

No. A12-0591

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STATE OF MINNESOTA

IN COURT OF APPEALS

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HEALTHSTAR HOME HEALTH, INC., a Minnesota corporation; V-CARE HOME HEALTH, INC., a Minnesota corporation; BREAK-THRU HOME CARE, Inc., a Minnesota corporation; UNITED HOME HEALTH CARE, INC., a Minnesota corporation; HMONG HOME HEALTH CARE, INC., a Minnesota corporation; CARE PLANNERS, INC., a Minnesota corporation; ABBEYCARE, INC., a Minnesota corporation; LIFE FOUNTAIN, HOME HEALTH CARE, INC., a Minnesota corporation; JEAN ROGERS, an individual, NANCY LARSON, an individual; ANNIE PEARL BROWN, an individual; MA LEE, an individual; WANG LAO YANG, an individual; DAVID KUE, an individual; PEE TEE, an individual; FREDDIE TINSLEY, an individual; MAI IA HER, an individual; CHRISTOPHER JOHNSON; an individual; FELISA VILLACAMPA, an individual; KENNER HARROWAY, an individual; DEONTE FRANKLIN, an individual; SAMMIE BANKS, an individual; SUSAN ARELLANO, an individual; TERRY STRICKLAND, an individual; and JOHNNELL LANE, an individual,

Appellant,

vs.

LUCINDA JESSON,  
in her official capacity as Commissioner of Human Services,

Respondent.

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RESPONDENT'S BRIEF AND ADDENDUM

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## LEGAL ISSUE

Whether Minnesota Statute section 256B.0659, subdivision 11(c) (2011), which requires Respondent to pay provider agencies 80 percent of the Medical Assistance Program's provider rate when personal care assistance services are performed by agency employees for close relatives, violates the equal protection requirements of the Minnesota Constitution.

The District Court held no.

*Carter v. Gregorie*, 672 F.Supp.2d 1146 (W.D. Wa. 2009).

*Gluba v. Bitzan & Ohern Masonry*, 735 N.W.2d 713 (Minn. 2007).

## STATEMENT OF THE CASE

This appeal involves the constitutionality of a statute that requires Minnesota's Medical Assistance program to pay provider agencies a reduced rate when their employees are performing personal care assistance ("PCA") services for close family members. This action was brought on October 12, 2011, in Ramsey County District Court by several PCA provider agencies, recipients of PCA services, and PCA provider agency employees. Appellant's Appendix ("AA") pp. 3-5, 37 ¶¶ 6-30. Named as Defendants were Lucinda Jesson, Commissioner of the Minnesota Department of Human Services and Minnesota Governor Mark Dayton. AA p. 5, ¶¶ 31-32.

Appellants moved for a temporary restraining order and a temporary injunction on October 24, 2011. AA pp. 64-65. Respondents opposed the motion and sought dismissal of Governor Dayton from the action. AA pp. 66-83. On October 27, 2011, the district court issued an order prohibiting Commissioner Jesson from implementing the provider payment reduction and dismissing Governor Dayton from the lawsuit. AA pp. 85-86. Commissioner Jesson answered the Complaint on November 1, 2011. AA pp. 43-62. The parties subsequently filed cross motions for summary judgment on Count I of the Complaint. AA pp. 89-93. On March 23, 2012, the Honorable Dale B. Lindman granted the Commissioner's summary judgment motion. AA pp. 122-131. Appellants appealed the district court's order to this Court on April 2, 2012. AA pp. 132-33.

## STATEMENT OF FACTS

### I. THE CHALLENGED LAW AND ITS LEGISLATIVE HISTORY.

In 2011, Minnesota faced a \$5 billion budget deficit. Respondent's Appendix ("RA") pp. 1-2. During the 2011 regular legislative session, the Legislature and Governor were unable to agree on a budget for the upcoming biennium that eliminated the massive deficit. As a result, state government shut down on July 1, 2011, the start of Minnesota's new fiscal year.

During the shutdown, the Legislature and Governor worked out an agreement which eliminated the deficit, and financed state government for the next two years. A special legislative session was called by the Governor at which the Legislature passed numerous spending cuts. Among the cuts was a reduction in the rate the Medical Assistance Program paid personal care provider agencies when their employees were caring for close family members. The law provides:

When the personal care assistant is a relative of the recipient, the commissioner shall pay 80 percent of the provider rate. For purposes of this section, relative means the parent or adoptive parent of an adult child, a sibling aged 16 years or older, an adult child, a grandparent, or a grandchild.

Minn. Stat. § 256B.0659, subd. 11 (c) (2011). The law was effective October 1, 2011. 2011 Laws of Minn. 1st Spec. Session, ch. 9, art. 7 § 10.

The rate reduction for PCA agencies had been introduced during the regular 2011 legislative session. The provision was included in the Health and Human Services Omnibus bill, House File 927, which was introduced in the Minnesota House on March 29, 2011. Respondent's Appendix ("RA") p. 8, ¶ 3. During the regular legislative

session it was added to the Senate Health and Human Services Finance bill, Senate File 760. *Id.* The provision was subsequently included in the Health and Human Services bill that emerged from conference committee. AA p. 41. The conference committee bill passed both houses during the 2011 regular session but was vetoed by the Governor.

As required by Minn. Stat. § 3.98, Robert Meyer, Director of the Fiscal Analysis and Performance Management Section of the Minnesota Department of Human Services Continuing Care Administration, in consultation with the Department's Reports and Forecasts Section, prepared a fiscal note on the PCA agency rate reduction. RA pp. 8-9, ¶ 4,5. The fiscal note, which was completed in February 2011, calculated that the rate reduction would save Minnesota approximately \$9.4 million in 2012, \$15 million in 2013, \$16 million in 2014 and \$17.4 million in 2015. RA p. 11; AA p. 42. The savings estimate included a 25 percent downward adjustment to account for the fact that a number of PCA services which had been provided by close relatives would be provided by unrelated individuals when the rate reduction became law. RA p. 11 n.4; AA p. 42 n. 4. Conversely, the fiscal note estimated that 75 percent of the PCA services that were being provided by relatives would continue to be provided by relatives after the provision went into effect. *Id.*

The fiscal note assumed that all PCA provider agencies would pass the reduction on to their employees who were caring for close relatives. RA p. 11 n.3; AA p. 42 n.3. However, when the rate reduction went into effect, PCA agencies varied in their response. Some agencies passed the reduction on to their employees. Others opted to

absorb the reduction and not lower the wages they paid to employees who were caring for close family members. RA p. 5, ¶ 8; p. 6.

## II. APPELLANTS' ACTION.

On October 12, 2011, the instant action was filed in Ramsey County District Court by a number of agencies that provide PCA services to recipients of Minnesota's Medical Assistance program, Medical Assistance recipients whose state-funded PCA services are being performed by close relatives, and agency employees who are performing state-funded PCA services for their close relative. AA pp. 3-5, 38 ¶¶ 6-30. Lucinda Jesson, Commissioner of the Minnesota Department of Human Services, and Governor Mark Dayton were named as defendants. AA p. 5, ¶¶ 31-32.

