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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

ALASKA STATE HOSPITAL AND)
NURSING HOME ASSOCIATION,)
an Alaska non-profit corporation,)

Plaintiff,)

v.)

STATE OF ALASKA, DEPARTMENT)
OF HEALTH AND SOCIAL)
SERVICES,)

Case No. 3AN-19-08244 CI

Defendant.)

OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

I. Introduction

The Alaska Department of Health and Social Services faces a serious funding shortfall in the Medicaid program for fiscal year 2020. As one cost containment measure, the Department implemented emergency regulations reducing Medicaid reimbursement rates for most providers for one fiscal year. The Alaska State Hospital and Nursing Home Association has sued the Department alleging that those regulations, and the process by which they were adopted, violate state and federal law. It has asked for a preliminary injunction prohibiting implementation of the regulations pending a final decision on the merits of their lawsuit.

But, ASHNHA fails to acknowledge United States Supreme Court and Ninth Circuit precedent directly adverse to its positions. ASHNHA fails to acknowledge language in the Alaska Statutes on which it relies that explicitly allows the Department

1 to reduce Medicaid reimbursement rates in response to reduced appropriations. And,
2 ASHNHA fails to acknowledge the substantive discussions about reimbursement rate
3 reductions that it has had with the Department over the past few months. Given these
4 serious failures in its legal arguments, this Court should deny ASHNHA's motion for a
5 preliminary injunction.
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7 **II. The factual background and procedural posture of this case mitigate against**
8 **a preliminary injunction.**

9 Alaska has one of the highest Medicaid reimbursement rates in the nation.¹ Its
10 reimbursement rates are generally higher than federally set Medicare reimbursement
11 rates.² Further, the number of providers seeing Medicaid patients in Alaska has
12 increased steadily over the last several years.³ And, Alaska's Medicaid spending has
13 increased steadily over the last several years.⁴
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15 On June 28, 2019, the Department announced emergency regulations, to take
16 effect July 1, reducing Medicaid reimbursement rates by five percent and freezing
17 inflationary increases for fiscal year 2020. There are exemptions to the emergency
18 regulations, including for federally qualified health centers, primary care providers, and
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21 ¹ Affidavit of Donna Steward, page 5 paragraph 12, Exhibit C.

22 ² Affidavit of Donna Steward, page 5 paragraph 12, Exhibit C.

23 ³ Affidavit of Donna Steward, page 11 paragraph 27.

24 ⁴ Exhibit E pp. 13-16.
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1 small “critical access hospitals.”⁵ Nursing facilities are also exempt from the emergency
2 regulations, but due to other federal requirements they will experience a 3% rate
3 reduction in order to remain compliant with the federal cap on payments for such
4 services commonly referred as the federal “upper payment limit” restriction.⁶ The
5 emergency regulations are currently in the midst of an administrative process before
6 becoming permanent.⁷ Public notice and comment is currently open.⁸ It closes on
7 August 8.⁹ The Department will seriously consider any comments submitted and may
8 amend the emergency regulations in response before they become permanent.¹⁰

10 The Department must also submit the emergency regulations and proposed
11 permanent regulations to the Centers for Medicaid Services to be reviewed for
12 compliance with federal law and approved.¹¹ This process includes review for
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16 ⁵ Exhibit E pp. 12, 17.

17 ⁶ Affidavit of Donna Steward, pages 11-12 paragraph 20.

18 ⁷ AS 44.62.260 (“a regulation adopted as an emergency regulation does not remain
19 in effect more than 120 days unless the adopting agency complies with
20 AS 44.62.040(c), 44.62.060, and 44.62.190-.215 either before submitting the regulation
21 to the lieutenant governor or during the 120-day period”).

22 ⁸ Exhibit B to Affidavit of Becky Hultberg p. 31, Exhibit C to Affidavit of Becky
Hultberg.

23 ⁹ *Id.*

24 ¹⁰ Affidavit of Donna Steward, pages 5-6 paragraph 13.

25 ¹¹ Affidavit of Donna Steward, pages 7-8 paragraphs 18-19.

1 compliance with 42 U.S.C. 1396(a)(30)(A).¹² Assuming CMS approves the regulations
2 as compliant with federal law, any person aggrieved by that final administrative
3 decision may seek judicial review under the federal Administrative Procedures Act.¹³
4 Finally, any provider who believes that the Department has set its facility
5 reimbursement rate inappropriately relative to reasonable costs inconsistent with state
6 law has the opportunity to appeal those rates administratively.¹⁴

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8 The Alaska State Hospital and Nursing Home Association is a nonprofit
9 association whose members are hospitals and nursing homes within the State of
10 Alaska.¹⁵ Because the emergency regulations challenged in this lawsuit do not apply to
11 nursing homes or critical access hospitals, only ten of ASHNHA's members are
12 affected.¹⁶ To date, neither ASHNHA nor any of these ten member hospitals has
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16 ¹² See e.g. *Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235, 1240 (9th Cir. 2013).

17 ¹³ 5 U.S.C. 581. See also *Managed Pharmacy Care*, 716 F.3d at 1240.

18 ¹⁴ AS 47.07.070, 7 AAC 150.010 *et seq.*

19 ¹⁵ <https://www.ashnha.com/about/membership/>.

