IN THE SUPREME COURT OF THE STATE OF ALASKA

Planned Parenthood of the Great Northwest, Jan Whitefield, M.D., Susan Lemagie, M.D.,	)	
Appellants/Cross-Appellees,	)	
v.	)	
State of Alaska, Loren Leman, Mia Costello, & Kim Hummer-Minnery,	)	Supreme Court Nos. **S-15010** S-15030 S-15039
Appellees/Cross-Appellants.	)	

Trial Court Case No. **3AN-10-12279 CI**

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE JOHN SUDDOCK, JUDGE

APPELLEE STATE OF ALASKA'S BRIEF

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AS 18.16.010. Abortions.

(a) An abortion may not be performed in this state unless

(1) the abortion is performed by a physician licensed by the State Medical Board under AS 08.64.200;

(2) the abortion is performed in a hospital or other facility approved for the purpose by the Department of Health and Social Services or a hospital operated by the federal government or an agency of the federal government;

(3) before an abortion is knowingly performed or induced on a pregnant, unmarried, unemancipated woman under 18 years of age, notice or consent have been given as required under AS 18.16.020 or a court has authorized the minor to proceed with the abortion without parental involvement under AS 18.16.030 and the minor consents; for purposes of enforcing this paragraph, there is a rebuttable presumption that a woman who is unmarried and under 18 years of age is unemancipated;

(4) the woman is domiciled or physically present in the state for 30 days before the abortion; and

(5) the applicable requirements of AS 18.16.060 have been satisfied.

(b) Nothing in this section requires a hospital or person to participate in an abortion, nor is a hospital or person liable for refusing to participate in an abortion under this section.

(c) A person who knowingly violates a provision of this section, upon conviction, is punishable by a fine of not more than $1,000, or by imprisonment for not more than five years, or by both.

(d) Repealed by SLA 1997, ch. 14, § 6, eff. July 31, 1997.

(e) A person who performs or induces an abortion in violation of (a)(3) of this section is civilly liable to the pregnant minor and the minor's parents, guardian, or custodian for compensatory and punitive damages.

(f) It is an affirmative defense to a prosecution or claim for a violation of (a)(3) of this section that the pregnant minor provided the person who performed or induced the abortion with false, misleading, or incorrect information about the minor's age, marital status, or emancipation, and the person who performed or induced the abortion did not otherwise have reasonable cause to believe that the pregnant minor was under 17 years of age, unmarried, or unemancipated.

(g) It is a defense to a prosecution or claim for violation of (a)(3) of this section that, in the clinical judgment of the physician or surgeon, compliance with the requirements of (a)(3) of this section was not possible because, in the clinical judgment of the physician or surgeon, an immediate threat of serious risk to the life or physical health of the pregnant minor from the continuation of the pregnancy created a medical emergency necessitating the immediate performance or inducement of an abortion. In this subsection,

(1) "clinical judgment" means a physician's or surgeon's subjective professional medical judgment exercised in good faith;

(2) "defense" has the meaning given in AS 11.81.900(b);

(3) "medical emergency" means a condition that, on the basis of the physician's or surgeon's good faith clinical judgment, so complicates the medical condition of a pregnant minor that

(A) an immediate abortion of the minor's pregnancy is necessary to avert the minor's death; or

(B) a delay in providing an abortion will create serious risk of medical instability caused by a substantial and irreversible impairment of a major bodily function of the pregnant minor.

(h) A physician or other health care provider is liable for failure to obtain the informed consent of a person as required under AS 18.16.060 if the claimant establishes by a preponderance of the evidence that the provider has failed to inform the person of the common risks and reasonable alternatives to the proposed abortion procedure and that, but for that failure, the person would not have consented to the abortion procedure.

(i) It is a defense to any action for the alleged failure to obtain the informed consent of a person under (h) of this section that

(1) the risk not disclosed is too commonly known or is too remote to require disclosure; or

(2) the person who is the subject of the alleged failure to obtain the informed consent stated to the physician or other health care provider that the person would or would not undergo the abortion procedure regardless of the risk involved or that the person did not want to be informed of the matters to which the person would be entitled to be informed.

(j) In an action under (h) of this section, there is a rebuttable presumption that an abortion was performed with the pregnant woman's informed consent if the person who performed

the abortion submits into evidence a copy of the woman's written certification required under AS 18.16.060(b).

AS 18.16.020. Notice or consent required before minor's abortion.

(a) A person may not knowingly perform or induce an abortion upon a minor who is known to the person to be pregnant, unmarried, under 18 years of age, and unemancipated unless, before the abortion, at least one of the following applies:

(1) either

(A) one of the minor's parents, the minor's legal guardian, or the minor's custodian has been given notice of the planned abortion not less than 48 hours before the abortion is performed, or

(B) the parent, legal guardian, or custodian has consented in writing to the performance or inducement of the abortion; if a parent has consented to the abortion the 48 hour waiting period referenced in (A) of this paragraph does not apply;

(2) a court issues an order under AS 18.16.030 authorizing the minor to consent to the abortion without notice or consent of a parent, guardian, or custodian, and the minor consents to the abortion;

(3) a court, by its inaction under AS 18.16.030, constructively has authorized the minor to consent to the abortion without notice and consent of a parent, guardian, or custodian, and the minor consents to the abortion; or

(4) the minor is the victim of physical abuse, sexual abuse, or a pattern of emotional abuse committed by one or both of the minor's parents or by a legal guardian or custodian of the minor and the abuse is documented by a declaration of the abuse in a signed and notarized statement by

(A) the minor; and

(B) another person who has personal knowledge of the abuse who is

(i) the sibling of the minor who is 21 years of age or older;

(ii) a law enforcement officer;

(iii) a representative of the department of Health and Social Services who has investigated the abuse;

(iv) a grandparent of the minor; or

(v) a stepparent of the minor.

(b) In (a)(1) of this section, actual notice must be given or attempted to be given in person or by telephone by either the physician who has referred the minor for an abortion or by the physician who intends to perform the abortion. An individual designated by the physician may initiate the notification process, but the actual notice shall be given by the physician. The physician giving notice of the abortion must document the notice or attempted notice in the minor's medical record and take reasonable steps to verify that the person to whom the notice is provided is the parent, legal guardian, or custodian of the minor seeking an abortion. Reasonable steps to provide notice must include

(1) if in person, requiring the person to show government-issued identification along with additional documentation of the person's relationship to the minor; additional documentation may include the minor's birth certificate or a court order of adoption, guardianship, or custodianship;

(2) if by telephone, initiating the call, attempting to verify through a review of published telephone directories that the number to be dialed is that of the minor's parent, legal guardian, or custodian, and asking questions of the person to verify that the person's relationship to the minor is that of parent, legal guardian, or custodian; when notice is attempted by telephone but the physician or physician's designee is unsuccessful in reaching the parent, legal guardian, or custodian, the physician's designee shall continue to initiate the call, in not less than two-hour increments, for not less than five attempts, in a 24-hour period.

(c) If actual notice is attempted unsuccessfully after reasonable steps have been taken as described under (b) of this section, the referring physician or the physician intending to perform an abortion on a minor may provide constructive notice to the minor's parent, legal guardian, or custodian. Constructive notice is considered to have been given 48 hours after the certified notice is mailed. In this subsection, "constructive notice" means that notice of the abortion was provided in writing and mailed by certified mail, delivery restricted to addressee only, to the last known address of the parent, legal guardian, or custodian after taking reasonable steps to verify the mailing address.

(d) A physician who suspects or receives a report of abuse under this section shall report the abuse as provided under AS 47.17.020.

(e) A physician who is informed that the pregnancy of a minor resulted from criminal sexual assault of the minor must retain, and take reasonable steps to preserve, the products of conception and evidence following the abortion for use by law enforcement officials in prosecuting the crime.

AS 18.16.030. Judicial bypass for minor seeking abortion.

(a) A woman who is pregnant, unmarried, under 18 years of age, and unemancipated who wishes to have an abortion without notice to or the consent of a parent, guardian, or custodian may file a complaint in the superior court requesting the issuance of an order authorizing the minor to consent to the performance or inducement of an abortion without notice to or the consent of a parent, guardian, or custodian.

(b) The complaint shall be made under oath and must include all of the following:

(1) a statement that the complainant is pregnant;

(2) a statement that the complainant is unmarried, under 18 years of age, and unemancipated;

(3) a statement that the complainant wishes to have an abortion without notice to or the consent of a parent, guardian, or custodian;

(4) an allegation of either or both of the following:

(A) that the complainant is sufficiently mature and well enough informed to decide intelligently whether to have an abortion without notice to or the consent of a parent, guardian, or custodian; or

(B) that one or both of the minor's parents or the minor's guardian or custodian was engaged in physical abuse, sexual abuse, or a pattern of emotional abuse against the minor, or that the consent of a parent, guardian, or custodian otherwise is not in the minor's best interest;

(5) a statement as to whether the complainant has retained an attorney and, if an attorney has been retained, the name, address, and telephone number of the attorney.

(c) The court shall fix a time for a hearing on any complaint filed under (a) of this section and shall keep a record of all testimony and other oral proceedings in the action. The hearing shall be held at the earliest possible time, but not later than the fifth business day after the day that the complaint is filed. The court shall enter judgment on the complaint immediately after the hearing is concluded. If the hearing required by this subsection is not held by the fifth business day after the complaint is filed, the failure to hold the hearing shall be considered to be a constructive order of the court authorizing the complainant to consent to the performance or inducement of an abortion without notice to or the consent of a parent, guardian, or custodian, and the complainant and any other person may rely on the constructive order to the same extent as if the court actually had

issued an order under this section authorizing the complainant to consent to the performance or inducement of an abortion without such consent.

(d) If the complainant has not retained an attorney, the court shall appoint an attorney to represent the complainant.

(e) If the complainant makes only the allegation set out in (b)(4)(A) of this section and if the court finds by clear and convincing evidence that the complainant is sufficiently mature and well enough informed to decide intelligently whether to have an abortion, the court shall issue an order authorizing the complainant to consent to the performance or inducement of an abortion without the consent of a parent, guardian, or custodian. If the court does not make the finding specified in this subsection, it shall dismiss the complaint.

(f) If the complainant makes only the allegation set out in (b)(4)(B) of this section and the court finds that there is clear and convincing evidence of physical abuse, sexual abuse, or a pattern of emotional abuse of the complainant by one or both of the minor's parents or the minor's guardian or custodian, or by clear and convincing evidence the consent of the parents, guardian, or custodian of the complainant otherwise is not in the best interest of the complainant, the court shall issue an order authorizing the complainant to consent to the performance or inducement of an abortion without the consent of a parent, guardian, or custodian. If the court does not make the finding specified in this subsection, it shall dismiss the complaint.

(g) If the complainant makes both of the allegations set out in (b)(4) of this section, the court shall proceed as follows:

> (1) the court first shall determine whether it can make the finding specified in (e) of this section and, if so, shall issue an order under that subsection; if the court issues an order under this paragraph, it may not proceed under (f) of this section; if the court does not make the finding specified in (e) of this section, it shall proceed under (2) of this subsection;
>
> (2) if the court under (1) of this subsection does not make the finding specified in (e) of this section, it shall proceed to determine whether it can make the finding specified in (f) of this section and, if so, shall issue an order under that subsection; if the court does not make the finding specified in (f) of this section, it shall dismiss the complaint.

(h) The court may not notify the parents, guardian, or custodian of the complainant that the complainant is pregnant or wants to have an abortion.

(i) If the court dismisses the complaint, the complainant has the right to appeal the decision to the supreme court, and the superior court immediately shall notify the complainant that there is a right to appeal.

