IN THE SUPREME COURT OF THE STATE OF ALASKA

PLANNED PARENTOOD OF THE GREAT NORTHWEST, JAN WHITEFIELD, M.D., SUSAN LEMAGIE, M.D.,	)	
Appellants/Cross-Appellees,	)	
v.	)	
	)	Supreme Court No. S-15010
STATE OF ALASKA, LOREN LEMAN, MIA COSTELLO, and KIM HUMMER-MINNERY,	)	S-15030 S-15039
Appellees/Cross Appellants.	)	Superior Court No. 3AN-12-04933CI

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

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Alaska Const. art. I, § 1. Inherent Rights

This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

Alaska Const. art I, § 22. Right of Privacy

The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

AS 18.16.010. Abortions

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

. . .

(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;

. . .

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

. . .

(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.

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 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.

JURISDICTIONAL STATEMENT

This is an appeal from the final judgment entered by the superior court at Anchorage, Alaska on December 6, 2012. [Exc. 228-30] Notice of Appeal was filed on January 4, 2013. This Court has jurisdiction pursuant to AS 22.05.010(b).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. The superior court erred in holding that the Parental Notification Law ("PNL") adequately furthers a compelling State interest under the equal protection and privacy provisions of the Alaska Constitution.

2. The superior court erred in holding that the PNL does not violate the equal protection rights of minors although abortion is singled out as the only type of pregnancy-related medical care to which unemancipated minors may not obtain confidential care without parental involvement or a court order.

3. The superior court erred in holding that the PNL does not violate the privacy rights of minors although it fails to further compelling State interests by the least restrictive means by: a) applying to 17-year-old minors seeking abortion; b) requiring "additional documentation of the person's relationship to the minor," if the adult receives notice in person; c) requiring minors who allege they are victims of abuse and seek to avoid parental notification or judicial bypass to sign a notarized statement and to secure a notarized statement from a third party in one of five specific categories, corroborating the abuse allegation; d) imposing a 48-hour waiting period following notification even when a parent, legal guardian, or custodian has previous notice of the abortion; and e) imposing criminal penalties.

STATEMENT OF THE CASE

In August 2010, the PNL was passed by initiative, making it a criminal offense for a physician to perform an abortion on a minor without providing notification to a parent or guardian, unless the minor has met stringent requirements to prove she was abused or has obtained an order from a superior court judge authorizing the abortion without compliance with the notice requirement ("judicial bypass"). Before the PNL took effect, Planned Parenthood and two individual physicians (collectively "Planned Parenthood") challenged the PNL under several provisions of the Alaska Constitution and sought a preliminary injunction. The superior court granted a partial preliminary injunction, enjoining particular requirements of the PNL, but allowing the notification requirement to take effect. [Exc. 55-64] The superior court subsequently denied motions for summary judgment, and the case was tried in February 2012. On October 8, 2012, the superior court issued a Decision and Order upholding the parental notification requirement, but construing and enjoining several individual provisions. [Exc. 163-227] The superior court issued its final judgment on December 6, 2012. [Exc. 228-30] Planned Parenthood appeals the denial of permanent and total injunctive relief against the PNL.

STATEMENT OF FACTS

A. Statutory Scheme

The PNL prohibits an unmarried, unemancipated minor under the age of 18 from obtaining an abortion without the consent of or notification to one parent, guardian, or custodian (hereinafter "parent"), proof of abuse, or a judicial bypass. Unlike other parental involvement laws that allow a clinic staffer or other health care professional to

provide notice, the PNL as enacted mandates that the physician personally provide the notice.[1] Notification must be provided in person, by telephone, or by certified letter. If notice is given by telephone ("actual notice"), the physician must attempt "to verify through a review of published telephone directories" the telephone number provided by the minor.[2] Attempts to reach the parent may only be made in a precisely delineated manner: phone calls must be made "in not less than two-hour increments, for not less than five attempts, in a 24-hour period."[3] No other notification law in the country contains such a requirement.

If attempts to provide actual notice are unsuccessful, the physician may provide "constructive notice" by sending a letter by certified mail to the last known address of the parent "after taking reasonable steps to verify the mailing address."[4] This letter is presumed to be received 48 hours after it is sent.

Finally, notice may be given to the parent, guardian, or custodian in person but only if he or she presents a government-issued identification and other documentation, such as a birth certificate or court order of adoption, proving the relationship with the minor.[5] This documentation requirement is the strictest in the nation.

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1 The superior court permanently enjoined this provision, allowing clinic personnel other than the physician to provide notice. [Exc. 226]

2 AS 18.16.020(b)(2).

3 *Id.*

4 AS 18.16.020(c).

5 AS 18.16.020(b)(1).

The PNL mandates a 48-hour delay after constructive or actual notice. A parent receiving notice by telephone cannot waive the 48-hour period even if (s)he wants to; a person receiving notice in person can do so only by consenting in writing to the abortion.[6] Not only do many states impose a shorter waiting period, but other states allow a consenting parent greater ability to waive the waiting period.[7]

The PNL states that notice is not required if a minor is the victim of physical or sexual abuse or a pattern of emotional abuse by a parent, guardian, or custodian. But in order to take advantage of the exception, the minor must provide both her own notarized statement documenting the abuse and a notarized statement from a corroborating witness with personal knowledge of the abuse who is either a sibling who is at least 21, a law enforcement officer, a representative of the Department of Health and Social Services who has investigated the abuse, a grandparent, or a stepparent.[8] No other parental involvement law that provides an abuse exception requires either notarization or corroboration.

The PNL provides that a minor may seek a judicial bypass of the notification requirement if she can establish by clear and convincing evidence that she is mature or that an abortion is in her best interest.[9] The superior court enjoined this requirement of

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6 AS 18.16.020(a)(1)(A).

7 *See infra* at nn.102, 105.

8 AS 18.16.020(a)(4).

9 AS 18.16.030(e).

proof by clear and convincing evidence, finding that it is not the least restrictive means for a judicial bypass. [Exc. 226]

The PNL contains "an overly-broad high-penalty" provision [Exc. 204], making a knowing violation a felony offense punishable "by a fine of not more than $1,000, or by imprisonment for not more than five years, or by both."[10] "No showing of harm is required" and "any knowing staff error no matter how insignificant" can be criminalized. [Exc. 226] The PNL also contains a "disturbingly undefined" civil liability provision that "imposes strict liability without fault on a physician for noncompliance with the PNL's notification provisions." [Exc. 204, 226] This provision was enjoined by the superior court. [Exc. 226]

In sum, although eleven other states currently enforce parental notice laws,[11] many features of the PNL, individually and cumulatively, make it one of the most onerous in the nation.

B. Abortion Is A Safe Procedure.

Based on the testimony at trial, the superior court correctly found that abortion is "an extraordinarily safe procedure," including for minors. [Exc. 199] This is especially true for abortions performed in the first trimester, when ninety percent of all abortions are performed. [Exc. 168] "The weight of credible evidence" presented at trial also demonstrated that abortion does not detrimentally affect mental health – either in adults

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10 AS 18.16.010(c).

11 *See* Parental Involvement in Minors' Abortions, Guttmacher Institute, http://www.guttmacher.org/statecenter/spibs/spib_PIMA.pdf (last accessed May 1, 2013).

or minors. [Exc. 171] In the words of the superior court, "The overwhelming weight of the credible evidence at trial established that parental involvement is not medically necessary for high quality abortion care." [Exc. 171] Nor is there a medical benefit to requiring a minor to notify a parent prior to terminating her pregnancy. The superior court found that minors are capable of providing their medical histories, including informing their doctors of any pre-existing conditions, medications they are taking, or medication allergies they have, and they "do an excellent job with after-care instructions." [Exc. 178; *see also* S. Exc. 264, 272 (minors are "very accurate" when providing medical histories, and capable of disclosing medication allergies)][12]

Nor is parental involvement necessary to adequately manage complications. [Exc. 179] Complications from abortion "are relatively rare and generally resolved by an obvious, immediate medical response" [Exc. 179] that is typically provided prior to the minor leaving the clinic. [Exc. 169] Hospitalization due to an abortion is "vanishingly rare." [Exc. 170] Minors are fully capable of recognizing and responding to complications in a timely manner [S. Exc. 262-63], and no concrete evidence was presented that minor women suffer adverse medical consequences from an abortion due to lack of parental involvement. [Exc. 179]

In comparison, carrying a pregnancy to term subjects a minor to more health risks and can involve more complex medical decision-making than having an abortion. "The safest obstetrical delivery is 20 times more hazardous than a first-trimester abortion."

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12 *See also* Exc. 179 (no peer-reviewed research was cited "substantiating a medical value to parental involvement in abortion").