20 ¹⁶ [http://www.ashnha.com/wp-content/uploads/2018/04/2018-List-of-Alaska-](http://www.ashnha.com/wp-content/uploads/2018/04/2018-List-of-Alaska-hospitals-and-nursing-homes.pdf)
21 [hospitals-and-nursing-homes.pdf](http://www.ashnha.com/wp-content/uploads/2018/04/2018-List-of-Alaska-hospitals-and-nursing-homes.pdf). See also Exhibit 3 page 17. ASHNHA presented the
22 affidavit of Ms. Allison Lee in support of its motion for summary judgment. Ms. Lee is
23 the executive director of the Alaska Association of Personal Care Supports, Inc. which
24 is not a member of ASHNHA. Nor are personal care service providers, generally,
25 members of ASHNHA. ASHNHA also submitted the affidavit of Dr. Timothy Bateman,
26 the president of the Alaska Hospitalist Group LLC, a for-profit limited liability
company providing physician services to Providence Alaska Medical Center. The
Alaska Hospitalist Group is listed on ASHNHA's website as an "Associate Member"
under the heading "Gold Corporate."

1 submitted comments opposing the proposed permanent regulations through the open
2 administrative process, nor have any of them challenged their reimbursement rate
3 relative to reasonable costs through the available administrative procedures.

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5 However, ASHNHA and its members have given substantive feedback to the
6 Department over the past several months regarding the proposed reimbursement rate
7 reductions. In February of 2019, the governor submitted a proposed budget to the
8 legislature that would significantly reduce Department appropriations for fiscal year
9 2020.¹⁷ Although it was not known what the Department's final budget would be, the
10 Department immediately began a comprehensive process of identifying cost
11 containment measures.¹⁸

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13 In mid-March, the Alaska Office of Management and Budget presented a
14 proposed Department budget for fiscal year 2020 to the legislature that included a
15 five percent reimbursement rate reduction across-the-board and inflation freeze.¹⁹
16 ASHNHA was aware of and engaged in this legislative process.²⁰ Over the next several
17 months, ASHNHA submitted written materials to the Department and the legislature
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22 ¹⁷ Affidavit of Donna Steward, pages 3-5 paragraphs 5-13.

23 ¹⁸ Affidavit of Donna Steward, page 3 paragraph 6.

24 ¹⁹ Affidavit of Donna Steward, page 6 paragraph 15, Ex. E p. 3.

25 ²⁰ Affidavit of Donna Steward, page 7 paragraph 16.

1 regarding proposed rate reduction for fiscal year 2020.²¹ ASHNHA also had emails,
2 calls and in-person contacts with the Department.²²

3 The legislature passed an operating budget that was signed into law on
4 June 28, 2019 after line-item vetoes by the Governor. As expected, the Department's
5 budget was significantly reduced from fiscal year 2019, although the final amounts were
6 not known until June 28. On that date, the Department implemented the five percent
7 reimbursement rate reduction and inflationary freeze that it had been developing over
8 the prior months as an appropriate cost containment measure. The Department
9 implemented his cost containment measure based on the legislature's reductions in the
10 Department's budget alone, regardless of the Governor's line-item vetoes.²³

11 Recognizing that, without cost containment measures including these rate reductions,
12 the Medicaid program would run out of money in April of 2020,²⁴ and recognizing the
13 urgent need to give providers certainty regarding reimbursement rates for fiscal year
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21 ²¹ Exhibit F.

22 ²² Affidavit of Donna Steward, page 7 paragraph 17.

23 ²³ Affidavit of Donna Steward, page 9 paragraph 22.

24 ²⁴ Affidavit of Brian Fechter, page 2, paragraph 4.

2020,²⁵ the commissioner implemented the reimbursement rate reduction as an emergency regulation.²⁶

III. This Court should not grant ASHNHA’s motion for a preliminary injunction.

A. The standards for issuing a preliminary injunction are stringent.

In order to obtain a preliminary injunction, the plaintiff must demonstrate “a clear showing of probable success on the merits.”²⁷ Failing that, the plaintiff must demonstrate the presence of the following three factors: (1) the plaintiff must be faced with irreparable harm; (2) the opposing party must be adequately protected; and (3) the plaintiff must raise serious and substantial questions going to the merits of the case.²⁸ These three factors are referred to as the “balance of the hardships” test.²⁹

²⁵ Affidavit of Donna Steward, page 10, paragraphs 24-25.

²⁶ Exhibit A to Affidavit of Becky Hultberg p. 2 (“The commissioner of health and social services finds that the costs of medical assistance for all persons eligible under [Alaska law] will exceed the amount allocated in the state budget for fiscal year 2020....[A]s a result, the medical program faces a fiscal reality that requires the immediate adoption of emergency regulations to preserve the health and general welfare of thousands of Medicaid recipients.... If the Medicaid program simply stops providing services to its recipients due to a budget shortfall, or if providers stop participating in the Medicaid program due to uncertainty in reimbursement for services by the department, there will be an immediate danger to the health and general welfare of these recipients.”)

²⁷ *A.J. Indus. Inc. v. Alaska Pub. Servs. Comm’n*, 470 P.2d 537, 540 (Alaska 1970).

²⁸ *Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014).

