

IN THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA AND THE
COMMISSIONER OF THE
DEPARTMENT OF HEALTH AND
SOCIAL SERVICES,

Appellants,

v.

PLANNED PARENTHOOD OF THE
GREAT NORTHWEST,

Appellee.

Supreme Court No. S-16123

Superior Court Case No. 3AN-14-04711 CI

APPEAL FROM THE SUPERIOR COURT,
THIRD JUDICIAL DISTRICT,
THE HONORABLE JUDGE SUDDOCK, PRESIDING

**AMICI CURIAE BRIEF OF NORTHERN JUSTICE PROJECT, LLC AND THE
NATIONAL HEALTH LAW PROGRAM IN SUPPORT OF APPELLEE**

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the State of Alaska,
this 8 day of August 2016.
MARILYN MAY, CLERK

By: Beth A. Peckota
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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF AMICI CURIAE	1
INTRODUCTION	1
ARGUMENT	3
I. By Defining Medically Necessary Abortions So Narrowly, the Funding Restrictions Position Alaska as an Outlier	3
CONCLUSION	12
CERTIFICATE OF COMPLIANCE	13

TABLE OF AUTHORITIES

Cases

<i>Comm. to Defend Reprod. Rights v. Myers</i> , 625 P.2d 779 (Cal. 1981)	4
<i>Doe v. Maher</i> , 515 A.2d 134 (Conn. 1986)	8, 9
<i>Humphreys v. Clinic for Women, Inc.</i> , 796 N.E.2d 247 (Ind. 2003)	11
<i>Jeannette R. v. Ellery</i> , No. BDV-94-811, 1995 Mont. Dist. LEXIS 795 (Mont. Dist. Ct. May 22, 1995).	7
<i>Moe v. Sec'y of Admin. & Fin.</i> , 417 N.E.2d 387 (Mass. 1981).....	5
<i>N.M. Right to Choose/NARAL v. Johnson</i> , 975 P.2d 841 (N.M. 1998).....	9
<i>Planned Parenthood Ass'n v. Dep't of Human Resources</i> , 663 P.2d 1247 (Or. Ct. App. 1983), <i>aff'd on statutory grounds</i> , 687 P.2d 785 (Or. 1984)	9
<i>Right to Choose v. Byrne</i> , 450 A.2d 925 (N.J. 1982)	6
<i>Simat Corp. v. Ariz. Health Care Cost Containment Sys.</i> , 56 P.3d 28 (Ariz. 2002).....	10
<i>State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.</i> , 28 P.3d 904 (Alaska 2001).....	2
<i>Women of State of Minn. by Doe v. Gomez</i> , 542 N.W.2d 17 (Minn. 1995).....	7
<i>Women's Health Ctr. of W. Va., Inc. v. Panepinto</i> , 446 S.E.2d 658 (W. Va. 1993)	6

Statutes and Regulations

23-202 Miss. Code R. § 5.4 (2016).....	4
42 U.S.C. § 1396-1 (2016).....	1
130 Mass. Code Regs. § 484.001(B) (2016).....	5
Alaska Admin. Code tit. 7, § 160.900(d)(30) (2016).....	3

Alaska Stat. Ann. § 47.07.068 (2016).....	2-3
Conn. Agencies Regs. § 17b-262-348(r)(3) (2016).....	9
Iowa Admin. Code r. 441-78.1(17)(b) (2016)	4
Md. Code Regs. 10.09.02.04 (2016).....	9-10
N.J. Admin. Code §§ 10:54–5.43, 10:52-2.15, 10:66-2.16 (2016).....	6
N.M. Code R. § 8.310.2.12 (2016)	9
N.Y. Soc. Serv. Law § 365-a (2016).....	8
Va. Code Ann. § 32.1-92.2 (2016).....	4
Wash. Admin. Code § 182-532-123 (2016).....	5
Wash. Rev. Code § 9.02.160 (2016).....	5
Wis. Admin. Code DHS § 107.06(4)(i) (2016)	11
Wis. Stat. Ann. § 20.927(b) (2016).....	11