[Exc. 169] "Minors are dramatically more at risk for an obstetrical complication than an abortion-related one," and "pregnancy complications are significantly more varied and health-threatening than abortion-related ones." [Exc. 169-70] Overall, "the carry-to-term decision may involve far weightier consequences than termination." [Exc. 218]

C. Minors' Maturity And Decision-Making

Minors of childbearing age possess "adequate cognitive abilities" to make the decision to have an abortion on their own. [Exc. 197] The superior court found:

> [M]inors aged 13 through 17 process information similarly to adults. They understand the mechanics of the abortion procedure and its risks and benefits. They accurately assess their own lack of physical, financial, intellectual, and emotional resources for parenthood. They are aware of their goals, desires, and agendas that conflict with parenting, and which parenthood would likely curtail or preclude. [Exc. 183]

In addition, the evidence established that minors seeking abortion have the "capacity . . . to furnish informed consent." [S. Exc. 294, 296] Moreover, as the superior court recognized, research on outcomes in judicial bypasses from other states has shown that there is a "de facto consensus" that "minors possess the maturity necessary to make the decision to have an abortion on their own." [Exc. 198][13]

Research also has concluded that minors who elect to terminate their pregnancies (compared to those that elect to carry to term) "tend to have greater ability to conceptualize the future;" are more likely to "have high educational accomplishments or aspirations;" and tend to have "a greater sense of control over their lives." [Exc. 181] The superior court found that "[a] minor's decision to carry to term is less demonstrably a

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[13] *See also* Exc. 184 ("bypass judges grant a judicial bypass to virtually all minors seeking it, finding them sufficiently mature to make the decision").

mature one" than the decision to terminate the pregnancy; testimony presented by the State showed that minors may "harbor unrealistic expectations" about the rigors of parenting and the impact of parenthood on their future prospects. [Exc. 183]

D. Abortion Services In Alaska

In 2011, Planned Parenthood, the main provider of abortions in Alaska, performed 87 abortions on minor women, the vast majority of whom were 16 or 17 years old. [Exc. 172, 175, 180] Abortion services, which include both surgical and medication abortion, are provided by "ethical" and "highly competent" physicians [Exc. 196] at Planned Parenthood clinics in Anchorage, Fairbanks, and Juneau, and by Dr. Susan Lemagie in Palmer. [Exc. 175]

For a number of reasons, "access to abortion services in Alaska is heavily constrained." [Exc. 172] In much of rural Alaska, there is no generally available abortion provider, including at facilities operated by the Alaska Native Tribal Health Consortium [Exc. 172], and air travel from rural communities is weather-dependent. [Exc. 203] Abortion services offered at Planned Parenthood are also limited: Planned Parenthood offers procedures in Fairbanks and Juneau only twice per month, and in Anchorage once a week. [Exc. 176] In addition, Planned Parenthood only provides abortions through the first trimester of pregnancy. [Exc. 168, 173, 177] Plaintiff Susan Lemagie can, on a very limited basis, provide abortions through 19 weeks at Valley Hospital in Palmer, but in effect, women seeking second-trimester abortions must travel out of state, with Seattle being the closest available location. [Exc. 173]

When counseling pregnant teens, it is Planned Parenthood's policy to strongly encourage young women to involve a parent in the abortion decision. [S. Exc. 273] As the evidence at trial established, the majority of pregnant teens do involve their parents before obtaining an abortion, without being compelled to do so by statute. [Exc. 184; S. Exc. 295, 303] Research from other states that do not mandate parental involvement shows that, in the majority of cases, parents are aware when their minor daughter is seeking an abortion. [Exc. 184] "The younger the minor, the more likely she [i]s to inform her parents of her pregnancy." [Exc. 181]

E. Risks Of Disclosure And Delay Caused By The PNL

Although the vast majority of minors seeking to terminate their pregnancies consult with a parent or other adult before the procedure [Exc. 197], the evidence demonstrates that, when they do not, it is often for compelling reasons. In particular, the evidence shows that a minor who does not consult with a parent frequently has a well-founded fear of physical, sexual, or emotional abuse, including by a parent or others close to her, and this fear is often based on the fact that prior abuse has occurred. [S. Exc. 266-67, 286-88] Notably, the rate of child abuse in Alaska is among the highest in the country [S. Exc. 274-75, 297-98], and is correlated to the high rate of domestic violence and parental substance abuse in this state. [S. Exc. 275] Minors who have already experienced abuse "have every reason to believe that something as serious as an unwanted pregnancy is something that's going to trigger a violent response." [S. Exc. 276]

Other minors choose not to involve their parents for fear of being thrown out of the house, or because they believe their parents will try to force them to carry the pregnancy to term (including because of the parents' religious beliefs). [S. Exc. 293; Exc. 197] "An assertive parent opposed to abortion may induce the minor to carry to term against her self-perceived best interest, and so effectively exercise a parental veto." [Exc. 186][14] Requiring notice therefore increases the risk of the very harm that the minor is seeking to avoid by obtaining an abortion without parental knowledge.

The PNL also causes harm through delay, "exposing minors to cascading consequences impacting [their] health." [Exc. 203] First, for many minors who would not otherwise involve a parent, the existence of a parental law and the fear of mandatory notification will cause them to delay before seeking abortion care. [S. Exc. 259-61] Minors who have experienced abuse and who learn of a mandatory disclosure requirement are likely to delay for weeks before seeking care; such delays are in addition to the mandatory delays set forth in the PNL. [S. Exc. 268-70]

The practical difficulties associated with providing notice or constructive notice add to the 48-hour delay imposed by the PNL. The fact that services at Planned Parenthood are limited to the first trimester means that "time might be of the essence" [Exc. 200] for those minors who contact the clinic on the cusp of that cutoff. "Notably, in the fourteen months between the PNL's inception and the trial, the Fairbanks clinic had two close calls with pregnancies nearing the second trimester." [Exc. 203]

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[14] For some abused minors, there is no difference between requiring parental consent or notice because the harmful consequences are the result of the abusing parent becoming aware of the pregnancy. [S. Exc. 291-92]

The evidence also established that the bypass procedure is "daunting." [Exc. 195] As the superior court noted, "the prospect of disclosing intimate life details to a judge inspires trepidation." [Exc. 210] Minors often feel intimidated and scared addressing a judge in any context, but particularly about personal matters. [S. Exc. 300-01] The added logistical burdens of figuring out how to file a complaint and participate in a court hearing will be "stressful" and "terrifying" for some – in part because of concerns about maintaining confidentiality – and will likely add to delays. [Exc. 217; S. Exc. 282-83, 289-90] Minors living in villages or small towns in Alaska will be particularly burdened where the very notion of disclosing one's personal family information to "the system" runs against cultural norms, in addition to any language barriers that exist. [S. Exc. 301-02][15]

The PNL's abuse exception – which requires that the minor provide a notarized statement documenting her abuse, and a notarized statement from a corroborating witness with personal knowledge of the abuse[16] – is "largely illusory" because few, if any, abused minors can satisfy its requirements. [Exc. 225] Specifically, the evidence demonstrated that this requirement would be "extremely daunting" given that some minors feel responsible for the abuse, and many individuals are reluctant to get involved in such a sensitive family affair. [S. Exc. 279] The notarization requirement is particularly onerous for minors that live in rural areas, as "some village postmaster notaries habitually

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15 *See also* S. Exc. 284-85 (noting that "cultural and communication differences that exist with Alaska Natives" must be taken into account when dealing with issues related to communication).

16 AS 18.16.020(a)(4).

peruse documents," thereby jeopardizing the minors' anonymity. [Exc. 217] The corroboration requirement will act as a complete bar for many minors [Exc. 225], and it "subtly echoes the perpetrator's taunt that no authority figure will accept the young woman's word." [Exc. 225] Moreover, it would be extremely rare for a minor to fabricate abuse in order to take advantage of the abuse exception. [S. Exc. 299] Nor does the bypass requirement alleviate these burdens: Minors who experience abuse may be very reluctant to discuss the abuse they have experienced with a judge. [S. Exc. 277]

STANDARDS OF REVIEW

This Court "review[s] constitutional questions de novo, adopting the most persuasive rule of law in light of precedent, reason, and policy."[17] The Court exercises "independent judgment" if a constitutional issue involves mixed questions of law and fact.[18] The superior court's factual determinations are reviewed for "clear error."[19]

ARGUMENTS

I. THE PARENTAL NOTICE LAW FAILS UNDER BOTH EQUAL PROTECTON AND PRIVACY BECAUSE IT DOES NOT ADEQUATELY FURTHER A COMPELLING STATE INTEREST.

To survive under either the equal protection or privacy provisions of the Alaska Constitution, a law, like the PNL, that burdens fundamental rights, must further a

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17 *State v. Planned Parenthood* ("*Planned Parenthood II*"), 171 P.3d 577, 581 (Alaska 2007) (striking down a law requiring parental consent for abortion (citing *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 260 (Alaska 2004)).

18 *Munson v. State*, 123 P.3d 1042, 1045-46 (Alaska 2005) (citations omitted).

19 *Id.* at 1062 n.8 (citing *State v. Ridgely*, 732 P.2d 550, 554 (Alaska 1987)).

compelling State interest.[20] The State invoked a series of interests in defense of the PNL. The superior court found as a factual matter that the PNL does not meaningfully advance most of these interests. In particular, the court found that the PNL does not advance the State's asserted interests in minors' health, in protecting minors from sexual abuse, or in informed and mature decision-making, and therefore that none of these interests can justify the law. [Exc. 180, 181, 197-98] With regard to the lone remaining interest asserted by the State – the interest in fostering family solidarity – the superior court's findings of fact demonstrated that few, if any, families would benefit from the PNL. The court likewise found that the PNL "is a fairly tentative mechanism to advance family consultation," which could only have "some unknowable" and "small" impact on the State's asserted interest. [Exc. 194-95] Nevertheless, the court erroneously concluded that, under the Alaska Constitution, such a negligible and indiscernible contribution to the State's interest is sufficient to survive strict scrutiny. Because this conclusion is antithetical to the strict scrutiny review applicable to challenges under both the equal protection and privacy provisions, the PNL cannot be sustained.