²⁹ *Id.*

1 Further, Alaska Rule of Civil Procedure 65(c) provides that a court may not issue
2 a preliminary injunction “except upon the giving of security by the applicant, in such
3 sum as the court deems proper, for the payment of such costs and damages as may be
4 incurred or suffered by any party who is found to have been wrongfully enjoined or
5 restrained.”
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7 For the reasons explained below, ASHNHA has not established that it is entitled
8 to a preliminary injunction either by a clear showing of probable success on the merits
9 or by a balance of the hardships. However, if this Court does choose to issue a
10 preliminary injunction, it should require ASHNHA to post a bond of at least
11 \$3.3 million.
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13 **B. ASHNHA has not established probable success on the merits.**

14 “The necessity to avoid premature consideration of the merits of a controversy
15 has been recognized and consequently it is usually held that a clear showing of probable
16 success on the merits must be made before preliminary injunctive relief will be
17 accorded.”³⁰ ASHNHA’s motion for preliminary injunction, and underlying motion for
18 summary judgment, oversimplify this complex area of law, ignore United States
19 Supreme Court precedent directly contrary to their position, and ignore the significant
20 administrative procedures more appropriate to resolve these disputes. Further,
21 ASHNHA presents non-specific and unsubstantiated evidence in support of its sweeping
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25 ³⁰ *A.J. Indus. Inc.*, 470 P.2d at 540.
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1 factual claims. It provides the court with no hard data supporting its allegations. And, it
2 fails to inform the Court of its substantive contacts with the Department regarding
3 proposed rate reductions over the past several months.

4 The significant weaknesses in each of ASHNHA's claims, to be argued more
5 fully in the Department's opposition to ASHNHA's underlying motion for summary
6 judgment, are described below.

7 **1. All challenges to the proposed permanent regulations are unripe.**

8 ASHNHA asks this Court to declare both the emergency regulations and the
9 "proposed permanent regulations" invalid.³¹ But, the proposed permanent regulations
10 are still in the notice and comment period and may be amended before becoming
11 permanent. The Department still has the obligation to consider any comments
12 submitted.³²

13 Alaska Statute 44.62.300 allows an interested person to "get a judicial
14 declaration on the validity of a regulation."³³ That statute does not apply to a proposed
15 regulation.³⁴ Alaska Statute 22.01.010(g) authorizes, but does not require, courts to

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20 ³¹ See Complaint, page 10 paragraphs A-D; Motion for Summary Judgment pages
21 1-2, 6, 12.

22 ³² AS 44.62.210. See also Affidavit of Donna Steward, page 5-6 paragraph 13.

23 ³³ Emphasis added.

24 ³⁴ One of the potential grounds on which a regulation may be found invalid under
25 AS 44.62.300 is failure to comply with the process outlined in AS 44.62.190-215. The
26 proposed permanent regulations are still in the midst of that process.

1 issue declaratory judgments “in case of an actual controversy.”³⁵ The phrase “actual
2 controversy” encompasses the concept of ripeness.³⁶ Ripeness depends on whether there
3 is a “substantial controversy...of sufficient immediacy and reality to warrant the
4 issuance of a declaratory judgment.”³⁷ A court must balance “the need for decision
5 against the risks of decision.” A court “should not issue advisory opinions or resolve
6 abstract questions of law.”³⁸

8 Many of ASHNHA’s arguments about the validity of the proposed permanent
9 regulations rely on the allegation that the Department has not adequately considered the
10 policy implications or practical effects of making the emergency regulations permanent.
11 But, the Department is still in the middle of the statutorily-mandated process for
12 considering those issues. And, ASHNHA and its members still have the opportunity to
13 comment and submit relevant data through that process.

15 If this Court were to rule on the validity of the proposed regulations, it would run
16 a significant risk of issuing an advisory opinion. For example, if this Court were to rule
17 that the proposed regulations were invalid based on the Department’s failure to consider
18 certain policy factors, and the Department ultimately considered those factors before the
19 proposed regulations became permanent, the Court’s decision would be merely
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22 ³⁵ *Lowell v. Hayes*, 117 P.3d 745, 756 (Alaska 2005).

23 ³⁶ *State v. Am. Civil Liberties Union of Alaska*, 204 P.3d 364, 369 (Alaska 2009).

24 ³⁷ *Id.*

25 ³⁸ *Id.*

1 advisory. Or, if this Court were to rule that the proposed regulations were invalid
2 because of their impacts on a specific facility, but the final regulations exempted that
3 facility, the Court's decision would be merely advisory.

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5 On the other side of the scale, there is no need for an immediate decision. After
6 the regulations become permanent in their final form, ASHNHA will still have the
7 ability to challenge the validity of those regulations under AS 44.62.300. And, the court
8 reviewing that challenge will have the advantage of a complete administrative record.
9 And, as discussed further below, ASHNHA will still have the ability to challenge the
10 regulations' consistency with federal law through judicial review of CMS's approval.

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12 Although the Alaska Supreme Court has never considered such a case, other
13 courts have dismissed challenges to proposed regulations as unripe.³⁹ Thus, ASHNHA
14 has not shown probable success on the merits of any of its arguments regarding the
15 validity of the proposed permanent regulations. All such arguments suffer from the
16 same serious weakness that they are unripe.

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18 **2. The United States Supreme Court has held that providers cannot directly**
19 **challenge the consistency of state Medicaid reimbursement rate**
reductions with federal law.

20 ASHNHA argues that the emergency regulations are inconsistent with
21 42 U.S.C. 1396(a)(30)(A) but fails to recognize that the United States Supreme Court
22 has held that providers have no cause of action to directly challenge the consistency of
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25 ³⁹ See e.g. *Blackfeet Nat. Bank v. Rubin*, 890 F.Supp. 48 (D.D.C. 1995) (affirmed
26 by *Blackfeet Nat. Bank v. Rubin*, 67 F.3d 972 (D.C. Cir. 1995)).

