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Via Hand Delivery and Electronic Mail

April 27, 2016

Matthew Pollack, Clerk
Maine Supreme Judicial Court
205 Newbury Street
Portland, ME 04101-4125

RE: *Kayla Doherty v. Merck & Co., Inc., et al.*
Docket No.: FED-16-14

Dear Mr. Pollack:

Enclosed for filing in the above-captioned matter, please find an original and 9 copies of Defendant-Appellee Merck & Co., Inc.'s Brief.

Please do not hesitate to contact me if you have any questions. Thank you.

Respectfully yours,

A handwritten signature in blue ink, appearing to read "Paul McDonald".

Paul McDonald

PM/js

Enclosure

cc: Laura H. White, Esq. (w/encl.; *via* electronic and first-class mail)
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**STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT**

LAW DOCKET NO. FED-16-014

**KAYLA DOHERTY,
*PLAINTIFF/APPELLANT***

v.

MERCK & CO., INC.,

and

**UNITED STATES OF AMERICA,
*DEFENDANTS/APPELLEES***

and

**ATTORNEY GENERAL FOR THE STATE OF MAINE,
*INTERVENOR DEFENDANT/APPELLEE***

**QUESTIONS OF LAW CERTIFIED TO THE LAW COURT BY
THE UNITED STATES DISTRICT COURT, DISTRICT OF MAINE
Case No. 1:15-cv-00129-DBH**

**BRIEF OF DEFENDANT/APPELLEE
MERCK & CO., INC.**

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PRELIMINARY STATEMENT

Plaintiff Kayla Doherty filed a lawsuit in federal court against Defendant Merck & Co., Inc., alleging that a defect in Merck's hormonal birth control product Implanon® resulted in the birth of her healthy son. The Maine legislature, however, has said unambiguously that “the birth of a normal, healthy child does not constitute a legally recognizable injury and that it is contrary to public policy to award damages for the birth or rearing of a healthy child.” 24 M.R.S.A. § 2931. Accordingly, it is the law of Maine that “[n]o person may maintain a claim for relief or receive an award for damages based on the claim that the birth and rearing of a healthy child resulted in damages to him.” *Id.*

Against this legal backdrop, Merck moved to dismiss Plaintiff's “wrongful birth” claims, which resulted in the federal district court certifying three questions to this Court for consideration.

First, the district court has asked whether Maine's wrongful birth statute, cited above, applies to product liability claims against a product manufacturer such as Merck. The answer to that question lies within the plain meaning of the statute, which unambiguously bars *all* claims based on “the birth of a normal, healthy child.” The statute provides for only one exception: it allows limited damages for claims arising from “failed sterilization procedures,” such as a tubal ligation. There is no exception for product liability claims, nor is there one for claims against pharmaceutical manufacturers. Moreover, when looking at Maine's Health Security Act (“MHSA”),¹ as a whole, as Plaintiff has encouraged this Court to do, it becomes evident that the Maine legislature expressly limited certain provisions of the MHSA to claims for “professional negligence.” The legislature, however, included no such limitation in the wrongful birth provision, despite expressly doing

¹ The MHSA is found at 24 M.R.S.A. ch 21, §§ 2501-2988.

so in other provisions. Had the legislature intended to limit the wrongful birth statute to particular kinds of claims, it clearly knew how to do that. The statute's actual language shows that the legislature chose not to.

Second, the district court has asked whether the Law Court's decision in *Macomber v. Dillman*, 505 A.2d 810 (Me. 1986), applies to Merck to bar Plaintiff's claims. Like the plain language of the wrongful birth statute, the *Macomber* decision holds that "a parent cannot be said to have been damaged or injured by the birth and rearing of a healthy, normal child." *Id.* at 813. This rule and the public policy behind it apply squarely to Plaintiff's product liability claims against Merck. Therefore, the correct response to the second certified question is that *Macomber* bars Plaintiff's claims against Merck, too.

Third, the district court has asked whether Maine's wrongful birth statute bars Plaintiff's claims in their entirety, or instead, whether Plaintiff is entitled to limited damages under the wrongful birth statute's exception for damages resulting from a "failed sterilization procedure." The correct answer is that Plaintiff's claims are barred in their entirety because Plaintiff cannot fit her claims into the statute's exception. Implanon® is a hormonal contraceptive that contains a progestin, which is also used in birth control pills, and prevents pregnancy in the same way that birth control pills do. It is designed to prevent pregnancy for up to three years, but can be removed earlier if necessary. [App. at 16] It does not "render an individual permanently incapable of procreation." *See* 34-B M.R.S.A. § 7003(9) (defining "sterilization" under Maine law). The state's "sterilization" exception therefore does not apply, and the statute bars all recovery.

Finally, Plaintiff spends most of her brief discussing constitutional issues. The district court did not certify constitutional issues to this Court, and they are not properly before it. Nonetheless, none of Plaintiff's constitutional challenges holds up. The Maine Legislature enacted the MHSA, including the wrongful birth

statute at issue here, for the purpose of controlling medical costs and protecting access to health care. The legislature therefore exercised its law-making power to promote a legitimate governmental purpose, which included defining when a wrongful birth claim would exist under Maine law and what remedies would be recoverable. Maine's wrongful birth statute therefore is a valid and constitutional exercise of legislative power that impinges on no constitutionally protected right. Indeed, the Law Court has upheld the constitutionality of Maine's wrongful birth statute, and courts elsewhere have uniformly upheld similar provisions against multiple constitutional challenges just like those made by Plaintiff.

For all of these reasons, and the reasons set forth below, Merck requests that the Law Court answer the certified questions as follows:

(1) Maine's wrongful birth statute, 24 M.R.S.A. § 2931, bars Plaintiff's product liability claims against Merck;

(2) The policy barring claims for the birth of a normal, healthy child as announced in the Law Court's decision in *Macomber v. Dillman*, 505 A.2d 810 (Me. 1986), applies to Merck and bars Plaintiff's claims; and

(3) Plaintiff's claims against Merck are barred in their entirety under Maine's wrongful birth statute.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

I. Plaintiff Sought Temporary Birth Control And Her Physician Recommended The Implantable Drug Implanon®

Plaintiff Kayla Doherty was twenty years old and wanted to avoid having a baby until she had economic stability. [App. at 15] She therefore consulted with her physician Dr. Amanda Ruxton regarding "birth control options," and Dr. Ruxton recommended either Implanon® or Nexplanon®.² [App. at 14, 15] As

² Plaintiff alleges that she was treated with either the implantable drug Implanon® or the second generation of the product, Nexplanon®, but she does not say which one. In the interest of simplicity, Merck will refer to the product used to treat Plaintiff as Implanon®.

Plaintiff alleges, she was seeking “contraception, not sterilization.” [App. at 37] Implanon® is a four-centimeters-long and two millimeters-wide single rod containing etonogestrel, a type of progestin hormone effective at inhibiting ovulation and preventing pregnancy. [App. at 15] Progestin hormones are also used in oral contraceptives, which have been available to women for decades. Implanon® is inserted just under the skin on the inner side of a woman’s arm between the bicep and triceps muscles using a syringe-like applicator. [App. at 15]

Implanon® is an FDA-approved “implantable drug” intended to prevent conception for a period of up to three years, unless removed earlier. [App. at 15-16] On February 28, 2012, Dr. Ruxton attempted to insert Implanon® into Plaintiff’s arm. [App. at 15] Plaintiff claims that the drug was not inserted, and as a result, she became pregnant. [App. at 15-16] On June 9, 2014, Plaintiff gave birth to a healthy baby boy. [App. at 17]

II. After Plaintiff Gave Birth To A Healthy Boy, She Sued Her Doctor And Merck Alleging Medical Malpractice And Product Liability—Claims That Maine Law Does Not Allow

Plaintiff initiated this lawsuit on April 3, 2015 in the United States District Court for the District of Maine. [App. at 3] In her initial Complaint, Plaintiff alleged causes of action against Merck for strict product liability, breach of implied warranty, breach of express warranty, negligence, and negligent misrepresentation. [App. at 3] She also alleged causes of action against Dr. Ruxton for medical negligence and lack of informed consent under the Federal Tort Claims Act, based on the allegation that the facility that employed Dr. Ruxton is a covered entity pursuant to the Federally Supported Health Centers Assistance Act. [*Id.*] Her alleged injury was “unplanned pregnancy” and the resulting birth of her healthy child. [*Id.*]

Maine law does not allow a claim based on the birth of a healthy child, except in cases of failed sterilization procedures. 24 M.R.S.A. § 2931. Thus, on

June 8, 2015, Merck moved to dismiss Plaintiff's original Complaint, arguing that Maine's "wrongful birth" statute barred Plaintiff's claim as a matter of law. [App. at 3-4]

Without responding to Merck's motion, Plaintiff filed a First Amended Complaint ("FAC"), which is now the operative pleading in the federal court action. [App. at 4] Similar to the initial complaint, Plaintiff's FAC asserts product liability claims against Merck and again seeks damages due to the unplanned birth of her healthy child. [App. 17-18] Acknowledging that Maine's wrongful birth statute barred her claim, Plaintiff's FAC added a claim for declaratory judgment that Maine's wrongful birth statute is unconstitutional under both state and federal law. [*Id.*]

III. Merck Moved To Dismiss Plaintiff's "Wrongful Birth" Claims And The Federal District Court Certified Questions To This Court

Because Maine law bars Plaintiff's "wrongful birth" claims, Merck moved to dismiss the FAC on July 30, 2015. [App. at 5] Merck argued that Plaintiff's claims were barred under the wrongful birth statute, which categorically prohibits all claims for alleged damages for the birth and rearing of a healthy child. [App. at 18] Plaintiff responded that the statute did not apply to product liability lawsuits such as hers against Merck; that her procedure was a "failed sterilization procedure" within the wrongful birth statute's lone exception; and that the statute was unconstitutional under both Maine and federal law. [App. at 17-18] In reply, Merck emphasized that the statute barred *all* claims based on the birth of a healthy child, with no exception for product liability claims, and that Implanon® is a temporary contraceptive method, not "sterilization." Plaintiff's treatment with Implanon® therefore fell outside the statute's exception for "failed sterilization procedures." [App. at 10-11, 18; *see also* 24 M.R.S.A. § 2931(1) and (2)] Finally, Merck argued that Maine's statute was constitutional in every respect. *Id.*

On December 3, 2015, the federal district court heard oral argument on Merck's motion to dismiss [App. at 8], and it ruled that it would deny Merck's motion without prejudice, pending answers to questions certified to the Maine Law Court regarding Maine's wrongful birth statute. [App. at 10, 18] On January 7, 2016, after all parties had an opportunity to weigh in on the proposed language of the certified questions and statement of undisputed facts under which those questions arose, the district court entered an order pursuant to Maine Rule of Appellate Procedure 25(a), certifying three questions of Maine law to this Court:

1. Does the protection of Maine's wrongful birth statute, 24 M.R.S.A. § 2931, extend to the defendant Merck & Co., Inc., as a drug manufacturer and distributor?