A. Family Cohesion Is Not A Compelling State Interest Where Few, If Any, Families Will Be Positively Affected.

The evidence failed to establish that the State's interest in family cohesion is compelling as to parental notification of minors seeking abortion. The State "does not

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[20] *Planned Parenthood II*, 171 P.3d at 581 (under privacy provision, laws burdening the fundamental right of reproductive choice must actually further a compelling State interest); *State v. Planned Parenthood ("Planned Parenthood I")*, 35 P.3d 30, 42 (Alaska 2001) (under equal protection, the State "must prove a compelling governmental interest").

have a compelling interest in each marginal percentage point by which its goals are advanced."[21] Here, the superior court found that "over 60 percent of parents of pregnant teenagers are informed or become aware of the pregnancy, and will learn of any abortion decision independently from the PNL; as to them the PNL is irrelevant." [Exc. 194] Of the remaining 40 percent of families, half could face serious, adverse consequences if a parent were notified that a daughter is pregnant and considering an abortion. [Exc. 194] Thus, for at least 80 percent of families, the PNL is either irrelevant or harmful.

With respect to the remaining 20 percent of families, the State failed to prove that the PNL would further family cohesiveness. As the superior court found, "A non-abusive parent will not always be helpful to a pregnant minor deciding whether to abort." [Exc. 186] In addition, the majority of non-disclosing minors live with only one or neither parent; "[t]hese minors can select which parent to notify, and are free to gravitate to the less-involved parent whose participation in their decision may be *pro forma*." [Exc. 195] Referencing evidence that the PNL caused one young woman from Fairbanks to notify her estranged father about her desire to have an abortion, the court said that "*[p]erhaps* this contributed familial value; perhaps it amounted to no more than a stressful disclosure to a virtual stranger." [Exc. 192 (emphasis added)] And, of course, minors could utilize the judicial bypass option, which would eliminate parental notification altogether. Thus, even if there were non-speculative evidence that the PNL could foster family

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[21] *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741 n.9 (2011); *cf. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 704 (2007) (student assignment plan which took into account students' race did not survive strict scrutiny, in part because the "minimal impact" of the suspect practice "cast doubt" on its "necessity").

cohesiveness, it would do so only in substantially less than 20 percent of all cases. "[F]illing . . . [such a] modest gap . . . can hardly be a compelling state interest."[22]

B. A Law Like The PNL That Does No More Than Tentatively Further A Compelling State Interest To A Small, Unknowable Degree Cannot Satisfy Strict Scrutiny.

Moreover, the superior court erred in concluding that a law survives strict scrutiny if it only "tentative[ly]" advances a State interest to "some unknowable" and "small" degree. [Exc. 194-95] Stating that "Alaska case law does not articulate the degree of furtherance of a compelling state interest required to uphold a measure impinging on fundamental constitutional rights," the superior court concluded that, under the Alaska Constitution, a statute need only bear a slight and unknowable connection to a compelling State interest to satisfy strict scrutiny. [Exc. 195] This conclusion is fundamentally incompatible with strict scrutiny and must be reversed.

This Court has long made clear that, in order to survive strict scrutiny, whether under equal protection or privacy, the challenged statute must be "*necessary* to further a compelling state interest."[23] A law that "does not *significantly* further [the] . . . government['s] interest . . . *cannot be necessary to further that interest*,"[24] and thus will not survive strict scrutiny. For example, in *Alaskans for a Common Language, Inc. v. Kritz*, this Court struck down a law under strict scrutiny review where it appeared that

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22 *Brown*, 131 S. Ct. at 2741.

23 *Planned Parenthood II*, 171 P.3d at 579 (quoting *Planned Parenthood I*, 35 P.3d at 41 (emphasis added)); *accord, Pub. Emps. Retirement Sys. v. Gallant*, 153 P.3d 346, 350 (Alaska 2007); *Myers v. Alaska Psychiatric Inst.*, 138 P.3d 238, 248 (Alaska 2006).

24 *Witt v. U.S. Dept. of the Air Force*, 739 F. Supp. 2d 1308, 1316 (W.D. Wash. 2010) (emphasis added).

"the methods [the law] employs in support of its admirable goals [were] of questionable efficacy" in achieving those goals.[25]

Similarly, in *Breese v. Smith*, this Court considered whether a regulation on the length of students' hair was necessary to further the government's "compelling interest in the education of . . . children" and the "management of [its] schools."[26] This Court held that the government failed to show that the regulation was necessary to further these compelling interests because the school's evidence did not prove with "hard facts" that there was a "causal relationship" between the operation of the law (and its impingement on constitutional rights) and furtherance of the interests.[27]

This Court's decisions in *Alaskans for a Common Language* and *Breese* cannot be squared with the superior court's conclusion that the PNL satisfies the compelling interest requirement merely because it "*has the potential* to foster family solidarity" to "some unknowable" and "small" degree that "should not be exaggerated." [Exc. 194-95

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[25] *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 208 (Alaska 2007). That case applied strict scrutiny in the context of a free speech analysis, but, as this Court has recognized, the compelling interest analysis for strict scrutiny is the same whether the right burdened is that of free speech, privacy, or equal protection. *See Valley Hosp. Ass'n, Inc. v. Mat-Su Coalition for Choice*, 948 P.2d 963, 971 (Alaska 1997) (citing *Vogler v. Miller*, 651 P.2d 1 (Alaska 1982), a free speech case, as authority for the strict scrutiny standard that applies to privacy cases); *see also, e.g., Treacy*, 91 P.3d at 264 & n.51 (citing *Valley Hosp. Ass'n*, a privacy case, for the strict scrutiny standard that applies under equal protection when a classification "impinges on a fundamental right").

[26] *Breese v. Smith*, 501 P.2d 159, 166 (Alaska 1972).

[27] *Id.* at 172 (quotation marks and citation omitted); *accord, Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 828 (Cal. 1997) (defendants failed to provide "empirical studies or other comparable evidence" to demonstrate that a parental consent to abortion law would actually enhance parent-child relationships).

(emphasis added)] Such a slight and uncertain relationship is manifestly insufficient to satisfy strict scrutiny.[28]

Indeed, even when applying *less exacting* standards, this Court has required a far more direct, certain connection between the statute and the government's interest than the superior court found between the PNL and the State's interest in family solidarity. For example, under the less exacting standard applicable where *non-fundamental* privacy rights are at stake, this Court has required the State to prove that there is a "close and substantial relationship between its interest and its chosen means of advancing that interest."[29] It simply cannot be the case, as the superior court believed, that this Court's

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[28] *Planned Parenthood I* and *II* do not dictate a different result. In *Planned Parenthood I*, this Court emphasized that, even if the interests underlying the law may be considered compelling in the abstract, the State nonetheless must prove that the law actually will further those interests. *See* 35 P.3d at 45 (even if asserted interests are compelling, evidence might show that the "act will not actually accomplish these purposes"); *see also id.* at 46 (State must prove that the law "*actually furthers* compelling state interests") (emphasis added). In *Planned Parenthood II*, the Court found, as a general matter, that the governmental interests underlying the Parental Consent Act ("PCA") were compelling. *See* 171 P.3d at 582. Because the Court concluded that the PCA was not narrowly tailored, it did not address whether the PCA would actually further those interests to a non-trivial degree. *See id.* at 583. Here, it would not be appropriate to assume that the PNL will actually further the State's interests to a meaningful degree, given the superior court's express factual findings to the contrary.

[29] *Fraternal Order of Eagles v. City & Borough of Juneau*, 254 P.3d 348, 356 (Alaska 2011); *accord, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980) (law will not survive even intermediate scrutiny if it provides only "ineffective or remote support for the government's purpose"); *Witt*, 739 F. Supp. 2d at 1316 (to survive intermediate scrutiny, government must show that its actions "significantly further" the asserted interest).

"most searching judicial scrutiny"[30] requires a *lesser* showing than where non-fundamental rights are involved.[31] Indeed, this Court has held otherwise.[32]

This Court should hold that the PNL does not sufficiently advance a compelling State interest and therefore cannot survive strict scrutiny under either the equal protection or privacy provisions of the Alaska Constitution.

II. THE PARENTAL NOTICE LAW VIOLATES THE EQUAL PROTECTION RIGHTS OF MINORS.

The PNL impermissibly treats two similarly situated groups of pregnant minors – those seeking abortion care and those seeking other pregnancy-related medical care – differently. Minors seeking abortion care and minors seeking other pregnancy-related medical care are similarly situated for equal protection purposes, for, as this Court has observed, "a woman who carries her pregnancy to term and a woman who terminates her pregnancy exercise the same fundamental right to reproductive choice. *Alaska's equal protection clause does not permit government discrimination against either woman.*"[33]

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30 *State, Dept. of Health & Soc. Servs. v. Planned Parenthood of Alaska*, 28 P.3d 904, 909 (Alaska 2001).

31 Nor is the PNL's "symbolic significance to the adopting electorate," which the superior court alluded to in its compelling interest analysis [Exc. 195], relevant to whether the PNL is necessary to advance a compelling State interest. In *Alaskans for a Common Language*, this Court considered a law that likewise was enacted via initiative and that too was symbolically important to voters. *See* 170 P.3d at 187, 207. The fact that the law in that case was enacted by initiative was not relevant to this Court's compelling interest analysis, nor did this Court hesitate to conclude that, because the law would be of questionable efficacy in advancing a compelling State interest, it could not survive strict scrutiny. *See id.* at 208.

32 *See, e.g., id.* at 208; *Breese*, 501 P.2d at 172.

33 *State, Dept. of Health & Soc. Servs.*, 28 P.3d at 913 (emphasis added).

However, under the PNL minors seeking to exercise their constitutionally protected right to terminate a pregnancy are precluded from obtaining confidential care and are forced to accept the burdens of delay and other harmful consequences, while minors seeking all other forms of pregnancy-related medical care may do so without State-imposed interference. This discriminatory treatment renders the PNL unconstitutional.