1 Medicaid reimbursement rate changes with that statute.⁴⁰ Providers' appropriate
2 recourse is to wait until after CMS review, and then, if CMS approves the new rates as
3 being consistent with that statute, appeal CMS's approval through the federal
4 Administrative Procedures Act.⁴¹ ASHNHA's argument that the emergency regulations
5 are invalid because the Department failed to get CMS approval before implementation
6 suffers from a similar inherent weakness. Although the United States Supreme Court
7 has not ruled on the question, the Ninth Circuit has held that providers have no cause of
8 action to force states to obtain CMS approval before implementing reimbursement rate
9 cuts.⁴² Only CMS has the authority to enforce that requirement.⁴³ And, CMS has the
10 discretion to decline to enforce that requirement and to retroactively approve
11 reimbursement rate changes.⁴⁴
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15 ⁴⁰ *Armstrong v. Exceptional Child Ctr., Inc.*, -- U.S. --, 135 S.Ct. 1378 (U.S. 2015).

16 ⁴¹ *Id.* See also *Douglas v. Indep. Living Ctr. of S. California, Inc.*, 565 U.S. 606
17 (2012).

18 ⁴² *Dev. Servs. Network v. Douglas*, 666 F.3d 540, 549 (9th Cir. 2011).

19 ⁴³ *Id.*

20 ⁴⁴ See *Hoag Mem. Hosp. Presbyterian v. Price*, 866 F.3d 1072, 1075 (9th Cir.
21 2017) (reciting fact of CMS retroactive approval of Medicaid reimbursement rate
22 change); *Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235, 123 (9th Cir. 2013)
23 (reciting fact of CMS retroactive approval of Medicaid reimbursement rate change).
24 Several of the cases cited by ASHNHA involve California's controversial efforts to
25 significantly reduce its Medicaid reimbursement rates while Toby Douglas was the
26 director of California's Department of Health Care Services. See e.g. *The Arc of
California v. Douglas*, 757 F.3d 975 (9th Cir 2014); *Douglas v. Indep. Living Ctr. of S.
California, Inc.*, 565 U.S. 606 (2012); *Dev. Servs. Network v. Douglas*, 666 F.3d 540
(9th Cir. 2011). California's Medicaid reimbursement rates are some of the lowest in the
nation. [Exhibit C] Because Alaska's Medicaid reimbursement rates are some of the

1 In *Armstrong v. Exceptional Child Center, Inc.*, the United States Supreme Court
2 held that the Supremacy Clause of the United States Constitution does not create a
3 private right of action.⁴⁵ Therefore, Medicaid providers did not have a cause of action to
4 directly challenge state Medicaid reimbursement rates on the grounds of inconsistency
5 with 42 U.S.C. 1396(a)(30)(A).⁴⁶ Nor does that section itself create a cause of action;
6 the statute only provides for CMS to withhold federal funding as a penalty for its
7 violation.⁴⁷ All cases ASHNHA cites in support of its argument that the emergency
8 regulations are inconsistent with 42 U.S.C. 1396(a)(30)(A) were either decided before
9 *Armstrong*,⁴⁸ involve appeal of CMS approval of states' Medicaid rates under the
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17 highest in the nation, Alaska expects significantly less scrutiny of its modest one-year
18 rate reduction from CMS.

19 ⁴⁵ *Armstrong v. Exceptional Child Ctr., Inc.*, -- U.S. --, 135 S.Ct. 1378, 1384 (U.S.
20 2015).

21 ⁴⁶ *Id.* at 1382.

22 ⁴⁷ *Id.* at 1385.

23 ⁴⁸ *The Arc of California v. Douglas*, 757 F.3d 975 (9th Cir 2014). On remand from
24 the Ninth Circuit, the District Court held that the plaintiffs could no longer maintain
25 their direct claims post-*Armstrong*, and dismissed the case. *The Arc of California v.*
26 *Douglas*, Not Reported in Fed. Supp., 2016 WL 4524814 at *2 (E.D. Ca. 2016). The
Ninth Circuit summarily affirmed the District Court's dismissal. *The Arc of California*
v. Douglas, Not Reported in F.3d, 2017 WL 4512460 (Ninth Circuit 2017).

1 federal Administrative procedures Act,⁴⁹ or involve the validity of a reimbursement rate
2 under other statutes.⁵⁰

3 Similarly, in *Developmental Services Network v. Douglas*, the Ninth Circuit held
4 that, while federal law requires states to obtain CMS approval before reducing Medicaid
5 reimbursement rates, providers did not have a private cause of action to enforce that
6 requirement.⁵¹ Only CMS has the authority to enforce it.⁵² Based on prior CMS
7 guidance, the Department reasonably expects that CMS will choose not to enforce the
8 pre-approval requirement in this case.⁵³ The Department reasonably expects to receive
9 retroactive approval of the reimbursement rate change, which is within CMS's
10 discretion to grant.⁵⁴

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13 Even if ASHNHA had a cause of action, it would be imprudent for this Court to
14 issue a declaratory judgment on the consistency of the emergency regulations with
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16 ⁴⁹ *Hoag Mem. Hosp. Presbyterian v. Price*, 866 F.3d 1072, 1075 (9th Cir. 2017);
17 *Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235, 123 (9th Cir. 2013). The
18 Secretary of Health and Social Services of the United States was the primary defendant
19 in both these cases, not the state Medicaid administrator.

20 ⁵⁰ *California Ass'n of Rural Health Clinics v. Douglas*, 738 F.3d 1007, 1013 (9th
21 Cir. 2013) (evaluating reduction in Medicaid services reimbursement to rural health
clinics and federally qualified health centers for compliance with 42 U.S.C. §
1396a(bb), not § 1396(a)(30)(A)).