2. If not, does the Law Court's decision in *Macomber v. Dillman*, 505 A.2d 810 (Me. 1986), which concerned a failed sterilization by a health care provider, apply to the plaintiff Kayla Doherty's claim against Merck as a drug manufacturer and distributor?

3. Does Maine's wrongful birth statute prohibit all recovery for Plaintiff against both defendants (Merck if it is covered by the statute, see question one, *supra*) because of the nature of the procedure she underwent? Or does the statute allow Plaintiff to proceed with her claims but limit the recoverable damages to her expenses incurred for the procedure and pregnancy, pain and suffering connected with the pregnancy, and loss of earnings during pregnancy?

IV. Plaintiff Filed An Opening Brief In This Court That Misconstrues The Record And Argues Issues That The District Court Did Not Certify

The district court took great care both to form its certified questions and to formulate the factual record that would be presented to this Court. As the district court's certification order makes clear, this Court was to accept as true only the facts described in Appendix "A" to the district court's order. [App. at 14 ("I

conclude as a matter of federal law that the *following* factual allegations are properly pleaded.”)] During the hearing on Merck’s motion to dismiss, the district court made its intentions regarding the certified record eminently clear:

[N]umber one, as a federal judge I’ve got to apply Iqbal and Twombly and decide which allegations of the amended complaint survive for purposes of analysis. Under Maine Rule of Appellate Procedure 25 I have to tell the Law Court what the facts are, and I will obviously do that in terms of what the complaint says, because at this point it’s a motion to dismiss, but I’ve got to decide what allegations are adequate.

[App. at 8, Transcript of proceedings before Hon. D. Brock Hornby, Dec. 3, 2015, Federal Court Doc. No. 54 (“Dec. 3, 2015 Trans.”) at 68:21-69:3]

After considering which allegations it considered adequately pleaded under federal law, and not clearly contradicted by materials judicially noticeable, the district court issued a draft statement of undisputed facts on December 10, 2015, and invited all parties to provide written comments. [App. at 9, Federal Court Doc. No. 55] The district court later issued its final order certifying the questions and stating the facts upon which those questions should be considered. [App. at 9, Federal Doc. No. 63; App. at 10]

In direct contravention of the district court’s determinations, Plaintiff’s brief attempts to inject pages of factual allegations not properly before the Law Court. Merck will not parse each line of unsupported or mischaracterized factual allegation in Plaintiff’s brief, but some clarification is necessary. In its order, the district court noted that “the defendants challenged the plaintiff’s ability to characterize her procedure as ‘sterilization,’” and the court therefore purposefully omitted any reference to “sterilization” from its statement of undisputed facts. [App. at 14 (“I have removed any characterization of the plaintiff’s procedure (leaving in place its factual description”)] The reason is that, despite Plaintiff’s attempts to plead otherwise, the FDA-approved labeling demonstrates that

Implanon® is a long-acting hormonal *contraceptive*, and Merck rejects that administering the drug could ever be construed as “sterilization.”³

The district court also made clear when it heard Merck’s motion to dismiss that it did not accept Plaintiff’s representation that she was seeking any form of “permanent” birth control. [App. at 15 (Plaintiff “wanted to avoid having a baby until she had economic stability.”); Dec. 3, 2015 Trans. at 69:10-14 (a fair reading of the FAC demonstrated to the district court that Plaintiff “does not say that she had an intent to seek permanent sterilization.”)] For these reasons, the district court specifically omitted any reference to “sterilization” and “permanence” that Plaintiff now seeks to evoke. [See, e.g., Doherty Brief at 2 (Plaintiff “sought out a

³ The FDA-approved labeling for Implanon® makes clear that it is “*a long-acting (up to 3 years), reversible, hormonal contraceptive method. The implant must be removed by the end of the third year and may be replaced by a new implant at the time of removal, if continued contraceptive protection is desired.*” The district court cited Implanon®’s approved labeling in its order [App. at 15 n. 5, 6], and the device labeling is publicly available at: http://www.accessdata.fda.gov/drugsatfda_docs/nda/2006/021529_implanon_toc.cfm (last visited April 10, 2016). Other FDA publications make clear the distinctions between *permanent* sterilization procedures and *reversible* forms of contraception, which include Implanon®, intra-uterine devices (“IUDs”), birth control pills, and condoms, among others. See, e.g., FDA, Free Publications, Birth Control: Medicines To Help You (“Birth Control”), last updated Jan. 8, 2015, available at <http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm> (last accessed Apr. 19, 2016) (“Permanent Methods: For people who are sure they never want to have a child or do not want any more children [include]. . . Sterilization Surgery for Men (Vasectomy). . . [and] Sterilization Surgery for Women [including tubal ligation and the use of devices to block the fallopian tubes]”); see also U.S. Food and Drug Admin., Birth Control Guide, 2013, available at <http://www.fda.gov/downloads/forconsumers/byaudience/forwomen/freepublications/ucm356451.pdf> (last accessed Apr. 19, 2016) (referring to “sterilization surger[ies] for women” as one-time procedures intended to be permanent, as distinguished from an implantable rod that “lasts up to 3 years.”). Unlike the various extrinsic newspapers articles, websites, and opinion pieces Plaintiff cites in her brief, in ruling on a motion to dismiss under Rule 12(b) of the Federal Rules of Civil Procedure, a federal court may take judicial notice of publicly available FDA records, such as FDA labeling, and a federal court need not accept as true allegations that are clearly contradicted by judicially noticeable facts. See *Gooley v. Mobil Oil Corp.*, 851 F.2d 513, 514 (1st Cir. 1988) (court need not accept contradicted facts); see also *In re Ariad Pharms., Inc.*, --- F. Supp. 3d ---, 2015 WL 1321438, at *22 (D. Mass. Mar. 24, 2015) (taking judicial notice of prescribing information for a prescription drug and reports published on the FDA’s website). Indeed, the allegations in the FAC also make plain that Plaintiff herself believes Implanon® is “contraception, *not sterilization*”. [App. at 37; see also App. at 20 (“Implanon . . . is a third-generation version of implantable *contraception*”); Doherty Brief at 2 (Plaintiff sought out a “long-acting *contraceptive* drug.”)]

type of *sterilization procedure*”); *id.* (Plaintiff’s goal was to “avoid pregnancy for the *foreseeable future.*”)]

Plaintiff disregarded the careful process the district court went through in determining which factual allegations were properly pleaded in the FAC, and her “facts” outside the record should be disregarded.

QUESTIONS CERTIFIED BY THE DISTRICT COURT

The district court certified the following three questions to this Court:

1. Does the protection of Maine’s wrongful birth statute, 24 M.R.S.A. § 2931, extend to the defendant Merck & Co., Inc., as a drug manufacturer and distributor?

2. If not, does the Law Court’s decision in *Macomber v. Dillman*, 505 A.2d 810 (Me. 1986), which concerned a failed sterilization by a health care provider, apply to the plaintiff Kayla Doherty’s claim against Merck as a drug manufacturer and distributor?

3. Does Maine’s wrongful birth statute prohibit all recovery for Plaintiff against both defendants (Merck if it is covered by the statute, see question one, *supra*) because of the nature of the procedure she underwent? Or does the statute allow Plaintiff to proceed with her claims but limit the recoverable damages to her expenses incurred for the procedure and pregnancy, pain and suffering connected with the pregnancy, and loss of earnings during pregnancy?

Plaintiff argues that the district court granted her motion to certify questions related to the “constitutionality” of 24 M.R.S.A. § 2931, and the bulk of her brief invites this Court to rule that the wrongful birth statute is unconstitutional under both Maine’s constitution and the federal constitution. [Doherty Brief at 2, 29-49] The district court, however, did not certify constitutional questions to this Court. Because Plaintiff has discussed constitutional issues at length in her opening brief, Merck will respond and explain why Plaintiff is incorrect at every step.

Nonetheless, constitutional issues are not properly before this Court. *See White v. Edgar*, 320 A.2d 668, 688 n.18 (Me. 1974) (refusing to offer opinion on whether state statute contravenes “equal protection” and other parallel constitutional guarantees not certified by the federal court).

SUMMARY OF ARGUMENT

Maine law is clear in its application to Plaintiff’s FAC, and the answers to the district court’s certified questions are easily found in the language of Maine’s statutes and this Court’s precedent.

First, the Maine wrongful birth statute applies to claims against Merck and not exclusively to claims for professional negligence. The statute’s unambiguous language makes plain that it bars *all* claims based on the birth and rearing of a healthy child, with one limited exception for “failed sterilization procedures.” 24 M.R.S.A. § 2931(2). The legislature separately stated its intent with equal clarity: “It is the intent of the Legislature that the birth of a normal, healthy child does not constitute a legally recognizable injury and that it is contrary to public policy to award damages for the birth or rearing of a healthy child.” 24 M.R.S.A. § 2931(1). To remove all doubt, the Legislature expressly limited multiple provisions of the MHSA to “actions for professional negligence,” but it placed no such limitation on the wrongful birth statute.