The superior court incorrectly concluded that the PNL does not violate the equal protection clause, based on two errors of law. First, it surmised that this Court's privacy-based decision in *Planned Parenthood II* forecloses success on the equal protection claim here. Second, it concluded that the two groups are not similarly situated. As a result of these errors, the court did not undertake a full-blown equal protection analysis. Applying the applicable strict scrutiny standard demonstrates beyond doubt, however, that the PNL violates the equal protection rights of minors seeking abortion.

A. *Planned Parenthood II* Does Not Foreclose Full Consideration Of The Equal Protection Claim.

The superior court incorrectly relied on *Planned Parenthood II* to support its conclusion that the PNL does not violate the equal protection rights of minors seeking abortion. [Exc. 220-21] It reasoned that this Court's statement that parental notification is not *per se* a violation of the *privacy clause* "strongly implies" that this Court would also reject the *equal protection* claim. [Exc. 220-21 ("The Court's formal reservation of the equal protection issue . . . seems more theoretical than real.")] The superior court was wrong to conclude that this Court's privacy analysis in *Planned Parenthood II* amounted to a wholesale, albeit *sub silentio*, rejection of the current equal protection claims.

Indeed, given this Court's express statement that *Planned Parenthood II* did not address the equal protection issue,[34] the superior court's determination that it addressed and foreclosed the equal protection claims of minors seeking abortions is simply untenable.

The superior court's conclusion is also at odds with this Court's decision in *Planned Parenthood I*. There, in a lengthy, detailed analysis, this Court recognized that the parental consent law "create[d] several potentially significant classes of similarly situated minors," including classes based on AS 25.20.025(a)(4), which "gives all minors – even those who are unemancipated and living with a parent or guardian – authority to consent to a broad range of medical services . . . except abortion, including 'diagnosis, prevention or treatment of pregnancy.'"[35] This Court made clear that "all these differences fall within the ambit of the equal protection question raised in this case and deserve careful scrutiny."[36]

In concluding that the privacy outcome in *Planned Parenthood II* forecloses the equal protection claim here, the superior court further asserted that, "in the abortion context, privacy and equal protection analyses are parallel and consistent, rising and falling together." [Exc. 220] That conclusion directly contradicts this Court's precedent. In *Planned Parenthood I*, this Court explained that, in the context of minors seeking abortion care, the privacy and equal protection analyses *do not* rise and fall together. The superior court in that case had treated the two issues as analytically parallel, an approach

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34 *Planned Parenthood II*, 171 P.3d at 581 n.21.

35 *Planned Parenthood I*, 35 P.3d at 43 (emphasis added).

36 *Id.*

this Court characterized as "problematic" precisely because the analyses are not inherently analogous.[37] *Planned Parenthood I* thus makes clear that the superior court here was incorrect to treat the privacy and equal protection analyses as parallel. Given that courts do "not normally overturn, or so dramatically limit, earlier authority *sub silentio*,"[38] the superior court's conclusion that *Planned Parenthood II* silently rejected the extensive equal protection analysis in *Planned Parenthood I* is erroneous.

Indeed, the superior court's conclusion fails to appreciate the distinct interests protected by the different constitutional provisions. In the equal protection clause, the "Alaska Constitution provides that all persons are entitled to equal rights, opportunities, and protection under the law. We interpret this provision to be a command to state and local governments to treat those who are similarly situated alike."[39] In contrast, "the primary purpose of [the privacy] section is to protect Alaskans' 'personal privacy and dignity against unwarranted intrusions by the State.'"[40]

The superior court's analysis, however, leads to the anomalous result that minors seeking to exercise their fundamental right of reproductive choice are protected only to the extent of their privacy rights, with no distinct protection for equal protection. If allowed to stand, this conclusion would set a dangerous precedent: distinct fundamental

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37 *Id.* at 44.

38 *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000); *accord, Todd v. State*, 917 P.2d 674, 678 n.3 (Alaska 1996) (presuming that courts do not overrule prior lines of cases *sub silentio*).

39 *Gallant*, 153 P.3d at 349 (quotation marks and citations omitted).

40 *Planned Parenthood II*, 171 P.3d at 581 (quoting *Luedtke v. Nabors Alaska Drilling Inc.*, 768 P.2d 1123, 1129 (Alaska 1989) (further citations omitted)).

rights could evaporate in this and other contexts.

Taken together, the *Planned Parenthood* decisions dictate that the robust protection afforded to the equal protection rights of minors are not diminished based on the fact that a parental notification law is not a per se violation of the privacy clause.

B. Minors Seeking Abortion Care And Minors Seeking Other Pregnancy Care Are Similarly Situated.

Minors seeking abortion care and those seeking other pregnancy care are similarly situated – each minor is deciding how to respond to a pregnancy, which, regardless of what she decides, will have implications for her health and her future. For 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.

The superior court erred in concluding that pregnant minors seeking medical care related to terminating a pregnancy are not similarly situated to pregnant minors seeking medical care related to the continuation of the pregnancy, and in fact failed to undertake the analysis applicable to that determination. The initial step in assessing an equal protection claim determines whether the groups at issue are similarly situated. As this Court has explained: "*In order to determine whether differently treated groups are similarly situated, we look to the state's reasons for treating the groups differently.*"[41] Had the superior court followed this analysis, it would have seen that its own findings

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[41] *Gallant*, 153 P.3d at 349 (emphasis added); *see also Gonzales v. Safeway Stores*, 882 P.2d 389, 396 (Alaska 1994) ("Equal protection jurisprudence concerns itself largely with the reasons for treating one group differently from another.").

establish that pregnant minors who continue a pregnancy and minors who terminate one are similarly situated.

Here, the State in closing argument articulated three reasons for treating the groups differently: (1) that abortion is an irreversible decision that a minor might regret; (2) that abortion can be kept secret, whereas parents will learn that their daughter is pregnant when the pregnancy reaches a late enough stage; and (3) that abortion requires medical intervention, whereas a pregnant minor carrying to term "doesn't absolutely have to" seek medical care. [S. Exc. 304-06]

The superior court's factual findings make clear, however, that none of these reasons justifies the PNL's differential treatment of minors seeking abortion care. First, as to the State's contention that minors may regret having an abortion, the superior court found that minors seeking abortions are competent decision-makers, and that a minor's decision to seek abortion care "involves far fewer enduring consequences" than the decision to carry to term. [Exc. 183-84, 197-99, 218] To the extent pregnant minors must make decisions with lasting consequences, then, the State has no reason to treat minors carrying to term more favorably than minors seeking abortions – the State's interest in familial communication applies with even greater force to minors carrying to term. Second, as to the State's contention that abortion can be kept secret, the evidence showed that pregnancy too can be kept secret at least until 24 weeks, which is well past when a decision can be made to obtain an abortion in Alaska and far beyond the stage when a minor should obtain pregnancy-related medical care. [S. Exc. 265; Exc. 173, 221] The potential to keep abortion a secret is no justification for the State's differential

treatment, because pregnancy can likewise be hidden past the point when important pregnancy-related decisions must be made. Third, as to the State's contention that pregnant minors carrying to term do not "absolutely have to" obtain medical care, the superior court found that early medical consultation is important *both* for minors seeking abortions *and* minors carrying to term. [Exc. 171, 221] This rationale thus also fails to justify treating these two categories of minors differently. In light of these findings, the State's asserted reasons for its differential treatment of the two groups are unsustainable.[42]

Notwithstanding the patent inadequacy of the State's own "reasons for treating the groups differently,"[43] the superior court concluded that minors seeking abortion care and those seeking other pregnancy-related medical care are not similarly situated. It reached this conclusion, not by looking to the government's asserted interests underlying the PNL, but by erroneously considering the operation of the medical emancipation statute.[44]

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[42] In its preliminary injunction briefing, the State identified two additional reasons in support of its differential treatment, each of which serves only to highlight the similarity between the two classes. First, the State asserted that abortion "raises a host of important non-medical issues," including "whether a minor is ready to care for a child." [S. Exc. 256] But the superior court found that the decision to carry to term implicates the same non-medical considerations to an equal or greater degree. [Exc. 218] Second, the State asserted that it could not require parental notification at the moment a minor *makes the decision* to keep her pregnancy, but could only do so when she seeks medical care related to that decision. [S. Exc. 257-58] But here too, the State cannot practically mandate parental involvement at the moment a minor decides what to do about her pregnancy (irrespective of whether she decides to abort or to carry to term) – it can do so only when she seeks medical care.

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

[44] The medical emancipation statute provides in relevant part: "Except as prohibited under AS 18.16.010(a)(3)," "a minor may give consent for diagnosis, prevention or

The superior court reasoned:

> [O]nce a minor elects an imminent abortion, the core rationale underpinning medical emancipation no longer applies to her; she no longer requires encouragement to see a doctor to protect her own health and that of her fetus. Other considerations such as familial involvement no longer tend to defeat her health interest, and so may be considered in a new light. When a minor decides to opt out of pregnancy, she is no longer similarly situated with other pregnant minors with respect to the familial consultation issue. [Exc. 221-22]

This conclusion is incorrect as a matter of law and fact. Whether two groups are similarly situated is generally a question of fact.[45] Here, the superior court's conclusions regarding minors seeking "imminent abortions" are unsupported and erroneous as a matter of fact. The determination that the two groups are not similarly situated based on the application of the medical emancipation statute is an error of law.

As a matter of law, in addition to overlooking the State's asserted reasons for dissimilar treatment under the PNL, the superior court was wrong to focus on the interests underlying a statute not challenged in this case – the medical emancipation statute.[46] Whether or not Planned Parenthood met the threshold showing necessary for full consideration of its equal protection claim must be based on the reasons for dissimilar treatment within the statute at issue – the PNL. The superior court's surmised rationale for the medical emancipation statute cannot be determinative of this issue. To hold otherwise would foreclose any equal protection claim against any parental involvement

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treatment of pregnancy . . . ." AS 25.20.025(a)(4).