Appellants' lawsuit alleged the PCA provider rate reduction violated the Minnesota Constitution's equal protection requirements and Title VI of the Civil Rights Act. AA pp. 1-37. The Complaint asserted that relatives provide higher quality PCA services than individuals who are not related to the recipients they assist. AA pp. 13-25, ¶¶ 67, 72, 78, 82, 86, 90, 97, 101, 105, 112, 116, 127, 131, 135, 139, 146, 150. It stated that relatives were better able to care for their disabled family members because they understood the recipient's language, culture, dietary preferences, and care needs. *Id.* ¶¶ 67, 72, 78, 82, 90, 97, 105, 112, 116, 127, 131, 139. The Complaint also alleged that relatives can be more effective in providing PCA services to their disabled family members who dislike, fear or distrust strangers. *Id.* ¶¶ 67, 78, 86, 90, 101, 127, 135, 150. The Complaint alleged that recipients would receive poorer care if their relatives stopped

providing their state-funded PCA services. *Id.* ¶¶ 67, 72, 78, 82, 86, 90, 97, 101, 105, 112, 116, 127, 131, 135, 139, 146, 150.

Appellants moved for a temporary restraining order and temporary injunction on October 24, 2011. AA pp. 64-65. Respondents opposed the motion and sought removal of Governor Dayton from the lawsuit. AA pp. 66-83. Following an October 26, 2011 motion hearing, the court issued a temporary restraining order prohibiting Commissioner Jesson from complying with the law. AA pp. 85-86. The court also dismissed Governor Dayton from the action. *Id.* The parties subsequently moved for summary judgment on Count I of the Complaint which alleged that the provider rate reduction violated the equal protect rights set out in Art. 1 § 2 of the Minnesota Constitution. AA pp. 89-93. The cross motions were heard on January 5, 2012, by the Honorable Dale B. Lindman. On March 23, 2012, Judge Lindman granted Respondent's summary judgment motion and denied Appellants' cross motion. AA pp. 122-31. The court found the provider rate reduction complied with the equal protection rights contained in Art 1 §2 of the state constitution. *Id.*

### **III. HISTORY OF MINNESOTA'S MEDICAL ASSISTANCE PAYMENT FOR PCA SERVICES.**

Minnesota participates in the federal Medicaid program through its Medical Assistance Program. Minn. Stat. § 256B.22 (2011). The Medicaid program, set out at 42 U.S.C. § 1396 *et seq.*, is a joint federal-state effort to provide medical care to certain needy individuals. The purpose of the federal Medicaid program is set out in its appropriations statute, which provides:

For the purpose of enabling each State, *as far as practicable under the conditions in each State*, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services. . . .

42 U.S.C. § 1396-1 (emphasis added).

Minnesota's Medical Assistance program has the same purpose.

Medical assistance for needy persons whose resources are not adequate to meet the cost of such care is hereby declared to be a matter of state concern. To provide such care, a statewide program of medical assistance, with free choice of vendor, is hereby established.

Minn. Stat. § 256B.01 (2011).

The federal Medicaid statute requires states participating in the program to pay for certain specific services and allows states at their option to include other services in their programs. Among the services Minnesota is required to cover in its program are inpatient and outpatient hospital services, laboratory and X-ray services, nursing home services, and physician services. 42 U.S.C. §§ 1396a(a)(10)(A), 1396d(a). Under federal law Minnesota is allowed, but not required, to include PCA services in its Medicaid program. *Id.*

Minnesota has chosen to include PCA services in its Medical Assistance program. Minn. Stat. § 256B.0625, subd. 19a (2011). The services allow disabled individuals to live independently in the community and avoid placement in a nursing home or other congregate living setting. The services provided by the PCA benefit are based on the recipient's specific needs and can include assistance with eating, bathing, dressing, grooming, toileting, positioning, transfers and mobility; redirection of harmful or

challenging behaviors; and help with complex medical needs. Minn. Stat. § 256B.0659, subd. 2 (2011). PCA services can also include help with everyday activities like shopping, bill paying, and meal preparation. *Id.*, Minn. Stat. § 256B.0659, subd. 1 (i) (2011).

PCA services were added to the statutory list of covered services in Minnesota's Medical Assistance program in 1983. 1983 Laws of Minn. ch. 312, art. 5, § 10. Initially all relatives were prohibited from providing PCA services and being reimbursed by Minnesota's program. Minn. Stat. § 256B.02, subd. 8 (17) (1983 Supp.). The state law that added PCA services to the Medical Assistance program provided:

“Medical assistance” or “medical care” means payment of part or all of the cost of the following care and services for eligible individuals whose income and resources are insufficient to meet all of such costs:

\* \* \*

(17) Personal care attendant services provided by an individual, *not a relative*, who is qualified to provide the services, where the services are prescribed by a physician in accordance with a plan of treatment and are supervised by a registered nurse. . .

*Id.* (emphasis added).

Minnesota's prohibition on payment for PCA services provided by a relative was mandated by the federal Medicaid Act, which provides:

The term “medical assistance” means payment of part or all of the cost of the following care and services . . .

(24) personal care services furnished to an individual who is not an inpatient or resident of a hospital, nursing facility, intermediate care facility for the mentally retarded, or institution for mental disease that are . . . (B) provided by an individual who is qualified to provide such services and *who is not a member of the individual's family*, and (C) furnished in a home or other location.

42 U.S.C. § 1396d(a) (emphasis added).

The federal Medicaid regulation governing PCA services expressly prohibits legally responsible relatives from receiving program payment for providing PCA services and allows states to extend the prohibition to other family members. 42 C.F.R. § 440.167 (2011). It provides:

**Personal care services**

Unless defined differently by a State agency for purposes of a waiver granted under part 441, subpart G of this chapter --

(a) *Personal care services* means services furnished to an individual who is not an inpatient or resident of a hospital, nursing facility, intermediate care facility for the mentally retarded, or institution for mental disease that are -

\* \* \*

(2) Provided by an individual who is qualified to provide such services and who is not a member of the individual's family:

\* \* \*

(b) For purposes of this section, *family member* means a legally responsible relative.

*Id.* (emphasis in original).

In 1991, the Minnesota laws governing PCA services were amended to allow parents, adult children, and adult siblings to be reimbursed by the Medical Assistance program for providing PCA services to a close family member if they were granted a waiver. 1991 Laws of Minn. ch. 292, art. 7 § 11. The law provided:

Parents of adult recipients, adult children or adult siblings of the recipient may be reimbursed for personal care services if they are granted a waiver under section 256B.0627.

Minn. Stat. § 256B.0625, subd. 19a (1992).