22 ⁵¹ *Dev. Servs. Network v. Douglas*, 666 F.3d 540, 549 (9th Cir. 2011).

23 ⁵² *Id.*

24 ⁵³ Affidavit of Donna Steward, page 6 paragraph 14.

25 ⁵⁴ See Affidavit of Donna Steward, page 8-9 paragraph 19-20.

42 U.S.C. 1396(a)(30)(A) before CMS has had the opportunity issue its own decision on that same question. In *Douglas v. Independent Living Center of Southern California, Inc.*, decided before *Armstrong*, the United States Supreme Court declined to consider a provider’s direct challenge to state Medicaid reimbursement rate reductions as being inconsistent with 42 U.S.C. 1396(a)(30)(A) on prudential grounds.⁵⁵ The Supreme Court remanded for conversion of the direct challenge into an appeal of CMS’s approval of the reimbursement rate reductions through the Administrative Procedures Act.⁵⁶ In that case the Court declined to rule on the cause of action question it ultimately decided in *Armstrong*, but the Court described the perils of independent judicial review outside the context of the Administrative Procedures Act.⁵⁷ The Court explained that the Medicaid Act commits the power to administer states’ Medicaid programs to CMS, and CMS’s decision regarding consistency with 42 U.S.C. 1396(a)(30)(A) “carries weight.”⁵⁸ The Court also noted that the language of that section “is broad and general, suggesting that the agency’s expertise is relevant in determining its application.”⁵⁹ Further, for a court to interpret that statute outside an Administrative Procedures Act appeal would subject the states to conflicting interpretations of federal law by several

⁵⁵ *Douglas v. Indep. Living Ctr. of S. California, Inc.*, 565 U.S. 606, 615-16 (2012).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 614.

⁵⁹ *Id.*

1 different courts (and the agency), thereby threatening to defeat the uniformity that
2 Congress intended by centralizing administration of the federal program in the agency
3 and to make superfluous or to undermine traditional APA review.⁶⁰ Finally, the Court
4 explained that it would be inefficient to continue the action directly between the
5 providers and the state without CMS's participation as a party.⁶¹

7 The same considerations apply to this case. It would be inefficient and imprudent
8 for this Court to consider whether the Department's rate reduction is consistent with
9 42 U.S.C. 1396(a)(30)(A) before CMS has considered the question. CMS's
10 interpretation of that section is entitled to deference, and CMS should be a party to any
11 proceeding involving interpretation of it.⁶²

13 So ASHNHA is not likely to succeed on the merits of its claim for a declaratory
14 judgment that the emergency regulations are inconsistent with federal law. Controlling
15 precedent holds that ASHNHA does not have a direct cause of action and the United
16 States Supreme Court has specifically warned against the dangers of issuing such a
17 declaratory judgment.

19 **3. The emergency regulations are consistent with state law, which expressly**
20 **allows for reimbursement rate reductions in the face of reduced**
21 **appropriations.**

23 ⁶⁰ *Id.* at 615.

24 ⁶¹ *Id.* at 616.

25 ⁶² *See Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235, 1240, 1248 (9th Cir.
26 2013) (holding that CMS's approval of state plan amendments is entitled to deference).

Emergency regulations, like other regulations, enjoy a presumption of validity.⁶³ Although a regulation that directly conflicts with state law can be declared invalid, state law on this issue is not as simplistic as ASHNHA presents it. In fact, Alaska law anticipates and accounts for the fact that Medicaid reimbursement rates are subject to legislative appropriations and must be set within that framework.

ASHNHA argues that the emergency regulations are inconsistent with AS 47.07.070(b) regarding facility reimbursement rates,⁶⁴ but ignores the language in that statute recognizing that rates must be set within the parameters of legislative appropriation:

In determining the rates of payment for health facilities for a fiscal year, the department shall, **within the limit of appropriations made by the legislature ... for that fiscal year**, including anticipated available federal revenue for that fiscal year, set rates for facilities that are based on (1) reasonable costs related to patient care; and (2) audit and inspection results and reports, when the audit or inspection is conducted under AS 47.07.074.

ASHNHA also ignores AS 47.07.036, which specifically allows the Department to undertake cost containment measures including reductions in provider payment rates if the Department finds that the costs of the Medicaid program will exceed the amount appropriated for the fiscal year. That statute provides:

If the department finds that the costs of medical assistance for all persons eligible under this chapter will exceed the amount allocated in the state

⁶³ *State of Alaska Bd. of Fisheries v. Grunert*, 139 P.3d 1226, 1232 (Alaska 2006).

⁶⁴ Note that AS 47.07.070 applies only to “health care facilities.” Reimbursement rates for other types of services, including personal care services, are set relative to different formulas and considerations. *See e.g.* 7 AAC 145.005 *et seq.*

1 budget for a fiscal year, the department may implement cost containment
2 measures to reduce anticipated program costs for that fiscal year as
3 authorized under this section. ... The cost containment measures taken
under this subsection may include ... changes in provider payment rates...

4 Further, ASHNHA has presented no hard data regarding the “reasonable costs of
5 patient care” relative to facility reimbursement rates after the emergency regulations.