Second, the *Macomber* decision applies to bar Plaintiff’s claims against Merck, too. The *Macomber* decision holds that “a parent cannot be said to have been damaged or injured by the birth and rearing of a healthy, normal child.” *Id.* This rule and the public policy behind it are not limited to medical malpractice claims and they apply squarely to Plaintiff’s product liability claims against Merck. Moreover, try as she might, Plaintiff cannot shoehorn her claims into the case’s exception for “failed sterilization procedures.” She admits that she “never had” a failed tubal ligation sterilization procedure, which was the procedure at issue in

Macomber. [Doherty Brief at 9] Moreover, Plaintiff expressly alleged in her FAC that she sought “contraception, not sterilization” from her physician, and Merck’s hormonal contraceptive products are not “sterilization procedures” in any event. [App. at 37]

Third, for similar reasons, Plaintiff is not entitled to *any* recovery under Maine’s wrongful birth statute, including the limited damages that the statute allows for “failed sterilization procedures.” Again, Plaintiff cannot fit her claims into the wrongful birth statute’s exception for “failed sterilization procedures” because Implanon® is a hormonal contraceptive product, not a “sterilization procedure.”

Finally, to the extent this Court reaches the constitutional issues, Maine’s wrongful birth statute passes constitutional muster in every regard. The statute represents a legitimate exercise of legislative power to promote a legitimate governmental interest—controlling medical costs and protecting access to health care. The statute therefore easily passes rational basis review under the Fourteenth Amendment, and because the statute neither impinges on a fundamental right nor discriminates on its face, heightened levels of scrutiny do not apply. Despite Plaintiff’s arguments, a “disparate impact”—even if one existed—*never* invokes heightened scrutiny under due process or equal protection. The wrongful birth statute also does not violate Maine’s “open courts” provision because the statute does not limit access to the court process; it merely defines what claims are recognized under Maine substantive law. The statute likewise does not impinge on the right to a jury trial. Indeed, it does not say anything about the jury’s function.

ARGUMENT

I. **Question One: Maine’s Wrongful Birth Statute Extends To Plaintiff’s Claims Against Merck Because The Statute Bars All Claims Arising From The Birth Of A Healthy Child—Without Exception For Product Liability Claims**

Maine’s wrongful birth statute extends to and bars Plaintiff’s product liability claims against Merck. The reasons are threefold. First and foremost, the statutory language and legislative intent unambiguously bar *all* claims for damages based on the birth and rearing of a healthy child. There is no exception for product liability claims. Second, when viewing the MHSA as a whole, the legislature clearly intended to limit certain provisions to actions for “professional negligence”—but *not* the wrongful birth statute. Third, barring all claims arising from the birth of a healthy child promotes the legislature’s purpose for enacting the law—to control medical costs and protect access to healthcare.

A. **The Plain Language Of The Wrongful Birth Statute States That The Statute Bars All Claims Arising From The Birth Of A Healthy Child, Not Only Medical Malpractice Claims**

The Maine legislature was clear when it enacted the wrongful birth statute, both in setting forth the statute’s scope and effect and in describing its legislative intent. By the statute’s plain terms, it bars Plaintiff’s claims against Merck.

Statutory interpretation begins with the actual language of the statute. *Savage v. Maine Pretrial Servs., Inc.*, 2013 ME 9, ¶ 7, 58 A.3d 1138. “The fundamental rule in the interpretation of any statute is that the intent of the legislature, as divined from the statutory language itself, controls.” *Daggett v. Sternick*, 2015 ME 8, ¶ 11, 109 A.3d 1137 (internal citations omitted). If there is no ambiguity, extrinsic indicia of legislative intent such as rules of construction and the legislative history are not consulted. *Dickey v. Vermette*, 2008 ME 179, ¶ 5, 960 A.2d 1178; *Savage*, 2013 ME 9, ¶ 8, 58 A.3d 1138. As this Court has observed:

If the meaning of this language is plain, we must interpret the statute to mean exactly what it says. . . . Stated succinctly, when the language chosen by the Legislature is clear and without ambiguity, it is not the role of the court to look behind those clear words in order to ascertain what the court may conclude was the Legislature's intent.

Kimball v. Land Use Regulation Comm'n, 2000 ME 20, ¶ 18, 745 A.2d 387 (internal quotation marks and citations omitted). A statute is ambiguous only if it can reasonably be interpreted in more than one way and still comport with the actual language of the statute. *Gaeth v. Deacon*, 2009 ME 9, ¶ 15, 964 A.2d 621.

Here, the statute unambiguously prohibits all wrongful birth claims, with only one exception. The statute states as follows:

§ 2931. Wrongful Birth; wrongful life

1. **Intent.** It is the intent of the Legislature that the birth of a normal, healthy child does not constitute a legally recognizable injury and that it is contrary to public policy to award damages for the birth or rearing of a healthy child.
2. **Birth of healthy child; claim for damages prohibited.** No person may maintain a claim for relief or receive an award for damages based on the claim that the birth and rearing of a healthy child resulted in damages to him. A person may maintain a claim for relief based on a failed sterilization procedure resulting in the birth of a healthy child and receive an award of damages for the hospital and medical expenses incurred for the sterilization procedures and pregnancy, the pain and suffering connected with the pregnancy and the loss of earnings by the mother during pregnancy.

24 M.R.S.A. § 2931.

There is no ambiguity in this language. By its terms, the statute excludes *all* claims based on a theory that the birth and rearing of a healthy child caused injury, with only one exception for “failed sterilization procedures.” *Id.* The language provides no exceptions for “product liability claims” or actions related to “drugs” or “pharmaceuticals.” Its application, likewise, is not limited solely to “actions for professional negligence” or claims against “health care providers.” As the Law Court has said, Maine’s wrongful birth statute “establish[es] a general rule that

actions based on the birth of a healthy child are contrary to public policy”
Musk v. Nelson, 647 A.2d 1198, 1201 (Me. 1994).

The legislature indeed made its intent clear: “It is the intent of the Legislature that the birth of a normal, healthy child does not constitute a legally recognizable injury and that it is contrary to public policy to award damages for the birth or rearing of a healthy child.” 24 M.R.S.A. § 2931(1). Like the statute’s operative language, the legislature’s stated intent does not limit the statute’s application to only certain claims or defendants, as Plaintiff argues. Instead, it eschews such a case-by-case analysis and resolutely eliminates all claims for wrongful birth, except when based on a failed sterilization procedure.

Because the statute’s language is unambiguous, this Court need proceed no further. It should answer the district court’s first question in the affirmative and hold that the wrongful birth statute applies to and bars Plaintiff’s claims against Merck.

B. A Proper Reading Of The MHSA Confirms That The Wrongful Birth Statute Applies To All Claims, And Not Only Medical Malpractice Actions

Plaintiff’s principal argument on statutory interpretation is that the Court should read Maine’s Health Security Act holistically to find that the wrongful birth statute applies only to “actions for professional negligence.” [Doherty Brief at 12-14] That argument, however, is incorrect. Although Plaintiff argues that the wrongful birth statute applies only to “actions for professional negligence” under the “plain language” of the MHSA [*Id.*], she cites no “language” from the Act—let alone the wrongful birth statute—that actually says that. Indeed she does not discuss the language of the wrongful birth statute at all, and she has identified no ambiguity in the wrongful birth statute’s language that would justify speculating that the Legislature meant something other than what it said.

Regardless, even taking a holistic view of the MHSA, as Plaintiff urges, the Act's structure demonstrates that the wrongful birth statute applies to Merck. Plaintiff's argument appears to be that the wrongful birth statute is limited to medical malpractice claims because the MHSA contains definitions for the terms "action for professional negligence" and "health care provider." [Doherty Brief at 13-14 (citing 24 M.R.S.A. § 2502)]

The problem for Plaintiff is that the wrongful birth statute contains none of these terms. The legislature defined "health care provider" when it originally enacted the MHSA in 1977.⁴ (enacted by P.L. 1977 ch. 492 § 3). The Act's definitions for "action for professional negligence" and "professional negligence" were enacted at the same time the legislature adopted the wrongful birth statute in 1986. *See* P.L. 1985, ch. 804 § 5; *see also* 24 M.R.S.A. § 2502(6) and (7).⁵ Those defined terms therefore existed and were present in the statute when the legislature enacted the wrongful birth provision, yet the legislature used none of them to define or limit the scope of the wrongful birth provision.

Significantly, the legislature *did* use the term "action for professional negligence" to limit the scope of numerous *other* provisions in the MHSA. For example, the mandatory pre-filing notice provisions apply only to "an action for

⁴ The MHSA's definition of a "health care provider" has been amended a number of times since originally enacted, but now reads: "'Health care provider' means any hospital, clinic, nursing home or other facility in which skilled nursing care or medical services are prescribed by or performed under the general direction of persons licensed to practice medicine, dentistry, podiatry or surgery in this State and that is licensed or otherwise authorized by the laws of this State. 'Health care provider' includes a veterinary hospital." 24 M.R.S.A. § 2502(2).

⁵ "An action for professional negligence" is defined as "any action for damages for injury or death against any health care provider, its agents or employees, or health care practitioner, his agents or employees, whether based upon tort or breach of contract or otherwise, arising out of the provision or failure to provide health care services." 24 M.R.S.A. § 2502(6). "Professional negligence" is defined as (A) "a reasonable medical or professional probability that the acts or omissions complained of constitute a deviation from the applicable standard of care by the health care practitioner or health care provider charged with that care"; and (B) "a reasonable medical or professional probability that the acts or omissions complained of proximately caused the injury complained of." 24 M.R.S.A. § 2502(7).

professional negligence.” 24 M.R.S.A. § 2903(1); *see also D.S. v. Spurwink Servs., Inc.*, 2013 ME 31, ¶ 25, 65 A.3d 1196 (concluding plaintiff’s claims not subject to mandatory prelitigation mechanisms because it was not an “action for professional negligence.”). Structured awards and periodic payments are also permitted in “any action for professional negligence” [24 M.R.S.A. § 2951(2)], and the Act formerly required disclosure of expert witnesses within 90 days of filing “an action for professional negligence.” 24 M.R.S.A. § 2903-A(1) (repealed).