The law allowed waivers to be granted only when:

- (i) the relative resigns from a part-time or full-time job to provide personal care for the recipient;
- (ii) the relative goes from a full-time to a part-time job with less compensation to provide personal care for the recipient;
- (iii) the relative takes a leave of absence without pay to provide personal care for the recipient;
- (iv) the relative incurs substantial expenses by providing personal care for the recipient; or
- (v) because of labor conditions, the relative is needed in order to provide an adequate number of qualified personal care assistants to meet the needs of the recipient.

Minn. Stat. § 256B.0627, subd. 4 (b) (7) (1992).

The waiver requirement was repealed in 2003. *See* 2003 Laws of Minn. 1st Spec. Sess. ch. 14, art. 3, § 27. However, state law continues to prohibit individuals from being reimbursed by the Medical Assistance program for providing PCA services to their spouse, minor children or wards. *See* Minn. Stat. §§ 256B.0659, subd. 3(a)(1), 256B.0625, subd. 19a (2011).

During the 2011 special legislative session, Minnesota enacted the law challenged here which reduces the rate PCA agencies receive when services are performed by a close relative of the recipient. Although, the statute was originally to be effective October 1, 2011, during the 2012 legislative session, a law was enacted delaying implementation of the reduction until July 1, 2013. *See* 2012 Laws of Minn. ch. 247, art. 4, § 18.

#### IV. THE DISTRICT COURT'S DECISION.

The district court, applying Minnesota's three-part rational basis test, found that the 20 percent reduction in the rate paid to PCA agencies under the Medical Assistance program was constitutional. Respondent's Addendum ("RAD") p. 9, Concl. 17. It concluded that although relative caregivers and non-relative caregivers were similarly situated because they had to comply with the same rules, statutes and regulations, and provide the services set out in the recipients' care plans, the State had a reasonable basis for treating the two groups differently. *Id.* pp. 6, 7, Concls. 8, 11. The court found that many individuals receive personal care assistance from family members who are not paid. *Id.* p. 4, Finding 15. It determined that many parents and children, siblings, and grandparents and grandchildren have long-standing caring relationships with each other. *Id.* Finding 16. It found that individuals who care for their close family members are familiar with their relatives' needs, preferences and homes. *Id.* p. 5, Finding 19. The court also found that PCA agencies' costs of recruiting, hiring and training personal care assistants are reduced when recipients are receiving PCA services from a family member who is already familiar with their needs, preferences and home. *Id.*, Finding 20.

The district court observed that familial status has been a long-standing classification under both the state and federal laws governing PCA services. *Id.* pp. 6-7 Concl. 10. It concluded that the affection, familial bond and knowledge of a recipient's needs and preferences, that are present when close relatives are providing care, does not exist when the personal care assistants are not related to the individuals under their care. *Id.* p. 7, Concl. 11. The court determined that the rationale for the difference in the rate

paid to agencies when a relative is providing care is based on the moral obligation that relatives have toward their disabled family members and the valid assumption that relatives will continue to provide care even if their pay is reduced. *Id.*

The court concluded that the purpose of providing PCA services is to allow individuals to remain in their homes and avoid a nursing home, intermediate care facility, or group home placement. *Id.* pp. 7-8, Concl. 12. The court found that a rationale for the lower payment was to reduce Medical Assistance expenditures, and determined that recipients will be able to receive services even if their relatives choose to no longer provide them. *Id.* p. 8, Concl. 13. According to the court, the state can reasonably expect family members to contribute to the care of their loved ones. *Id.*, Concl. 15. The court concluded that reducing medical expenditures and supporting individuals caring for close family members were permissible governmental goals. *Id.* pp. 8-9, Concls. 14, 16. These goals, according to the court, are advanced by continuing to allow close relatives to be reimbursed by the Medical Assistance program for providing PCA services even though they may receive a reduced payment from their employers. *Id.* The court rejected Appellants' contention that the reduction was based on the State's disfavor of relative personal care assistants. *Id.* p. 9, Concl. 16.

### **SCOPE OF REVIEW**

On an appeal from summary judgment this Court must determine whether there are any genuine issues of material fact and whether the court below erred in applying the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). The Court views the evidence in the light most favorable to the party against whom judgment was granted.

*Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). When there are no genuine issues of material fact, this Court reviews the district court's decision de novo to determine whether it erred in applying the law. *Art Goebel Inc. v. N. Suburban Agencies*, 567 N.W.2d 511, 515 (Minn. 1997).

Statutes are presumed constitutional. The party challenging the statute "bears the very heavy burden of demonstrating beyond a reasonable doubt that the statute is unconstitutional." *State v. Merrill*, 450 N.W.2d 318, 321 (Minn. 1990). When the constitutionality of a statute is at issue, the role of the judiciary is limited to deciding whether the statute is constitutional, not whether it is wise or prudent. Courts "do not sit as legislators with a veto vote, but as judges deciding whether the legislation, presumably constitutional, is so." *Id.* Moreover, the separation of powers doctrine requires the Court to give deference to the Legislature's action. *See State v. Russell*, 447 N.W.2d 886, 894-95 (Minn. 1991) (Simonett J., concurring) (the separation of powers doctrine requires the court to accord deference to the legislative branch).

## ARGUMENT

### **I. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE TWENTY PERCENT REDUCTION IN PAYMENTS TO PCA AGENCIES WHEN CLOSE RELATIVES ARE PROVIDING CARE COMPLIES WITH THE EQUAL PROTECTION REQUIREMENTS CONTAINED IN THE STATE CONSTITUTION.**

The district court correctly determined that the legislatively mandated payment reduction to provider agencies did not violate the equal protection rights contained in Minnesota's Constitution. As a result, this Court should affirm the lower court's decision.

The district court correctly concluded that strict scrutiny did not apply because this case did not involve a suspect class or a fundamental right. *See Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (close relatives are not a suspect class); *Mitchell v. Steffen*, 504 N.W.2d 198, 203 (Minn. 1993) (citing *Dandridge v. Williams*, 397 U.S. 471, 486-87 (1970)) (welfare benefits are not a fundamental right). The court below applied Minnesota's three-part rational basis test to Appellants' equal protection claim. Under this test, the challenged statute will be upheld if it meets the following criteria:

(1) The distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs; (2) the classification must be genuine or relevant to the purpose of the law; that is, there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; (3) the purpose of the statute must be one that the state can legitimately attempt to achieve.