[45] *See Alaska Inter-Tribal Council v. State*, 110 P.3d 947, 967 (Alaska 2005) (citation omitted).

[46] A version of the medical emancipation statute, AS 25.20.025, was first enacted in 1968. Its current form is quoted in relevant part *supra* at n.44.

law, so long as the medical emancipation statute remains on the books. Such a result cannot stand.

Factually, the superior court's analysis erroneously postulates that a pregnant minor who intends to have an abortion has "elect[ed] an *imminent* abortion." [Exc. 221 (emphasis added)] But the superior court did not explain what it meant by "imminent abortion." In context, it appears that the superior court assumed that, in contrast with pregnant minors choosing to carry to term, a minor choosing abortion needs no "encouragement to see a doctor to protect her own health" because she has already reached a point where mandated parental involvement could not work to her detriment or hinder her by "fear of coerced parental notice." [Exc. 221] The superior court appears to have drawn the unsupported factual conclusion that the PNL will only be a factor after the minor has scheduled her abortion. Even if the PNL does not come into play until a minor calls to schedule an abortion (an assumption for which there is no basis), thereby somehow making her abortion "imminent," the PNL still may operate to dissuade or delay a minor from seeking care. Equating an abortion with an imminent abortion merely assumes the truth of the superior court's premise: That it is unnecessary to facilitate a minor's access to abortion care, as the medical emancipation statute does for minors seeking other pregnancy-related medical care, because the care is already imminent and cannot be hindered by "fear of coerced parental notice."

The record evidence shows that precisely the opposite is true. Specifically, the record makes clear that minors desiring abortions, just like minors who wish to obtain prenatal care, are likely to delay seeking medical care out of fear that their parents will

find out that they are sexually active and pregnant,[47] and that delay in obtaining abortion care can be detrimental to minors' health. [Exc. 171] Simply because a minor has elected abortion does not mean that fear of mandatory parental notice cannot impede or interrupt (through fear, avoidance, and/or delay) her access to care. Thus, the very same interest underlying the medical emancipation statute's provision protecting minors seeking non-abortion pregnancy care – the interest in encouraging a pregnant minor to seek timely medical care "without fear of coerced parental notice" – unquestionably applies to minors who decide to terminate their pregnancies. [Exc. 221][48] Stripped of its inappropriate conflation of "abortion" with "imminent abortion," the superior court's conclusion that the "core rationale" of medical emancipation does not apply to minors who intend to obtain abortion care is wrong [Exc. 221], and fails to justify the PNL's differential treatment of minors seeking abortions.

C. The PNL Does Not Further Compelling State Interests By The Least Restrictive Means.

Once it has been established that a law treats similarly situated groups of people unequally, this Court applies a "sliding scale" test to equal protection claims, "which

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47 *See* S. Exc. 259-60 (among the "factors that can cause a delay for minors seeking either abortions or prenatal care" is that "they're afraid of telling their parents about it"), 268-71 (discussing delay by abused minors as it relates to fear of parents learning of pregnancy and abortion; "if somebody's aware of mandatory disclosure . . . one of the hallmarks of being an abuse victim and suffering from any kind of traumatic response is avoidance").

48 Indeed, the similarity between these two classes of minors is particularly evident in light of the only State interest that the superior court found the PNL to further – the interest in family cohesion.

places a greater or lesser burden on the state to justify a classification depending on the importance of the individual right involved":

> If the right impaired by the challenged legislation is not very important, the State need only show that its objectives are legitimate and that the legislation bears a substantial relationship to its purpose. At the other end of the continuum, legislation that impairs one of the most important individual interests will be upheld only if it furthers the State's compelling interest and if it is the least restrictive means available to achieve the State's objective.[49]

This Court has already determined that the right to choose an abortion is a fundamental right applicable to minors under the Alaska Constitution.[50] Accordingly, the next consideration is whether the State has met its burden of showing that the PNL is necessary to further a compelling interest. The State has not. As discussed in Argument I above, the PNL does not adequately further the sole compelling interest found by the superior court to support the notice requirement – family cohesion. As a result, the PNL violates the equal protection rights of minors seeking abortion, whether or not it satisfies the least restrictive means requirement.

Even assuming that the PNL adequately furthered a compelling State interest, however, it is abundantly clear that it does not satisfy the least restrictive means analysis. When a law burdens a fundamental right, the last part of the sliding scale equal protection analysis examines whether the law "is the least restrictive means available to achieve the

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[49] *C.J. v. State, Dept. of Corrections*, 151 P.3d 373, 378 (Alaska 2006) (footnotes and internal quotes omitted).

[50] *Planned Parenthood II*, 171 P.3d at 581-82; *Planned Parenthood I*, 35 P.3d at 40-41.

State's objective."[51] Although on its face this may appear similar to the final step of the strict scrutiny test applicable in the context of privacy, this Court made clear in *Planned Parenthood I* that, in assessing parental involvement laws, the last step of the equal protection analysis looks at "whether the state had compelling reasons to require parental [notice] or judicial authorization for one group of minors but not another."[52] Given that the applicable standard is strict scrutiny, the PNL's "means-to-ends fit" must be a close one: "If the purpose can be accomplished by a less restrictive alternative, the classification will be invalidated."[53] Here, the State cannot satisfy the final prong of the equal protection analysis because the PNL is under-inclusive. A law with even the "potential for pervasive over- and under-inclusiveness" is not narrowly tailored and cannot survive strict scrutiny.[54]

The PNL is under-inclusive because it does not apply to all minors for whom the State has the same interest in promoting parental involvement in making decisions regarding pregnancy-related medical care. Parental notification for a minor seeking

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51 *C.J.*, 151 P.3d at 378 (quotation marks and citation omitted).

52 *Planned Parenthood I*, 35 P.3d at 44. *See also Fuzzard v. State*, 13 P.3d 1163, 1168 (Alaska App. 2000) (the court "must examine the connection between the social policies underlying the statute and the means adopted in the statute to further those policies") (citation omitted).

53 *Alaska Civil Liberties Union v. State*, 122 P.3d 781, 789 (Alaska 2005) (citations omitted).

54 *State v. Enserch Alaska Constr. Inc.*, 787 P.2d 624, 635 (Alaska 1989); *see also Patrick v. Lynden Trans., Inc.*, 765 P.2d 1375, 1379 (Alaska 1988) (although State's purposes were legitimate, the over- and under-inclusive means utilized by the legislature were not "sufficiently well-tailored to its ends where the important constitutional right of access to the courts is infringed").

pregnancy care would serve the same State interests, to the same or greater extent, as parental notification for abortion. Specifically, the superior court found that "[f]ew life decisions could benefit more from consultation with supportive parents than a minor's decision to carry to term; the decision to abort, comparatively, involves far fewer enduring consequences." [Exc. 218] The superior court also found that carrying a pregnancy to term carries significantly more health risks than abortion, meaning that, if parental input has any value for minors' medical decision-making, it is more valuable for minors carrying to term than for minors seeking abortions. [Exc. 169-71] And the superior court's factual findings concerning the maturity of pregnant minors make clear that, to the extent the State claims an interest in protecting minors from their immaturity, that interest applies with greater force to minors carrying to term than to minors seeking abortions. [Exc. 181-84, 196-98] The evidence overwhelmingly demonstrates that by burdening minors choosing abortion but not minors seeking other pregnancy-related medical care, the PNL is fatally under-inclusive.[55]

D. Decisions From Other Courts Applying Strict Scrutiny Support The Conclusion That The PNL Violates The Equal Protection Rights Of Minors Seeking Abortions.

Analyses of parental involvement laws by the Supreme Courts of New Jersey, Florida, and California support the conclusion that the PNL is unconstitutional under Alaska's equal protection clause. Each of these courts has, like Alaska, recognized the right of reproductive choice as fundamental under the state constitution and applied strict

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[55] *See State, Dept. of Health & Soc. Servs.*, 28 P.3d at 913.

scrutiny to analyze claims against parental involvement laws.[56] Although the Courts reached their results through varied analyses, the common thread in the decisions relevant to equal protection analysis is that the State in each instance failed to justify its disparate treatment of minors seeking abortions versus those seeking other pregnancy care.[57]

In *Planned Parenthood of Central New Jersey v. Farmer*, the New Jersey Supreme Court struck down a parental notification requirement on equal protection grounds, finding that the State had failed to "offer adequate justification for distinguishing between minors seeking an abortion and minors seeking medical and surgical care relating to their pregnancies."[58] The court found that "plaintiffs present compelling evidence that neither the interests of parents nor the interests of minors are advanced by the Notification Act, and further *that there is no principled basis for imposing special burdens only on that class of minors seeking an abortion.*"[59] The court therefore held that "the State's interest in enforcing the statutory classification fails to override the substantial intrusions it imposes on a young woman's fundamental right to an abortion."[60]

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56 *See Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620 (N.J. 2000); *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612 (Fla. 2003); *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 823 (Cal. 1997).

57 This Court acknowledged each of these decisions in *Planned Parenthood I*. *See* 35 P.3d at 40, 43 n.84, 45 nn. 93 & 95-97. It is implausible to suggest, as the superior court did [Exc. 220], that this Court subsequently rejected these decisions without discussion in *Planned Parenthood II*. *Planned Parenthood II* did not cite these cases, but they were not relevant, given the Court's disposition of the privacy claim as failing under the least restrictive means prong of the privacy analysis.

58 762 A.2d at 642.

59 *Id.* (emphasis added).

60 *Id.* at 643.