The legislature therefore knew how to limit provisions of the MHSA to “actions for professional negligence” when it meant to do so. It did not, however, include that language in the wrongful birth statute, nor did it include any other defined term that would limit the provision’s plain meaning to medical malpractice claims. Thus, when Plaintiff cites the MHSA’s definitions and places so much emphasis on defined terms such as “action for professional negligence” and “health care provider,” she overlooks that those terms have no impact whatsoever on the wrongful birth statute. That statute used none of those terms.

None of the cases Plaintiff relies on leads to a different result. For example, in *Spurwink*, 2013 ME 31, 65 A.3d 1196, this Court interpreted the MHSA’s mandatory pre-litigation procedures, which by their very terms are triggered only for “actions for professional negligence.” *Id.* ¶ 1. The Court concluded that a woman’s negligence cause of action against an education facility for allowing her to leave their property, after which she was sexually assaulted, was not subject to the MHSA’s pre-litigation provisions because the facility—a school—was not a “health care provider” within the meaning of the MHSA, and therefore, the woman’s lawsuit was not an “action for professional negligence.” *Id.* ¶ 25. The case has no bearing on the issue at hand, as the Law Court interpreted only the MHSA’s pre-litigation procedures, which are specifically limited to “actions for

professional negligence.” As already noted, there is no comparable language in the wrongful birth statute.

The same is true of *LaCroix v. Caron*, 423 A.2d 247 (Me. 1980). There the Law Court interpreted the mandatory pre-litigation provisions under the 1977 version of the MHSA. It concluded that a patient’s lawsuit against her podiatrist was not subject to the pre-litigation mechanisms because “podiatrists” were not enumerated in the definition of a “health care provider.” *Id.* at 248. Like *Spurwink*, the case made no ruling on whether the definition of “health care provider” could limit other provisions of the MHSA, and the Court could not have construed the scope of the wrongful birth statute because it was not enacted until nearly a decade later. If anything, the case further supports the proposition that Legislature meant what it wrote, and additional terms are not to be read into the MHSA.

C. Barring Product Liability Claims For Wrongful Birth Of A Normal, Healthy Child Advances The Interests Of Reducing Medical Costs And Protecting Access To Health Care

As a final point, Plaintiff argues that the “legislative purpose behind the wrongful birth statute was to lower medical malpractice premiums, not limit the liability of multi-billion dollar drug companies.” [Doherty Brief at 15] To begin with, Plaintiff again has identified no ambiguity in the statute, which makes it unnecessary to resort to extrinsic evidence of the legislature’s purpose. *Savage*, 2013 ME 9, ¶ 8, 58 A.3d 1138. And the legislature made its intent crystal clear in any event: “It is the intent of the Legislature that the birth of a normal, healthy child does not constitute a legally recognizable injury and that it is contrary to public policy to award damages for the birth or rearing of a healthy child.” 24 M.R.S.A. § 2931.

But even taking Plaintiff’s argument at face value, barring all claims for wrongful birth of a healthy child directly furthers the Legislature’s purpose.

According to the MHSA's legislative history, the Legislature passed the Act to control civil liability and the impact such liability was having on the cost and availability of medical care. *See* Maine Legislative Record, Senate, Apr. 8, 1986, at 1163-67; Maine Legislative Record, House, Apr. 15, 1986, at 1465-71.

Limitations on product liability actions directly serve that legitimate purpose by controlling the cost of important drugs and medical devices and by encouraging companies to pursue innovative technologies that will benefit patients.

In sum, there is no indication in the MHSA, the wrongful birth statute itself, or any of the Act's legislative history that the wrongful birth statute was intended to apply solely to "actions for professional negligence." To the contrary, the plain language and express intent of the legislature state that the wrongful birth statute applies to all claims arising from the birth of a healthy child, without exception for product liability claims or claims against product manufacturers such as Merck.

II. Question Two: The Law Court's Opinion in *Macomber v. Dillman* Bars Plaintiff's Claims Against Merck Because It Holds That No Parent Is Legally Damaged By The Birth Of A Healthy Child

This Court's opinion in *Macomber v. Dillman* likewise applies to Plaintiff's claims against Merck and bars those claims. That is because *Macomber* holds that "a parent cannot be said to have been damaged or injured by the birth and rearing of a healthy, normal child," again with a lone exception for "failed sterilization procedures." *Macomber*, 505 A.2d at 813.

In *Macomber*, the defendant physician performed "a tubal ligation on [the plaintiff] for the purpose of her permanent sterilization." 505 A.2d at 812. However, because of the physician's alleged negligence in performing the sterilization procedure, the plaintiff was not permanently sterilized, and as a result, she became pregnant and gave birth to a healthy child. *Id.* Plaintiff and her husband sued the surgeon who performed the tubal ligation, seeking damages for the cost of raising and educating the child, the medical and other expenses related

to the pregnancy and childbirth, medical expenses of a subsequent hysterectomy for purposes of sterilization, lost wages, loss consortium, medical expenses associated with the unsuccessful tubal ligation, permanent physical impairment resulting from the childbirth, and physical and mental pain and suffering. *Id.* The surgeon moved to dismiss the plaintiffs' claims on the grounds that she failed to state a claim under Maine law and that the plaintiffs could not recover damages for the cost of rearing and educating a normal, healthy child. *Id.*

The trial court denied the defendants' motions, and found that the plaintiffs were entitled to "all reasonable, foreseeable, and proximately caused damages, including the expenses of child rearing." *Id.* The trial court then reported two questions to the Law Court: (1) did the plaintiff state a claim based on a failed tubal ligation resulting in the birth of a healthy child; and if so (2) are plaintiffs' damages limited? *Id.*

In answering the reported questions, this Court announced the law that the Maine legislature later codified in 24 M.R.S.A. § 2931: "We hold for reasons of public policy that a parent cannot be said to have been damaged or injured by the birth and rearing of a healthy, normal child." *Id.* at 813. The only exception that the Court allowed was for claims arising from a "failed sterilization procedure resulting in the birth of a healthy, normal child." *Id.* In such cases, the plaintiff could claim limited damages, *i.e.*, "the hospital and medical expenses incurred for the sterilization procedures and pregnancy, the pain and suffering connected with the pregnancy and the loss of earnings by the mother during that time." *Id.* Notably, the Court expressly confined its recognition of a cause of action to the "facts of this case," meaning that the claim for limited damages arising from "failed sterilization procedure" should be strictly and narrowly construed. *Id.* at 813.

The general rule that this Court announced in *Macomber* applies with equal force regardless of the defendant's identity or the nature of the claim: "[A] parent cannot be said to have been damaged or injured by the birth and rearing of a healthy, normal child." *Macomber*, 505 A.2d at 813.

To evade this rule, Plaintiff argues mainly that Implanon® is a "sterilization procedure" within the meaning of 24 M.R.S.A. § 2931 and *Macomber*. Plaintiff cannot, however, bring herself within the "failed sterilization procedure" exception no matter how hard she tries. To begin with, Plaintiff admits in her opening brief that she "never had" a failed tubal ligation sterilization procedure, which alone takes her outside *Macomber*'s exception for such procedures. [Doherty Brief at 9] Plaintiff similarly asserted in her FAC that she sought "**contraception, not sterilization**, from her physician." [App. at 37]

Moreover, as explained more fully below in connection with the district court's third question, Implanon® cannot reasonably be considered a "sterilization procedure." Maine law defines "sterilization" to mean "a medical or surgical procedure, the purpose of which is to render an individual *permanently* incapable of procreation." 34-B M.R.S.A. § 7003(9) (emphasis added). Other sources confirm that "sterilization" is commonly understood to mean rendering a person permanently unable to procreate. *See* Black's Law Dictionary (10th ed. 2014) (The term "sterilization" is commonly understood to mean "the act of making (a person or other living thing) permanently unable to reproduce" or "[t]he act of depriving (a person or other living thing) of reproductive organs; esp., castration."). The quintessential example is the "sterilization procedure" at issue in *Macomber*—tubal ligation, which is intended to be permanent and *is* permanent unless and until the patient decides to undergo another surgery.⁶

⁶ Plaintiff asserts that the Black's Law Dictionary definition of "sterilization" is "of no better assistance . . . because the term dates back to 1905." [Doherty Brief at 25] Plaintiff, however, misses the point.

By contrast, the FDA has approved Implanon® as a hormonal contraceptive intended to last only temporarily. [App. at 15-16] Implanon® releases a low level of contraceptive hormone (a progestin called etonogestrel, the same hormone used in many oral contraceptives) that is effective at preventing pregnancy, but only for up to three years, at which time it must be replaced if a woman wants continued pregnancy protection. [App. at 16] The protection is also “reversible” at any time by removing the drug, and intended to be so. [App. 16 n.6] For these reasons, there is no rational basis to say that Implanon® makes a woman “permanently incapable of procreation.” Indeed, given that Implanon® is designed to last for up to three years, it would not be an appropriate choice for a woman seeking “sterilization,” just as “sterilization” would not make sense for someone like Plaintiff who envisioned “start[ing] a family” in the future. [App. at 27]

This Court therefore should answer the second question in the affirmative: The rule set out in *Macomber* that “a parent cannot be said to have been damaged or injured by the birth and rearing of a healthy, normal child” bars Plaintiff’s products liability claims against Merck.

III. Question Three: Because Plaintiff’s Product Liability Claims Do Not Fit Within The Wrongful Birth Statute’s Limited Exception For “Failed Sterilization Procedures,” Her Claims Against Merck Are Completely Barred

Maine’s wrongful birth statute prohibits *all* recovery against Merck. The issue is whether Plaintiff’s claims come within the statute’s exception for “failed sterilization procedures”—in which case Plaintiff would be able to claim limited damages. There are two reasons why Plaintiff’s claims do not fall within the

The definition quoted above was available to the legislature when it passed the wrongful birth statute in 1986. Permanence was a defining feature of “sterilization” at that time, as it is now. *See also* Merriam-Webster, Web. 09 Apr. 2016 (“sterilization” is “to deprive of the power of reproducing”); Oxford University Press, March 2016. Web. 09 April 2016 (“sterilization” is “[t]o cause to be unfruitful; to destroy the fertility of.”); *see also Rhoda v. Fitzpatrick*, 655 A.2d 357, 360 (Me. 1995) (using Webster’s Dictionary and case law to interpret the term “intersection”).

exception, thus resulting in a complete bar. First, under the statute's plain language, Implanon® is not a "sterilization procedure." Second, even if there were some ambiguity, rules of statutory construction hold that the "failed sterilization procedure" exception should be construed narrowly to exclude claims based on hormonal birth control such as Implanon®.