*ILHC of Eagan v. County of Dakota*, 693 N.W.2d 412, 421 (Minn. 2005). Under Minnesota's rational basis test, the challenged statute must be upheld "unless there is no reasonable basis for the classification." *Id.* at 422 (quoting *Westling v. County of Mille Lacs*, 581 N.W.2d 815, 820 (Minn. 1998)). The differences between the classes need not be great and if any reasonable distinction can be found, the classification is constitutional. *ILHC*, 693 N.W.2d at 422. Moreover the legislature is given considerable leeway when drawing distinctions between groups in economic matters as is the case here. *See Gluba v. Bitzan & Ohern Masonry*, 735 N.W.2d 713, 723 (Minn. 2007) ("it is proper to defer to the legislature in matters 'concerning the desirability of statutory classifications affecting the regulation of economic activity and the distribution of economic benefit'") (quoting

*Alcozer v. North Country Community Food Bank*, 635 N.W.2d 695, 705 (Minn. 2001)),  
*Peterson v. Minnesota Dep't of Labor and Industry*, 591 N.W.2d 76, 79 (Minn. Ct. App.  
1999) (“economic or social welfare classifications will not be set aside under the Equal  
Protection Clause unless it is shown to have no rational or reasonable basis”).

**A. Genuine And Substantial Differences Between Individuals Providing  
PCA Services To Close Relatives And Other PCA Caregivers Provide  
A Natural And Reasonable Basis For The Provider Rate Reduction.**

The district court correctly found that the challenged law met the first prong of  
Minnesota’s rational basis test. It determined that there were genuine and substantial  
differences between individuals providing PCA services to their close relatives and  
individuals providing PCA services to non-relatives. These differences, the district court  
noted, have long been recognized by the federal Medicaid statute which explicitly  
prohibits relatives from being paid for providing PCA services to family members, as  
well as past and current state law governing the PCA benefit.

**1. The Differences Between Close Relatives And Strangers Are  
Substantial.**

As the district court determined, the relationship between close relatives is not the  
same as the relationship between strangers. Parents and adult children, brothers and  
sisters, grandparents and grandchildren have very special relationships with each other.  
They are part of the same family. They have known each other and often have lived  
together for years. Parents have taken care of their children from birth until the children  
were able to take care of themselves. Siblings have grown up together, played together  
and at times fought with each other. Grandparents have often played major roles in their

grandchildren's lives. Family members provide love, support and encouragement to each other.

Courts have long recognized that these long-standing familial bonds result in great affection between family members and concern for each other's well being. *See Smith v. Organization of Foster Families*, 431 U.S. 816, 844 (1977) ("the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in promoting a way of life . . . as well as from the fact of blood relationship.") (citations omitted); *See also Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 505 (1977) ("Especially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual assistance and to maintain or rebuild a secure home life"). As the court below correctly found, familial bonds encourage relatives to take care of each other.

Minnesota law also acknowledges the importance of familial bonds and the mutual obligations they create. State courts recognize an evidentiary presumption that services performed by a relative are gratuitous. *See Estate of Novak*, 398 N.W.2d 653 (Minn. Ct. App. 1987). State statutes give family members preference in the placement and adoption of children, and the guardianship of incapacitated individuals. *See* Minn. Stat. §§ 259.57, subd. 2(c)(1) (2011) (giving priority to relatives in adoption); 260C.215, subd. 1 (2011) (encouraging recruitment of relatives to care for foster children); 524.5-309(a) (2011) (giving relatives priority in guardianship appointments).

The court below properly recognized the undeniable fact that the strong bonds that exist among close relatives are not present when elderly or disabled individuals and their PCA caregivers are strangers. Caregivers who are strangers do not have long-standing personal relationships with the recipients which predates their work relationships. They have not lived together and have not grown up together. The mutual affection that exists between close family members is absent from the relationship between elderly and disabled individuals and their unrelated caregivers.

The district court appropriately found that the rationale for the distinction between relative caregivers and other caregivers was based on the relatives' moral obligation to help their family members and the valid assumption that many relative caregivers will continue to provide care even if their pay is cut. Non-relative caregivers do not have the same moral obligation and incentive to continue providing care. This difference between relative and non-relative caregivers is self evident and cannot be ignored as Appellants contend.

**2. The Record Below Supports The District Court's Findings.**

Appellants assert that the district court had no basis for finding that the familial relationship actually affects the way relatives provide PCA services to their family members. App. Br. p. 20. Appellants' assertion is incorrect and contradicted by their Complaint which admits that close relatives often find it easier to care for disabled or elderly family members. The Complaint asserts that relative caregivers are familiar with their family members' needs, preferences, customs, languages and homes. AA pp. 13-25, ¶¶ 67, 72, 78, 82, 90, 97, 105, 112, 116, 127, 131, 139. It also contends that because

recipients are familiar with their relative caregivers, the difficulties that exist when strangers attempt to care for individuals who dislike, fear or distrust strangers will not be present. *Id.* ¶¶ 67, 78, 86, 90, 101, 127, 135, 150. Appellants' Complaint repeatedly asserts that recipients' care will suffer if their relative caregivers stop providing the PCA services they require. *Id.* ¶¶ 67, 72, 78, 82, 86, 90, 97, 101, 105, 112, 116, 127, 131, 135, 139, 146, 150.

Appellants also contend that there was no basis for the district court's finding that most relatives care for their family members without receiving any compensation. App. Br. 24. Appellants' assertion is incorrect.

A 2006 report published by the Family Care Alliance detailed the extent of unpaid care provided by family members. The report, which is part of the district court record, stated:

More than three-quarters (78%) of adults (age 18+) who receive [long term care] at home get *all* their care exclusively from unpaid family and friends, mostly wives and adult daughters. Another 14 percent receive some combination of family care and paid assistance; only eight percent rely on formal care alone. Recent research suggests that among community-dwelling older people (age 65+) with disabilities, the use of formal, paid care has declined while reliance on family caregivers has increased.

An estimated 44 million adults (age 18+) provide unpaid assistance and support to older people and adults with disabilities in the community. In 2000, informal (i.e. unpaid) caregiving by family and friends had an estimated national economic value of \$257 billion annually, greatly exceeding the combined costs of nursing home care (\$92 billion) and home health care (\$32 billion). Without family and informal caregivers, spending for [long term care] services would be much higher than it is now.

Family Caregiver Alliance (2006) *The Pivotal Role of Family Care, Caregiver Assessment: Principles, Guidelines and Strategies for Change*, (emphasis in original). RA p. 18.

A recent report by the U.S. Department of Labor's Bureau of Labor Statistics corroborates these findings. The federal government report found that in 2011, 16 percent of the U.S. population age 15 and over was providing *unpaid care* to an individual over age 65. See *American Time Use Survey, -- 2011 Results*, Bureau of Labor Statistic, found at [www.bls.gov/news.release/pdf/atus.pdf](http://www.bls.gov/news.release/pdf/atus.pdf). RA p. 31.<sup>1</sup> The report also found that over 42 percent of the unpaid caregivers were caring for a parent, and 19 percent were caring for a grandparent. *Id.* p. 42.