The Florida Supreme Court has invalidated both parental consent and parental notice requirements under the state's explicit privacy provision, finding that the disparate treatment of minors carrying to term demonstrated that the State's asserted interests were not compelling (akin to the second prong of Alaska's equal protection analysis). The court observed in striking down the parental notification law that "[t]he State's interests in protecting an immature minor and fostering the integrity of the family, while important and worthy, do not justify restricting a minor's right to choose abortion where similar restrictions are not imposed on comparable choices or decisions."[61] Similarly, in striking down the earlier parental consent law, the court, noting that Florida law allowed a pregnant minor to consent to any medical procedure related to her pregnancy except abortion, was "unable to discern a special compelling interest . . . in protecting the minor only where abortion is concerned."[62]

The California Supreme Court also invalidated a parental consent requirement under that state's explicit privacy provision.[63] Although the California court accepted the State's asserted interests as compelling, it nonetheless found that, "in view of the numerous statutes authorizing a minor, without parental consent, to obtain medical care or make other fundamental decisions for herself and her child in other, analogous settings, [the challenged law] cannot properly be sustained on the ground that its

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61 *See N. Fla. Women's Health & Counseling Servs.*, 866 So. 2d at 633 (quoting approvingly from the trial court decision).

62 *In re T.W.*, 551 So. 2d 1186, 1195 (Fla. 1989) (footnote omitted).

63 *Lungren*, 940 P.2d at 823.

requirements are necessary . . . to protect the minor's relationship with her parent."[64]

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In sum, minors seeking abortions and minors seeking other pregnancy-related medical care *are* similarly situated in every respect relevant to the State's asserted interests. The State has failed to show that the PNL adequately furthers a compelling interest. And the exclusion of minors seeking other pregnancy care demonstrates that the law does not meet the close means-to-ends fit required under the strict scrutiny equal protection analysis. The PNL therefore should be declared unconstitutional in its entirety as violative of the guarantee of equal protection.

III. THE PARENTAL NOTICE LAW VIOLATES THE PRIVACY RIGHTS OF MINORS.

Because "the 'uniquely personal physical, psychological, and economic implications of the abortion decision . . . are in no way peculiar to adult women,'" this Court has "explicitly extended the fundamental reproductive rights guaranteed by the privacy clause to minors."[65] The PNL "unquestionably" burdens these rights, and as such, it must be found unconstitutional unless it satisfies strict scrutiny.[66] Under this "most searching judicial scrutiny,"[67] the PNL may be upheld only if the State sustains its

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64 *Id.* at 827-28. The court therefore did not consider whether the parental consent statute was the least restrictive means by which the State could achieve its asserted interests.

65 *Planned Parenthood II*, 171 P.3d at 582 (quoting *Planned Parenthood I*, 35 P.3d at 40).

66 *Id.* at 582, 584.

67 *State, Dept. of Health & Soc. Servs.*, 28 P.3d at 909.

burden of proving both that the PNL's constraints on fundamental rights are "necessary to further a compelling state interest"[68] and that "no less restrictive means could advance that interest."[69]

Applying this standard in analyzing the parental consent law that preceded the PNL, this Court concluded that a requirement of parental notification would further the State's interests by less restrictive means than a consent requirement.[70] The Court reasoned that "the [Alaska] constitution permits *a* statutory scheme which ensures that parents are notified so that they can be engaged in their daughters' important decisions" regarding their pregnancies.[71] In so reasoning, this Court did not, of course, foreclose all future determinations as to whether the provisions of any *specific* parental notification law further a compelling State interest by the least restrictive means.[72] Thus, the question now before this Court is whether *this* parental notification law furthers compelling State interests, and, if so, whether it advances those interests in the manner that least restricts minors' fundamental rights.[73]

Although the superior court correctly articulated the rigorous strict scrutiny standard in addressing Planned Parenthood's privacy claim, it did not correctly apply that

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68 *Planned Parenthood II*, 171 P.3d at 579 (quoting *Planned Parenthood I*, 35 P.3d at 41).

69 *Valley Hosp. Ass'n*, 948 P.2d at 969; *see also Planned Parenthood II*, 171 P.3d at 579 (the State bears the burden of proving that a law satisfies strict scrutiny).

70 *See Planned Parenthood II*, 171 P.3d at 583-85.

71 *Id.* at 579 (emphasis added).

72 *See id.* at 583.

73 *Id.* at 579.

standard. First, as addressed in Argument I, the superior court erroneously concluded that the PNL satisfies the compelling interest requirement, though it does not at all further the State's interest in minors' health, in preventing sexual abuse, or in informed and mature decision-making, and at most bears a remote and indiscernible relationship to the State's interest in family solidarity.

Second, the superior court failed to subject certain burdensome provisions of the PNL to the least restrictive means analysis, instead applying a less rigorous review applicable to laws that affect *non-fundamental* privacy interests.[74] Under the least restrictive means inquiry, the government must do more than show that there is a close, substantial relationship between the challenged statute and the State's interest; instead, where fundamental privacy rights are at issue, nothing short of the least intrusive statutory scheme will pass muster.[75] Moreover, in assessing the intrusiveness of the PNL, both its "scope" and its "methods" are central to determining whether its "provisions constitute the least restrictive means of pursuing the State's ends."[76] Particularly in light of the fact that parental involvement laws with narrower scopes and less restrictive methods are employed in other states, the State here did not come close to establishing

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74 *See, e.g., Sampson v. State*, 31 P.3d 88, 91 (Alaska 2001); *see also Fraternal Order of Eagles*, 254 P.3d at 356.

75 *See, e.g., Fraternal Order of Eagles*, 254 P.3d at 356; *Valley Hosp. Ass'n*, 948 P.2d at 969.

76 *Planned Parenthood II*, 171 P.3d at 583.

that its more intrusive scheme satisfies the least restrictive means requirement.[77]

A. Because It Burdens Seventeen-Year-Olds, The PNL's Scope Is Unnecessarily Restrictive.

The State of Alaska previously determined that seventeen-year-olds could obtain abortion care without mandated parental involvement and narrowed the scope of the parental consent law accordingly. The PNL foregoes any such effort at narrow tailoring by including seventeen-year-olds – the oldest and most mature minors. Thus, the PNL employs a scope more intrusive than the State itself has previously regarded as not necessary to achieve its asserted interests, and broader than the parental involvement laws of multiple states.

As this Court noted in *Planned Parenthood II*, an essential consideration for whether a statute burdens fundamental rights in the least restrictive manner possible is "the scope of its coverage" – *i.e.*, whether the law is narrowly drawn such that it does not burden the fundamental rights of more persons than is necessary.[78] Although this Court ultimately rejected the Parental Consent Act ("PCA"), it emphasized that the "legislature ha[d] made a *serious effort to narrowly tailor the scope* of the PCA *by exempting seventeen-year-olds*."[79] In the view of the dissenting Justices in *Planned Parenthood II*,

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[77] *See Planned Parenthood II*, 171 P.3d at 583, 584 & n.43 (comparing more permissive laws in other states in holding that the Parental Consent Act did not constitute the least restrictive alternative).

[78] *Id.* at 583.

[79] *Id.* (emphasis added); *accord*, Exc. 197 ("Seventeen year olds were thought by the legislature to be sufficiently mature that they were excluded from" the PCA). Other states have done the same. *See, e.g.*, Del. Code Ann. tit. 24 § 1782(6) (law mandating parental notification for abortion applies only to minors under sixteen years of age); S.C.

"By exempting seventeen-year-olds from the PCA, the legislature *appropriately tailored* the legislation to affect the less mature population of pregnant minors."[80] Thus, the PNL makes the scope of the intrusion on privacy rights *more restrictive* than the PCA by extending its reach to include seventeen-year-olds, and therefore the PNL cannot be said to be narrowly tailored.

Courts applying strict scrutiny have repeatedly held that a law burdening fundamental rights is not narrowly tailored when the government itself previously employed a more permissive statutory provision.[81] That is particularly so where, as here, the government did not produce convincing proof specifically demonstrating the inadequacy of its own previously endorsed, less restrictive provision.[82] Rather than attempting to meet its burden of proof, the State here contended that it did not have to defend the PNL's more restrictive *scope* because the PNL employs a less restrictive *method* than the PCA (notification versus consent). But this reasoning ignores the

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Code Ann. § 44–41–10(m) (law mandating parental consent to abortion applies only to minors under seventeen years of age).

[80] *Planned Parenthood II*, 171 P.3d at 594 (Carpeneti, J., dissenting) (emphasis added); *see also id.* at 586 ("[T]he legislature exempted from the scope of the Act all seventeen-year-old girls. *The importance of this exemption can hardly be overstated.*") (emphasis added); *id.* at 593 ("[T]his narrowing of the minors covered by the Act is not arbitrary, but instead is tailored to eliminate those least likely to need the legislation: the most mature of the pregnant minors.").

[81] *See, e.g., Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 668 (2004) ("[T]he Government failed to introduce specific evidence proving that existing technologies are less effective than the restrictions in [the challenged law]."); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816-27 (2000).

[82] *See, e.g., Ashcroft*, 542 U.S. at 668; *Playboy*, 529 U.S. at 816; *Concerned Democrats of Florida v. Reno*, 458 F. Supp. 60, 65 (S.D. Fla. 1978); *Nefedro v. Montgomery Cnty.*, 996 A.2d. 850, 863-64 (Md. 2010).

