing family planning services. "When . . . the construction of a statute by those charged with

its administration has not been uniform, the rule which authorizes courts to give deference to administrative interpretations of a statutory scheme is simply inapplicable." *Colorado Common Cause v. Meyer*, 758 P.2d 153, 159 (Colo. 1988). Here, Norton acknowledges that her own, particular interpretation of Section 50 lasted only so long as the administration in which she served and was contrary to CDPHE's contracting practices both before and after her tenure. Norton's constitutional interpretation at issue here is, therefore, entitled to no deference.

## CONCLUSION

In conclusion, both the District Court and the Court of Appeals correctly concluded that Section 50 clearly and unambiguously prohibits the State from using public funds to pay or reimburse health care providers for performing abortion procedures. In doing so, both Courts gave meaning to each word of Section 50 and construed those words in keeping with their plain and commonplace meanings. Likewise, both Courts correctly rejected Norton's strained interpretation of Section 50, which would bar the State from contracting with any health care provider who performs abortion procedures, or is associated with a provider of abortion care. The Courts below made no error in recognizing that to adopt Norton's "subsidization" theory would require erasing material terms from Section 50 and would give way to absurd results. Moreover, Norton's

expansive and unsupported interpretation of Section 50 directly conflicts with settled federal statutory and judicial authorities that prohibit states from barring providers of abortion care from participating in state Medicaid programs. Because the Court of Appeals and the District Court properly construed Section 50, and correctly dismissed Norton's Complaint as a matter of law, PPRM respectfully requests this Court to affirm the judgment below.

Respectfully submitted this 8th day of March, 2017.

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## CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March, 2017 a true and correct copy of the foregoing **ANSWER BRIEF OF ROCKY MOUNTAIN PLANNED PARENTHOOD, INC.** was filed and served via the Integrated Colorado Courts E-Filing System to the following:

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*In accordance with C.A.R. 30(f), a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.*