(j) If the complainant files a notice of appeal authorized under this section, the superior court shall deliver a copy of the notice of appeal and the record on appeal to the supreme court within four days after the notice of appeal is filed. Upon receipt of the notice and record, the clerk of the supreme court shall place the appeal on the docket. The appellant shall file a brief within four days after the appeal is docketed. Unless the appellant waives the right to oral argument, the supreme court shall hear oral argument within five days after the appeal is docketed. The supreme court shall enter judgment in the appeal immediately after the oral argument or, if oral argument has been waived, within five days after the appeal is docketed. Upon motion of the appellant and for good cause shown, the supreme court may shorten or extend the maximum times set out in this subsection. However, in any case, if judgment is not entered within five days after the appeal is docketed, the failure to enter the judgment shall be considered to be a constructive order of the court authorizing the appellant to consent to the performance or inducement of an abortion without notice to or the consent of a parent, guardian, or custodian, and the appellant and any other person may rely on the constructive order to the same extent as if the court actually had entered a judgment under this subsection authorizing the appellant to consent to the performance or inducement of an abortion without notice to or the consent of another person. In the interest of justice, the supreme court, in an appeal under this subsection, shall liberally modify or dispense with the formal requirements that normally apply as to the contents and form of an appellant's brief.

(k) Each hearing under this section, and all proceedings under (j) of this section, shall be conducted in a manner that will preserve the anonymity of the complainant. The complaint and all other papers and records that pertain to an action commenced under this section, including papers and records that pertain to an appeal under this section, shall be kept confidential and are not public records under AS 40.25.110-40.25.120.

(l) The supreme court shall prescribe complaint and notice of appeal forms that shall be used by a complainant filing a complaint or appeal under this section. The clerk of each superior court shall furnish blank copies of the forms, without charge, to any person who requests them.

(m) A filing fee may not be required of, and court costs may not be assessed against, a complainant filing a complaint under this section or an appellant filing an appeal under this section.

(n) Blank copies of the forms prescribed under (*l*) of this section and information on the proper procedures for filing a complaint or appeal shall be made available by the court system at the official location of each superior court, district court, and magistrate in the

state. The information required under this subsection must also include notification to the minor that

(1) there is no filing fee required for either form;

(2) no court costs will be assessed against the minor for procedures under this section;

(3) an attorney will be appointed to represent the minor if the minor does not retain an attorney;

(4) the minor may request that the superior court with appropriate jurisdiction hold a telephonic hearing on the complaint so that the minor need not personally be present;

(5) the minor may request that the superior court with appropriate jurisdiction issue an order directing the minor's school to excuse the minor from school to attend court hearings held under this section and to have the abortion if one is authorized by the court and directing the school not to notify the minor's parent, legal guardian, or custodian that the minor is pregnant, seeking an abortion, or is absent for purposes of obtaining an abortion.

AS 18.16.040. Reports.

For each month in which an abortion is performed on a minor by a physician, the physician shall file a report with the Department of Health and Social Services indicating the number of abortions performed on a minor for that month, the age of each minor, the number of previous abortions performed on each minor, if any, and the number of pregnancies of each minor, if any, and the number of consents provided under each of the exceptions enumerated under AS 18.16.020(a)(1)--(4). A report filed under this section may not include identifying information of the minor other than the minor's age.

AS 18.16.060. Informed consent requirements.

(a) Except as provided in (d) of this section, a person may not knowingly perform or induce an abortion without the voluntary and informed consent of

(1) a woman on whom an abortion is to be performed or induced;

(2) the parent, guardian, or custodian of a pregnant, unemancipated minor if required under AS 18.16.020; or

(3) a pregnant, unemancipated minor if authorized by a court under AS 18.16.030.

(b) Consent to an abortion is informed and voluntary when the woman or another person whose consent is required certifies in writing that the physician who is to perform the abortion, a member of the physician's staff who is a licensed health care provider, or the referring physician has verbally informed the woman or another person whose consent is required of the name of the physician who will perform the procedure and the gestational estimation of the pregnancy at the time the abortion is to be performed and has provided either

(1) the Internet information required to be maintained under AS 18.05.032; the physician or a member of the physician's staff who is a licensed health care provider shall provide a copy of the Internet information if a person requests a written copy; if a member of the physician's staff provides the information required under this paragraph, the member of the physician's staff shall offer the opportunity to consult with the physician; or

(2) information about the nature and risks of undergoing or not undergoing the proposed procedure that a reasonable patient would consider material to making a voluntary and informed decision of whether to undergo the procedure.

(c) The information required in (b) of this section shall be provided before the procedure in a private setting to protect privacy, maintain the confidentiality of the decision, ensure that the information focuses on the individual circumstances, and ensure an adequate opportunity to ask questions. Provision of the information telephonically or by electronic mail, regular mail, or facsimile transmittal before the person's appointment satisfies the requirements of this subsection as long as the person whose consent is required under (a) of this section has an opportunity to ask questions of the physician after receiving the information.

(d) Notwithstanding (a) of this section, informed consent that meets the requirements of (a)--(c) of this section is not required in the case of a medical emergency or if the pregnancy is the result of sexual assault under AS 11.41.410--11.41.427, sexual abuse of a minor under AS 11.41.434--11.41.440, incest under AS 11.41.450, or an offense under a law of another jurisdiction with elements similar to one of these offences. In this

subsection, "medical emergency" means a condition that, on the basis of a physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman that

(1) the immediate termination of the woman's pregnancy is necessary to avert the woman's death; or

(2) a delay in providing an abortion will create serious risk of substantial and irreversible impairment of a major bodily function of the woman.

AS 18.16.090. Definitions.

In this chapter,

(1) "abortion" means the use or prescription of an instrument, medicine, drug, or other substance or device to terminate the pregnancy of a woman known to be pregnant, except that "abortion" does not include the termination of a pregnancy if done with the intent to

(A) save the life or preserve the health of the unborn child;

(B) deliver the unborn child prematurely to preserve the health of both the pregnant woman and the woman's child; or

(C) remove a dead unborn child;

(2) "unemancipated" means that a woman who is unmarried and under 17 years of age has not done any of the following:

(A) entered the armed services of the United States;

(B) become employed and self-subsisting;

(C) been emancipated under AS 09.55.590; or

(D) otherwise become independent from the care and control of the woman's parent, guardian, or custodian.

AS 25.20.025. Examination and treatment of minors.

(a) Except as prohibited under AS 18.16.010(a)(3),

(1) a minor who is living apart from the minor's parents or legal guardian and who is managing the minor's own financial affairs, regardless of the source or extent of income, may give consent for medical and dental services for the minor;

(2) a minor may give consent for medical and dental services if the parent or legal guardian of the minor cannot be contacted or, if contacted, is unwilling either to grant or withhold consent; however, where the parent or legal guardian cannot be contacted or, if contacted, is unwilling either to grant or to withhold consent, the provider of medical or dental services shall counsel the minor keeping in mind not only the valid interests of the minor but also the valid interests of the parent or guardian and the family unit as best the provider presumes them;

(3) a minor who is the parent of a child may give consent to medical and dental services for the minor or the child;

(4) a minor may give consent for diagnosis, prevention or treatment of pregnancy, and for diagnosis and treatment of venereal disease;

(5) the parent or guardian of the minor is relieved of all financial obligation to the provider of the service under this section.

(b) The consent of a minor who represents that the minor may give consent under this section is considered valid if the person rendering the medical or dental service relied in good faith upon the representations of the minor.

(c) Nothing in this section may be construed to remove liability of the person performing the examination or treatment for failure to meet the standards of care common throughout the health professions in the state or for intentional misconduct.

ISSUES PRESENTED

1. The superior court characterized the State's interest that is served by the Parental Notification Law ("PNL") as promoting "family cohesion," although both the State and this Court identified this particular interest as "aiding parents to fulfill their parental responsibilities."[1] Does the PNL sufficiently advance the State's compelling interest in giving parents an opportunity to parent their children—or, in the superior court's words, in "family cohesion"—to satisfy strict scrutiny under Alaska law?

2. Did the superior court err in holding that the PNL does not violate Alaska's equal protection clause?

3. Did the superior court err in determining that the PNL was the least restrictive means available to accomplish the State's compelling interests?

STATEMENT OF THE CASE

I. Legal background.

When the State of Alaska legalized abortion in 1970, the new statute included a requirement that parents consent to a minor's abortion.[2] This was consistent with then existing law that required parental consent for all medical treatment for minors, except for venereal disease.[3]

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[1] The superior court's error in concluding that the notification law did not advance the State's compelling interest in protecting minors from their own immaturity is addressed in the State's appellant brief. [State's At. Br. at 14-29]

[2] Ch. 103, § 1, SLA 1970.

[3] Ch. 204, § 1, SLA 1968. Before 1968, there do not appear to have been any exceptions to the default rule that required parental consent for any medical treatment of minors. Minors over the age of 15 could be "*examine[d]* … with regard to pregnancy" under the 1968 statute, but not treated without parental consent. *Id.* (Emphasis added).

In 1974, the legislature expanded the exceptions in the medical treatment statute to cover minors who were living apart from their parents and managing their own finances; minors whose parents could not be contacted or who refused to grant or deny consent; and minors who were themselves parents.[4] At the same time, the law was expanded to allow a minor to "give consent for diagnosis, prevention or treatment of pregnancy, [and] for diagnosis and treatment of venereal disease."[5] But the amendments expressly excepted abortion from the listed exceptions.[6] Then in 1978, the United States Supreme Court's decision in *Bellotti v. Baird* effectively invalidated Alaska's parental consent requirement because the statute lacked any judicial bypass procedure.[7]

In 1997, the legislature enacted the Parental Consent Act ("PCA"), creating a bypass procedure to address the constitutional problem identified in *Bellotti*.[8] Planned Parenthood of Alaska and two local doctors filed suit to enjoin the consent law. The superior court granted the plaintiffs summary judgment, holding that the law violated Alaska's guarantee of equal protection.[9] The State appealed and the Supreme Court remanded for trial, ruling that the superior court had to hear evidence about whether the PCA served the State's compelling interests before ruling on the plaintiffs' privacy and

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Compare subsection (a) providing that a person could "examine or treat" a minor with venereal disease without consent *with* subsection (b) providing only that a person could "examine" a minor "with regard to pregnancy" without parental consent.

4 Ch. 73, § 1, SLA 1974.

5 *Id.*

6 *Id.*

7 *See Bellotti v. Baird*, 443 U.S. 622, 644 – 45 (1979) (invalidating Massachusetts's parental consent law because it lacked a judicial bypass process).

8 Ch. 14, § 4, SLA 1974.

9 *State v. Planned Parenthood of Alaska* ("*Planned Parenthood I*"), 35 P.3d 30, 32 (Alaska 2001).

equal protection claims.[10] After trial, the superior court again enjoined the PCA, ruling that it violated both the equal protection and privacy clauses of the Alaska constitution.[11]

The State appealed again and, over a vigorous dissent, this Court agreed that the PCA violated Alaska's privacy clause. Although this Court recognized that the State had an "undeniably compelling interest in protecting the health of minors and in fostering family involvement in a minor's decisions regarding her pregnancy,"[12] it held that the PCA was not the least restrictive means available to achieve those interests. Rather, it held that a parental notice law would burden a pregnant minor's ability to get an abortion less while encouraging parental involvement to an even greater degree:

> to the extent that parents who do not possess a 'veto power' over their minor children's abortion decision have a greater incentive to engage in a constructive and ongoing conversation with their minor children about the important medical, philosophical, and moral issues surrounding abortion, a notification requirement may actually better serve the State's compelling interests.[13]

In response to the Court's ruling, Alaskan voters enacted the PNL by ballot initiative. [Exc. 145] The PNL requires that, with some exceptions, parents be notified of their child's abortion at least forty-eight hours in advance of the procedure.[14] [Exc. 145]

Before the law went into effect, Planned Parenthood of the Great Northwest and two local doctors (collectively "Planned Parenthood") sued, requesting a preliminary

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10 *Id.* at 46.

11 *State v. Planned Parenthood of Alaska* ("*Planned Parenthood II*,") 171 P.3d 577, 580-81 (Alaska 2007).