The district court record also contained the fiscal note prepared on the PCA provider rate provision. AA p. 42; RA pp. 10-12. It estimated that many relative caregivers would continue to provide care even if their wages were cut. *Id.* fn. 4. The fiscal note calculated that 75 percent of the services, that were being provided by close relatives, would continue to be provided by the relatives after the reduction went into effect. *Id.*

In addition, the district court record included statements by two caregivers that they intended to continue providing PCA services to their family members even if their income declined due to the provider rate reduction. Appellant Freddie Tinsley admitted

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<sup>1</sup> This Court can consider government reports that are a matter of public record. See *Estate of Turner*, 391 N.W.2d 767, 771 (Minn. 1986). See also Minn. Rule of Evidence 803(8) (exempting government records from hearsay rule).

that he planned to continue caring for his twin brother even if his wages were reduced. While acknowledging that any wage cut would be stressful, Tinsley was quoted by the *StarTribune* as saying: “I’ll always take care of him, because he’s my brother.” RA p. 26. Similarly another individual who provides PCA services to her adult son and anticipated an income reduction due to the law told the *StarTribune* that she intended to continue caring for her son. RA p. 30.

The court below correctly found that there were clearly genuine and substantial differences between individuals who provide PCA services to their close family members and individuals who provide PCA services to individuals with whom they have no preexisting personal relationships. Those differences result from the familial relationship that exists among family members and the emotional bond it creates and are supported in the record.

**B. The District Court Correctly Determined That The Differences Between Relative And Non-Relative Caregivers Are Genuine And Relevant To The Purposes Of The Statute.**

In applying the second prong of Minnesota’s rational basis test, the court below focused on the broad purpose of the Medical Assistance program’s PCA benefit. The court found that the purpose of providing PCA services is to allow program recipients to remain in their homes and avoid moving into nursing homes, intermediate care facilities and group homes. RAD pp. 7-8, Concl. 12. The court then determined that limiting the amount of funds received by relative caregivers was not contrary to that purpose. *Id.* Concl. 13. The district court correctly determined that Medical Assistance recipients will

be able to receive the services they require from other caregivers if their relative caregivers cease providing them. *Id.*

In addition to meeting the purpose of the PCA statute, the provider rate reduction also meets the broad purpose of the federal Medicaid Act -- to provide medical care to needy individuals as far as practical under the conditions in each state. 42 U.S.C. § 1396-1. The federal Medicaid statute clearly recognizes that a state's financial situation will impact the services it provides and the reimbursement rates it pays. Moreover the federal act explicitly prohibits program payment to family members for providing the service, clearly setting out Congress' intention that public funds not be used to pay for services family members have traditionally provided. 42 U.S.C. § 1396d(a)(24).

For twenty of the twenty eight years that PCA services have been included as a covered service in Minnesota's Medical Assistance Program, family members have been treated differently than non-family members for purposes of the PCA benefit. Family members were either entirely prohibited from being paid by the program for providing PCA services to their close relatives or could only be paid under very limited circumstances.

Initially, individuals were absolutely barred from receiving Medical Assistance payment for providing PCA services to a family member. Minn. Stat. § 256B.02, subd. 8 (17) (1983 Supp.). The Medical Assistance program still prohibits individuals from receiving payment for providing PCA services to their minor children, spouses and wards. Minn. Stat. §§ 256B.0625, subd. 19a, 256B.0659, subd. 3(a)(1) (2011). From 1991 until 2003, certain close relatives were allowed to be paid for providing PCA

services if they received a waiver. Minn. Stat. § 256B.0625, subd. 19a (2002). Waivers, however, were only granted when family members quit their jobs, went from full-time to part-time employment, incurred financial hardship or when there was a shortage of non-relative caregivers available to provided the needed services. Minn. Stat. § 256B.0627, subd. 4(d)(10) (2002). Only in recent years were close relatives, other than spouses, guardians and parents of minor children, even allowed to provide services without qualifying for a waiver.

Governing federal law has always mandated separate treatment. In the preamble to the federal regulations currently governing PCA services, the federal agency explained the rationale for the prohibition.

Congress clearly intended to preclude family members from providing personal care services and we believe our revised definition is the most reasonable interpretation of the term. Furthermore we have always maintained that spouses and parents are inherently responsible for meeting the personal care needs of their family members, and therefore, it would not be appropriate to allow Medicaid reimbursement for such services.

62 F.R. 47896, 47899 (Sept. 11, 1997) .

The federal agency went on to explain that states can expand the definition of relatives who are prohibited from being paid for providing PCA services. The preamble to the regulations contains the following public comment and federal agency response:

*Comment:* Some commenters were concerned about our proposed definition of “family member” for purposes of individuals providing personal care services. A few commenters suggested that we expand the definition to preclude Medicaid coverage of personal services provided by children, grandparents and legal guardians.

\* \* \*

*Response:* Section 1905(a)(24)(B) of the Act specifies that personal care services may not be furnished by a member of the individual's family. We proposed to define family members as spouses of recipients and parents (or stepparents) of minor recipients. Additionally we proposed that States can further restrict which family members could qualify as providers by extending the definition to apply to family members other than spouses and parents.

\* \* \*

States can further restrict which family members can qualify as providers by extending the definition to apply to individuals other than those legally responsible for the recipient. . . In addition, by allowing States to further define "family members" for purposes of personal care services, States can tailor their programs to meet their individual needs.

*Id.* at 47898-99.

Under controlling federal law, Minnesota could prohibit close relatives from receiving any Medical Assistance payment for providing PCA services to their family members. The State chose not to do so. Instead the Legislature and Governor elected to reduce the payment the program would make to PCA agencies when their employees were caring for close family members. Indeed it would be anomalous to find the 80 percent agency payment unconstitutional while the more drastic action of totally denying all payment would be constitutional.

Reducing Medical Assistance expenditures is a permissible purpose. *See Pharm. Research and Mfrs. of America v. Walsh*, 538 U.S. 644 (2003) (holding that Maine's law that lowered Medicaid costs without severely curtailing access to services could not be enjoined); *Pharm. Research and Mfrs. of America v. Meadows*, 304 F.3d 1197 (11th Cir. 2001) (upholding Florida's prior authorization program that reduced Medicaid

expenditures). Paying a reduced rate to provider agencies for PCA services provided by close relatives advances that purpose in a rational way.

**1. The Legislature Was Aware Of The Rate Reduction's Effect On The State Budget And Recipients Of PCA Services.**

Appellants erroneously contend that Legislature did not have any basis to believe that reducing the agency payment by 20 percent would actually save money. App. Br. p. 29. The February 2011 fiscal note prepared by the Department of Human Services calculated the payment reduction's anticipated savings. RA pp. 10-12. The fiscal note's calculations took into account the fact that some individuals would cease providing PCA services to their family members. These family members would then receive services from unrelated individuals thus reducing the savings the State would realize. The fiscal note reduced the provision's saving projections by 25 percent to account for such occurrences. RA p. 11 n.4.

The Legislature was clearly aware that a number of family members would stop providing PCA services to their close relatives if their employers reduced their wages because of the rate reduction. *Id.* It also believed the majority of relative caregivers would continue to provide PCA services to their family members even at a reduced wage. That belief was reasonable and was affirmed by Appellant Freddie Tinsley. RA p. 26. Moreover, the challenged statute applies to the rate the state welfare program pays PCA agencies. It does not directly apply to the wages the agencies pay their employees. Although some agencies dealt with the reduction by passing it on to their employees who were caring for close relatives, other agencies chose not to do so. RA p. 5, ¶ 8, p.6.

