In the Supreme Court of the State of Alaska

Planned Parenthood of the Great Northwest, Jan Whitefield, M.D., and Susan Lemagie, M.D.,	)	
Appellant/Cross-Appellees,	)	Supreme Court No. **S-15010/S-15030/ S-15039**
v.	)	**Order**
State of Alaska, Loren Leman, Mia Costello, and Kim Hummer-Minnery,	)	
Appellees/Cross-Appellants.	)	Date of Order: **September 22, 2016**

Trial Court Case # **3AN-10-12279CI**

Before: Stowers, Chief Justice, and Winfree, Maassen, and Bolger, Justices, and Fabe, Senior Justice*

It has come to the court's attention that Opinion No. 7114 (July 22, 2016) contains an error. The sentence that begins at the bottom of page 18 states:

> Earlier, in *Evans ex rel. Kutch v. State*,[62] the four-person court had addressed whether the new provision passed constitutional equal protection muster, and two justices concluded that it did.[63]

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[62] 56 P.3d 1046 (Alaska 2002).

[63] *Id.* at 1066 (concluding "subsection .140(c)'s disparate treatment of minors under the age of eight is rationally based and furthers legitimate state interests").

That statement is incorrect. Only Justice Carpeneti dissented on the equal protection issue as applied to subsection .140(c).

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* Sitting by assignment under Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

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THE SUPREME COURT OF THE STATE OF ALASKA

PLANNED PARENTHOOD OF THE GREAT NORTHWEST, JAN WHITEFIELD, M.D., and SUSAN LEMAGIE, M.D.,	Supreme Court Nos. S-15010/15030/ 15039 (Consolidated)
	Superior Court No. 3AN-10-12279 CI
Appellants and Cross-Appellees,	OPINION
v.	No. 7114 – July 22, 2016
STATE OF ALASKA, LOREN LEMAN, MIA COSTELLO, and KIM HUMMER-MINNERY,	
Appellees and Cross-Appellants.	

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, John Suddock, Judge.

Appearances: Susan Orlansky, Feldman Orlansky & Sanders, and Thomas Stenson, ACLU of Alaska Foundation, Anchorage, Janet Crepps, Center for Reproductive Rights, Simpsonville, South Carolina, Talcott Camp and Andrew Beck, ACLU Foundation, and Diana O. Salgado, Planned Parenthood Federation of America, New York, New York, and Laura F. Einstein, Planned Parenthood of the Great Northwest, Seattle, Washington, for Appellants/Cross-Appellees. Margaret Paton Walsh and Dario Borghesan, Assistant Attorneys General, Anchorage, and Michael C. Geraghty, Attorney General, Juneau for Appellee/Cross-Appellant State of Alaska. Kevin G. Clarkson and

But in that 2007 ruling we recognized that the State of Alaska has compelling interests in aiding parents to help their minor children make informed and mature pregnancy-related decisions, and we indicated that a parental notification law *might* be implemented without unduly interfering with minors' fundamental privacy rights. The 2010 voter-enacted Parental Notification Law — generally requiring 48-hour advance parental notice before a physician may terminate a minor's pregnancy — revived the exception in the existing medical emancipation statute, creating considerable tension between a minor's fundamental privacy right to reproductive choice and how the State may advance its compelling interests.

In this case we must decide whether the Notification Law violates the Alaska Constitution, and we are presented with two specific and distinctly different questions: (1) Does the Notification Law violate the Alaska Constitution's equal protection guarantee by unjustifiably burdening the fundamental privacy rights only of minors seeking pregnancy termination, rather than applying equally to all pregnant minors? (2) If the Notification Law does not violate the Alaska Constitution's equal protection guarantee, does it violate the Alaska Constitution's privacy guarantee by unjustifiably infringing on the fundamental privacy rights of minors seeking to terminate a pregnancy?