12 *Id.* at 579.

13 *Id.* at 585.

14 AS 18.16.010(a)(3); AS 18.16.020(a)(1)(A). The law is described in more detail in the State's cross-appeal brief at 5-8.

injunction and an order striking the law down in its entirety. [Exc. 1-31] Planned Parenthood claimed that the law violates the Alaska Constitution's guarantees of privacy, equal protection, and due process, [Exc. 26-29] challenging its application to seventeen-year-olds, the 48-hour notice period, the requirement of verifying a phone number and address when notifying a parent, the adequacy of its exception for abused minors, and the adequacy of the bypass provision [Exc. 26 – 31]. The sponsors of the initiative intervened in the litigation to defend the law alongside the State. [R 64-65] After oral argument on the preliminary injunction motion, the superior court upheld most of the law but enjoined five specific elements, including the criminal and civil penalties for non-compliance, the clear and convincing evidentiary standard in judicial bypass proceedings, and aspects of the notice protocol. [Exc. 39-56]

II. The PNL in operation.

At the time of trial, the modified notification law had been in effect for a little more than a year. [Exc. 144] In that time, Planned Parenthood had performed 78 minor abortions in Alaska. [Exc. 144] Of those 78, eight required parental notification, and four were authorized after a judicial bypass hearing.[15] [Exc. 144] Planned Parenthood managers, who were tasked with making the notifications, testified that notification was accomplished with a single phone call; that no minor abortion had been delayed into the second trimester as a result of the notification waiting period; and that they were unaware

[15] The evidence also showed that a total of 8 minors received judicial authorization to obtain an abortion after bypass proceedings; [Tr. 1486 – 87] presumably some of these minors obtained abortions from other providers.

of any minor who had been deterred from getting an abortion as a result of the notification requirement. [Tr. 750, 753, 755, 771, 1600 – 01, 1990 – 91]

III. The superior court's opinion.

After a three-week trial, the superior court rejected Planned Parenthood's claim that the PNL violated Alaska's equal protection clause, holding that minors who seek an abortion are not similarly situated to those who plan to carry to term. [Exc. 221-22] It also held that, with some modifications, the law represented the least restrictive means of furthering a compelling state interest in "family cohesiveness." [Exc. 192, 226] This appeal and cross-appeal followed.

STANDARD OF REVIEW

This appeal presents a facial challenge to the parental notification law. This Court will "uphold a statute against a facial constitutional challenge if 'despite any occasional problems it might create in its application to specific cases, [the statute] has a plainly legitimate sweep.' "[16] When raising a facial challenge, it is the plaintiffs who must establish that the law lacks a plainly legitimate sweep.[17]

This Court reviews factual findings for "clear error."[18] It reviews constitutional challenges de novo, "adopting the most persuasive rule of law in light of precedent, reason, and policy."[19] This Court has held that the right to an abortion is a fundamental

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16 *Planned Parenthood II*, 171 P.3d at 581 (quoting *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 260, n.14 (Alaska 2004)).

17 *Treacy*, 91 P.3d at 268 ("As we noted, plaintiffs seeking facial invalidation of a law must establish at least that the law does not have a 'plainly legitimate sweep.' ").

18 *Romero v. Cox*, 166 P.3d 4, 7 (Alaska 2007).

19 *Planned Parenthood II*, 171 P.3d at 581.

right, and thus laws infringing on that right are subject to strict scrutiny.[20] A law will survive strict scrutiny only if the court believes that it is narrowly tailored to advance a compelling state interest.[21] An alternate formulation of the test asks whether the State has used the least restrictive means to advance a compelling a state interest.[22]

Unfortunately, it is easier to state the test than to apply it. Professor Richard Fallon has identified three different versions of strict scrutiny in federal jurisprudence: the first "allows infringements of constitutional rights only to avert catastrophic or nearly catastrophic harms. Another ... views legislation as appropriately suspect when likely to reflect constitutionally forbidden purposes[; and the third] ... amounts to little more than weighted balancing, with the scales tipped slightly to favor the protected right."[23]

Alaska's approach is most closely aligned with the last of these—weighted balancing—with the scales tipped rather more in favor of the protected right than in federal cases. For example, this Court has noted that "the rights to privacy and liberty are neither absolute nor comprehensive ... [and] their limits depend on a balance of interests."[24] Similarly, Alaska's sliding scale equal protection jurisprudence expressly balances the State's interests and the importance of the rights involved. In fact, the importance of the State's interest determines not only the level of scrutiny applied, but

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20 *State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 909 (Alaska 2001).

21 *State, Dep't of Revenue, Permanent Fund Dividend Div. v. Cosio*, 858 P.2d 621, 626 (Alaska 1993).

22 *Planned Parenthood II*, 171 P.3d at 581.

23 Richard H. Fallon, Jr., Strict Judicial Scrutiny, 54 UCLA L. Rev. 1267, 1271 (2007).

24 *Sampson v. State*, 31 P.3d 88, 91 (Alaska 2001).

also whether the challenged statute is narrowly tailored.[25] Thus, in applying strict scrutiny to the PNL, "the precise degree to which the challenged legislation must actually further a compelling state interest and represent the least restrictive alternative is determined, at least in part, by the relative weight of the competing rights and interests."[26]

ARGUMENT

Although the superior court reached the correct result in this case—ruling that the PNL does not violate either the equal protection clause or the privacy clause of the Alaska Constitution—it did so in a peculiar way. It ignored compelling state interests that are central to understanding the way the PNL is framed and recharacterized the only state interest that it recognized in a way that obscures what is really at stake. The PNL can be understood only by recognizing: (1) the compelling public health concerns that shape the State's policy toward medical treatment of minors; and (2) that the statute's purpose is not to promote "familial cohesiveness" or "solidarity," as the superior court believed, [Exc. 192 – 95] but to balance minors' reproductive rights with parents' constitutionally protected rights to guide their children's upbringing.

When these two points are considered, it is clear that the PNL satisfies strict scrutiny under both the equal protection and privacy clauses. Because the State's public

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[25] *See Pub. Employees' Ret. Sys. v. Gallant*, 153 P.3d 346, 350 (Alaska 2007) ("In order to determine what degree of scrutiny to employ, we must address the whole range of questions posed by our equal protection methodology. In other words, we have to quantify (a) the importance of the state's purpose, (b) the extent of the infringement on the right to travel, and (c) the closeness of the relationship between the means employed by the statute and its purpose. The answers to these questions determine both the degree of scrutiny that we should employ and whether the challenged statute violates the equal protection clause.").

[26] *Planned Parenthood II*, 171 P.3d at 581 (citing *Sampson*, 31 P.3d at 91).

health interests are different with respect to minors who carry to term and minors who choose to terminate, these two groups are not similarly situated with respect to *all* of the interests served by the PNL and related statutes. And because the PNL must balance the competing constitutional rights of minors and parents as well as the State's compelling interests, each of the statute's enforcement measures is narrowly tailored to ensure that parental notice occurs when it will promote these interests and is excused when it will not.

I. The PNL constitutionally balances competing rights and compelling interests.

The issue of children's reproductive health care inevitably creates a significant and intractable tension between parents' fundamental right to guide the upbringing of their children[27] and minors' right to privacy.[28] Under the direction of this Court's express holding that "the constitution permits a statutory scheme which ensures that parents are notified so that they can be engaged in their daughter's important decisions in these matters,"[29] the PNL carefully balances the fundamental but competing rights of parents and their sexually-active minor children.

The difficult balance between parental and minors' rights inherent in the reproductive health context cannot be struck in isolation, however; the State also has competing interests in protecting minors from their own immaturity and protecting public health. It was undisputed at trial that the State has a compelling interest in stopping the

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27 *Id.* at 583.

28 *Planned Parenthood I*, 35 P.3d at 41.

29 *Planned Parenthood II*, 171 P.3d at 579.

spread of sexually transmitted diseases and in encouraging pregnant women, whatever their age, to obtain prenatal care.[30] [Tr. 105 – 07, 951 – 53]

Recognizing the tripartite tension between parents' rights, minors' rights and dueling state interests is essential to any meaningful analysis of the PNL. Both Planned Parenthood and the superior court ignore this complexity and posit instead a simplistic face-off between minors' right to privacy and the State's compelling interest in "family cohesion." But this imaginary dichotomy strips parental rights—"one of the most basic of all civil liberties'"[31]—from the equation, replacing it with a vague, garbled interest in "family cohesion," and ignores the State's public health interests altogether.

Indeed, Planned Parenthood asks this Court to analyze the impact of the PNL on minors' rights in a vacuum—without reference to parental rights and without consideration of the broader state interests that explain the law's distinctions. [PPGNW At. Br. 25 & *passim*] But if the Court evaluates the law in context—as it should—it is plain that the PNL constitutionally harmonizes competing parental rights and minors' rights in a way that most effectively serves compelling yet dueling state interests.

The default rule with respect to all medical treatment of minors is the requirement that parents consent.[32] That rule reflects the fundamental character of parents' right to

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30 Notably, however, no witness testified that the State has an interest in encouraging pregnant women, whatever their age, to obtain abortions. [*See, e.g.*, Tr. 953]

31 *Matter of K.L.J.*, 813 P.2d 276, 279 (Alaska 1991) (quoting *Flores v. Flores*, 598 P.2d 893, 895 (Alaska 1979)).

32 *See* AS 25.20.025 (enumerating exceptions to the general rule requiring parental consent for medical care given to minors).

guide the upbringing of their children.[33] The Alaska statutes, however, carve out a handful of exceptions to this rule, including for the diagnosis, prevention and treatment of pregnancy and the diagnosis and treatment of venereal disease.[34] By allowing minors to obtain health care for sexually-transmitted diseases and pregnancy without parental involvement, the statute infringes on parents' fundamental rights while affording minors greater privacy. This tipping of the scale encourages minors to seek prenatal care and treatment for venereal disease, which are compelling public health goals. But because the State has no comparable interest in encouraging minors to seek abortions, it lacks a similar justification for tipping the scale to parents' detriment when minors seek this procedure.

In its strictest sense, the balancing of parental rights and minors' rights in this context is essentially a zero-sum game—greater protection for minors' sexual privacy necessarily results in less protection for parents' fundamental right to parent and vice versa. Rather than give these rights a fixed relative weight, this Court has rejected the notion of a hierarchy of fundamental rights, declaring: "we will not create a false dichotomy by classifying some fundamental rights as more deserving of protection than

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33 *Planned Parenthood II*, 171 P.3d at 583 ("[I]t is the right and duty, privilege and burden, of all parents to involve themselves in their children's lives;" and as a result, parents "are entitled to the support of laws designed to aid [in the] discharge of that responsibility.")

34 AS 25.20.025(a)(4). The other exceptions are for minors who are living apart from their parents and managing their own finances; for minors whose parents are unavailable or who refuse either to consent or deny consent; for minors who are themselves parents. AS 25.20.025(a)(1)-(3).

others."[35] Because Planned Parenthood simply ignores parents' fundamental rights in making its constitutional arguments, its legal analysis is fatally deficient.

But the State cannot ignore the rights of many of its citizens. After this Court invalidated the PCA on the basis that it tipped the balance too far in the direction of parents' rights and that the State's interests could be served by a notification law, the people of Alaska reasonably and appropriately enacted a law that struck a fair constitutional balance. This Court should uphold the PNL.

II. The PNL advances the State's compelling interests.

A. This Court has already concluded that parental notice laws further the State's compelling interest in fostering family involvement in a minor's decisions regarding her pregnancy.