6 The statute does not require consideration of *actual* costs related to patient care but
7 *reasonable* costs related to patient care. Therefore, the vague statements in ASHNHA’s
8 supporting affidavits that “[r]ate cuts and suspension of inflationary adjustments result
9 in reimbursement below what it actually costs to provide services” is not relevant to the
10 AS 47.07.070 analysis.⁶⁵ And, the two cases that ASHNHA cites in support of its
11 argument are so factually distinguishable from this situation as to be irrelevant.⁶⁶

12 Thus, ASHNHA has not clearly shown probable success at overcoming the
13 presumption that the emergency regulations are valid. Alaska law expressly allows for
14 Medicaid reimbursement rate reductions in the face of reduced legislative
15 appropriations to the Department.
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19 ⁶⁵ ASHNHA also ignores AS 47.07.075 and 7 AAC 150.010 *et seq.* which create an
20 administrative process to appeal rates set under AS 47.07.070, and an opportunity to
21 request relief in extraordinary circumstances.

22 ⁶⁶ *State, Dept. of Health & Soc. Servs. v. Valley Hosp. Ass’n, Inc.*, 116 P.3d 580
23 (Alaska 2005) (where Department knew certain information was inaccurate and had
24 historically disregarded it, Department’s action arbitrary and capricious retroactively
25 changing certain rate-setting methodology to use information known to be inaccurate);
26 *North Slope Borough v. Sohio Petroleum Corp.*, 585 P.2d 534 (Alaska 1978) (holding
emergency regulation denying tax credit for taxes paid by oil pipeline owners to
municipalities invalid as inconsistent with statute creating tax credit for all municipal
taxes paid by oil pipelines owners).

1 **4. The Department carefully considered the relevant policy issues before**
2 **issuing the emergency regulations.**

3 The emergency regulations were the result of a months-long, in-depth
4 exploration of various cost containment options, and were not “arbitrary or
5 unreasonable.” The affidavits accompanying this brief undermine ASHNHA’s argument
6 that the Department failed to take a hard look at the salient problems and did not
7 genuinely engage in reasoned decision-making when adopting the emergency
8 regulations. Although the Department is still mustering the large volume of evidence
9 related to its decision-making process, which it will use to support its opposition to the
10 underlying motion for summary judgment, the preliminary affidavit of Deputy
11 Commissioner Donna Steward gives an overview of the robust process undertaken by
12 the Department to develop these emergency regulations.
13

14 ASHNHA has presented no hard evidence or specifics in support of its general
15 predictions that Alaska providers will have to eliminate services for Medicaid
16 beneficiaries as a result of a one-year reimbursement rate reduction. Although the
17 affidavits in support of its motions provide anecdotal evidence that some providers are
18 financially marginal, it does not explore whether any factors other than Medicaid
19 reimbursement rates are contributing to those financial difficulties. Further, ASHNHA’s
20 vague predictions of loss of services contain no timeframe: even if made permanent,
21 the emergency regulations would apply only through Fiscal Year 2020.
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23 Thus, ASHNHA has not clearly shown probable success on the merits of its
24 argument that the emergency regulations are arbitrary and unreasonable. The
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1 Department's evidence undermines ASHNHA's unsupported claims that the
2 Department did not engage in reasoned decision-making.

3 **5. This Court defers to the commissioner's reasonable finding of**
4 **emergency.**

5 ASHNHA misrepresents the Commissioner's finding of emergency as a
6 panicked and unreasoned reaction to the governor's veto. In fact, it was a cost
7 containment measure developed over the course of the legislative session to be
8 implemented if necessary upon receiving a final budget. This cost containment measure
9 was implemented to absorb the budgetary reductions contained in the legislature's
10 budget, regardless of the governor's veto. Second, the finding of emergency explained
11 the immediate need for the reimbursement rate reductions in light of public health and
12 welfare. Specifically, the commissioner found that, without cost containment measures,
13 the Medicaid program would run out of funding and cease operation, leaving thousands
14 of beneficiaries without coverage, before the end of the fiscal year.⁶⁷ The commissioner
15 also found that, without immediate certainty regarding the reimbursement rates for the
16 fiscal year, providers might stop serving Medicaid beneficiaries for fear of not being
17 reimbursed at all.⁶⁸

18 "Emergency regulations promulgated in accordance with AS 44.62.250 enjoy the
19 same presumption of validity as regulations promulgated after a notice and comment
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24 ⁶⁷ Exhibit A to Affidavit of Becky Hultberg, page 2.

25 ⁶⁸ *Id.* See also Affidavit of Donna Steward, page 10 paragraph 25.
26

1 process.”⁶⁹ ASHNHA’s evidence and arguments are not sufficient to show that they are
2 likely to overcome this presumption. The basic allegation on which ASHNHA’s
3 argument relies—that the emergency regulations were an unconsidered response to the
4 Governor’s veto—is wrong. The commissioner responded promptly and appropriately
5 to the legislature’s reduction in Medicaid appropriations to avoid loss of coverage and
6 services to thousands of Medicaid beneficiaries.

8 **6. ASHNHA had adequate notice of and opportunity to comment on**
9 **reimbursement rate reductions before implementation of the emergency**
10 **regulations.**

11 ASHNHA argues that the Department violated its procedural due process rights
12 by issuing emergency regulations “without allowing an opportunity for notice and
13 comment,” but ignores the input it and its members provided to the Department over the
14 last several months regarding reimbursement rate reductions as a cost containment
15 measure. Deputy Director Steward’s affidavit shows that ASHNHA had advance notice
16 that the Department was considering a five percent reimbursement rate reduction and
17 inflationary freeze for fiscal year 2020 and gave feedback regarding the idea to the
18 Department between March and the end of June. ASHNHA provided written materials
19 and had email, phone and in-person contact with the Department on this subject.⁷⁰

21 Because ASHNHA had actual notice and opportunity to comment, ASHNHA’s
22 argument seems to be a formalistic argument that the Due Process Clause required the
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24 ⁶⁹ *State of Alaska Bd. of Fisheries v. Grunert*, 139 P.3d 1226, 1232 (Alaska 2006).