A. The Wrongful Birth Statute Makes An Exception For "Failed Sterilization Procedures," Not Hormonal Birth Control Such As Implanon®

Plaintiff's claims do not fall within the statute's "failed sterilization procedure" exception under the statute's plain meaning. As set forth above, Maine law defines "sterilization" to mean "a medical or surgical procedure, the purpose of which is to render an individual *permanently* incapable of procreation." 34-B M.R.S.A. § 7003(9) (emphasis added). Indeed, Plaintiff specifically alleged in her FAC that she sought "contraception, not sterilization, from her physician." [App. at 37] Moreover, the FDA has approved Implanon® as a hormonal contraceptive intended to last temporarily for up to three years. [App. at 15-16] When the Maine Legislature adopted the wrongful birth statute in 1986, hormonal contraceptives like birth control pills, as well as intrauterine devices ("IUDs"), had been approved by the FDA and used by millions of women for decades. The Maine Legislature did not, however, create an exception for "birth control" or "hormonal contraceptives." The sole exception it created was one for "failed sterilization procedures." This language unambiguously excludes prescription contraceptive drugs like Implanon®.

B. Even If Ambiguity Did Exist, Use Of Hormonal Birth Control Cannot Reasonably Be Construed As A "Sterilization Procedure"

Plaintiff's brief argues—based on questionable sources like Wikipedia and slanted opinion articles that are not in the record certified by the district court—that the statute is ambiguous and that use of the hormonal birth control drug

Implanon® can be construed as “a sterilization procedure.”⁷ However, even if the Court resorts to rules of statutory construction to resolve a purported ambiguity, Plaintiff’s argument fails for three reasons.

First, because the “failed sterilization procedure” provision is an exception to a general rule, it should be strictly construed. Exceptions to a general provision are strictly construed, and should only be interpreted to alter the general provision to the extent the legislature has made that intent clear. *See* 2A Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 47:8, at 313-14 (7th ed. 2007) (hereinafter “Sutherland”) (“[T]he legislative purpose set forth in the purview of an enactment is assumed to express the legislative policy, and only those subjects expressly exempted by the proviso should be freed from the operation of the statute.”); *Moffett v. City of Portland*, 400 A.2d 340, 348 (Me. 1979) (exceptions to an act’s requirements must be strictly construed); *Pace v. Armstrong World Indus., Inc.*, 578 So. 2d 281, 285 (Ala. 1991) (“[W]e will restrict from the operation of § 6-5-410 only those actions that are expressly restricted . . .”).

The wrongful birth statute sets a general rule that the birth of a normal, healthy child does not constitute a legally recognizable injury, and that no person can claim damages based on the birth and rearing of a healthy child. The lone exception is for claims arising from “failed sterilization procedures.” As an

⁷ Plaintiff’s brief cites, among other sources, articles from medical journals and online sources related to tubal ligation and contraceptives, PubMed search results, news articles from Forbes and the Washington Post, Wikipedia, and the United States District Court for the District of Minnesota and other courts’ websites related to complex, coordinated proceedings. None of these sources are alleged in Plaintiff’s FAC, let alone appear in the district court’s statement of undisputed facts upon which these certified questions were to be considered. *See Campbell v. Sec. of Health & Human Servs.*, 69 Fed. Cl. 775, 781 (2006) (Wikipedia is “a website that allows virtually anyone to upload an article into what is essentially a free, online encyclopedia,” including articles containing “remarkable oversights and omissions” and those that may be “caught up in a heavily unbalanced viewpoint.”) Plaintiff cited much of this same material in the federal district court proceeding in opposition to Merck’s motion to dismiss. However, the district court accepted none of it as true, as evidenced by their absence from the statement of facts. These alleged “facts” therefore are not properly before this Court, and should be disregarded.

exception to a broadly stated general rule, this Court should construe the “failed sterilization procedure” provision strictly. Plaintiff, however, is urging the opposite—a broad reading of the exception that would encompass “any long-lasting effort to render a woman infertile.” [Doherty Brief at 29 (emphasis in original)] That would cover virtually any kind of birth control, including implants, IUDs, contraceptive hormone injections, and even oral contraceptives where the woman follows her regimen for an extended duration, as women often do. Under Plaintiff’s argument, the exception would swallow the rule.⁸

Second, the legislature’s specificity in creating the exception suggests the deliberate exclusion of other exceptions. Under the canon of statutory interpretation “*expressio unius est exclusio alterius*,” the legislature’s expression of one thing suggests the deliberate exclusion of others. *See 2A Sutherland 24*, § 47:23, at 404 (7th ed. 2007) (where a list of things is designated, “all omissions should be construed as exclusions.”); *Radvanovsky v. Maine Dep’t of Manpower Affairs Emp’t Sec. Comm’n*, 427 A.2d 961, 967 (Me. 1981) (“The time-honored precept of ‘*expressio unius est exclusio alterius*’ should find ready application in the construction of legislation, where the Legislature has manifested a deliberate attempt to be specific to the minute detail.”); *Tate v. Ogg*, 195 S.E. 496, 499 (Va. 1938) (where a statute applied to ‘any horse, mule cattle, hog, sheep or goat,’ it did not apply to turkeys).

Here, the legislature created an exception for “failed sterilization procedures,” and nothing else. Nowhere does the statute provide an exception for

⁸ As an example, Plaintiff quotes a law review article at length on page 27 of her brief and argues that the Norplant hormonal contraceptive implant is “synonymous with sterilization.” But as the quoted material shows, the article addressed not only sterilization but also “mandatory birth control” as a criminal sentence. Moreover, the article consistently refers to the contraceptive implant as “birth control” or a “contraceptive”—never as “sterilization.” Plaintiff’s misuse of this article shows her erroneous reading of the statute would convert all contraceptives into “sterilization procedures” to suit her purpose. [See Doherty Brief at 27 (citing Kristyn M. Walker, *Note, Judicial Control of Reproductive Freedom: The Use of Norplant as a Condition of Probation*, 78 Iowa L. Rev. 779 (1993))]

allegedly failed “implantable drugs,” [App. at 15], “birth control” [App. at 14], “long-lasting” contraceptives [Doherty Brief at 29], or “implantable contraception.” [App. at 26] Plaintiff’s attempt to read these exceptions into the statute would be creating exceptions out of whole cloth. As mentioned above, when the legislature enacted the wrongful birth statute, hormonal contraceptives and IUDs had been around for decades, yet it created no exception for the alleged “failure” of those products when it enacted the statute.

Third, the wrongful birth statute’s legislative history supports a plain and narrow reading of the exception. The legislative history indicates that the Maine Legislature enacted the exception for “failed sterilization procedures” in the wrongful birth statute to accommodate the Law Court’s opinion in *Macomber*, 505 A.2d 810 (1986). See Maine Legislative Record, House, Apr. 15, 1986, at 1466 (noting that the proposed language of the wrongful birth statute had been revised to allow recovery for “sterilization that did not work” in order to codify “the Dillman case”). As discussed above, *Macomber* involved “a tubal ligation . . . for the purpose of . . . **permanent sterilization.**” 505 A.2d at 812 (emphasis added). This Court held generally that “a parent cannot be said to have been damaged or injured by the birth and rearing of a healthy, normal child,” but created a cause of action limited to the facts of that case. *Id.* at 813. The Legislature thus, in codifying *Macomber*, created a statutory exception for “failed sterilization procedures” to permit the limited claim recognized in *Macomber* arising from a failed sterilization procedure performed “for the purpose of [the patient’s] permanent sterilization.” *Id.* at 812. Because the legislature intended to codify *Macomber*, the statute’s exception for “failed sterilization procedures” should be construed narrowly.

Finally, Plaintiff’s attempt to read additional exceptions into the statute would directly frustrate, not further, the Legislature’s intent in enacting the wrongful birth statute, which was to limit, not expand tort liability. *Musk*, 647

A.2d at 1200 (the wrongful birth statute “repudiates certain types of actions,” and does not create a new right to relief). Plaintiff shows her true colors on this point when she argues at the end of her brief that this Court should reject the assertedly “outdated ‘public policy’” that the legislature enacted via the wrongful birth statute. [Doherty Brief at 48] In other words, rather than promote the legislature’s purpose, Plaintiff would have this Court unravel it, all because she has a different view of what Maine’s law ought to be. If Maine’s law requires “updating,” that task is entrusted firmly with the legislature.

For these reasons, the Court should not read an additional exception for failed “birth control” into the wrongful birth statute, and should find that Plaintiff’s claims are barred in their entirety.

IV. The Wrongful Birth Statute Is Constitutional In Every Respect

Much of Plaintiff’s brief deals with a topic not certified to this Court—the constitutionality of 24 M.R.S.A. § 2931(2). She argues that an interpretation of Maine’s wrongful birth statute that precludes her recovery against Merck would violate both the Maine and United States Constitutions because: (1) it would violate the open courts provision of Maine’s Constitution; (2) violate her right to a jury trial; and (3) violate equal protection and substantive due process under the Fourteenth Amendment. None of these issues was certified to the Law Court. Regardless, Plaintiff’s constitutional arguments are without merit.

A. The Open Courts Provision of Maine’s Constitution Does Not Guarantee Plaintiff’s Claims

Plaintiff’s invocation of the open courts provision fundamentally misconstrues the law. [Doherty Brief at 29-33] Although Plaintiff has a right of fair access to Maine courts, she does not have the right to *prevail*. Moreover, Maine’s legislature has every right to determine what recovery can and cannot be had under Maine’s substantive law.