In *Planned Parenthood II*, this Court decided that "the State has an undeniably compelling interest in . . . fostering family involvement in a minor's decisions regarding her pregnancy":[36]

> [T]he affirmative process of teaching, guiding, and inspiring a minor child is, in large part, beyond the competence of impersonal political institutions. Parents, therefore, have an important guiding role to play in the upbringing of their children. Indeed, it is the right and duty, privilege and burden, of all parents to involve themselves in their children's lives; to provide their children with emotional, physical, and material support; and to instill in their children moral standards, religious beliefs, and elements of good citizenship.[37]

The Court concluded that parents "who have [the] primary responsibility for children's well-being are entitled to the support of laws designed to aid [in the]

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35 *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 265 (Alaska 2004).

36 171 P.3d at 579.

37 171 P.3d at 583 (quoting *H.L. v. Matheson*, 450 U.S. 398, 410 (1981); *Bellotti v. Baird*, 443 U.S. 622, 637 – 38 (1979); *Wisconsin v. Yoder*, 406 U.S. 205, 211 (1972)) (internal footnotes and quotation marks omitted).

discharge of that responsibility."[38] Because the State has a compelling interest in "aiding parents in fulfilling their parental responsibilities,"[39] the Court concluded that "the constitution permits a statutory scheme which ensures that parents are notified so that they can be engaged in their daughters' important decisions in these matters."[40]

The Court ruled that the parental consent law being challenged in that case was unconstitutional because a parental notice law would be less burdensome to minors but just as effective in achieving the State's interests.[41] In doing so, the Court necessarily had to determine that a parental notice law sufficiently advanced the State's interests to pass constitutional muster.[42] In fact, the Court reasoned that a notice law "may actually better serve the State's compelling interests."[43]

Because this Court has already ruled that a parental notice law serves the State's interests in aiding parents to fulfill their parental responsibilities to a great enough degree that it passes constitutional muster,[44] Planned Parenthood's argument that the challenged law does not adequately further a compelling state interest should be rejected. [At. Br. 12 – 18]

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38 171 P.3d at 583 (quoting *Bellotti*, 443 U.S. at 639).

39 171 P.3d at 582.

40 *Id.* at 579.

41 *Id.* at 584 – 85.

42 *Id.* at 595 (Carpeneti, J., dissenting) ("A mere showing that the state might have taken less restrictive action . . . is not sufficient to defeat legislation absent a determination that the less restrictive action would effectively achieve the state's compelling interests. Indeed, the least restrictive action that a state may take in every case is not to legislate at all." (citing *Treacy*, 91 P.3d at 267.)

43 171 P.3d at 585.

44 *Id.* at 579.

B. The evidence shows that the PNL advances the State's interest.

Planned Parenthood's argument that the PNL does not adequately further the State's compelling interests is without merit because, like the superior court, it mistakes the State's interest as a superficial interest in "family cohesion," [Exc. 192 – 95; At. Br. 13] rather than the more consequential interest this Court has already recognized: "aiding parents in fulfilling their parental responsibilities."[45] In mischaracterizing the State's interest, Planned Parenthood both devalues it and overlooks the parental notice law's significant success in achieving it.

The State's role in helping parents direct their child's upbringing has a more significant constitutional dimension than Planned Parenthood acknowledges. "The right to direct the upbringing of one's child 'is one of the most basic of all civil liberties.' "[46] "The right to the care, custody, companionship, and control of one's children 'undeniably warrants deference and, absent a powerful countervailing interest, protection.' "[47] Like the Alaska Constitution, the United States Constitution has long protected parental rights from governmental interference[48] and, more recently, from interference by third parties attempting to use governmental mechanisms to vindicate their own rights at the expense

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45 171 P.3d at 582.

46 *Matter of K.L.J.*, 813 P.2d 276, 279 (Alaska 1991) (quoting *Flores v. Flores*, 598 P.2d 893, 895 (Alaska 1979)).

47 *Matter of K.L.J.*. 813 P.2d at 279 (quoting *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 27 (1981)).

48 *Stanley v. Illinois,* 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *Prince v. Massachusetts,* 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944); *Pierce v. Society of the Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923).

of parents' rights.[49] In *Troxel v. Granville* seven justices agreed that these rights are not limited only to enjoying a relationship with the child by retaining custody, but include the right to control and guide the child's upbringing in the way the parent deems best.[50] Given that parents' rights under *Troxel* include the authority to control a child's associates, it is difficult to see how they do not include a parent's opportunity to counsel that child about abortion.

In mischaracterizing the State's interest in helping parents exercise their rights, Planned Parenthood both devalues the right itself and overlooks the PNL's significant success in achieving it. Parents want to know if their daughter is pregnant and going to have an abortion. They want to counsel and support her. But they cannot do so unless they know about it. By requiring parental notification before an abortion except when the minor is the victim of abuse or has obtained a judicial bypass, the law ensures that a

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[49] *Troxel v. Granville*, 530 U.S. 57, 73 (2000) (plurality op.) (ruling that Washington's visitation statute, which permitted any person to obtain visitation with child over parent's objection if court determined visitation was in child's best interests, violated parent's constitutional rights).

[50] 530 U.S. at 72 (plurality op.) ("[T]he combination of these factors demonstrates that the visitation order in this case was an unconstitutional infringement on Granville's fundamental right to make decisions concerning the care, custody, and control of her two daughters."); *id.* at 78 (Souter, J., concurring) ("Our cases . . . have not set out exact metes and bounds to the protected interest of a parent in the relationship with his child, but *Meyer*'s repeatedly recognized right of upbringing would be a sham if it failed to encompass the right to be free of judicially compelled visitation... The strength of a parent's interest in controlling a child's associates is as obvious as the influence of personal associations on the development of the child's social and moral character."); *id.* at 80 (Thomas, J., concurring) ("I agree with the plurality that this Court's recognition of a fundamental right of parents to direct the upbringing of their children resolves this case."); *id.* at 95 (Kennedy, J., dissenting) ("[The] custodial parent has a constitutional right to determine, without undue interference from the state, how best to raise, nurture, and educate the child.").

parent will generally have the opportunity to guide and support his or her child through one of the most difficult situations she can face. The law therefore advances the State's compelling interest to a high degree.

The superior court failed to recognize the PNL's effectiveness because it conflated the concept of "family cohesion" with the State's true interest in giving parents an opportunity to be involved in the minor's decision. Planned Parenthood enthusiastically embraces the superior court's mistake and bases its entire argument on the impossibility of measuring just how much the PNL will bring families closer together, ignoring that this is not the law's primary purpose. [At. Br. 13 – 18] Planned Parenthood's argument that the PNL fails to further the State's interest to a constitutionally sufficient degree thus misses the mark entirely.

C. The State has compelling interests that justify mandatory parental involvement for seventeen-year-olds.

Planned Parenthood's argument that applying the PNL to seventeen-year-olds is not the least restrictive means of achieving the State's interest focuses on the wrong end of the strict scrutiny analysis. If the State has a compelling interest in ensuring parental involvement in the decision-making of pregnant seventeen-year-olds, then the only way to further that interest is to apply the parental notice law to seventeen-year-olds.[51] The

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[51] Planned Parenthood argues that scope and method are two distinct elements of the narrow tailoring analysis, [At. Br. 37 – 38] but the question of whether the law has an appropriate scope more logically belongs to the compelling interest prong of the test. In *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1460 – 61 (8th Cir. 1995), the Eighth Circuit explained that a parental notice law must exempt minors who show they are mature or that an abortion is in their best interests because the State has no reason to require their parents' involvement. *See also id.* at 612 ("The whole point of a

real question, then, is whether the State's interests in protecting minors from their immaturity and in protecting parents' rights extends to seventeen-year-old minors. The evidence shows that it does.

Although seventeen-year-olds may be, as a group, marginally more mature than sixteen-year-olds, their decision-making capacity is still under-developed. Experts recognized that adolescence, and the socio-emotional growth that accompanies it, continues into the twenties. Planned Parenthood's expert Dr. Halpern-Felsher, who defines an adolescent as a person between the ages of ten and twenty-two, [Tr. 636 – 37] agreed that "important progress in the development of psychosocial maturity continues to occur during late adolescence, well-beyond the point in development when age differences in purely cognitive abilities seem to disappear." [Tr. 675 – 76] She also acknowledged that "these changes have a profound effect on [adolescents'] ability to make consistently mature decisions." [Tr. 682] Dr. Patricia Casey, an expert in adolescent psychiatry, testified that studies show adolescents' ability to make decisions continues to improve into the early twenties. [Tr. 1943] Dr. John Tappel, a pediatrician practicing in Anchorage, testified that a pregnancy is the kind of complex problem with long-term

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bypass procedure is to allow the minor to show that the State's justification for requiring parental notice—that minors are immature and in need of guidance for their own best interests—does not apply to her, either because she is mature or because an abortion is actually in her best interest."). In other words, the acceptable scope of a parental notice law—those minors to whom the law may constitutionally apply—depends on whether the state has a sufficient interest at stake. Although this Court discussed scope and method in the context of its least restrictive means analysis in the *Planned Parenthood II* decision, this explanation was simply to rebut the dissent's argument that the consent law was narrowly tailored because it exempted seventeen-year-olds, *compare* 177 P.3d at 583 with *id.* at 593, and does not preclude the Court from analyzing the issue of seventeen-year-olds as a question of compelling interests rather than narrow tailoring.

ramifications that even seventeen-year-olds would have limited ability to process. [Tr. 1362 – 63] Because seventeen-year-olds still have not generally reached the point of fully mature decision-making,[52] the State has a compelling interest in mandating parental involvement to protect them from the consequences of immature decision-making.

Likewise, although seventeen-year olds may be more independent than sixteen-year-olds, they are still most often living at home, attending high school, and financially dependent on their parents.[53] In other words, they are still children in a way that most young people eighteen and older are not. Pregnant sixteen- and seventeen-year-olds are both facing a decision with "lasting and profound consequences."[54] The seventeen-year-old's parent will have no less interest in being there for her just because she is one year older. And if the state has a compelling interest in protecting this minor and her parent, then the only way to advance it is to apply the parental notice law to seventeen-year-olds. Although it is impossible to enact a generally applicable law that perfectly accounts for each pregnant minor's individual maturity and circumstances, applying the law to

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[52] For this reason, the State draws the line at eighteen for the exercise of other fundamental rights too. *E.g.*, AS 15.05.010 (only those 18 and older may vote in elections); AS 25.05.011 (person under 18 unable to marry, unless he or she is above 16 and has received parental consent under AS 25.05.171).

[53] Those seventeen-year-olds who are actually living apart from and financially independent of a parent, minor, or legal guardian are emancipated and thus not subject to the law. AS 18.16.010(a)(3); AS 18.16.090(2).

[54] *Planned Parenthood II*, 171 P.3d at 582 n.28.

seventeen-year-olds while creating a judicial bypass procedure advances the State's twin interests when they are strong while exempting those minors for whom it is weak.[55]

Planned Parenthood's suggestion that the PNL's application to seventeen-year-olds cannot be constitutional because the PCA did not apply to seventeen year-olds is also misplaced. [At. Br. 36 – 37] Alaska should not be barred from advancing a compelling state interest just because prior legislation did not do so. In effect, Planned Parenthood is proposing that a legislative decision about the scope of an abortion law binds every future legislature regardless of evolving opinion or new evidence. Such a holding is irreconcilable with basic principles of democratic government.