Appellants contend that because the provision was enacted during the special legislative session and no committee hearings were held on the rate reduction, the Legislature was unaware of the consequences of the provision. App. Br. p. 28. Although no committee hearings may have been held on the PCA provider rate reduction, the reduction in the agency payment rate was part of two major bills that were introduced in the house and senate during the regular legislative session. RA p. 8, ¶ 3. Concerned Minnesotans, including Appellants, had the opportunity during the regular legislative session to inform their legislators of the affect of the provider rate reduction. They were able to contact their individual legislators and voice their concerns about the provision.

In addition to the fiscal note accompanying the provision in the senate and house bills, and any input received from constituents, the Legislature was undoubtedly aware of the existing laws that completely prohibit individuals from receiving Medical Assistance payment for providing PCA services to their minor children, spouses and wards. It was also aware of the previous state laws that initially prohibited all relatives from receiving Medical Assistance payment and that subsequently allowed payment only if the relative obtained a waiver. *See Rocco Altobelli, Inc. v. State Dep't of Commerce*, 524 N.W.2d 30, 36 (Minn. Ct. App. 1994) (Legislature is presumed to act “with full knowledge of prior legislation on the same subject”). The Legislature appropriately took these factors into account when it enacted the provider rate reduction.

Appellants rely on the Supreme Court’s decision in *Gluba v. Bitzan & Ohern Masonry*, 735 N.W.2d 713 (Minn. 2007) for the proposition that courts will not hypothesize a rational basis to justify a classification. App. Br. p. 22. Although the

*Gluba* Court recited that proposition in describing Minnesota’s rational basis test, it refused to apply it. After acknowledging that the equal protection test the Court applies in workers compensation cases echoes the *Russell* test’s terminology and three-prong structure, the Court stated: “[W]e do not interpret this formulation as implicating the ‘higher standard’ of rational basis review that we applied in *Russell*.” *Id.* at 721 In applying the second prong of the equal protection test, the *Gluba* Court rejected the *Russell* requirement, stating: “[O]ur inquiry must focus on whether the legislature *could reasonably have believed in any facts* that would support the connection between the [permanent total disability] thresholds and the employability of injured workers.” *Id.* at 723 (emphasis added) . The Court further held:

[I]n light of the deference we give when applying rational basis review to classifications affecting the distribution of economic benefits, we are unable to conclude that the legislature could not reasonably have conceived of any factual basis for conditioning [permanent total disability] eligibility on a combination of age, educational attainment, and PPD ratings. We note that age and educational attainment are longstanding factors in assessing [permanent total disability].

*Id.* at 725. Appellants’ reliance on the Court’s *Gluba* decision is misplaced. The decision supports Respondent’s position that more deference is owed legislative classifications that deal with the distribution of economic benefits.

Appellants repeatedly assert that anecdotal information is not sufficient to support the legislation. In support of their position Appellants rely primarily on *Mitchell v. Steffen*, 487 N.W.2d 896 (Minn. Ct. App. 1992) and *State v. Russell*, 477 N.W.2d 886 (Minn. 1991) . Their reliance on these cases is misplaced. In both cases, recent

government studies contradicted the anecdotal evidence presented to the Legislature. In *Mitchell*, reports by the Minnesota Department of Human Services and Legislative Auditor contradicted the anecdotal evidence that individuals moved to Minnesota to obtain welfare benefits. *Mitchell*, 487 N.W.2d. at 900. In *Russell*, a Department of Public Safety study contradicted the anecdotal evidence about the quantity of cocaine necessary to establish that the individual in possession was a drug dealer. *Russell*, 477 N.W.2d 886 at 890.

Appellants contend that instead of relying on anecdotal evidence, Legislature was required to conduct a more in-depth analysis before the statute could be passed and found constitutional. App. Br. pp. 20, 22. Appellants apparently believe that the fiscal note prepared by the agency having the most experience with the PCA benefit, past and current laws on the payment of services provided by relatives, and the input legislators may have received from their constituents were insufficient. Instead Appellants contend an analysis had to be conducted on the number of recipients who would require institutional care if the provision became law, and the effect the reduction would have on relative caregivers and their families, including the number of relative caregivers who would qualify for public assistance due to their decreased income. App. Br. pp. 21, 29.

Appellant's assertion must be rejected. It would result in dramatically slowing down legislative action while increasing the cost of state government by requiring numerous expensive studies to be performed before legislation could be enacted.

Moreover it ignores fundamental separation of powers principles and the Legislature's primary role in lawmaking. The Supreme Court recently acknowledged

that it was not the court's role to second-guess the Legislature's public policy judgments expressed in statute. *Welfare of MLM*, 813 N.W.2d 26, 35 (Minn. 2012).

The district court clearly understood that the Legislature had a difficult job to do. The legislative body was charged with passing a balanced budget, and enacting legislation that was in the best interest of the state. It had numerous difficult decisions to make as it dealt with the huge budget deficit. It could not continue funding everything that had been funded. There was not enough revenue to do so. The Legislature could have totally eliminated PCA services from its state-funded program. Instead, it decided to reduce the rate it paid provider agencies for services provided by close relatives.

The court below correctly found that the challenged law allows relatives to continue to be paid by the state welfare program for providing PCA services to their close family members. However, the payments their employer agencies receive will be reduced. That result does not violate equal protection. Minnesota is not required to maintain payment rates at a uniform level. *See Bowen v. Gillard*, 483 U.S. 587, 604 (1987) ("Congress is not, by virtue of having instituted a social welfare program, bound to continue it at all, much less at the same benefit level").

The decision on how to reduce expenditures is the Legislature's and it can proceed on a step by step basis. *Haskell's Inc. v. Sopsic*, 306 N.W.2d 555, 559 (Minn. 1981) ("legislature may implement its program step by step . . . adopting regulations that only partially ameliorate a perceived evil") (citations omitted). Indeed the Legislature has delayed implementation of the payment reduction Appellants challenge until July 1, 2013. Appellants seem to be asserting that the Minnesota Constitution requires a

system in which once a benefit is given, it can never be taken away. Such a policy would be unworkable, is contrary to case law and must be rejected.

A reduced payment rate is still an incentive for individuals to provide care to their loved ones and for agencies to continue to employ them. The challenged law allows agencies to be paid for services that in the past received no payment at all. Paying for PCA services provided by close family members advances the goal of supporting individuals who choose to care for their loved ones and encourages individuals to continue to do so, even if they may receive reduced pay.