Other Authorities

Ariz. Health Care Cost Containment Sys., <i>AHCCCS Medical Policy Manual</i> (2016), https://www.azahcccs.gov/shared/Downloads/MedicalPolicyManual/Chap400.pdf	10
Cal. Dep’t of Health Care Servs., <i>Medi-Cal Provider Manual, General Medicine, Abortions</i> (2015)	4
Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242 (2015).....	2
Dep’t of Health & Human Servs., Health Care Fin. Admin., <i>Dear State Medicaid Director Letter</i> (Feb. 12, 1998).	2
Dep’t of Vt. Health Access, <i>Form 219B, Abortion Certification</i> (2014), http://dvha.vermont.gov/for-providers/219b-abortion-certification-r10-10-part2.pdf	5

Guttmacher Inst., <i>State Laws and Policies, State Funding of Abortion Under Medicaid</i> (2016), https://www.guttmacher.org/state-policy/explore/state-funding-abortion-under-medicaid	2
Haw. Dep’t of Human Servs., Med-Quest Div., <i>Memo No. FFS-1512, Revised Guidelines for Submittal and Payment of Induced/Intentional Termination of Pregnancy (ITOP) Claims</i> (2015), http://www.med-quest.us/PDFs/Provider%20Memos/FFS-1512.pdf	4
Ill. Dep’t of Healthcare & Family Servs., <i>Handbook for Practitioners Rendering Medical Services</i> . (2010), https://www.illinois.gov/hfs/SiteCollection Documents/a200.pdf	8
Minn. Dep’t of Human Servs., <i>Provider Manual, Reproductive Health, Abortion Services</i> (2015), http://www.dhs.state.mn.us/main/idcplg?IdcService=GET_DYNAMIC_CONVERSION&RevisionSelectionMethod=LatestReleased&dDocName=dhs16_137809#	7
Md. Dep’t of Health and Mental Hygiene, <i>Physicians’ Services Provider Fee Manual</i> (2014), https://mmcp.dhmmh.maryland.gov /documents/2014physiciansfeemanual.pdf	9-10
Mt. Dep’t of Pub. Health and Human Servs., <i>MA-037 Montana Healthcare Programs Physician Certification for Abortion Services</i> (2015), https://medicaidprovider.mt.gov/Portals/68/docs/forms/ma37physcertaborserv.pdf	7
Mt. Dep’t of Pub. Health and Human Servs., <i>Physician-Related Services, Medicaid and Other Medical Assistance Programs</i> (2015), https://medicaidprovider.mt.gov/Portals/68/docs/manuals/physician082015.pdf	7
N.Y. State Medicaid Program, <i>Midwife Manual Policy Guidelines</i> (2015), https://www.emedny.org/ProviderManuals/Midwife/PDFS/Midwife_Manual_Policy_Section.pdf	8
S. Rep. No. 89-404 (1965), <i>reprinted in</i> 1965 U.S.C.C.A.N. 1943, 1986.....	1-2
Vt. Agency of Human Servs., Dep’t of Vt. Health Access, <i>GreenMountainCare Provider Manual</i> (2016), https://vtmedicaid.com/Downloads/manuals/New%20Consolidated%20Manual/VTMedicaidProviderManual.pdf	5-6

W. Va. Dep't of Health and Human Res., Bureau for Medical Servs., *Provider Manual* (2016), http://www.dhhr.wv.gov/bms/Provider/Documents/Manuals/Chapter%20519%20Practitioner%20Services/Policy_519.19_Womens_Health_Services.pdf..... 6-7

STATEMENT OF INTEREST OF AMICUS CURIAE

The Northern Justice Project, LLC (“NJP”) was founded in 2005 to represent low-income Alaskans and Alaska tribes in civil rights matters, without charge. Since its founding, NJP has assisted thousands of low-income Alaskans, in a variety of areas, from racial discrimination, to Medicaid rights, to discriminatory zoning laws, to illegal foreclosures to consumer protection. NJP is the only private civil rights firm in Alaska. NJP accepts no government funding of any sort which means that NJP is one of the only (if not the only) “public interest” law firms in the state that is free to litigate the issues important to the low-income community, without any restrictions, even if those issues are politically charged, such as a woman’s right to reproductive freedom.