Planned Parenthood's argument is particularly misplaced because the rationale for the PNL justifies broader application than a consent law. Although requiring parental consent presumes that the minor herself is not mature enough to consent to the procedure, requiring parental notice presumes only that due to her immaturity she is less likely to make the best possible decision for her. While a lower age threshold makes sense in a consent law because many seventeen-year-olds will be competent to consent to a medical

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[55] *See Bellotti v. Baird*, 443 U.S. at 643 n.23 ("The nature of both the State's interest in fostering parental authority and the problem of determining "maturity" makes clear why the State generally may resort to objective, though inevitably arbitrary, criteria such as age limits, marital status, or membership in the Armed Forces for lifting some or all of the legal disabilities of minority. Not only is it difficult to define, let alone determine, maturity, but also the fact that a minor may be very much an adult in some respects does not mean that his or her need and opportunity for growth under parental guidance and discipline have ended.").

procedure, a higher age threshold is appropriate for a notice law because even seventeen-year-olds will benefit from parental involvement in their decision-making.[56]

Even if the Court reviews the law's application to seventeen-year-olds as a question of narrow tailoring, it should reject the suggestion that applying the PNL to seventeen-year-olds is more burdensome than necessary because exempting them would significantly reduce the law's effectiveness in meeting the State's goals. Far more seventeen-year-old girls get pregnant than girls sixteen or younger. [Exc. 127 – 28] Once pregnant, seventeen-year-old girls are less likely to have a parent involved before having an abortion than younger girls are. [Exc. 181] Any parental notice law that does not apply to seventeen-year-olds will thus fail to reach the majority of pregnant minors who do not tell a parent—will fail, in other words, to address the bulk of the problem it targets.

Although seventeen-year-olds may be, on average, more mature than younger minors, the testimony cited above shows that they are not as mature as adults and their parents still have a right and interest in guiding them through the difficult decision of terminating a pregnancy. Alaska's law will therefore protect more minors and more parents than a law that applies only to younger minors. Applying the parental notice law only to pregnant minors under seventeen might be less "restrictive," but it would also be much less effective in light of its goal of helping pregnant minors make the best possible decision and giving their parents the opportunity to guide them through that process.

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[56] Most of the abortion providers who testified at trial indicated that they encouraged minors to inform their parents; none testified that they excluded seventeen-year-olds from that advice. [Tr. 416, 912, 1292]

III. PNL is narrowly tailored and satisfies the equal protection clause

A. The superior court correctly held that *Planned Parenthood II* is inconsistent with Planned Parenthood's equal protection claim.

In holding that the notification law did not violate Alaska's equal protection clause, the superior court expressly relied on the implicit message of *Planned Parenthood II*, noting that this Court's "formal reservation of the equal protection issue in that decision seems more theoretical than real." [Exc. 221] Planned Parenthood argues that the superior court erred in concluding that *Planned Parenthood II* "silently rejected the extensive equal protection analysis in *Planned Parenthood I*." [PPGNW's At. Br. 21] But Planned Parenthood dramatically overplays the significance of the latter decision. What Planned Parenthood calls a "lengthy detailed analysis" [PPGNW At. Br. 20] is merely a list of a few classifications created by the PCA, which the Court speculated might "deserve careful scrutiny."[57] The Court drew no conclusions regarding the viability of the equal protection argument in *Planned Parenthood I*; and as a result, the import of this Court's decision in *Planned Parenthood II* cannot be dismissed on the theory that courts do not typically "overturn, or so dramatically limit, earlier authority *sub silentio*." [At. Br. at 21] When this Court held in *Planned Parenthood II* that a parental notification law was a constitutional option that was less restrictive than the parental consent law, by implication it also rejected Planned Parenthood's equal protection challenge.[58]

A law that is considered a meaningful less restrictive alternative for the purposes of a privacy analysis cannot simultaneously be unconstitutional for another reason. In

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57 *Planned Parenthood I*, 35 P.3d at 43.

58 *Planned Parenthood II*, 171 P.3d at 584.

Planned Parenthood I, the superior court invalidated the PCA on both equal protection and privacy grounds and both arguments were briefed. This Court could not have failed to realize that the notification laws that it presented as less restrictive alternatives to the PCA employed the same distinction between pregnant minors seeking abortion and those planning to carry to term that Planned Parenthood now argues violates equal protection. If the Court agreed, it would be "hard to fathom" [Exc. 220] the conclusion it reached in *Planned Parenthood II*.

B. Minors seeking abortion are not similarly situated to minors planning to carry to term.

Planned Parenthood begins its discussion of the first step of the equal protection analysis—whether the groups in question are similarly situated—by boldly declaring: "For the purposes of the interests asserted in support of the PNL, there is only one relevant category—minors who are pregnant and need to make a decision that would benefit from parental involvement." [PPGNW At. Br at 22] But Planned Parenthood's blinkered analysis focuses only on the single interest in "family cohesion" recognized by the superior court and ignores both parents' rights and the State's public health interests that explain why the PNL and AS 25.20.025, the medical emancipation statute, treat minors who terminate differently than minors who carry to term. Because "[i]n order to determine whether differently treated groups are similarly situated, [this Court] look[s] to the state's reasons for treating the groups differently,"[59] the State's other compelling interests cannot be dismissed.

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[59] *Gallant*, 153 P.3d at 349.

Alaska Statute 25.20.025 creates exceptions to the default rule that parental consent is required before medical care may be given to minors. The statute creates two categories of minors who are assumed to be mature enough to make medical decisions for themselves—those who are living apart from their parents and managing their own finances and those who have children of their own.[60] Another exception protects minors from medical problems created by absent parents or those unwilling or unable to give or deny consent.[61] Notably, however, it does not permit a minor to consent to treatment when a parent has affirmatively denied consent. The final exception for reproductive health care, of central importance here, reflects the State's compelling interest in promoting public health goals like reducing unwanted teenage pregnancy, fighting the spread of sexually transmitted diseases and encouraging prenatal care.[62] Understanding that the parental consent requirement will discourage minors who wish to keep knowledge of their sexual activity secret from their parents from seeking important medical care, this exception compromises parental rights in the service of public health.[63]

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60 AS 25.20.025(a)(1), (a)(3). Although the first group is defined by an actual characteristic of maturity—independence—the second group is not necessarily mature. Rather the authority given to them recognizes their own fundamental rights as parents to direct the care of their children and the incongruity that would result if a minor was able to make decisions about the treatment of her own child but not herself.

61 AS 25.20.025(a)(2).

62 AS 25.20.025(a)(4).

63 Contrary to the superior court's suggestion, [Exc. 197] nothing in the statute suggests that the legislature intended to signal its belief in the maturity of minors by enacting the reproductive health exception. It is illogical to suggest that the legislature decided that minors are mature enough to make decisions about reproductive health care, but not mature enough to decide whether to take antibiotics to treat an infection or undergo surgery to fix a broken bone. The exception simply recognizes that the State has

Contrary to Planned Parenthood's suggestion, minors seeking an abortion are not similarly situated to minors who plan to carry to term just because they are all pregnant minors. The State's interest in a minor who plans to have an abortion is limited—the law must balance only the parents' right to parent their child, the child's right to privacy and the State's interest in promoting parental involvement in their children's important decisions and protecting minors from their own immaturity. But when a minor plans to carry a baby to term or has not yet decided what to do with her pregnancy, the State has additional powerful interests—in encouraging early diagnosis of pregnancy and early and ongoing prenatal care to protect the health of both mother and child. It was undisputed at trial that the State has a compelling interest in encouraging pregnant minors to seek pre-natal care. [Tr. 105 – 07, 951 – 53] By contrast, the State has no comparable interest in encouraging pregnant minors to seek an abortion. [Tr. 223 – 25, 953] The State's interest in reducing delay in a minor seeking an abortion is no greater than for any other time-sensitive but non-emergency medical procedure, for which the general rule is that parental consent is required.[64] Thus, when a pregnant minor decides to get an abortion, the State's interest in her medical care becomes different from its interest in a minor who plans to carry her pregnancy to term or a minor who has not yet made any decision.

Planned Parenthood's argument that the Court must determine whether the groups in question are similarly situated without reference to the medical emancipation statute and the justifications for it [At. Br. 24 – 25] is illogical and unsupported by any legal

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a compelling interest in promoting certain public health goals and thus privileges those goals, to a limited degree, over parental rights.

[64] AS 25.20.025(a).

authority. The PNL is an exception to the medical emancipation statute[65] (which is itself an exception to the overarching rule of parental consent); it does not make sense to suggest that the Court should analyze the exception by ignoring the general rule. Planned Parenthood would have the Court ignore the complex balance of competing interests that this statute represents: parents' fundamental right to parent their children, minors' rights to medical treatment and privacy, and the State's public health concerns. The PNL also balances these competing interests and the suggestion that the law can be understood without reference to the determinations made in the medical emancipation statute—and the reasons for them—is without merit.

In addition to ignoring the important public health context in which the PNL operates, Planned Parenthood also misapprehends the significance of the differences between the decision to abort and the decision to carry to term identified by the State: first, absent a notification requirement an abortion can be kept secret, whereas carrying to term cannot. Second, abortion is irreversible, but a decision to carry to term can be changed at least through the second trimester of pregnancy. Third, abortion requires medical intervention, whereas a young girl may choose to carry a child to term without receiving any medical care. These differences justify the PNL's differing treatment of the two decisions, because they directly affect the State's interest in parental rights and the opportunity to be involved in the decision about how to respond to a pregnancy and also because they affect the practical operation of the law.

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[65] AS 25.20.025(a) ("Except as prohibited under AS 18.16.010(a)(3) .....").

First, the purpose of the PNL is to protect parental rights by giving parents an opportunity to be involved in their daughter's decision about how to respond to her pregnancy. If a minor decides to have an abortion, the notification law is the single limited means available to ensure parents have that opportunity and can effectuate their right to direct and guide their daughter's upbringing. But a minor cannot realistically or reliably plan to keep her pregnancy secret from her parents throughout, much less keep the baby secret once it is born. Thus, a decision to carry to term is also effectively a decision to involve her parents. Requiring notification of the decision to carry to term, then, does nothing to further the State's interest in "aiding parents to fulfill their parental responsibilities"[66]—it would be redundant. Worse, it could act as a disincentive for a minor to seek early diagnosis of her pregnancy and regular prenatal care. Nor is the analysis changed by the scattered references at trial to the fact that some very small number of women can hide their pregnancies for long enough to avoid parental involvement in the decision about how to respond. Such situations are rare and the possible existence of a handful of outliers does not compromise the legitimacy of the State's differential treatment.

Second, abortion is irreversible, but the decision to carry to term is a fluid one that can be revisited and changed at least until approximately twenty-four weeks into a pregnancy. A girl who obtains an abortion makes a single, finite decision with irrevocable results; she cannot later deliberate the profound potential consequences of that decision and change her mind. Without the PNL, her parents may have no

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66 *Planned Parenthood II*, 171 P.3d at 582.

opportunity whatsoever to counsel her about her decision and discuss alternative options. A minor who chooses to carry to term, on the other hand, will likely to tell her parents about her pregnancy—or they will inevitably find out—thereby creating a clear opportunity for parents to offer advice and support and to address the possibility of abortion. The decision to abort is thus fixed and irrevocable in a way that choosing to carry to term is not.

This difference creates a third important practical distinction between minors who choose to abort and those who choose to carry to term. A minor who decides to have an abortion must seek medical assistance.[67] And that creates a moment when notification may be required and accomplished that does not exist for the decision to carry to term. Indeed, Planned Parenthood has identified no feasible way that the state *could* mandate parental involvement for the decision to keep a pregnancy. A notification law requires the existence of a person who will do the notifying, as well as a moment when the obligation to notify is triggered. Neither state nor medical intervention is necessary for a minor to become pregnant; nor is either necessary for her to decide and execute the decision to carry the baby to term. It is however, extremely desirable that a pregnant minor (indeed any pregnant woman) seek and receive prenatal care. And the state should not impose requirements on such care that might discourage minors from seeking medical advice.

Planned Parenthood argues that the fact that all pregnant minors face the same decision—whether to have the baby or not—means that they are similarly situated with

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[67] No evidence presented at trial or apparent from other states with notification or even consent laws suggests that minors are attempting to self-abort in the face of parental involvement laws.

respect to the operation of the notification law whichever choice they make. Not so. Consider two girls: the first becomes pregnant and chooses to carry to term, while the second chooses to terminate her pregnancy. Although the first will likely benefit from parental involvement in her decision in the same way that the second will, the ability of the State to create an opportunity for parental involvement and the need for State action to accomplish this is markedly different. The first girl decides to pursue a course of action that will inevitably provide notice to her parents through either direct notice or the inevitable outward physical manifestation of pregnancy; she can (although she should not) pursue that course without involving any medical provider; and, at least for a while, she may change her mind and later opt to terminate her pregnancy. In contrast, the second girl who chooses to abort decides to pursue a medical procedure at a fixed point in time that requires the assistance of a healthcare provider; the procedure is irreversible and without the PNL could often be kept secret from her parents. Just because parental involvement is desirable for both girls, does not mean that the groups are similarly situated for the purposes of the notification law.