## **2. Federal Court Precedent Supports The District Court's Decision.**

In 2009, the federal District Court for the Western District of Washington upheld, against equal protection attack, a Washington law that prohibited numerous relatives from providing PCA services through home health agencies while allowing them to provide services at a reduced payment rate of approximately twenty percent as independent providers. *Carter v. Gregorie*, 672 F. Supp. 2d 1146 (W.D. Wa. 2009). The plaintiffs in *Carter*, like Appellants here, argued that relative caregivers were providing exactly the same services and were subject to the same requirements, yet were being paid less solely because of their familial stature. *Id.* at 1152, 1159. The federal court, in refusing to enjoin Washington's law, determined that plaintiffs were unlikely to prevail on the merits on any of their claims. The court specifically rejected plaintiffs' equal protection claim. *Id.* at 1159-60. The court found Washington's statute to be rationally related to a legitimate government purpose:

[B]ecause the state can reasonably expect family members to contribute to the care of their loved one and the state is afforded flexibility to design a cost-effective Medicaid system, it is reasonable for the state to require family members receiving public compensation for caring for their own family member to deliver it in the most cost-effective means possible, as an individual provider. The Legislature could, and did, reasonably conclude that limited Medicaid dollars were not well spent paying a home care agency to manage the employment relationship between a care recipient and his or her caregiver if the caregiver was a member of his or her family.

*Id.* Washington's challenged law defined family member more broadly than the Minnesota law at issue here. Washington's statute defined family member to "include, but not be limited to, a parent, child, sibling, uncle, aunt, cousin, grandparent, grandchild, grandniece or grandnephew." *Id.* at 1154.

The *Carter* court was also weary of taking on a legislative role. It stated:

[T]here is a significant difference between legislative policy making and judicial findings of legal violations. The facts and issues currently before the Court involve a difficult legislative policy decision and even more difficult judicial determination of whether that legislative decision violates federal Constitutional rights and/or rights provided under certain state statutes. While the reduction in reimbursement to the person who in the vast majority of situations may be the best caregiver to significantly disadvantaged beneficiaries is an extraordinarily difficult decision to make, the Court may only halt the implementation of that decision if it violates Plaintiffs' rights. . . .The Court is cognizant of the hardships on caregivers when their pay is reduced, especially those who . . . are already struggling to make ends meet. These benefits and/or disadvantages . . . however, are issues that must be presented to and addressed by the Washington legislature.

*Id.* at 1155.

Although the *Carter* court was applying the more deferential federal rational basis test, the court's rationale applies here. The court recognized that it was reasonable for the state to expect family members to care for their loved ones. *Id.* at 1159-60. It also

acknowledged that supervisory and administrative costs for hiring, firing and scheduling decrease when a relative provides PCA services to a Medicaid recipient. *Id.* at 1153, 1160. It found that Washington's decision to preclude relatives from providing services as an agency provider was rational and saved costs. *Id.* at 1160. Here, although all individuals providing PCA services must be employed by an agency, the agency often experiences efficiencies when relatives provide care. The agency's costs of recruiting, training, scheduling and supervising are reduced. As Appellant's assert in their Complaint, the relative caregiver will already be familiar with the recipient's disabilities, needs, preferences, and language, thus reducing the training and supervision the agency must provide. Recruiting costs are also reduced since the agency will not have to advertise job openings, interview potential employees and determine which applicant can best serve the recipient's needs.

In this appeal, the district court correctly found that the distinctions between relative and non-relative caregivers were genuine and relevant to the purposes of the law. It found that recipients will still be able to receive PCA services either from their relatives or from non-relative caregivers. Moreover, it correctly found that the law saves scarce state welfare dollars and continues to encourage family members to care for each other by allowing program payment for the care they provide while attempting to recover some of the efficiencies experienced by provider agencies when relatives provide care. That decision was correct and should be affirmed.

**C. Reducing Expenditures While Continuing To Support Relatives Providing Care To Disabled Family Members Are Legitimate Governmental Purposes.**

The district court correctly found that the twenty percent rate reduction to PCA agencies for services provided by close relatives satisfies the third prong of Minnesota's rational basis test. Reducing Medical Assistance expenditures is something the State can legitimately attempt to achieve. *Mitchell*, 487 N.W.2d at 903 ("state may legitimately attempt to limit its expenditures" as long as it does not invidiously discriminate). When the payment provision was passed, Minnesota was facing a large budget deficit. The Legislature, which is constitutionally required to pass a balanced budget, *see* Minn. Const. Art. XI, §1, had difficult decisions to make. Reducing payments for PCA services that in the past were not eligible for any payment and that Minnesota could prohibit today was clearly rational.

Continuing to support relative caregivers, though at a reduced agency rate, is also a legitimate governmental purpose. It recognizes the contributions made by relatives who are caring for their family members and still provides a significant financial incentive for agencies to continue employing relative caregivers. Given the affection many close relatives share and the current job market, it was rational for the Legislature to believe that substantial numbers of relative caregivers will decide to continue providing PCA services to their family members even if their salaries are reduced.

Appellants contend that the Legislature cannot achieve its legitimate goals through invidious means. App. Br. p. 33. They erroneously assert that the provider rate reduction invidiously discriminates against relative caregivers. Invidious discrimination occurs

when a privilege is denied to a disfavored group in order to harm it. *Pagan v. Calderon*, 448 F.3d 16, 35-36 (1st Cir. 2006); *National Committee of the Reform Party v. Democratic National Committee*, 168 F.3d 360, 366 (9th Cir. 1999). Families however are not a disfavored group. A number of state laws protect families and familial relationships. See Minn. Stat. §§ 363A.02, subd. 1(a)(2), 363A.09, subd. 1 (2011) (prohibiting discrimination in housing and real property based on marital and familial status), Minn. Stat. § 524.2-101, *et seq.* (2011) (distributing intestate estates among decedent's family members), Minn. Stat. § 257C.08 (2011) (authorizing grandparent visitation with grandchildren).

To support their contention that the provider rate reduction provision invidiously discriminates, Appellants again rely primarily on the *Mitchell* and *Russell* decisions. Neither supports their position.

*Mitchell* involved a challenge to a Minnesota statute that required individuals, who had resided in the State for less than six months, to receive only 60 percent of the regular General Assistance and Work Readiness grants. *Mitchell*, 487 N.W.2d at 899. Under that statute, new residents received \$122 per month, while longer-term residents received \$203 per month. *Id.* This Court determined that the statute violated new residents' fundamental right to travel. *Id.* at 904.

Because a fundamental right was involved, the challenged law was subject to strict scrutiny and could not survive that difficult test. *Id.* at 903. Applying the federal strict scrutiny test, this Court found that the reduction was not the least restrictive means of

achieving a compelling state interest, and therefore, was unconstitutional. *Id.* at 904.<sup>2</sup> Because the statute infringed a fundamental, the Court found that the statute improperly discriminated against new residents.<sup>3</sup>

The provider rate reduction statute does not infringe a fundamental right. Instead it deals with the payments an agency will receive for providing healthcare services. It involves the distribution of economic benefits and is not subject to strict scrutiny.