We conclude that the Notification Law violates the Alaska Constitution's equal protection guarantee and cannot be enforced. But the decision we reach today is narrow in light of the limited State interests offered to justify the Notification Law. The State expressly disclaims any interest in *how* a minor exercises her fundamental privacy right of reproductive choice, and it does not suggest that it has an interest in limiting abortions generally or with respect to minors specifically. And as a court we are not concerned with whether abortion is right, wrong, moral, or immoral, or with whether abortions should be available to minors without restriction. We are concerned only with

portions of AS 11.15.060.[6] The Attorney General concluded that the parental consent provision was a "clearly unconstitutional" infringement of minors' fundamental privacy rights under the United States Constitution because it was a blanket ban — regardless of a minor's actual capacity or maturity — and it applied even when an abortion might be necessary to save a minor's life.[7]

In 1980 the legislature removed AS 11.15.060 from the criminal statutes and renumbered it as AS 18.16.010, but did not respond to the Attorney General's 1976 opinion that the parental consent provision violated the United States Constitution.[8] The parental consent provision remained in place as AS 18.16.010(a)(3) until amended with the enactment of the 1997 Parental Consent Act.[9] The relevant provision of the medical emancipation statute has not changed — other than replacing the exception's original reference to AS 11.15.060(a)(3) with a reference to AS 18.16.011(a)(3)[10] — although it was renumbered in 1994.[11]

B. Early Constitutional Backdrop

In 1972 voters added the following provision to the Alaska Constitution: "The right of the people to privacy is recognized and shall not be infringed."[12] In 1997

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6 1976 INFORMAL OP. ATT'Y GEN. (Oct. 21).

7 *Id.* at 3-6, 7.

8 Ch. 166, § 22, SLA 1978 (effective Jan. 1, 1980). The statute later was reorganized. *See* AS 18.16.010 (1986).

9 Ch. 14, §§ 2, 3, 6, SLA 1997.

10 Ch. 166, § 22, SLA 1978 (effective Jan. 1, 1980).

11 *See* AS 25.20.025(a)(4) (1994).

12 Alaska Const. art. I, § 22; *Valley Hosp. Ass'n v. Mat-Su Coal. for Choice,* (continued...)

The Consent Act's constitutionality soon was challenged.[17] The superior court enjoined the State from enforcing the Consent Act, summarily concluding that it violated the Alaska Constitution's equal protection guarantee.[18] The State appealed, and in *Planned Parenthood I* we remanded for a full trial.[19] But we acknowledged that under the Alaska Constitution pregnant minors have the same fundamental privacy right to reproductive choice as pregnant adults:

> The "uniquely personal" physical, psychological, and economic implications of the abortion decision that we described in *Valley Hospital* are in no way peculiar to adult women. Deciding whether to terminate a pregnancy is at least as difficult, and the consequences of such decisions are at least as profound, for minors as for adults . . . .[20]

After trial the superior court concluded that the Consent Act violated both the privacy and equal protection guarantees of the Alaska Constitution, and again enjoined the State from enforcing the Consent Act.[21] The State appealed, and in *Planned Parenthood II* we held that although the State had shown compelling interests "in protecting minors from their own immaturity" and in "aiding parents to fulfill their parental responsibilities," the Consent Act was not the least restrictive means of

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[17] *See State v. Planned Parenthood of Alaska* (*Planned Parenthood I*), 35 P.3d 30, 32-33 (Alaska 2001).

[18] *Id.* at 33; *see* Alaska Const. art. I, § 1 (guaranteeing "equal rights, opportunities, and protection under the law").

[19] *Planned Parenthood I*, 35 P.3d at 46.

[20] *Id.* at 40 (footnote omitted), *quoted with approval in State v. Planned Parenthood of Alaska* (*Planned Parenthood II*), 171 P.3d 577, 582 & n.26 (Alaska 2007).