25 ⁷⁰ Affidavit of Donna Steward, page 7 paragraphs 16-17, Exhibit F.

1 Department complete the procedures found in AS 44.62.190-.215 before reducing
2 Medicaid reimbursement rates.⁷¹ But that argument is undermined by the fact that
3 ASHNHA and its members have not thus far participated in that process for the
4 proposed permanent regulations. Similarly, none of ASHNHA's members has appealed
5 the reimbursement rates for their facilities under the procedures made available by
6 AS 47.07.075 and administrative regulation. The fact that ASHNHA and its members
7 are not availing themselves of the additional procedures that are actually available to
8 them demonstrates that they have already had adequate notice and opportunity to
9 provide input regarding the substance of the emergency regulations.
10

11 The Due Process Clause is not a constitutional Administrative Procedures Act.⁷²
12 It is a practical analysis that balances competing interests.⁷³ Because ASHNHA had
13 actual advance notice that Medicaid reimbursement rate reductions were under
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17 ⁷¹ Essentially this is an argument that AS 44.62.250 is unconstitutional as applied to
18 Medicaid reimbursement rate reductions, and the Commissioner cannot reduce
19 Medicaid reimbursement rates by emergency regulation.

20 ⁷² See *New Jersey Primary Care Ass'n Inc. v. New Jersey Dep't of Human Servs.*,
21 722 F.3d 527, 537 (3rd Cir. 2013) (holding that State's failure to engage in notice-and-
22 comment rulemaking before changing Medicaid reimbursements did not violate federal
23 Due Process clause and stating: "The plaintiffs suggest that some sort of notice-and-
24 comment rulemaking might satisfy constitutional due process. The prospect of a federal
court ordering a state to create such a procedure risks turning procedural due process
into a constitutionally mandated state administrative procedure act") (*quoting Tenny v.*
Blagojevich, 659 F.3d 578, 582 (7th Cir. 2011)).

25 ⁷³ See *State, Dept. of Health & Soc. Servs. v. Valley Hosp. Ass'n, Inc.*, 116 P.3d
26 580, 583 (Alaska 2005).

1 consideration and opportunity to provide input to the Department, it has not shown
2 likely success on the merits of this argument.

3 **C. The balance of hardships does not weigh in favor of ASHNHA.**

4 Because ASHNHA has not shown probable success on the merits, in order to
5 obtain an injunction ASHNHA must show that it is warranted under the “balance of
6 hardships” analysis. But, ASHNHA’s members are faced only with financial harm,
7 which is not irreparable. And, the Department cannot be adequately protected; the
8 Department’s budget for fiscal year 2020 has been set by the legislature, and signed by
9 the Governor, and if the Department cannot immediately implement this cost
10 containment measure it will have to implement another of similar value. That may mean
11 cuts to benefits or eligibility, causing irreparable harm to Medicaid beneficiaries.
12 Further, the Department will would be costly and difficult to “claw back” funds
13 overpaid to providers if this Court ultimately rules in favor of the Department and lifts
14 the injunction.⁷⁴ And the significant, unacknowledged weaknesses in ASHNHA’s legal
15 arguments are detailed above.

16 **1. ASHNHA’s members are not faced with irreparable harm.**

17 In the “balance of hardships” analysis, “irreparable injury” is one where “no
18 certain pecuniary standard exists for the measurement of damages, [or that] cannot
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25 ⁷⁴ When considering hardship to the Department, this Court assumes the
26 Department will prevail. *Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014).

1 receive reasonable redress in a court of law.”⁷⁵ ASHNHA’s members are faced only
2 with reduced payments, which the state may reimburse in the event that this Court rules
3 in ASHNHA’s favor. ASHNHA does not represent other interests and there are no other
4 parties to this lawsuit.⁷⁶ Although ASHNHA makes vague predictions that Medicaid
5 providers may have to eliminate services as a result of the reimbursement rate reduction,
6 there is no indication that would occur in the time it will take to resolve the underlying
7 motion on the expedited briefing schedule.
8

9 ASHNHA alleges that, without a preliminary injunction, Medicaid beneficiaries
10 and “the Medicaid system” will suffer irreparable harm. But ASHNHA does not
11 represent the interests of Medicaid beneficiaries or “the Medicaid system.” The
12 Department is charged with protecting those interests,⁷⁷ and ASHNHA does not have
13 the expertise or the authority to represent what is best for the one-third of Alaskans who
14 participate in Medicaid.
15

16 2. The Department cannot be adequately protected.

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20 ⁷⁵ *State v. Kluti Kaah Native Village of Copper Ctr.*, 831 P.2d 1270, 1273 n.5
(Alaska 1992) (*quoting* Black's Law Dictionary, 786 (6th Ed.1990)).

21 ⁷⁶ An association has standing to bring suit on behalf of its members when “(1) its
22 members would otherwise have standing to sue in their own right; (2) the interests it
23 seeks to protect are germane to the organization’s purpose; and (3) neither the claim
24 asserted nor the relief requested requires the participation of individual members in the
25 lawsuit.” *Friends of Willow Lake, Inc. v. State, Dep’t of Transp.*, 280 P.3d 542, 546
(Alaska 2012).

26 ⁷⁷ See AS 18.05.010.