Similarly the Supreme Court's decision in *State v. Russell*, 477 N.W.2d 886 (Minn. 1991) , does not support Appellants' assertion that the provider rate reduction amounts to invidious discrimination. *Russell* involved the criminal laws governing the possession of crack cocaine and powder cocaine and their impact on a racial minority. The Court found that imposing substantially higher penalties for the possession of crack cocaine than for the possession of powder cocaine violated the equal protection rights set out in the Minnesota Constitution. *Id.* at 889. The challenged law made possession of 3 grams of crack cocaine subject to a 20 year prison sentence, while possession of 3 grams

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<sup>2</sup> After holding that the reduction violated new residents' federal constitutional right to travel, the Court summarily applied Minnesota's three-prong rational basis test and determined that the reduction also violated State equal protection rights. *Id.* at 904-05. The Minnesota Supreme Court granted review of the decision. *Mitchell v. Steffen*, 504 N.W.2d 198 (Minn. 1993). The Supreme Court affirmed this Court's holding that the benefit reduction violated the fundamental right to travel guaranteed by the United States Constitution. The Supreme Court refused to affirm this Court's decision that the reduction also violated Minnesota Constitution's equal protection requirements. *Id.* at 203

<sup>3</sup> *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974) and *Shapiro v. Thompson*, 394 U.S. 618 (1969), cited by Appellants, also involved the fundamental right to travel and therefore are inapplicable to the current appeal.

of powder cocaine was subject to a five year prison sentence. *Id.* at 887. The vast majority of the persons charged with possession of crack cocaine were black, while most persons charged with possession of powder cocaine were white. *Id.* at 887, fn. 1. The *Russell* Court reasoned that less deferential equal protection review was particularly appropriate when the class impacted by the legislation was the very class the equal protection clause was enacted to protect. *Id.* at 889. Justice Simonett in his concurrence agreed stating that applying the three part test was appropriate where a facially neutral *criminal statute* has in its application a substantial racial impact. *Id.* p. 894. In such cases, Justice Simonett held the court may give less deference to the challenged legislative enactment. *Id.*

The instant appeal is very different. It does not involve a criminal statute that contains substantial criminal penalties imposed almost exclusively on a racial minority. Instead, it deals with an economic issue—the payments Minnesota makes to provider agencies. Invidious discrimination will be found when a suspect class receives disparate treatment or when a disfavored group is denied a fundamental right. Neither occurred in this case. Appellants’ assertion that the statute invidiously discriminates against family members is incorrect, was rejected by the court below, and must be rejected by this Court.

## **II. APPELLANTS ARE NOT ENTITLED TO ATTORNEY FEES AND COSTS.**

Appellants ask this Court to award them attorney fees and costs. Their request must be denied because they are not entitled to either award. The court below properly

denied their request because they did not prevail on the merits of their claim. This Court must deny their request for fees even if it reverses the court below.

**A. Appellants Are Not Entitled To A Fee Award Under Minnesota’s Equal Access To Justice Act.**

Minnesota’s Equal Access to Justice Act (“MEAJA”) provides:

If a prevailing party other than the state, in a civil action . . . other than a tort action, brought by or against the state, shows that the position of the state was not substantially justified, the court . . . shall award fees and other expenses to the party unless special circumstances make an award unjust.

Minn. Stat. § 15.472(a) (2011). “Substantially justified” means that the state’s position had a reasonable basis in law and fact, based on the totality of the circumstances before and during the litigation. Minn. Stat. § 15.471, subd. 8 (2011). Moreover, because the “MEAJA is a limited waiver of sovereign immunity, courts should strictly construe its language.” *Donovan Contracting of St. Cloud, Inc. v. Minn. Dep’t of Transportation*, 469 N.W.2d 718, 720 (Minn. Ct. App. 1991). The state’s position will be substantially justified if it is “justified to a degree that could satisfy a reasonable person.” *Id.* (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)). Appellants bear the burden of proving that the State’s position was not substantially justified. *Id.* Appellants have failed to meet their burden.

The State’s position is substantially justified. Indeed, its position prevailed in district court. The Legislature enacted a law that reduced provider payment rates when the providers’ employees were caring for close family members. Previously laws had prohibited all payment for care provided by relatives or allowed payment in very limited

and compelling situations. In addition, governing federal law supports the State's position as does case law from another jurisdiction.

The Legislature could reasonably conclude that a reduction in payments for services that for much of the history of the program received no payment at all was constitutional. In defending the law, the State asserted arguments based on past laws governing the same issue, federal requirements, long documented familial relationships and similar legislation that passed constitutional muster in another jurisdiction. Such arguments take into account the facts and law relevant to the case and present an argument that is substantially justified, i.e. justified to a degree that could satisfy a reasonable person.<sup>4</sup> Appellants are not entitled to an award of attorney fees under the MEAJA.

**B. Appellants Are Not Entitled To Costs Under The Declaratory Judgments Act.**

The State is not subject to payment of costs under Minnesota's Declaratory Judgments Act. The taxation of costs and disbursements is not permitted against the State when it acts in its sovereign capacity, unless such an award is expressly provided by law. *Lund v. Comm'r of Public Safety*, 783 N.W.2d 142, 143 (Minn. 2010); *DeCook v. Rochester Inter. Airport Joint Zoning Bd.*, 811 N.W.2d 610, 616 (Minn. 2012). State law provides that "[t]he state is not bound by the passage of a law unless named therein, or unless the words of the act are so plain, clear, and unmistakable as to leave no doubt as to

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<sup>4</sup> Appellants admit that they have not met their burden of establishing that they meet the MEAJA's definition of party. App. Br. p. 36.

the intention of the legislature.” Minn. Stat. § 645.27 (2011). The Declaratory Judgments Act does not expressly provide for an award against the State. Minn. Stat. § 555.10 (2011) (“the court may make such award of costs as may seem equitable and just”).

The State, through its Commissioner, is acting in its sovereign capacity in implementing and defending the challenged law. The enforcement of law involves governmental authority and is not a proprietary action. *See State v. Holm*, 243 N.W. 133, 135, 186 Minn. 331, 331-35, (1932) (recognizing that the Secretary of State was acting in sovereign capacity in an action challenging the validity of laws administered by his office). Appellants are not entitled to an award of costs under the Declaratory Judgments Act.

## CONCLUSION

Minnesota Statute § 256B.0659, subd. 11(c) (2011) is clearly constitutional. It is rationally related to legitimate governmental interests and meets Minnesota's three-part rational basis test. As a result, the provision fully complies with the equal protection rights contained in the Minnesota Constitution. Respondent asks that this Court affirm the decision below.

Dated: August 6, 2012

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE  
WITH MINN. R. APP. P 132.01, SUBD. 3**

The undersigned certifies that the Brief submitted herein contains 11,422 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Word 2003, the word processing system used to prepare this Brief.



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