C. Even if these groups are similarly situated, the PNL is narrowly tailored to advance a compelling state interest.

The analysis above establishing that girls seeking abortion are not similarly situated to those who decide to carry to term also demonstrates that the PNL is narrowly tailored to advance the State's compelling interests.[68] Planned Parenthood asks this Court

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[68] *Pub. Employees' Ret. Sys. v. Gallant*, 153 P.3d 346, 350 (Alaska 2007) ("The answers to these questions determine both the degree of scrutiny that we should employ and whether the challenged statute violates the equal protection clause.")

to analyze the law divorced from practical considerations and the context of the State's compelling interests in public health, but the State cannot legislate meaningfully without regard to these things. The PNL is narrowly tailored to the State's compelling interest in protecting parental rights and promoting parental involvement in a minor's decision about her pregnancy, because it reaches only the situations where a minor's decision could reasonably be kept secret and it does not jeopardize other equally compelling state interests, like encouraging minors to obtain prenatal care.[69] Thus, contrary to Planned Parenthood's argument, the law is not "fatally under-inclusive." [At. Br. at 30] Rather, it carefully balances the rights of minors and their parents and pursues a narrowly-tailored approach to maximizing the State's ability to accomplish its varied—and not always easily reconcilable—compelling interests.

IV. The PNL satisfies the Alaska Constitution's privacy clause.

Alaska's parental notice law is narrowly tailored to require such notice for those minors who will likely benefit from parental involvement and to excuse those minors who will not or who do not need the law to make their parents aware. No parental notice law is perfect; it is impossible to guarantee that notification will occur for all minors who will benefit and none who won't. In face of this problem, some states have enacted notice

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[69] Because none of the courts in the three cases relied upon by Planned Parenthood—*Planned Parenthood of Cent. New Jersey v. Farmer*, 762 A.2d 620 (2000); *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797 (Cal. 1997); and *N. Florida Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612 (Fla. 2003)—identified a State interest in encouraging minors to obtain abortions comparable to the State's interests in encouraging prompt prenatal care and treatment of sexually-transmitted diseases, these cases simply fail to address the complex reality of legislating in this arena and are thus unpersuasive. This Court should decline to follow these cases.

or consent laws with extremely relaxed provisions: for example, Maryland's consent law allows the doctor performing the abortion to excuse notice whenever he or she determines that parental notice would not be in the minor's best interest, and even if notice is given, the physician may perform the abortion as soon as he or she drops a letter in the mail.[70] Alaska, by contrast, has enacted a law that is narrowly tailored to achieve a high degree of accuracy in determining who should, and who should not, be required to tell a parent, and to maximize the opportunity for parents to be involved in some way in their daughter's decision-making.

A. Narrow tailoring does not require the State to legislate the lowest common denominator.

Planned Parenthood argues that the PNL fails the least restrictive means test because other states employ shorter notice periods or require less documentation, but this glosses over the complex nature of the privacy analysis, especially as applied to the issue of parental notification of a minor's abortion. The least restrictive means inquiry is not a search for the absolute least burdensome statutory scheme—it is "whether a less restrictive alternative exists that would achieve almost as much [benefit] while infringing less on protected rights."[71]

Planned Parenthood fails to recognize an essential dynamic of the least restrictive means analysis: many less restrictive alternatives will be less effective as well.[72] In fact,

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70 Md. Code Ann. Health-Gen. § 20-103(c), (d) (Westlaw 2013).

71 Fallon, *supra* note 23, at 1331.

72 *Id.* ("Coming at the same question of constitutional permissibility from the narrow tailoring side, a judge could ask whether there is a less restrictive alternative that would equally advance the government's interest in reducing the risk of terrorism. Typically if

for any given legislative goal there may be a series of alternative measures, each alternative placing a lesser burden on a fundamental right, but achieving the goal to lesser degree. To strike down the more restrictive alternative simply because less restrictive—but also less effective—alternatives exist, would fatally shortchange this Court's constitutional analysis. "A mere showing that the state might have taken less restrictive action . . . is not sufficient to defeat legislation absent a determination that the less restrictive action would effectively achieve the state's compelling interests. Indeed, the least restrictive action that a state may take in every case is not to legislate at all."[73]

Moreover, many alternatives along the continuum may be the least restrictive means of advancing the State's interest to *that particular degree*.[74] Planned Parenthood appears to argue that it should not matter whether an incrementally less restrictive alternative is also incrementally less effective: instead, "nothing short of the least intrusive statutory scheme will pass muster." [At. Br. 35] According to Planned Parenthood's approach, the PNL is unconstitutional because the State of Maryland permits the physician to perform an abortion on a minor as soon as the physician drops a letter of notice in the mail,[75] even though Maryland's law will not give any parents

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not invariably, however, any alternative that is less restrictive in theory is also likely to be less effective in fact.").

[73] 171 P.3d at 595 (Carpeneti, J., dissenting) (citing *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 267 (Alaska 2004)).

[74] PPGNW's argument that the State has no compelling interest in each degree of advancement of State interest would, [PPGNW At. Br. 13 - 14]if taken to its logical conclusion, render strict scrutiny impossible to meet, because any enactment could be invalidated on the ground that an incrementally less burdensome, incrementally less effective alternative exists.

[75] Md. Code Ann. Health-Gen. § 20-103(a), (d).

"notified" in this way a real opportunity to be involved in the minor's decision. Planned Parenthood proposes little more than a race to the bottom in which no state may decide, as a policy matter, how successful a parental law should be in achieving its aims—even if using the least restrictive means necessary to achieve that degree of success. This approach to strict scrutiny would shackle Alaska to the policy judgments made by other states, irrespective of Alaska's own values and conditions. But that is not what the privacy clause requires. Although the Court must strictly guard constitutional rights against any *unnecessary* infringement, it should not supplant the legislature in establishing social policy.[76]

This dynamic is especially important to consider in light of the tension between pregnant minors' constitutional rights and their parents' constitutional rights. Most concessions to minors' constitutional rights will diminish parents' right to guide their children through a difficult decision. If the notice period is reduced from 48 hours to 24 hours, parents will have less time to work through the issue with their child. If the standard of proof in the judicial bypass is reduced from clear and convincing to a preponderance, it is more likely—especially given the ex parte nature of the proceeding—that parents whose involvement would be beneficial will be excluded. If verification of parentage is not required, it is easier for a pregnant minor to avoid telling a

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[76] *Planned Parenthood II*, 171 P.3d at 579 ("We are not legislators, policy makers, or pundits charged with making law or assessing the wisdom of legislative enactments. . . . We are focused only on upholding the constitution and laws of the State of Alaska."); *id.* at 585 ("[W]e go no further than the Alaska Constitution demands, and merely reaffirm that the State does not strike the proper constitutional balance between its own compelling interests and the fundamental rights of its citizens by adopting an unnecessarily restrictive statute.").

parent by having someone else pretend to be the parent. Many available alternatives are thus less effective at serving the State's interests and protecting parents' rights to some marked degree. Given this dynamic, the State should not have to show that all less restrictive alternatives are ineffective; it need only show that they are less effective than Alaska's law in achieving the law's goals.[77]

Planned Parenthood also ignores the dearth of reliable, probative evidence in the area of abortion policy. As an initial matter, the constitutionality of the various enforcement measures that Planned Parenthood challenges is not a factual question susceptible to clear proof. Planned Parenthood's insistence that the State must, for example, "adduce credible evidence explaining why a 48-hour delay would substantially advance its interests to a degree that a less restrictive 24-hour waiting period would not," [At. Br. 46] ignores the reality that there is no way to prove the minimum amount of time necessary to foster a meaningful parent-child interaction about the child's pregnancy.[78] The same is true for the amount of documentation required to verify the identity of the person professing to be a minor's parent, guardian, or custodian. If a state does not require verification, those who pretend to be a minor's parent will likely never be detected; there is no way to compare results between Alaska's law and the laws of states which require only notarization of a consent form or no verification of identity at all.

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[77] *See Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997) ("That burden on adult speech is unacceptable if less restrictive alternatives would be *at least as effective* in achieving the legitimate purpose that the statute was enacted to serve." (emphasis added)).

[78] In fact, there would be no way to "adduce credible evidence" showing that 24 hours is more effective than 18, that 18 is more effective than 12, or that 12 is more effective than 6.

Whether the PNL's provisions are narrowly tailored are questions of judgment and common-sense inference, not of mathematical proof.

The difficulty of proof is compounded by the absence of testimony from the people most directly affected by the law being challenged.[79] The confidentiality of a minor's abortion is protected,[80] so the State cannot identify people who might testify about their experience. Planned Parenthood and its affiliates could do so, but they have not. Although this is no doubt to protect the confidentiality of its patients, the Court should keep in mind that the party attacking the law is the only party with access to the evidence most relevant to its constitutionality.

Of the witnesses who are available to testify, most hold deep-seated and often intractable ideological beliefs. In the litigation over the parental consent law, the superior court observed that "on both sides, the opinions were uniformly politicized" and that the "striking" "bias many of the witnesses have for either the pro-life or the pro-choice position" "affected the weight that should be given to a particular opinion."[81] The superior court in this case also remarked on the same pronounced ideological divide:

> Planned Parenthood's witnesses lauded autonomy in decision-making as a primary public health value. . . . This endorsement of patient autonomy was an oft-repeated theme of Planned Parenthood witnesses; it was seemingly a part of their DNA. . . . In contrast, equally qualified state's witnesses

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79 Planned Parenthood attempts to discount the testimony of the only person who testified about her personal experience with a parental notice law and her subsequent abortion as mere "anecdotal testimony," [At. Br. 44 n.100] but the experience of people directly affected by parental involvement laws is highly relevant to the burden they impose and the benefits they realize.

80 AS 18.16.040.

81 *Planned Parenthood of Alaska v. State*, 3AN-97-6014 CI, Decision on Remand at 27 (Alaska Super. Ct. Oct. 13, 2003).

> heralded family involvement as a preeminent public health value. [Exc. 194]

Although it is not surprising that most people, even professionals, are moved by deeply held ideological beliefs about abortion, the prevalence and intensity of these beliefs make it difficult to find genuinely objective expert testimony to inform state policy.

Useful research on the subject is just as difficult to find. Despite relying on studies for his opinion that Alaska's parental notice law would cause minors to delay their abortions [Tr. 243], Planned Parenthood's expert witness Dr. Santelli acknowledged that the few studies of parental involvement laws in other states cannot easily be applied to predict the results of Alaska's law:

> Well, I mean, I think … these laws can be quite varied. And so I'm not sure … I don't think the two states are --any of the three states are comparable. I mean, you know, ultimately you're just going to have to find out what happened in your own state. [Tr. 272]

The superior court concluded that attempting to use this data in an attempt to determine whether Alaska's law would delay or deter minors from getting abortions would be to "go down a rabbit hole." [Tr. 287 – 88] And on the particular details of the PNL challenged in this appeal, there appear to be no relevant studies at all. Although several experts testified about how abused minors would fare under the PNL, for example, they did not refer to any studies of parental involvement laws' effects on abused minors. [Exc. 331 – 32, 348 – 53; Tr. 1245 – 46]

The upshot is that privacy analysis is not as simple as Planned Parenthood suggests. Because a parental involvement law that has more exceptions and has fewer

controls will often be less successful in actually involving parents and giving pregnant minors the benefit of their counsel, the Court should reject Planned Parenthood's race to the bottom in favor of an inquiry as to whether proposed less restrictive alternatives would achieve the State's interests nearly as much while infringing less on pregnant minors' rights. And given the evidentiary limitations in this field, the State should not be required to demonstrate different laws' relative degrees of effectiveness with mathematical precision; the Court must also rely on its good judgment and common sense in deciding whether the less restrictive alternatives proposed are just as effective as Alaska's law. In fact, the Court has taken this approach to strict scrutiny before when upholding the implementing details of the juvenile curfew ordinance challenged in *Treacy v. Municipality of Anchorage*:

> Although the requirement of a timed, dated, and signed writing to prove that the minor is on a parental errand does give us some pause, we agree with Anchorage that such a requirement is appropriate to the reasonable enforcement of the ordinance, and we believe that the writing requirement would not unduly burden parents in its mainstream application. We therefore hold that the ordinance has a "plainly legitimate sweep."[82]

The Court's approach reflects a justified reluctance to tinker with the law's enforcement mechanisms when there is no showing that they have been or will be problematic in a significant proportion of cases.