The National Health Law Program (“NHLP”) is a 40 year-old public interest law firm that works to advance access to quality health care, including the full range of reproductive health care services, and protect the legal rights of lower-income people and people with disabilities. NHLP engages in education, policy analysis, administrative advocacy, and litigation at both the state and federal level.

INTRODUCTION

Medicaid is a federal-state partnership program designed to cover health care services for individuals “whose income and resources are insufficient to meet the costs of necessary medical services.” 42 U.S.C. § 1396-1 (2016). Notably, in enacting Medicaid, Congress intended for physicians to play a primary role in determining which health care services are medically necessary. S. Rep. No. 89-404 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1943, 1986 (“[T]he physician is to be the key figure in determining

utilization of health services . . . it is a physician who is to decide upon admission to a hospital, order tests, drugs, and treatments, and determine the length of stay.”).

Although the Hyde Amendment limits the use of federal Medicaid funding for abortions, almost half of the states use their own funds to cover some or all abortions for Medicaid-eligible women when federal funding is not available.¹ Guttmacher Inst., *State Laws and Policies, State Funding of Abortion Under Medicaid* (2016), <https://www.guttmacher.org/state-policy/explore/state-funding-abortion-under-medicaid>. Many of the states provide such coverage due to a court order, while others do so voluntarily. A state-by-state assessment of the relevant laws and policies establishes that the overwhelming majority of these states have established broad coverage standards that rely on the professional judgment of physicians to determine when an abortion is medically necessary.²

In contrast, Alaska has adopted a restrictive definition of medical necessity that marginalizes the role of physicians. An abortion is medically necessary if “in a

¹ Under the current version of the Hyde Amendment, federal funds are only available for abortions when a pregnancy is the result of rape or incest or when “a woman suffers from a physical disorder, physical injury, or physical illness, including a life endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed.” Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Div. H, §§ 506, 507, 129 Stat. 2242, 2649 (2015). State Medicaid programs must cover abortions that qualify for federal funding. Dep’t of Health & Human Servs., Health Care Fin. Admin., *Dear State Medicaid Director Letter* (Feb. 12, 1998).

² This is not to suggest that each of these standards would pass constitutional muster in Alaska, where the right to reproductive freedom is a fundamental constitutional right, and laws affecting that right are “subject to the most searching judicial scrutiny, often called ‘strict scrutiny.’” See *State, Dep’t of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 909 (Alaska 2001).

physician's objective and reasonable professional judgment after considering medically relevant factors," it must be performed "to avoid a threat of serious risk to the life or physical health of a woman from continuation of the woman's pregnancy." Alaska Stat. Ann. § 47.07.068(b)(3). The statute further specifies that "serious risk to the life or physical health" includes a serious risk of death or a serious risk of impairment of a major bodily function because of: (1) one of twenty-one listed physical conditions; or (2) "another physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy that places the woman in danger of death or major bodily impairment if an abortion is not performed."³ *Id.* § 47.07.068(b)(4). In "titrat[ing]" access to abortion services "with such exacting rigor," Alaska has positioned itself as an outlier. [Exc. 116]

ARGUMENT

I. By Defining Medically Necessary Abortions So Narrowly, the Funding Restrictions Position Alaska as an Outlier

The limited coverage available under the Funding Restrictions stands in stark contrast to the coverage provided in other states that use state funds for abortions that do not qualify for federal funding under the Hyde Amendment. Several states cover abortions in all circumstances. Nearly all of the remaining states have developed broad coverage standards that defer to a woman's physician to determine if an abortion is

³ The Department of Health and Social Services enacted a regulation containing a nearly identical definition of medical necessity. *See* Alaska Admin. Code tit. 7, § 160.900(d)(30) (2016). Hereinafter, the challenged statute and regulation are collectively referred to as the "Funding Restrictions."

medically necessary. Moreover, only one other state explicitly prohibits physicians from considering a woman's mental health when evaluating medical necessity. State coverage standards are listed below, beginning with those states that provide the broadest coverage.⁴

California

California covers all abortions for women enrolled in Medicaid. *See Comm. to Defend Reprod. Rights v. Myers*, 625 P.2d 779 (Cal. 1981); Cal. Dep't of Health Care Servs., *Medi-Cal Provider Manual, General Medicine, Abortions* 1 (2015) (noting that the Medicaid program covers abortion as a physician service, and "medical justification and authorization for abortion are not required").