1 The Department’s budget for fiscal year 2020 has already been set, and funding
2 reductions from the prior fiscal year must be absorbed by some part of the Medicaid
3 system. If this Court issues a preliminary injunction and later finds in favor of the
4 Department, it will be expensive and difficult, if not impractical, for the Department to
5 “claw back” the five percent that it overpaid providers while the preliminary injunction
6 was in force. It will also cause significant administrative burdens and uncertainty for the
7 many affected providers, the majority of which are not ASHNHA members. There are
8 also significant costs to change the Department’s reimbursement systems back and
9 forth.⁷⁸ The Department has already expended significant funds and effort to implement
10 the five percent rate reduction; if this court grants a preliminary injunction and the
11 Department ultimately prevails, it will have to make those expenditures twice more to
12 change its systems back and back again.⁷⁹ Those funds will have to be absorbed through
13 cost containment in some other aspect of the Medicaid system, which may mean cuts to
14 beneficiary eligibility or services.⁸⁰ This would cause irreparable harm to Medicaid
15 beneficiaries.

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19 In his Finding of Emergency, the commissioner laid out the potentially dire
20 consequences of failing to implement this reimbursement rate reduction immediately. If
21 this Court enjoins implementation of those reductions, the Department will have to shift
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23 ⁷⁸ Affidavit of Renee Gayhart, pages 3-4 paragraphs 7-9.

24 ⁷⁹ *Id.*

25 ⁸⁰ *See* AS 47.07.036 prioritizing cost containment measures.
26

1 this funding shortfall to other areas. Further, the uncertainty regarding reimbursement
2 rates for fiscal year 2020 will be detrimental to Alaska Medicaid providers, the vast
3 majority of whom are not represented in this lawsuit.

4
5 **3. ASHNHA's oversimplification of the facts and law renders its**
6 **arguments insufficient to raise serious and substantial**
7 **questions.**

8 ASHNHA's failure to acknowledge the facts and legal precedent adverse to its
9 position render its arguments insubstantial. ASHNHA's motions fail to acknowledge
10 *Armstrong and Developmental Services Network*, fail to acknowledge that AS 47.07.036
11 explicitly allows the Department to reduce Medicaid reimbursement rates in the face of
12 reduced legislative appropriations,⁸¹ and fail to acknowledge ASHNHA's substantive
13 contacts with the Department and the legislature over the course of the last few months.
14 These failures so severely weaken its arguments that they lack seriousness and
15 substantiality.

16 **D. If this Court grants a preliminary injunction, it must require**
17 **ASHNHA to post security.**

18 Alaska Rule of Civil Procedure 65(c) provides:

19 No restraining order or preliminary injunction shall issue except upon the
20 giving of security by the applicant, in such sum as the court deems proper,
21 for the payment of such costs and damages as may be incurred or suffered
22 by any party who is found to have been wrongfully enjoined or restrained.
23 No such security shall be required of the state.

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26 ⁸¹ As does AS 47.07.070.

1 As argued above, this Court should not issue a preliminary injunction. However,
2 if this Court chooses to issue an injunction, it must require ASHNHA to post an
3 adequate bond to reimburse the Department in the event that the Department ultimately
4 prevails. This should include the value of the five percent reimbursement rate reduction
5 and the inflation freeze while the underlying Motion for Summary Judgment is pending,
6 as well as the costs associated with undoing and then redoing the Department's
7 implementation of the changed rate (estimated at \$714,244⁸²).

8
9 The value of the reimbursement rate reduction for fiscal year 2020 is projected at
10 \$32 million, or approximately \$2.6 million per month.⁸³ This Court is in the best
11 position to estimate when an order might issue on ASHNHA's underlying motion for
12 summary judgment, given the expedited briefing schedule. If the expectation is that a
13 preliminary injunction would remain in effect for approximately one month, this Court
14 should require ASHNHA to post a bond of approximately \$3.3 million, representing
15 \$2,600,000 and \$714,244. Because ASHNHA only represents a handful of Alaska
16 Medicaid providers affected by the emergency regulation, ASHNHA cannot simply
17 agree that its members will pay back five percent of reimbursements if the injunction is
18 lifted. They must bond against the effect of the emergency regulations on the hundreds
19 of affected Medicaid providers in the state.
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25 ⁸² Affidavit of Renee Gayhart pages 3-4, paragraphs 7-9.

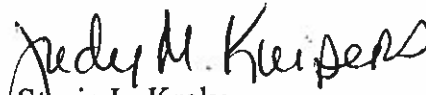
26 ⁸³ Affidavit of Donna Steward, page 9, paragraph 21.

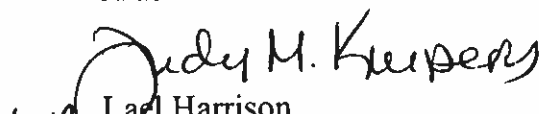
IV. Conclusion

This Court cannot enjoin the legislature to increase the Department's funding. ASHNHA's motion for preliminary injunction fails to recognize that, if the Department does not immediately implement a five percent reimbursement rate cut, it will have to take other and potentially more drastic measures to absorb the reduction in its funding for fiscal year 2020. If the Department cannot implement a rate cut through emergency regulations, but can only do so after a lengthy regulatory and CMS approval process, it may have to cut reimbursement rates more drastically the final months of fiscal year 2020 in order to realize the entire savings in a few months. Obviously, it is better for providers to absorb a smaller reduction over the entire fiscal year than a larger reduction over a few months. ASHNHA's motion for a preliminary injunction is short-sighted and self-interested. And, it fails to recognize the serious weaknesses in its legal arguments. This Court should deny ASHNHA's request for a preliminary injunction.

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