The alternative is that no state may have a parental notice law that requires more than Maryland's law, which requires no waiting period at all after parental notification.[83]

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82 91 P.3d at 269 (internal footnote omitted).

83 Md. Code Ann. Health–Gen. § 20-103 (Westlaw 2013).

Even though common sense suggests that for a parental notice law to do its job, a parent has to have some opportunity to discuss the decision with their child, it is impossible to empirically prove that a waiting period will produce better outcomes for the girl, the parent, or the family as a whole. There is simply no way to identify Maryland's pregnant minors en masse, poll them regarding their experience, control for confounding variables, and then translate the results into a useful metric to compare with the experiences of Alaska's pregnant minors. Similarly, Maryland's law does not appear to require the physician to attempt to verify that the person being notified is actually the pregnant minor's parent or guardian. Although there was evidence adduced at trial showing that unless parental status is verified a minor can evade parental notice by pretending that someone else is her parent, [Tr. 1465 – 66] it is impossible to know the exact degree to which requiring an attempt at verification deters this problem. The inability to determine with any precision the degree to which one alternative is more or less effective than another should not require Alaska to cede its legislative powers to the people of Maryland—who have made their own policy judgment about how effective they want a parental notice law to be—simply because Maryland's law is the lowest common denominator.

B. The law is narrowly tailored to exempt abused minors from having to tell a parent while preventing minors who are not abused from evading parental notice.

Because the State has no interest in requiring a minor whose parent is abusive to notify that parent of her pregnancy, the PNL has two ways that an abused minor can avoid parental notice. First, the minor can qualify for the statutory exception by showing

her physician two affidavits attesting to the abuse.[84] Second, the minor can seek a judicial bypass, either on grounds of parental abuse or on grounds that notifying a parent is not in her best interest.[85] Although Planned Parenthood attacks the alleged inadequacies of the statutory exception at length, it acknowledges only in passing that minors who are abused may also use the bypass procedure [At. Br. 38 – 42]—likely because the available evidence shows that the bypass process, supplemented with the abuse exception, is narrowly tailored to ensure that abused minors can avoid parental notice while pregnant minors who are not abused do not evade parental notice simply out of fear, embarrassment or disappointment.

The evidence at trial showed that the judicial bypass process is accessible to all pregnant minors, including those suffering from abuse. In the roughly one-year period during which the law was in effect before trial, nine minors filed judicial bypasses. [Tr. 1486 – 87] Of these nine, eight minors successfully obtained a bypass, and one withdrew her petition for unknown reasons. [Tr. 1486 – 87, 1532] One minor who was the victim of long-term physical and emotional abuse by both parents obtained a bypass on these grounds. [Tr. 1532, 1567]

A judicial bypass is easily accessible because minors have the assistance of counsel both before and after filing the petition. Planned Parenthood employees testified

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[84] AS 18.16.020(a)(4). The person signing the corroborating affidavit must have personal knowledge of the abuse and be one of the following persons: (1) a sibling 21 years of age or older; (2) a law enforcement officer; (3) a representative of the Alaska Department of Health and Social Services who has investigated the abuse; (4) a grandparent; or (5) a step-parent.

[85] AS 18.16.030.(b)(4), (e) – (f).

that when a minor calls the office seeking an abortion and does not want to notify a parent, office staff will place the minor in touch with Planned Parenthood's legal counsel to explain the bypass process and to refer the minor to an attorney who can help her in filing the bypass petition.[86] [Exc. 175, 400 – 03; Tr. 748, 1989] Despite the offer of assistance, at least one of the nine minors filed the petition on her own.[87] [Tr. 748] Once the petition is filed, the minor is assigned counsel at public expense.[88] This attorney, who serves also as an attorney guardian-ad-litem in the Office of Public Advocacy (OPA), [Exc. 186; Tr. 1530] has represented seven of the nine minors. [Tr. 1531 – 32] After making contact with the minor, she explains the process and its confidentiality and prepares the minor for questioning. [Tr. 1539 – 41] A minor has the option of participating in the hearing telephonically,[89] which can make it easier for minors to testify. [Tr. 1549] The OPA attorney also testified that although the topics covered in the bypass hearing are sensitive, personal, and potentially embarrassing, her clients were able to answer questions and participate fully in the proceeding. [Tr. 1544 – 45, 1550 – 51]

Planned Parenthood's attempts to show that abused minors could not use the judicial bypass were entirely speculative. Their experts' testimony that many abused minors would not be able to go through with the bypass process because it is daunting was not based on any knowledge of or studies showing abused minors being deterred

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86 Planned Parenthood performs the vast majority of abortions on minors in Alaska. [Exc. 172]

87 The superior court described how easy it is for a minor to locate information about the bypass procedure using the internet and found that the bypass process appears to work well. [Exc. 216 – 17]

88 AS 18.16.030(d).

89 Alaska Probate R. 20(d).

from getting abortions by parental involvement laws. [Exc. 331 – 32, 348 – 53, 383; Tr. 1245 – 46] Notably, Planned Parenthood's own staff—who take phone calls from pregnant minors who often are unaware that they are required to tell a parent about the abortion [Tr. 1988]—testified that they were unaware of any minor who did not want to tell a parent whom the PNL discouraged from getting an abortion. [Tr. 771, 1990]

The existence of an additional statutory exception for abused minors will also make it easier for abused minors to avoid telling their parents about a pregnancy. Although Planned Parenthood's experts spent much time discussing the difficulty a minor would have in qualifying for the exception, they conceded that in some cases it may be easier for an abused minor to use the exception than to use the bypass. [Tr. 845, 1242] This is especially so when, for example, there is already OCS involvement with the family. [Tr. 845] Thus the PNL, by including an exception for abused minors in addition to the judicial bypass, makes it easier for abused minors to exempt themselves from the notice requirement than the laws of the majority of states that lack an abuse exception.

Planned Parenthood's attack on the statutory abuse exception, like all its privacy arguments, also ignores the tradeoff between effectiveness and burden: the evidence shows that an abuse exception lacking a corroboration requirement will likely allow more minors who are not abused to evade parental notice by falsely claiming abuse. Planned Parenthood's expert Suzanne Pinto testified that false reports of abuse are uncommon but acknowledged that between 7 and 14 percent of reports of abuse are fabricated. [Tr. 309] Expert Deborah Downs confirmed that although false reports of abuse are rare, minors who have an incentive to fabricate a claim of abuse will sometimes do so, describing an

instance where a girl accused her father of sexual abuse in order to cover up sexual activity with a boyfriend. [Tr. 599 – 600] Given the existence of fabricated abuse reports and a minor's incentive to falsely claim abuse in order to get an abortion, an alternative abuse exception like Maryland's, which allows a minor to evade parental notice if in the judgment of the physician performing the abortion parental notification may lead to physical or emotional abuse[90] will enable more non-abused minors to evade parental notice. More important still, it renders such a parental notice law less effective in achieving its goals.

Conversely, eliminating the corroboration requirement will not make it appreciably easier for abused minors to qualify for the abuse exception because abused minors are unlikely to disclose abuse to a physician even if no corroboration or oath is required. Planned Parenthood's experts described how difficult it is for young victims of abuse to divulge their secret to anyone. [Tr. 562 – 63, 1211] Expert Deborah Downs testified that a pregnant minor who is abused by her parents would be very reluctant to disclose that abuse to a physician or a nurse due to a lack of trust and fear that reporting the abuse would lead to the breakup of her family. [Tr. 617 – 18] Expert Barbara Malchick also testified that minors are very reluctant to tell a physician that they have been abused. [Exc. 383] Because abused minors are generally unwilling to report abuse even to a treating physician, eliminating the corroboration requirement is unlikely to result in many more abused minors using it. Instead, it would create an easy loophole for minors who are not abused to exploit. In other words, the "less restrictive" alternatives

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90 Md. Code Ann. Health–Gen. § 20-103(c)(1)(i) (Westlaw 2013).

that Planned Parenthood identifies in other states are neither as effective as Alaska's law nor appreciably less burdensome.

Finally, Planned Parenthood's attack on the superior court's reasoning that "courts do not 'overturn statutes based on worst-case scenarios'" [At. Br. 41 – 42] overlooks a court's duty, in ruling upon a facial challenge such as this one, to uphold the law unless it lacks a plainly legitimate sweep.[91] This is so even if the law is subject to strict scrutiny because it places restrictions on a fundamental right.[92] The superior court was right not to rule the provisions for abused minors unconstitutional without any showing that an abused minor had been denied or deterred from an abortion due to the law's restrictions or on the basis of other states' abuse exceptions that the evidence shows will be less effective in achieving the State's goals.

C. The law's documentation requirement is narrowly tailored to ensure that the proper person is notified.

Alaska's parental notice law requires documentation of parentage or lawful guardian status in order to make sure that the parent, guardian, or custodian is actually notified.[93] Without such safeguards, a pregnant minor could avoid telling a parent by pretending that some other person was her parent. The superior court hypothesized that the documentation requirement could pose problems if time were of the essence and clinic staff were not familiar enough with the law's requirements to satisfy the law by

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91 *Treacy v. Municipality of Anchorage*, 91 P.3d at 268 (citing *Troxel v. Granville*, 530 U.S. 57, 85 & n.6 (2000) (Stevens, J., op.)).

92 *Treacy*, 91 P.3d at 268 (rejecting facial challenge to juvenile curfew ordinance despite application of strict scrutiny because plaintiffs failed to meet burden to show curfew lacked plainly legitimate sweep).

93 AS 18.16.020(b)(1).

alternative means, but concluded that these concerns were more theoretical than real and upheld the provision. [Exc. 200 – 01] Because requiring documentation to verify relationship to the minor increases the law's effectiveness and imposes only a minimal burden, this ruling should be affirmed.

States use various methods in attempting to verify parental identity,[94] though Alaska is one of a few that have fairly decided to require documentation of parental status.[95] Other methods to verify identity, such as notarization, are simply less effective in ensuring that the parent receives notice. Requiring a show of ID or notarization is effective at proving that the person receiving notice is who he or she says s/he is, but much less effective at proving that person's relationship to the minor: many children do not share the last name of at least one parent. And relying solely on the existing criminal law prohibiting false claims of identity, as Planned Parenthood recommends, would not be effective either. [At. Br. 44] Although AS 11.51.130(a)(1) would enable the authorities to punish a person for pretending to be a minor's parent or guardian—*if* the fraud were ever discovered—it cannot prevent the harm in the first place.

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[94] For example, several states require that the parental consent be notarized or witnessed. Ariz. Rev. Stat. Ann § 26.2152(A) (Westlaw 2013); Ark. Code Ann. § 20-16-803(b)(5) (Westlaw 2013); Kan. Stat. Ann. § 65-6705(a) (Westlaw 2013); S.C. Code Ann. § 44-41-31(A)(1) (Westlaw 2013). Alabama requires a minor to verify in writing that the signature on a parental consent form is her parent's, Ala. Code § 26-21-3(c) (Westlaw 2013), while Georgia requires a parent to show government-issued identification and state that s/he is the parent of the minor, Ga. Code Ann. § 15-11-112 (Westlaw 2013).