Hawaii

Hawaii covers all abortions for Medicaid-eligible women. Haw. Dep't of Human Servs., Med-Quest Div., *Memo No. FFS-1512, Revised Guidelines for Submittal and Payment of Induced/Intentional Termination of Pregnancy (ITOP) Claims* 1 (2015), <http://www.med-quest.us/PDFs/Provider%20Memos/FFS-1512.pdf> (noting that Hawaii Medicaid has elected to use state funds to cover "induced/intentional termination of pregnancy").

⁴ Three states use state funds to cover abortions that do not qualify for federal funding only if certain fetal anomalies are present. *See* Iowa Admin. Code r. 441-78.1(17)(b) (2016); 23-202 Miss. Code R. § 5.4 (2016); Va. Code Ann. § 32.1-92.2 (2016). These states are not considered below.

Washington

Washington covers all abortions for women enrolled in Medicaid. *See* Wash. Rev. Code § 9.02.160 (2016) (“If the state provides, directly or by contract, maternity care benefits, services, or information to women through any program administered or funded in whole or in part by the state, the state shall also provide women otherwise eligible for any such program with substantially equivalent benefits, services, or information to permit them to voluntarily terminate their pregnancies.”); Wash. Admin. Code § 182-532-123 (2016) (listing abortion as a Medicaid-covered reproductive health service).

Massachusetts

Massachusetts covers abortions which, according to the medical judgment of a licensed physician, are “necessary in light of all factors affecting the woman’s health.” 130 Mass. Code Regs. § 484.001(B) (2016) (defining medically necessary abortions); *Moe v. Sec’y of Admin. & Fin.*, 417 N.E.2d 387, 404 (Mass. 1981) (requiring the State to cover medically necessary abortions for Medicaid recipients).

Vermont

Vermont covers abortions “necessary in light of all factors . . . relevant to the health-related wellbeing of the patient,” including physical, emotional, psychological, and familial considerations, as well as the age of the woman. Dep’t of Vt. Health Access, *Form 219B, Abortion Certification* (2014), <http://dvha.vermont.gov/for-providers/219b-abortion-certification-r10-10-part2.pdf>; Vt. Agency of Human Servs., Dep’t of Vt. Health Access, *GreenMountainCare Provider Manual* 64 (2016),

<https://vtmedicaid.com/Downloads/manuals/New%20Consolidated%20Manual/VTMedicaidProviderManual.pdf>.

New Jersey

In holding that the New Jersey Constitution requires the State to cover abortions “medically necessary to preserve the life or health” of a woman enrolled in Medicaid, the New Jersey Supreme Court noted that “[t]he determination of ‘medical necessity’ is the proper province of physicians, who may be guided, to the extent consistent with competent medical treatment, by the regulations of the Department of Human Services.” *Right to Choose v. Byrne*, 450 A.2d 925, 937-38 (N.J. 1982). As a result, New Jersey covers abortions which, in the physician’s professional judgment, are medically necessary considering physical, emotional, and psychological factors, family reasons, and the age of the woman. N.J. Admin. Code §§ 10:54–5.43 (physician services), 10:52-2.15 (hospital services), 10:66-2.16 (independent clinic services) (2016).