Court's direction in *Planned Parenthood II* that a law's scope and its method are separate, equally important considerations.[83] To suggest that a less restrictive method of involving parents can compensate for an expanded scope is to compare apples and oranges – a comparison this Court expressly rejected in *Planned Parenthood II*.[84]

B. The Methods By Which The PNL Seeks To Further The State's Interests Are Not The Least Restrictive Means.

1. The PNL imposes unnecessary burdens on abused minors and therefore is not the least restrictive means.

As is true of the parental involvement laws enacted in numerous states,[85] the PNL contains an "exception" for abused minors.[86] However, unlike the exceptions in any other state, the PNL forces abuse victims to corroborate the abuse with a notarized statement by a third party.[87] In light of the burdens that the corroboration and

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83 *See* 171 P.3d at 583 (statutory scope is "one of the important criteria" to determine whether a law employs the least restrictive means; the "method by which the statute involves parents is also central" to the least restrictive means analysis).

84 *See id.*

85 *See* Colo. Rev. Stat. § 12-37.5-105(1)(b); 750 Ill. Comp. Stat § 70/20(4); Iowa Code Ann. § 135L.3.3m(4); Md. Code Ann., Health-Gen. § 20-103(c)(1)(i); Minn. Stat. Ann. § 144.343(4)(c); Neb. Rev. Stat. § 71-6902.01; Okla. Stat. Ann. tit. 63 § 1-740.2(C)(2); Va. Code Ann. § 16.1.241W; Wis. Stat. Ann. § 48.375(4)(b).

86 *See* AS 18.16.020(a)(4).

87 The PNL provides that a minor may obtain an abortion without notifying her parent or getting judicial authorization if she "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," but only if the abuse is documented in a signed, notarized statement by the minor *and* by "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." AS 18.16.020(a)(4). *Compare* statutes cited *supra* n.85

notarization requirements impose and the fact that the parental involvement laws of numerous states contain far less onerous provisions, the PNL's abuse exception is not the least intrusive mechanism to achieve any compelling State interest.

The superior court's findings make clear that the corroboration/notarization requirements impose such onerous burdens on abuse victims that it is exceedingly difficult, if not impossible, for a minor to avail herself of the provision. [Exc. 225] Specifically, the evidence showed that a significant percentage of abuse victims will be unable to secure a corroborating statement because: (1) many minors would not want to disclose that they live in abusive situations; (2) even if a qualifying corroborating witness like a grandparent or adult sibling knows of the abuse, these potential witnesses may be unwilling to corroborate the abuse out of loyalty to the abuser or because the potential witness does not support the victim's decision to have an abortion; and (3) with regard to case workers or law enforcement, a minor may be unable to locate them. [Exc. 224-25; S. Exc. 281] Further, a minor's ability to use the abuse exception is severely curtailed by its explicit limitations. The limited category of corroborating witnesses excludes many potential corroborators, including aunts, uncles, cousins, teachers, and guardians ad litem. And the abuse provision only applies when the abuse is by a parent, guardian, or custodian but does not apply if the abuser is a step-parent or live-in boyfriend. [Exc. 147-48]

(all containing no corroboration or notarization requirement). In addition, several states provide exceptions if the pregnancy is the result of incest. *See* Ariz. Rev. Stat. § 36-2152(H)(1); Idaho Code Ann. § 18-609A(7)(a); S.C. Code Ann. § 44–41–30(c)(2). These provisions likewise do not contain corroboration or notarization requirements.

The notarization requirement renders the exception even more burdensome and unusable because: (1) notaries are not available in some villages, and smaller towns have few notaries; (2) the notarization requirement will compromise some minors' confidentiality, particularly in villages and small communities; and (3) many minors do not know what a notary is or how to access one. [S. Exc. 269, 278-79] The superior court recognized that the PNL's abuse provision "is largely illusory," and found that "only a small percentage of abuse victims will avail themselves of the affidavit-of-abuse exception to notice." [Exc. 225]

Nor is the "greater intrusiveness" of the abuse provision, as compared to more permissive abuse exceptions in other states, necessary to advance the State's interest in family solidarity.[88] The premise underlying the notarization and corroboration requirements – that they are necessary because minors will lie about the abuse – is false: Experts with a long history of working with abused minors in Alaska made clear that it is exceedingly uncommon for minors to fabricate accounts of abuse. [S. Exc. 299] In light of these facts, it is little wonder that, of all the states that have abuse exceptions to their parental involvement laws, *none* except Alaska imposes notarization or corroboration requirements.[89] As this abundance of less intrusive approaches makes plain, an abuse

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

89 *See* statutes cited *supra* n.85.

exception that does *not* include a notarization and corroboration requirement is a "less burdensome and widely used" alternative.[90]

The superior court held otherwise, explaining only that the judicial bypass route is available to abused minors who cannot satisfy the corroboration requirement, and that courts do not "overturn statutes based on worst-case scenarios." [Exc. 225] This reasoning is erroneous. First, it is inconsistent with this Court's decision in *Planned Parenthood II*, which made clear that the existence of a judicial bypass option does *not* mean that the remaining provisions of a parental involvement law need not comport with the least restrictive means requirement.

In addition, the superior court answered the wrong questions. Where, as here, a statute constrains fundamental rights, the dispositive questions are whether "the constraints are justified by a compelling state interest, and [whether any] less restrictive means could advance that interest." The superior court did not, however, address these critical questions. Rather, it considered whether some other provision of the PNL provides an alternative channel for exercising constitutional rights and whether the

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[90] *Planned Parenthood II*, 171 P.3d at 579. It is no answer to this profusion of less burdensome abuse provisions to note that some other states provide no abuse exception at all. First, the laws that do not contain abuse exceptions have not been subjected to strict scrutiny review and the least-restrictive-means requirement. More fundamentally, the least restrictive means requirement does not amount to a search for the midpoint between the more restrictive and less restrictive approaches. To the contrary, under the least restrictive means test, the government is prohibited from adopting a more restrictive statute unless it proves that "no less restrictive means could advance [its] interest." *Valley Hosp. Ass'n*, 948 P.2d at 969.

constraints imposed by the PNL amount to a worst-case scenario. These questions are not germane to the least restrictive means inquiry.[91]

In sum, because the "State has failed to establish that the greater intrusiveness" of the PNL's abuse provision, as compared to other states' more permissive abuse exceptions, "is necessary to achieve its compelling interests,"[92] this Court should strike the corroboration and notarization requirements from the abuse exception.

2. The PNL's documentation requirements for the person receiving notice are not the least restrictive means.

The PNL imposes burdensome requirements for abortion providers who give in-person notification to, and obtain consent from, a parent, guardian, or custodian, "requir[ing] the person to show . . . additional documentation of the person's relationship to the minor," which "may include the minor's birth certificate or a court order of adoption, guardianship, or custodianship."[93] The superior court recognized that this requirement could prove burdensome and that it "to some extent clashes with the realities of rural Alaska." [Exc. 200-01 ("For example, a mother accompanying her daughter from rural Alaska to Fairbanks may fail to bring a birth certificate. An abortion provider convinced of her identity would be unable to proceed. Time might be of the essence, as has recently occurred twice in the Fairbanks clinic when the second-trimester was imminent.")] The superior court nevertheless upheld the requirement, concluding, *not*

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91 *See Planned Parenthood II*, 171 P.3d at 584 (subjecting the PCA to least restrictive review in spite of the availability of judicial bypass).

92 *Id.* at 579.

93 AS 18.16.020(b)(1).

that it is the least restrictive means of advancing the State's interest, but that it is a "tolerable mechanism to assure parental identity." [Exc. 201][94] In so concluding, the superior court again failed to give full measure to the least restrictive means requirement.

The PNL's burdensome documentation requirement is unquestionably not the least restrictive means available to the State. To the contrary, "a review of statutory schemes [for parental involvement] enacted around the nation"[95] makes clear that Alaska has adopted one of the nation's *most restrictive* mechanisms for providers seeking to give in-person notification to a parent, guardian, or custodian. Only one other state requires the person receiving notice to provide documentary proof of his or her relationship to the minor.[96] Contrary to the PNL's restrictive approach, then, the near-consensus among

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[94] Concluding that a statutory scheme is a tolerable means of achieving a legislative end is, of course, far different from concluding that it is the least restrictive means of doing so. *See, e.g., Flint v. Dennison*, 488 F.3d 816, 834-35 (9th Cir. 2007); *Wilson v. State*, 207 P.3d 565, 572 (Alaska App. 2009) (Mannheimer, J., dissenting).

[95] *Planned Parenthood II*, 171 P.3d at 583.

[96] *See* Ala. Code § 26-21-3(c) (no documentation of relationship required; minor verifies in writing that signature is her parent's); Ariz. Rev. Stat. § 36-2152(A) (no documentation of relationship required); Ark. Code Ann. § 20-16-803(c) (no documentation of relationship required; it is sufficient for abortion provider to witness parent's signature); Colo. Rev. Stat. § 12-37.5-105(1)(a) (no documentation of relationship required; written certification of parent is sufficient); Del. Code Ann. tit. 24 § 1783 (no documentation of relationship required); Fla. Stat. Ann. § 390.01114 (same); Ga. Code Ann. § 15-11-112 (same); Idaho Code Ann. § 18-609A(1) (same); Ind. Code § 16-18-2-267 (same); Iowa Code Ann. § 135L.3(2) (same); Kan. Stat. Ann. § 65-6705 (same); Ky. Rev. Stat. Ann. § 311.732 (same); La. Rev. Stat. Ann. § 40:1299.35.5(A)(1) (same); Md. Code Ann., Health-Gen. § 20-103 (same); Mass. Gen. Laws Ann. ch. 112 § 12S (same); Mich. Comp. Laws § 722.903 (same); Minn. Stat. Ann. § 144.343(4)(b) (same); Miss. Code Ann. § 41-41-53 (same); Mo. Ann. Stat. § 188.028(1)(1) (same); Mont. Code Ann. § 50-20-204 (same); Neb. Rev. Stat. § 28-327.09 (same); Nev. Rev. Stat. § 442.255(1) (same); N.C. Gen. Stat. Ann. § 90-21.7(a)(1) (same); N.D. Cent. Code § 14-02.1-03(1) (same); Ohio Rev. Code Ann. § 2919.12(B)(1)(a)(i) (same); Okla. Stat.