The Maine Constitution, article I, section 19 states that “[e]very person, for an injury inflicted on the person or the person’s reputation, property or immunities shall have remedy by due course of law; and right and justice shall be administered freely and without sale, completely and without denial, promptly and without delay.” This “open courts” provision addresses fair access to the courts, but it neither bestows substantive rights nor limits the legislature’s right to define the scope of tort recovery. Rather, as numerous Maine courts have held, “[t]he open courts provision means the courts must be accessible to all persons alike without discrimination, at times and places designated for their sitting, and afford a speedy remedy for every wrong *recognized by law as remediable in a court.*” *Maine Med. Ctr. v. Cote*, 577 A.2d 1173, 1176 (Me. 1990) (emphasis added). The open courts provision therefore guarantees accessible courts, but it does not address what rights can be pursued or what remedies can be awarded.

No court has ever stricken or declined to apply a Maine statute based on the open courts provision, despite the fact that many plaintiffs have tried. Indeed, plaintiffs have challenged multiple provisions of Maine’s statutes governing medical lawsuits, and courts have rejected those efforts every time. In *Choroszy v. Tso*, 647 A.2d 803 (Me. 1994), the plaintiffs challenged the statute imposing a three-year statute of limitations with no discovery rule as violating the open courts provision because “it is unreasonable to cut off a cause of action before the potential claimant could reasonably discover” it. The Law Court rejected that argument because the “judgment of our Legislature . . . is to the contrary.” *Id.* at 806. This Court has rejected similar challenges time and time again, including challenges to caps on non-economic damages [*Peters v. Saft*, 597 A.2d 50, 54 (Me. 1991)], restrictive statutes of limitations and tolling rules [*Cote*, 577 A.2d at 1176; *Musk*, 647 A.2d at 1202], requirements for pre-litigation medical screening panels [*Irish v. Gimbel*, 1997 ME 50, 691 A.2d 664, 672-73; *see also Houk v. Furman*,

613 F. Supp. 1022, 1034 (D. Me. 1985)], and statutes of repose [*Godbout v. WLB Holding, Inc.*, 2010 ME 46, ¶ 6, 997 A.2d 92].

Plaintiff has not cited a single case to the contrary, but instead attempts to distinguish these authorities by claiming that the wrongful birth statute at issue here is a complete bar to recovery. [Doherty Brief at 30] Plaintiff is wrong for two reasons. First, the statute does not impose a complete bar. The wrongful birth statute permits specific types of claims, including claims arising from the birth of an unhealthy child and claims arising from failed sterilization procedures. 24 M.R.S.A. § 2931(2), (3). The statute therefore bars Plaintiff's claims, but it is not the complete prohibition that Plaintiff makes it out to be. Second, and more importantly, the open courts provision does not prohibit complete bars to recovery, and this Court has upheld laws multiple times even where the law completely terminated the plaintiffs' claims without any examination of the merits. *See, e.g., Choroszy*, 647 A.2d at 806 (statute of limitations); *Godbout*, 2010 ME 46, ¶ 6, 997 A.2d 92 (statute of repose).⁹

Plaintiff therefore has the right of fair access to courts—a right she is exercising by pursuing this proceeding in the federal district court and this Court. She does not, however, have the right to define her own cause of action contrary to the substantive law of Maine. As the United States Supreme Court has observed, “[O]ur cases rest on the recognition that the right [of access to courts] is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court.” *Christopher v. Harbury*, 536 U.S. 403, 415 (2002)

⁹ The only published example of a court citing the open courts provision to reverse a dismissal involved a judge-made rule that impermissibly shifted the burdens on motions to dismiss under Maine's anti-SLAPP statute. In *Nader v. Maine Democratic Party*, 2012 ME 57, ¶¶ 29-36, 41 A.3d 551, the court cited multiple state and federal constitutional provisions to rule that it was unconstitutional to place the burden on a non-moving party to demonstrate the merits of its case in the face of a motion to dismiss—the so-called “converse summary-judgment-like standard.” *Id.* The anti-SLAPP statute, however, was not itself called into question, and there are no comparable burden-shifting rules at issue under Maine's wrongful birth statute.

(emphasis added). The First Circuit agrees: “In a nutshell, while there is a constitutional right to court access, there is no complementary constitutional right to receive or be eligible for a particular form of relief.” *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649, 660 (1st Cir. 1997).

B. The Wrongful Birth Statute Does Not Curtail Plaintiff’s Right To A Jury Trial

Plaintiff’s argument that Maine’s wrongful birth statute violates the right to a jury trial is equally infirm. The Seventh Amendment guarantees a jury trial only where a substantive claim exists and there are triable issues of fact. *See Kelly v. United States*, 789 F.2d 94, 97-98 (1st Cir. 1986). The right does not preclude a court from determining the viability of Plaintiff’s claims as a matter of law. For example, in *Sullivan v. United States*, 788 F.2d 813, 816 (1st Cir. 1986), the district court had properly determined the plaintiff’s claims as questions of law, “and its granting of a motion to dismiss did not deprive [the plaintiff] of any right to a jury trial.” *Id.* In affirming dismissal, the First Circuit held, “The right to a jury trial exists only when there is some genuine issue of material fact to be determined.” *Id.*; *see also Kelly*, 789 F.2d at 98 (affirming dismissal, holding that “by granting the motion to dismiss, the district court did not deprive [the plaintiff] of any right to a jury trial.”).

So it is here. Maine’s wrongful birth statute places no limitation on jury trials; it does not address the jury’s function at all. As the statute’s text shows, it sets forth what kinds of wrongful birth claims exist under Maine substantive law, but it does not take any factual issue out of the jury’s hands. Thus, in claiming that the right to a jury trial gives her a right to proceed beyond the pleadings, Plaintiff has the cart firmly before the horse. To proceed to a jury, she first has to have a claim recognized under the law, and then there have to be triable issues of fact. Neither factor currently exists. Indeed, if Plaintiff had her way, courts could never

determine claims as a matter of law, which is clearly not the case. *See, e.g., Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 336 (1979) (observing the many devices for determining claims as a matter of law, including directed verdict and summary judgment, which do not impinge on the Seventh Amendment).

C. The Wrongful Birth Statute Does Not Violate Equal Protection Or Due Process Because It Does Nothing More Than Set Forth The Scope Of Tort Recovery Under Maine Law

Plaintiff's major constitutional argument is that Maine's wrongful birth statute is an unconstitutional burden on her right to contraceptive choice, citing the equal protection and substantive due process clauses of the Fourteenth Amendment. Multiple plaintiffs have made similar challenges to tort reform statutes generally, and to wrongful birth statutes specifically, including in Maine, and those statutes have unanimously withstood Fourteenth Amendment challenges. Again, Plaintiff's failure to cite even one case where a wrongful birth statute was found unconstitutional on these grounds is telling.

Although the Court will find no clear statement of the law in Plaintiff's brief, the legal framework is straightforward. The Equal Protection Clause of the U.S. Constitution's Fourteenth Amendment guarantees that no State shall deprive its citizens of equal protection under the laws. U.S. Const. Amend. XIV. However, "[t]he equal protection guarantee of the Fourteenth Amendment does not take from the State all power of classification." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 271 (1979). As the Supreme Court has held,

Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law. When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern.

Id. at 271-72. Importantly, the impact of a particular law on society "is a legislative and not a judicial responsibility." *Id.* at 272. Thus, "[i]n assessing an

equal protection challenge, a court is called upon only to measure the basic validity of the legislative classification.” *Id.*

This is rational basis review, under which a plaintiff “bears a heavy burden of proving unconstitutionality since all acts of the [Maine] Legislature are presumed constitutional.” *State v. Thomas*, 2010 ME 116, ¶ 19, 8 A.3d 638.¹⁰ As the First Circuit has held in rejecting constitutional challenges to another of Maine’s tort reform statutes, “a law will withstand an equal protection challenge if it bears a rational relationship to a legitimate governmental end.” *Boivin v. Black*, 225 F.3d 36, 42 (1st Cir. 2000) (rejecting constitutional challenge to Prison Litigation Reform Act). There need not be a “seamless fit” between the law and the governmental goal, and rational basis review “does not require a perfect accommodation between means and ends.” *Id.* at 45-46. Importantly, rational basis scrutiny and its deference to legislative acts apply to all equal protection challenges, with only two exceptions: Heightened scrutiny applies if the law “[1] infringes a fundamental right or [2] involves a suspect class.” *Id.* at 42.

Maine’s Wrongful Birth Statute and other laws reforming medical lawsuits in Maine have withstood constitutional scrutiny multiple times, as have similar laws enacted in other states. The result should be the same here because: (1) Plaintiff has not alleged any state action regulated by the Fourteenth Amendment; (2) Maine’s wrongful birth statute is rationally related to the governmental end of tort reform and controlling health care costs; (3) Plaintiff has not alleged the infringement of any fundamental right sufficient to trigger strict scrutiny, as courts have routinely held that monetary recovery in a lawsuit is not a fundamental right; and (4) Plaintiff has not alleged any classification affecting a suspect class that

¹⁰ The equal protection clause of the Maine Constitution guarantees rights equivalent to those under the federal Equal Protection Clause. *Choroszy*, 647 A.2d at 808; see also *Dasha v. Maine Med. Ctr.*, Civ. No. 93-343-P-C, 1994 WL 371464, at *1 (D. Me. Jul. 8, 1994) (Maine’s constitutional equal protection guarantee does not affect a statute’s validity different than the federal Equal Protection Clause).

would trigger intermediate scrutiny, because the Statute is gender neutral on its face and a “disparate impact” alone is *never* sufficient to invoke heightened scrutiny.

1. Because The Wrongful Birth Statute Regulates The Relationship Between Private Parties, Plaintiff Has Not Alleged State Action

The wrongful birth statute regulates tort actions between private parties, which are beyond the reach of the Fourteenth Amendment. Because Plaintiff has not alleged state action, her Fourteenth Amendment arguments fail.