West Virginia

West Virginia covers abortions when they are “medically advisable . . . in light of physical, emotional, psychological, familial, or age factors (or a combination thereof) relevant to the well-being of the patient.” *Women’s Health Ctr. of W. Va., Inc. v. Panepinto*, 446 S.E.2d 658, 661 n.4 (W. Va. 1993) (invalidating statute denying Medicaid-eligible women coverage of medically necessary abortions, as previously defined by the Medicaid agency). The attending physician decides – with the woman – when an abortion is medically advisable. *Id.*; W. Va. Dep’t of Health and Human Res., Bureau for Medical Servs., *Provider Manual*, § 519.19.4 (2016),

http://www.dhhr.wv.gov/bms/Provider/Documents/Manuals/Chapter%20519%20Practitioner%20Services/Policy_519.19_Womens_Health_Services.pdf.

Minnesota

Minnesota covers abortions necessary for “therapeutic” or health reasons. *Women of State of Minn. by Doe v. Gomez*, 542 N.W.2d 17, 32 (Minn. 1995); Minn. Dep’t of Human Servs., *Provider Manual, Reproductive Health, Abortion Services* (2016), http://www.dhs.state.mn.us/main/idcplg?IdcService=GET_DYNAMIC_CONVERSION&RevisionSelectionMethod=LatestReleased&dDocName=dhs16_137809#. In holding that the Minnesota Constitution requires such coverage for Medicaid-eligible women, the Minnesota Supreme Court made clear that the “decision whether to obtain a therapeutic abortion . . . will be left to the woman and her doctor.” *Women of State of Minn. by Doe*, 542 N.W.2d at 32.

Montana

Montana covers abortions that have been determined to be medically necessary by the attending physician. Mt. Dep’t of Pub. Health and Human Servs., *Physician-Related Services, Medicaid and Other Medical Assistance Programs* § 2.1 (2015), <https://medicaidprovider.mt.gov/Portals/68/docs/manuals/physician082015.pdf>; Mt. Dep’t of Pub. Health and Human Servs., *MA-037 Montana Healthcare Programs Physician Certification for Abortion Services* (2015), <https://medicaidprovider.mt.gov/Portals/68/docs/forms/ma37physcertaborserv.pdf>; *Jeannette R. v. Ellery*, No. BDV-94-811, 1995 Mont. Dist. LEXIS 795 (Mont. Dist. Ct. May 22, 1995).

New York

New York treats abortion services the same as all other physician services, using its general definition of medically necessary services. N.Y. State Medicaid Program, *Midwife Manual Policy Guidelines* 12 (2015), https://www.emedny.org/ProviderManuals/Midwife/PDFS/Midwife_Manual_Policy_Section.pdf. New York defines medically necessary services as those “necessary to prevent, diagnose, correct or cure conditions in the person that cause acute suffering, endanger life, result in illness or infirmity, interfere with his/her capacity for normal activity or threaten some significant handicap...” *Id.*; N.Y. Soc. Serv. Law § 365-a (2016). The Medicaid agency explicitly states that the attending physician decides if an abortion is medically necessary. N.Y. State Medicaid Program, *Midwife Manual Policy Guidelines* 12 (2015).

Illinois

Illinois covers abortions which, “in the professional judgment of a licensed practitioner,” are necessary “to protect a woman’s health.” Ill. Dep’t of Healthcare & Family Servs., *Handbook for Practitioners Rendering Medical Services*. A-223.8 (Aug. 2010), <https://www.illinois.gov/hfs/SiteCollectionDocuments/a200.pdf>.

Connecticut

Connecticut must cover all medically necessary abortions, defined as those “necessary to ameliorate a condition that is deleterious to a woman’s physical or psychological health.” *Doe v. Maher*, 515 A.2d 134, 162, n.4 (Conn. 1986). The State is required to pay for the costs of medically necessary abortions “to the same extent and with the same limitations as . . . all other medical expenses under the Medicaid program.”

Id. at 162. “For the purposes of abortion coverage and payment, a physician determines medical necessity.” Conn. Agencies Regs. § 17b-262-348(r)(3) (2016).

New Mexico

New Mexico covers abortions “when a pregnancy aggravates a pre-existing condition, makes treatment of a condition impossible, interferes with or hampers a diagnosis, or has a profound negative impact upon the physical or mental health of an individual.” *N.M. Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 844-45 (N.M. 1998) (requiring the state to cover medically necessary abortions, as defined, for Medicaid-eligible women); *see also* N.M. Code R. § 8.310.2.12 (2016).