[95] Tennessee and Montana also require documentation of a parent or guardian's relationship to the minor. Mont. Laws 2013, Ch. 307, § 6(1) (effective July 1, 2013) (not yet codified); Tenn. Code Ann § 37-10-303(a)(1) (Westlaw 2013).

The risk that a minor may evade parental notice by having her physician notify someone pretending to be her parent is very real. Lay witness Chelsea Wallace testified how she evaded the requirements of Ohio's parental notice law by having her adult boyfriend misrepresent his identity. [Tr. 1458- 59, 1463 – 68] Although Planned Parenthood attempts to dismiss this evidence as merely "anecdotal," it is impossible for the State to uncover anything *other* than anecdotal evidence given confidentiality protections surrounding a minor's decision to abort. And although the evidence is anecdotal—in other words, it is a direct account of a pregnant minor's experience with a parental involvement law, which is otherwise in short supply in this litigation—it shows how readily a girl might circumvent a parental notice law that requires only a show of identification. Alaska's additional documentation requirement thus makes the law more likely to actually involve parents than the notice and consent laws of most other states.

Finally, as the superior court correctly found, there was simply no evidence suggesting that the PNL's requirement of documentation to verify parent, guardian, or custodian status placed anything more than a minimal burden on minors' ability to get an abortion. There was no testimony at trial indicating that minors had been inconvenienced or delayed by the need for additional documentation. Most abortions were performed with parental consent or after telephonic notice, a process which attempts to verify parental identity without the need for documentation.[96] [Exc. 144] Planned Parenthood's "theoretical" concerns about the burden of requiring additional documentation [Exc. 201]

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[96] AS 18.16.020(b)(2) (abortion provider must attempt to verify the parent's phone number in a telephone directory and must ask questions of the personal called in an attempt to verify the person's relationship to the minor).

are therefore insufficient to show that the requirement lacks a "plainly legitimate sweep."[97]

E. The 48-hour notice period is narrowly tailored to ensure that the pregnant minor and her parent have enough time to consider an irreversible decision with life-long consequences.

Planned Parenthood's challenge to the notice period conveniently ignores the virtual impossibility of comparing the relative effectiveness of different notice periods. [At. Br. 46 – 47] For the reasons explained earlier, it is impossible to determine with precision where the optimal balance between meaningful parental involvement and avoiding undue delay should be struck.[98]

Putting aside this evidentiary conundrum, the Court can and should draw on its common sense in recognizing that giving a pregnant minor and her parent more time to discuss a decision "with lasting and profound consequences"[99] will often lead to a more considered decision. The purpose of mandatory parental notice is to "ensure that parents are notified so that they can be engaged in their daughters' important decisions in these

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97 *See Treacy*, 91 P.3d at 268 ("[P]laintiffs seeking facial invalidation of a law must establish that the law does not have a 'plainly legitimate sweep.' " (citing *Troxel*, 530 U.S. at 85 & n.6)).

98 *See Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 41 (1928) (Holmes, J., dissenting) ("When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the Legislature must be accepted unless we can say that it is very wide of any reasonable mark.").

99 *Planned Parenthood II*, 171 P.3d at 582 n.28.

matters."[100] A parent will have little opportunity to be engaged if she has only a few hours to talk the issue through with her child, and parental involvement will do little to protect a minor from her own immaturity if the minor can go ahead with the abortion immediately without having time to reflect on what her parent has said. A 24-hour notice period will realistically give the parent just one evening after work to discuss the abortion with the minor; for a parent working out-of-town or on an evening shift, having a meaningful opportunity to counsel the child will be that much more difficult. Forty-eight hours increases the likelihood that a meaningful discussion will take place and that the minor will have time to reflect on it.

Notably, Planned Parenthood does not argue that the incremental difference in burden between a 48-hour notice period and a 24-hour notice period is significant. [At. Br. 45 – 47] No minors were denied abortions due to the 48-hour waiting period. The two "close calls" that occurred were due not to the 48-hour requirement but to the fact that Planned Parenthood's Fairbanks clinic schedules abortions only twice per month. [Exc. 177; Tr. 396 – 97, 753 – 54, 758] Because Alaska's 48-hour notice period does not impose a significant burden on pregnant minors seeking an abortion, it is narrowly tailored to increase the likelihood that parents will have a meaningful opportunity to guide their children and that the children, in turn, will be able to benefit from that guidance.

Planned Parenthood's attack on the notice period's "inflexibility" is equally misplaced. [At. BR. 45 – 46] Planned Parenthood complains that a minor must wait 48

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100 *Id.* at 579.

hours after notification even if her parent does not wish to discuss the matter with her, but then acknowledges that the parent can waive the 48-hour period simply by signing a consent form.[101] [At. Br. 45] Planned Parenthood argues that this provision is not narrowly tailored because a handful of other states permit the parent to waive notice by signing a waiver of notice form,[102] [At. Br. 45 & n.12] but this argument presumes the existence of a parent who, after being notified and declining to discuss the abortion further with the daughter, *would* sign a waiver of notice form but *not* a consent form.[103] A facial challenge to the notice requirement should not be sustained solely on the basis of such an unlikely hypothetical completely lacking in any evidentiary foundation.[104]

F. The PNL's criminal penalty is constitutional.

The superior court correctly recognized that the choice of penalty for knowing violations of the parental notice law is properly a matter for legislative, rather than judicial, policy-making. [Exc. 205] Criminal penalties are not merely a means of making

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101 *See* AS 18.16.020(a)(1)(B).

102 *See, e.g.*, Colo. Rev. Stat. § 12-37.5-105(1)(a) (Westlaw 2013) ("No notice shall be required pursuant to this article if: (a) The person or persons who may receive notice . . . certify in writing that they have been notified . . . ."); S.D. Code § 34-23A-7(1) (Westlaw 2013); W. Va. Code. § 16-2F-3 (Westlaw 2013).

103 Georgia is the only state that permits the parent to waive the notice period verbally. Ga. Code Ann. § 15-11-112(a)(1)(b) (Westlaw 2013) (recently re-codified at Ga. Code Ann. § 15-11-682(a)(1)(B)). The existence of a parent who would verbally relinquish his or her right to consult with the child about the abortion but would not sign a consent form is just as unlikely.

104 *See Treacy*, 91 P.3d at 268 ("[P]laintiffs seeking facial invalidation of a law must establish that the law does not have a 'plainly legitimate sweep.' " (citing *Troxel*, 530 U.S. at 85 & n.6)).

the law effective; they reflect also society's view of the seriousness of the offense.[105] Criminal penalties are therefore different in nature from merely instrumental aspects of the parental notice law like the documentation requirement, the sole purpose of which is to increase the law's effectiveness. And because the criminal penalties are more than a means of achieving the law's ends, they should not be struck down just because more lenient penalties might have similar deterrent effect.[106] Applying the least restrictive means test to the law's criminal penalties would be a remarkable interference with the traditionally legislative function of determining how much punishment a crime deserves.[107]

Applying the least restrictive means test would also be virtually impossible. As a general matter, it is difficult to prove the relative deterrent effect of different degrees of punishment. Measuring the relative deterrent effect of criminal penalties for abortion

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105 *See State v. Dunlop*, 721 P.2d 604, 607 (Alaska 1986) (observing that objectives of criminal law include punishment of the offender as well as deterrence and rehabilitation); *Kelly v. State*, 622 P.2d 432, 434 – 35 (Alaska 1981) (holding that superior court erred in conflating sentencing factor of community condemnation with sentencing factor of deterrence); *State v. Chaney*, 477 P.2d 441, 447 (Alaska 1970) (vacating sentence as too lenient because it fell short of goal of community condemnation in criminal punishment).

106 The one case Planned Parenthood cites in support of its argument that criminal penalties should be subject to a least restrictive means analysis, *State v. J.P.*, 907 So. 2d 1101, 1119 (Fla. 2004), fails to address this distinction and does not merit this Court's adherence. In *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d at 1464 – 65, the Eight Circuit struck down a South Dakota parental involvement law's criminal penalties because they contained no mens rea requirement. This case is distinguishable because strict liability raises a question of scope—in other words, would it have a chilling effect on the provision of abortions to criminalize innocent mistakes?—rather than sanction.

107 *Cf. United States v. Wilkins*, 911 F.2d 337, 340 (9th Cir. 1990) ("[A]s a general rule, it is for Congress to say what shall be a crime and how it shall be punished . . . ." (internal brackets and quotation marks omitted)).

laws is even harder because prosecutions are so rare. Planned Parenthood's solution—eliminating the criminal penalty entirely [At. Br. 48]—nicely encapsulates its lowest common denominator approach to privacy analysis. In opposing the existence of both criminal and civil liability, Planned Parenthood appears to argue that the only parental notice law that passes constitutional muster is one that is unenforceable.

Even if the least restrictive means test is applied, Planned Parenthood cannot show that the criminal penalties lack a plainly legitimate sweep because there is no evidence it actually deters the provision of abortions to minors. The criminal penalty for knowing violations of the parental notice law is the same penalty that applies to a knowing violation of any of AS 18.16.010(a)'s requirements for lawful abortions, including the requirement that the physician obtain informed consent for the procedure as specified in AS 18.16.060. Like the parental notice requirement, the informed consent requirement includes detailed instructions that physicians must follow and exceptions that may excuse compliance in certain situations (including a medical emergency exception).[108] The informed consent procedure has been in effect since 2004[109] with the same penalty for knowing violation, but it has not deterred physicians from performing abortions.[110] [Tr. 426 – 27, 1121] Plaintiff Susan Lemagie testified that the parental notice law's notice protocol would be more difficult to comply with, but her testimony was based on the erroneous belief that criminal liability would attach if she was unable to guarantee that

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108 *See* AS 18.16.060.

109 Ch. 178, § 5, SLA 2004.

110 Dr. Anna Kaminski testified that she was not even aware of the consequences for failing to comply with the informed consent statute, suggesting that its criminal penalties have not deterred her from providing abortions. [Tr. 426 – 27]

the person being notified was actually the parent, [Tr. 1011] whereas criminal liability attaches only if the physician knowingly fails to "ask[] questions of the person to verify" the relationship.[111] Both she and plaintiff Jan Whitfield testified that difficulty understanding the medical emergency provision might deter physicians from performing abortions on minors, [Tr. 1018, 1109] but to the extent that the provision was confusing, the superior court clarified it in the final judgment.[112] [Exc. 229] This feeble evidence fails to show that the PNL's criminal penalties will render abortions less available to minors who seek them.

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Because each of the specific PNL provisions challenged by Planned Parenthood represents a careful balancing of effectiveness and restrictiveness, producing a result that has a plainly legitimate sweep, this Court should affirm the superior court's ruling that the law does not violate Alaska's privacy clause.

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111 Even if Dr. Lemagie's misunderstanding of the law dissuades her from providing abortions to minors, there will be no appreciable effect on their availability: at the time of trial, she had performed only two abortions on minors in the preceding five years and none in the preceding two years. [Tr. 970]

112 Dr. Whitfield also testified that the criminal penalties would not deter him personally from providing abortions. [Tr. 1109]

CONCLUSION

For these reasons, this Court should affirm the superior court's ruling that the PNL does not violate either the equal protection or privacy clauses of the Alaska Constitution.

DATED July 17, 2013.

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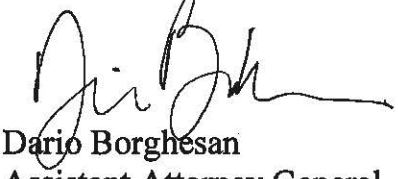
By: 

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