The Fourteenth Amendment protects individuals against discriminatory state action, not private conduct. *Perkins v. Londonderry Basketball Club*, 196 F.3d 13, 18 (1st Cir. 1999) (the “public/private dichotomy” inherent in the Constitution “distinguishes between state action, which must conform to the prescriptions of the Fourteenth Amendment, and private conduct, which generally enjoys immunity from Fourteenth Amendment strictures.”). As the Eleventh Circuit held in rejecting constitutional challenges to Georgia’s refusal to recognize the tort of wrongful birth, “The Fourteenth Amendment acts as a shield against only the government. . . . The constitution does not affect the relations between private parties, ‘however discriminatory or wrongful.’” *Campbell v. United States*, 962 F.2d 1579, 1582 (11th Cir. 1992) (citing *Shelley v. Kramer*, 334 U.S. 1, 13 (1948)).

Private conduct can be treated as state action under the Fourteenth Amendment only if the state has coerced the private decision or has “provided such significant encouragement . . . that the choice must in law be deemed to be that of the state.” *Campbell*, 962 F.2d at 1582 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982)). Applying this rule, the Eleventh Circuit held that the Georgia Supreme Court’s decision to prohibit recovery for wrongful birth was not state action. *Campbell*, 962 F.2d at 1583. The court reasoned that Georgia’s law could very well have a “practical effect” on medical care for women, but non-recognition

of the wrongful birth tort “does not coerce or compel private parties to violate women’s rights.” *Id.* Ruling otherwise would “cut[] against a basic tenet of our constitutional law: the Fourteenth Amendment regulates the relationship between the state and its citizens, not the private relations between citizens.” *Id.* (citing *Shelley*, 334 U.S. at 13). Put another way, Georgia’s failure “to remedy the wrong committed by a private party does not make the party’s act an unconstitutional state act.” *Id.* at 1584.

The Minnesota Supreme Court came to the same conclusion for similar reasons in *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10 (Minn. 1986). In *Hickman*, the court rejected Fourteenth Amendment challenges to Minnesota’s wrongful birth statute for numerous reasons, including the fact that the “[p]requisite to a possible violation of the Fourteenth Amendment is state action or involvement,” and the statute imposed none. *Id.* at 13. As the court stated, “How can it be argued that state action is involved in this case? The relationship here is strictly between doctor and patient.” *Id.* The statute did not restrict the flow of information between doctor and patient, and it did not “directly touch” the patient’s right to choose. *Id.* The due process and equal protection clauses of the Fourteenth Amendment were therefore not implicated. *Id.*; see also *Flickinger v. Wanczyk*, 843 F. Supp. 32, 35-37 (E.D. Pa. 1994) (dismissing section 1983 claim alleging that Pennsylvania’s wrongful birth statute violated equal protection because there was no state action, reasoning that the statute did not “provide[] significant encouragement to private doctors and laboratories to infringe upon a woman’s right to make an informed choice regarding her pregnancy”).

Maine’s wrongful birth statute similarly lacks any element of state action, which cuts off Plaintiff’s Fourteenth Amendment challenge at the start. Like the laws at issue in the cases cited above, the Maine statute does nothing more than limit recovery for the tort of wrongful birth. Even if that could have an indirect

“practical effect” on a doctor’s level of care (which is highly speculative in any event), that does not convert purely private conduct into a state affair. *See, e.g., Campbell*, 962 F.2d at 1583. This is reason alone to reject Plaintiff’s Fourteenth Amendment challenges.

2. Maine’s Wrongful Birth Statute Is Rationally Related To The Governmental Goal Of Controlling Medical Costs And Reducing Insurance Premiums

Maine’s wrongful birth statute is constitutional also because it is rationally related to the Maine Legislature’s goals of protecting access to healthcare and controlling medical costs. As set forth above, all acts of the Maine Legislature are presumed constitutional [*State v. Thomas*, 2010 ME 116, ¶ 19, 8 A.3d 638], and a law will withstand an equal protection challenge if it bears a rational relationship to a governmental end, even if the fit between the means and the end is less than perfect. *Boivin*, 225 F.3d at 42, 45-46.

The Maine Legislature enacted the wrongful birth Statute in 1986 as part of the MHSA. *See Musk*, 647 A.2d at 1201. According to the statute’s legislative history, the legislature passed the MHSA to control civil liability arising from medical malpractice lawsuits and the impact the liability was having on the cost and availability of medical care. *See* Maine Legislative Record, Senate, Apr. 8, 1986, at 1163-67; Maine Legislative Record, House, Apr. 15, 1986, at 1465-71. Multiple published opinions have cited this legislative intent to uphold various parts of the MHSA against constitutional challenges. In *Choroszy*, 647 A.2d at 808, the Law Court rejected an equal protection challenge to the MHSA and found that the state’s objective—“to control the cost of medical malpractice insurance and of health care in general”—was legitimate, and that the MHSA (in particular, its restrictive statute of limitations) was a rational way to achieve that goal. *Id.*

This Court has also upheld the constitutionality of Maine’s wrongful birth statute under rational basis review. In *Musk*, 647 A.2d at 1200, the plaintiff sued

her doctor under Maine's wrongful birth statute after a failed sterilization procedure, alleging damages arising from the birth of a healthy child. The law's statute of limitations (which did not apply a discovery rule) barred her claim, leading her to argue that the statute violated her rights to due process and equal protection. *Id.* The Law Court rejected those arguments because the wrongful birth statute was gender neutral and, thus, survived scrutiny under the rational basis test. As the Court held:

The success of an equal protection challenge hinges on the standard of review. *Although [the plaintiff] invokes her status as a pregnant woman, the statute is gender neutral on its face. Therefore to satisfy the Equal Protection Clause the statute need only have a rational relationship to a legitimate goal.*

Id. at 1202 (citation omitted) (emphasis added). The wrongful birth statute and its statute of limitations passed constitutional muster because the law "bears a rational relationship to the Legislature's goal to reduce malpractice insurance premiums and control the cost of health care." *Id.*; *see also Houk*, 613 F. Supp. at 1034 (upholding statutory provision limiting medical malpractice litigation in Maine, reasoning that the statutory provision bore a rational relation to the Maine's objective of "assuring the continued availability of affordable health care in the face of increasing insurance costs attributable, in part, to litigation costs."); *Dasha*, 1994 WL 371464, at *1-2 (provision of Maine's tort reform bill was rationally related to the legitimate goal of reducing cost of malpractice insurance). Multiple other cases have applied rational basis review to Maine's laws reforming medical lawsuits, and those courts have upheld the laws under equal protection every time. *See Cote*, 577 A.2d at 1176-77; *Irish*, 1997 ME 50, 691 A.2d at 673; *Peters*, 597 A.2d at 53.¹¹

¹¹ Courts in other states have likewise upheld wrongful birth statutes against equal protection challenges, always applying rational basis review. *See, e.g., Dansby v. Thomas Jefferson Univ. Hosp.*, 623 A.2d 816, 819-20 (Pa. Super. Ct. 1993) (wrongful birth statute rationally related to governmental ends of refusing to

Maine’s wrongful birth statute easily satisfies the rational basis test. The statute cuts off liability for people—both men and women—who would seek damages based on the birth and rearing of a normal, healthy child, except in cases of failed sterilization procedures. Like most laws, this statute draws a classification, but it does so for the purpose of controlling tort liability and reducing the cost and availability of health care. Maine’s Health Security Act and its wrongful birth statute are rationally related to these legitimate governmental objectives.

3. Tort Recovery Is Not And Never Has Been A Fundamental Right Warranting Heightened Scrutiny

Plaintiff tries to avoid rational basis review by arguing that Maine’s wrongful birth statute infringes on a fundamental right and, therefore, requires strict scrutiny. Specifically, she attempts to bring her claims under the umbrella of “Reproductive Rights Jurisprudence.” [Doherty Brief at 35-41] This effort fails. The wrongful birth statute invokes only the right to tort recovery, which is not a fundamental right.

“The right at stake here is the entitlement to monetary damages for negligence, which has never been held to be a fundamental right under the United States Constitution.” *Kranson v. Valley Crest Nursing Home*, 755 F.2d 46, 52 (3d Cir. 1985) (rejecting equal protection challenge to statute granting immunity to municipal nursing homes); *see also Hammond v. United States*, 786 F.2d 8, 13 (1st Cir. 1986) (“There is no fundamental right to particular state-law tort claims.”); *Z.B. ex rel. Next Friend v. Ammonoosuc Cmty. Health Servs., Inc.*, No. CIV. 03-540 (NH), 2004 WL 1571988, at *6 (D. Me. June 13, 2004) (same). As the Law

dictate to the medical profession and to control tort liability); *Wood v. University of Utah Med. Ctr.*, 67 P.3d 436, 448-49 (Utah 2002) (upholding wrongful birth statute and rejecting heightened scrutiny because the statute did not involve a suspect class); *Hickman*, 396 N.W.2d at 13-15 (upholding wrongful birth statute, holding that no suspect class was involved and the legislature had a reasonable basis for treating negligence in sterilization procedure differently from other situations).

Court has said in rejecting the application of strict scrutiny to Maine's Health Security Act, "[t]his argument [that strict scrutiny applies] fails because we have never held, nor do we now hold, that the pursuit of a negligence action is a fundamental right." *Cote*, 577 A.2d at 1177; *see also Choroszy*, 647 A.2d at 808 ("We have held that the right to pursue a cause of action is not a fundamental right . . .").