Oregon

Oregon must cover abortions when a physician concludes that “medical problems may be caused or aggravated by the pregnancy endangering the health of the woman.” *See Planned Parenthood Ass'n v. Dep't of Human Resources*, 663 P.2d 1247, 1252 (Or. Ct. App. 1983), *aff'd on statutory grounds*, 687 P.2d 785 (Or. 1984) (requiring coverage of abortions in these circumstances).

Maryland

Maryland covers abortions when a physician certifies that, based on his or her professional judgment, the services are necessary and: (1) the physician can ascertain “within a reasonable degree of medical certainty that the fetus is affected by genetic defect or serious deformity or abnormality;” (2) the physician can ascertain “within a reasonable degree of medical certainty” that an abortion is medically necessary “because there is substantial risk that continuation of the pregnancy could have a serious and

adverse effect on the woman's present or future physical health;" or (3) "there exists medical evidence that continuation of the pregnancy is creating a serious effect on the woman's present mental health and if carried to term there is substantial risk of a serious or long lasting effect on the woman's future mental health." Md. Code Regs. 10.09.02.04 (2016); *see also* Md. Dep't of Health and Mental Hygiene, *Physicians' Services Provider Fee Manual* § 3-19 (2014), <https://mmcp.dhmh.maryland.gov/documents/2014physiciansfeemanual.pdf>.

Arizona

Arizona covers abortions when a licensed physician finds that "continuation of the pregnancy could reasonably be expected to pose a serious physical or behavioral health problem" for the woman by: (1) creating a serious physical or behavioral health problem; (2) seriously impairing a bodily function; (3) causing dysfunction of a bodily organ or part; (4) exacerbating a health problem; or (5) preventing the woman from obtaining treatment for a health problem. Ariz. Health Care Cost Containment Sys., *AHCCCS Medical Policy Manual*, § 410-16, 410-17 (2016), <https://www.azahcccs.gov/shared/Downloads/MedicalPolicyManual/Chap400.pdf>; *see also* *Simat Corp. v. Ariz. Health Care Cost Containment Sys.*, 56 P.3d 28, 37 (Ariz. 2002) (requiring the state to cover abortions when "medically necessary to administer treatment necessary to address serious health problems of pregnant [Medicaid] patients").

Indiana

An Indiana Supreme Court decision requires coverage of abortions when a pregnancy creates “a serious risk of substantial and irreversible impairment of a major bodily function.” *Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247, 257 (Ind. 2003) (requiring the State to cover this subset of medically necessary abortions for Medicaid enrollees).

Wisconsin

Wisconsin covers abortions when a physician determines that “due to a medical condition existing prior to the abortion,” the procedure is “directly and medically necessary to prevent grave, long-lasting physical health damage to the woman.” Wis. Stat. Ann. § 20.927(b) (2016); Wis. Admin. Code DHS § 107.06(4)(i) (2016).

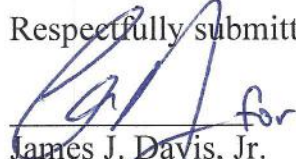
To summarize, the overwhelming majority of the states that use their own funds to pay for abortions for Medicaid-eligible women cover abortions in all circumstances or have established broad coverage guidelines that allow physicians to use their professional judgment to determine when an abortion is medically necessary. Only one other state, Wisconsin, prevents physicians from considering a woman’s psychological and emotional health when evaluating medical necessity. No other state law or policy is as prescriptive as Alaska’s, and no other state has so dramatically circumscribed the role of physicians by detailing which particular conditions may qualify an abortion as medically necessary.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

Dated: August 1, 2016

Respectfully submitted,



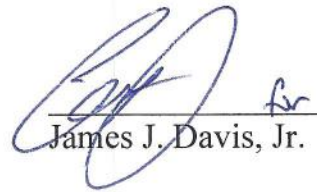
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Alaska R. App. P. 513.5(c) because it has been prepared in 13-point Times New Roman, a proportionally spaced font.

Dated: August 1, 2016



James J. Davis, Jr.