other jurisdictions is that documentary proof of relationship is unnecessary, and that less intrusive methods, such as written certification by the person entitled to notice, are sufficient to achieve the government's purposes. Notably, in most states, including Alaska, a person who falsely claimed to be the minor's parent, guardian, or custodian would be subject to criminal penalties.[97] The backdrop of preexisting laws prohibiting such false claims of identity is itself a less restrictive alternative to the PNL's burdensome documentation requirement.[98] In the face of the "widely used"[99] – indeed, almost unanimously adopted – less restrictive provisions employed by other states, the State here did not prove[100] "that the greater intrusiveness" of the PNL's documentation

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Ann. tit. 63 § 1-740.4b(C) (no documentation requirement; affirmative defense for provider available if person falsely claiming to be parent presents government identification and provider uses due diligence); 18 Pa. Cons. Stat. Ann. § 3206(a) (no documentation of relationship required); R.I. Gen. Laws § 23-4.7-6 (same); S.C. Code Ann. § 44-41-31(a)(1) (same); S.D. Codified Laws § 34-23A-7(2) (same); Tex. Family Code Ann. § 33.002(c) (same); Utah Code Ann. § 76-7-304.5(2) (same); Va. Code Ann. § 16.1-241 (same); W. Va. Code § 16-2F-3 (same); Wis. Stat. Ann. § 48.375(4)(1) (no documentation of relationship required for person giving consent to abortion); *but see* Tenn. Code Ann. § 37-10-303(a)(1).

97 *See* AS 11.51.130(a)(1) ("A person commits the crime of contributing to the delinquency of a minor if . . . the person aids . . . a child . . . under 18 years of age to do any act prohibited by state law[.]"); *see also Sullivan v. State*, 766 P.2d 51, 57 (Alaska App. 1988) (construing the phrase "to do any act prohibited by state law" in AS 11.51.130(a)(1) to "include acts that violate laws enacted for the protection of minors, even when the minor could not be prosecuted for the act").

98 *See, e.g.*, *Playboy*, 529 U.S. at 816 (a law is not narrowly tailored when the government already has available to it a less restrictive alternative).

99 *Planned Parenthood II*, 171 P.3d at 583.

100 Indeed, the State's evidence failed almost entirely even to address the documentation requirement, much less to prove its necessity. The only evidence that even remotely addressed this topic was anecdotal testimony describing a single, decade-old instance in which an Ohio minor's soccer coach falsely claimed to be her father to

requirement "is necessary to achieve its compelling interests."[101]

3. The PNL's 48-hour delay requirement is not the least restrictive means.

The PNL imposes a longer and more rigid post-notification waiting period than is necessary to advance the State's interest. Once a parent, guardian, or custodian has been notified of the minor's intent to have an abortion, the minor must wait 48 hours before the procedure – *even if* the parent has made clear that he or she already knew of the planned abortion and/or does not want to consult with the minor about it. The 48-hour delay can only be waived if the parent provides consent. Other states have recognized that ensuring that a parent knows about a minor's planned abortion does not require delaying *every* minor's abortion, and thus have adopted more permissive statutes under which a minor can obtain an abortion immediately if a parent waives the waiting period or indicates that he or she does not want to consult with the minor.[102] The PNL's

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evade parental consent. [Exc. 180-81] But where strict scrutiny applies, a single anecdote unquestionably fails to show that a restriction on fundamental rights is necessary to achieve a compelling State interest. *See, e.g.*, *Playboy*, 529 U.S. at 822 (government must produce "more than anecdote and supposition" to show that a law is the least restrictive means of advancing its compelling interest).

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

102 *See* Colo. Rev. Stat. § 12-37.5-105 (notification and delay not required if person to be notified certifies in writing that (s)he has been notified); Fla. Stat. Ann. § 390.01114 (same, if writing is notarized); 750 Ill. Comp. Stat. § 70/20(2) (same); Mont. Code Ann. § 50-20-228 (same); N.J. Stat. Ann. § 9:17A-1.5 (same; law enjoined by *Planned Parenthood of Cent. N.J.*); S.D. Codified Laws § 34-23A-7(2) (same, but law in effect); W. Va. Code § 16-2F-3 (same); *see also* Ga. Code Ann. § 15-11-112(a)(1)(B) (abortion may proceed without delay "if the person so notified indicates that he or she has been previously informed that the minor was seeking an abortion or if the person so notified has not been previously informed and he or she clearly expresses that he or she does not wish to consult with the minor"). Georgia and Illinois also allow an abortion without

requirement does not at all advance the State's interest in family solidarity where it operates to force a delay in cases where a parent wishes to waive the waiting period (even if he or she does not provide written consent to the procedure), or where a parent indicates either that he or she has already had adequate time to consult with the minor about the abortion, or that he or she does not want to consult with the minor. The State utterly failed to sustain its burden to prove that its more restrictive scheme is necessary to advance its interest in family solidarity.[103]

Moreover, the 48-hour delay requirement itself fails the least restrictive means test. As a "less burdensome and widely used"[104] alternative, many states allow for an abortion to be performed 24 hours after actual notice has been provided.[105] It was the State's burden to prove that adopting a waiting period twice as long as is used in many other states is necessary to advance its compelling interest. The State did not 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 could not. The superior

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delay if the minor is accompanied by the person entitled to notice, even if that person does not provide consent to the abortion. *See* Ga. Code Ann. § 15-11-112(a)(1); 750 Ill. Comp. Stat. § 70/20(1).

103 *Valley Hosp. Ass'n*, 948 P.2d at 969 (State bears burden to show that "no less restrictive means could advance [its] interest").

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

105 *See* Del. Code Ann. tit. 24 § 1783; Ga. Code Ann. § 15-11-112(a)(1)(B); W. Va. Code § 16-2F-3(a); *cf.* Kan. Stat. Ann. § 65-6705(a) (no delay required after notification); Md. Code Ann., Health-Gen. § 20-103 (same).

court erred in failing to subject these requirements to a least-restrictive-means analysis, and its decision upholding these requirements should be reversed.[106]

4. The PNL's criminal penalties are not the least restrictive means.

The superior court likewise erred in failing to enjoin the PNL's criminal penalties. The court clearly recognized that the PNL's extreme criminal sanctions – a five-year term of imprisonment and a $1,000 penalty, both of which it preliminarily enjoined pretrial – are severe and unnecessary to advance a governmental interest:

> [T]he court is confronted with an overly-broad high-penalty criminal statute in a context that requires the state to act in a least restrictive manner. *No evidence suggests felony liability is necessary to address an existing or anticipated pattern of abuse. The PNL functioned well pretrial without it.* Other states impose misdemeanor sanctions. [Exc. 204 (emphasis added)]

Despite these findings, the superior court upheld the penalties on the basis that "courts avoid interference with legislative authority to decree criminal penalties," reasoning that providers facing prosecution might challenge the penalties on an as-applied basis on some future occasion. [Exc. 205]

The superior court erroneously failed to subject the PNL's extreme penalties to strict scrutiny. The court's factual findings establish that the PNL's criminal penalties are neither necessary to further a compelling State interest, nor the least restrictive means to do so.[107] Indeed, not only do most other states employ less extreme criminal sanctions than the PNL's (as the superior court noted), other parental involvement laws contain no

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106 The superior court did not specifically address this claim and it was therefore disposed of in the judgment, which simply denied relief as to any claim not addressed in the Court's final order.

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

criminal penalty at all.[108] Given the superior court's findings that criminal penalties are not "necessary" to further the State's interests [Exc. 204], and that less restrictive means are available, the criminal penalties should have been stricken.

Whatever deference to legislative authority might be appropriate in another context, such deference has no place here.[109] Where a statute burdens fundamental rights and is subject to strict scrutiny, "the imposition of criminal sanctions [must be] narrowly tailored to achieve the stated interests."[110] And where means short of a criminal penalty are available, such penalties cannot be sustained unless the State proves they are necessary.[111] Here the State made no such showing.

Nor does it suffice to conclude, as the superior court did, that the PNL's severe criminal penalties could be addressed on an as-applied basis at some future date. The very threat of such "draconian" sanctions, even before they are imposed, can chill the exercise of fundamental rights, as the superior court itself recognized. [Exc. 201]

This Court should strike the criminal penalties.

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108 *See* Colo. Rev. Stat. § 12-37.5-106 (imposing civil, but not criminal, penalties); 750 Ill. Comp. Stat. § 70/40 (violations of parental involvement law reported to State Medical Disciplinary Board, but no criminal sanctions); Md. Code Ann., Health-Gen. § 20-103 (no criminal penalties).

109 *See State v. J.P.*, 907 So. 2d 1101, 1119 (Fla. 2004) ("[T]hese criminal penalties indicate that the Tampa ordinance does not use the least intrusive means to accomplish its purpose, especially when viewed against the model ordinance which accomplishes the same goal with only a civil penalty.").

110 *Id.*

111 *Id.*

CONCLUSION

The Parental Notice Law should be stricken in its entirety because it fails to adequately further the State's asserted interest in family cohesion in violation of both the equal protection and privacy provisions of the Alaska Constitution. The PNL also violates the equal protection provision by discriminating between minors seeking abortions and those seeking other pregnancy-related medical care and, for this reason too, the PNL should be invalidated. Alternatively, those provisions of the PNL that violate the privacy rights of minors should be enjoined.

DATED this 13th day of May, 2013.

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