This concept is critical because multiple plaintiffs have attempted, like Plaintiff, to bring prohibitions of wrongful birth claims within the realm of "fundamental rights" by citing cases on contraception and abortion. They have failed in every instance, because wrongful birth claims affect monetary recovery, not reproductive rights. In *Dansby v. Thomas Jefferson University Hospital*, 623 A.2d 816, 819 (Pa. Super. Ct. 1993), the plaintiffs challenged Pennsylvania's statutory prohibition on wrongful birth claims, alleging that it violated their constitutional rights under the Fourteenth Amendment as determined in *Roe v. Wade* and related cases on reproductive choice. The Pennsylvania court rejected that argument because the statute regulated "tort liability" and did not restrict a woman's right to choose. *Id.* at 819-20. According to the court, "[T]he Pennsylvania Wrongful Birth Statute does not violate a woman's constitutional rights under *Roe v. Wade, supra*. It does not impose a restriction upon or authorize action which impedes a woman's right to an abortion, nor does it impose procedures which unduly burden the exercise of that right." *Id.* at 819. The statute "merely extinguishes all causes of action . . ." *Id.*

The court therefore upheld Pennsylvania's statute under rational basis review because the right asserted—tort recovery—was "not deemed fundamental." *Dansby*, 623 A.2d at 819-20. As the court concluded, the "refusal to create new tort liability does not constitute governmental interference with the constitutionally protected access to abortion. The right to seek an abortion is neither predicated

upon the existence of a negligence cause of action, nor is it deterred by the absence of such a cause of action.” *Id.* at 820.

The plaintiffs in *Hickman*, 396 N.W.2d at 10, similarly challenged Minnesota’s wrongful birth statute as violating the Fourteenth Amendment, and they too claimed to be vindicating reproductive rights under *Roe v. Wade*. *Id.* at 13. The Minnesota Supreme Court bluntly called out the plaintiffs’ lawsuit for what it was: “In summary, we do not believe that the mother’s right to abortion is the real issue in this case. The issue is whether the state has a right to decide what action or inaction on the part of one person is actionable by another in the courts of this state. It is illogical to us for the courts to declare that a cause of action exists in instances where the legislature clearly and unequivocally has said there is none.” *Id.* at 14-15. The court thus applied rational basis review and upheld the statute. *Id.* at 14.

The Nevada Supreme Court has likewise declined to recognize a cause of action arising from the birth of a healthy child, and it expressly held that its decision in no way implicated the rights to contraception or abortion. *See Szekeres v. Robinson*, 715 P.2d 1076, 1078-79 (Nev. 1986). The Nevada court ruled as follows, in a passage that applies with equal force to this case:

It has also been argued that “all decisions since *Roe v. Wade* that deny recognition of the action [for birth of a normal child] are ignoring the Supreme Court rulings regarding the individual’s right not to have children.” . . . [W]e must ask what the consequences of the existence of such a right would be in the present context. Our refusal to recognize the birth of a normal, healthy child as a compensable wrong does not in any way interfere with a person’s ostensible right to avoid contraception or, per *Roe v. Wade*, to abort a fetus in the first trimester. . . . Our decision to disallow tort actions for the birth of a normal child, sometimes called “wrongful birth” actions, does not interfere with anyone’s right to have children or not to have children; ***it simply holds that one cannot recover in tort for such an event*** because the constituent element of a negligence tort, namely damages, is not present here.

Id. (emphasis added).

Plaintiff completely ignores this line of authority despite its obvious relevance, and she fails to cite even a single case where a court applied heightened scrutiny to a wrongful birth statute. Instead, she discusses *Griswold v. Connecticut* and *Roe v. Wade* and their progeny, but those authorities are entirely beside the point because they involved direct governmental restrictions on contraception or abortion. See *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965) (holding that Connecticut's law making it a crime to prescribe contraception was unconstitutional); *Eisenstadt v. Baird*, 405 U.S. 438, 440 (1972) (holding that Massachusetts law allowing contraception for married couples but prohibiting distribution of contraceptives to single people violated equal protection); *Roe v. Wade*, 410 U.S. 113, 164 (1973) (holding that Texas statute prohibiting abortions except to save the life of the mother violated the Fourteenth Amendment Due Process Clause); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 681 (1977) (holding that New York law making it a crime for anyone to distribute contraceptives to anyone under 16, for anyone other than a pharmacist to distribute contraceptives to anyone 16 or over, and for anyone to advertise or display contraceptives violated equal protection); *Planned Parenthood v. Casey*, 505 U.S. 833, 844-45 (1992) (judging constitutionality of Pennsylvania law placing conditions such as a 24-hour waiting period, parental consent for minors, and spousal consent, and holding that only the spousal consent requirement violated the Equal Protection clause).

In these cases, the Supreme Court was not asked to decide, and did not decide, whether monetary recovery in a civil action is a fundamental right. And as the cases cited above show, it is well established that it is not. Because Maine's wrongful birth statute does not impinge on a fundamental right, the statute is constitutional under rational basis review.

4. The Wrongful Birth Statute Does Not Draw A Classification Based On A Suspect Class

Plaintiff also argues that intermediate scrutiny should apply because Maine's wrongful birth statute purportedly has "a disparate impact on women." [Doherty Brief at 41-44] Plaintiff, however, has the law wrong. As set forth above, this Court has already held that Maine's wrongful birth statute is gender neutral and is constitutional under the rational basis test. *See Musk*, 647 A.2d at 1202.

Plaintiff's "disparate impact" argument does not alter this analysis. First, the wrongful birth statute does not have a disparate impact on women. On its face, the statute draws no gender distinction at all; it is gender neutral, and its sole topic is tort liability. The statute prohibits claims alleging damages from the birth of a healthy child—whether brought by a mother, father, wife, or husband. It makes an exception for relief based on a failed sterilization procedure—whether that procedure was performed on a man or a woman. It permits damages for the birth of an unhealthy child—whether the child is male or female and whether the parent bringing suit is a man or a woman. Plaintiff argues that the statute has a disparate impact nonetheless because her child's father did not experience "pain and suffering during pregnancy, lost wages during pregnancy, emotional distress, pain, or medical expenses related to the birth of the baby." [Doherty Brief at 42] But her narrow focus on these kinds of damages misses the point. A man can allege damages from the birth of a healthy child just as Plaintiff has, including for medical expenses, emotional distress, lost wages, and the cost of child-rearing. Maine's wrongful birth statute expressly cuts off those claims, without regard to gender.

Second, and equally as important, a *disparate impact* on a suspect class *never* invokes heightened scrutiny under equal protection analysis. The U.S. Supreme Court determined this exact issue in *Washington v. Davis*, 426 U.S. 229 (1976), where black police officers claimed that a written personnel test violated

the Equal Protection Clause because it had a *disparate impact* based on race. *Id.* at 232. The Court of Appeals had found a constitutional violation, borrowing rules from Title VII, the statute prohibiting race and gender discrimination in employment. *Id.* at 236-37. The Supreme Court, however, found “plain error” in that position:

[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny

Id. at 239, 242. The Supreme Court extended this holding to alleged gender discrimination in *Feeney*, 442 U.S. at 256, where women challenged a law granting civil service preference to veterans, which overwhelmingly helped men. The Supreme Court found no violation of equal protection because the “distinction made . . . is, as it seems to be, quite simply between veterans and nonveterans, not between men and women. *Id.* at 275. Following *Washington v. Davis*, the Supreme Court held that “the Fourteenth Amendment guarantees equal laws, not equal results” and that a facially gender-neutral law complies with equal protection, despite a *disparate impact*, so long as the legislature has not acted with discriminatory purpose. *Id.* at 273, 276-79.

Plaintiff therefore applies the wrong rule in arguing that Maine’s wrongful birth statute violates equal protection because it “has a disparate impact on women”—even if a disparate impact could be found. None of the cases that she cites supports her position. In *Craig v. Boren*, 429 U.S. 190, 198-99 (1976), the Supreme Court applied intermediate scrutiny to a law that discriminated *on its face* according to gender by prohibiting the sale of certain beverages to men between

the age of 18 and 21, but not women. That, however, is not the case here, and as *Washington v. Davis* and *Personnel Administrator v. Feeney* hold, different rules apply to statutes that are facially gender neutral. Plaintiff's citation to Pregnancy Discrimination Act/Title VII cases—*Newport News Shipbuilding v. EEOC*, 462 U.S. 669 (1983) and *UAW v. Johnson Controls*, 499 U.S. 187 (1991)—is also inapposite, because the Supreme Court has expressly held that it is “plain error” to apply Title VII “disparate impact” standards to equal protection analysis. *Washington*, 426 U.S. at 238.

It would likewise be error for this Court to apply heightened scrutiny based on Plaintiff's unfounded argument that Maine's wrongful birth statute “has a disparate impact on women, but functionally no impact on men.” [Doherty Brief at 42-43] Even if that were the case, the statute is gender neutral on its face, and disparate impact does *not* invoke heightened scrutiny under the Constitution. The Court should therefore follow the multiple courts that have applied rational basis review to uphold such laws.

CONCLUSION

For the foregoing reasons, the Law Court should answer the certified questions as follows:

(1) Maine's wrongful birth statute, 24 M.R.S.A. § 2931, barring claims for the birth of a normal, healthy child does extend to Merck as a drug manufacturer and distributor;

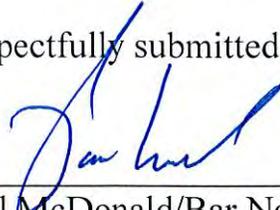
(2) The general policy barring claims for the birth of a normal, healthy child set forth in *Macomber v. Dillman*, 505 A.2d 810 (Me. 1986) applies to Merck as a drug manufacturer and distributor;

(3) Plaintiff's claims against Merck are barred in their entirety under Maine's wrongful birth statute, and Plaintiff is *not* entitled to recover limited

damages for expenses incurred for her procedure and pregnancy, pain and suffering connected with her pregnancy, and loss of earnings during pregnancy.

Dated: April 27, 2016

Respectfully submitted,



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CERTIFICATE OF SERVICE

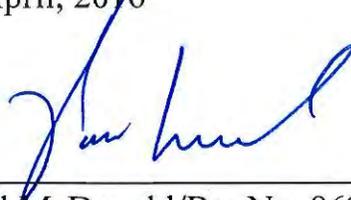
I, Paul McDonald, attorney of record for Defendant-Appellee Merck & Co., Inc., hereby certify that on this date I have caused two copies of the foregoing Brief to be served upon counsel of record by depositing said copies in the United States mail, postage prepaid, addressed as follows:

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