[21] *Planned Parenthood II*, 171 P.3d at 580-81.

emancipation statute's differential treatment of pregnant minors based on how they exercised their fundamental privacy right of reproductive choice.[30]

The Notification Law applies to unemancipated, unmarried minors under age 18 seeking to terminate a pregnancy.[31] It includes specific requirements for parental notification,[32] a 48-hour mandatory waiting period between parental notification and the

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[29] (...continued)
parental notice or judicial authorization to proceed without parental involvement, as set forth in related Notification Law provisions.

[30] *Cf.* AS 25.20.025(a)(4) ("Except as prohibited under AS 18.16.010(a)(3)" minors may give consent to pregnancy-related health care.).

[31] AS 18.16.020(a) (prohibiting, absent parental notice or other exception, persons from performing or inducing an abortion upon "a minor who is known . . . to be pregnant, unmarried, under 18 years of age, and unemancipated").

[32] AS 18.16.020(b) provides in part:

> 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
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> (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;
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> (2) if by telephone, initiating the call, attempting to verify through a review of published telephone directories

(continued...)

First, with the assistance of a court-appointed attorney,[37] a minor may seek a judge's permission to bypass the notification requirement.[38] Permission will be granted if the minor proves by clear and convincing evidence[39] that she is mature enough to make the decision without parental notice or consent or that her parents are abusive.[40] Second, an abused minor may bypass the notification requirement by providing to her physician notarized statements from herself and a witness regarding the abuse.[41] If an abused

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[35] (...continued)
by a substantial and irreversible impairment of a major bodily function").

[36] *See* AS 18.16.030; AS 18.16.020(a)(4).

[37] AS 18.16.030(d), (n)(3).

[38] AS 18.16.030.

[39] AS 18.16.030(e), (f).

[40] AS 18.16.030(b)(4) provides that permission to bypass the notification requirement will be granted if the minor proves:

> (A) that [she] is sufficiently mature and well enough informed to decide intelligently whether to have an abortion without notice to . . . a parent, guardian, or custodian; or
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> (B) that one or both of the minor's parents or the minor's guardian or custodian was engaged in physical abuse, sexual abuse, or a pattern of emotional abuse against the minor . . . .

[41] AS 18.16.020(a)(4) allows minors who are victims 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" to bypass notification by providing signed and notarized statements to the physician from the minor and from a witness with "personal knowledge" documenting the abuse. The witness must be a law enforcement officer, an Alaska Department of Health and Social Services representative who has investigated the abuse, or the minor's sibling over the age of 21, grandparent,
(continued...)

doctor to protect her own health and that of her fetus." The court therefore concluded that minors seeking pregnancy termination are not similarly situated to minors seeking to carry to term, and that the Notification Law's effective disparate application of the medical emancipation statute "does not violate Alaska's equal protection clause."

The superior court also analyzed whether the Notification Law violates minors' constitutional privacy rights and concluded that parts of the law are constitutional but others are not. The court vacated its preliminary injunction against some provisions, including the criminal sanctions for physicians and the parental-documentation requirement; it issued a permanent injunction against others, including the imposition of civil liability on physicians, the requirement that physicians personally notify parents, and the clear and convincing evidence standard for judicial bypass of the notification requirement.

The superior court issued a final judgment, and the clerk of court then awarded the State and the Sponsors their trial costs. The superior court later vacated the cost awards, concluding that both sides were prevailing parties on a main issue in the case and that no cost awards should be made.

Planned Parenthood appeals the superior court's ruling upholding the majority of the Notification Law, arguing for reversal on both equal protection and privacy grounds. The State and the Sponsors appeal the court's decision to strike some of the Notification Law's provisions, arguing that those provisions do not violate minors' constitutional privacy rights; they also appeal the costs ruling.

problems in its application, as long as it "has a plainly legitimate sweep."[48] But a statute infringing on a constitutionally protected right deserves close attention.[49] And our duty to uphold the Alaska Constitution is paramount; it takes precedence over the politics of the day and our own personal preferences.[50]

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[48] *Planned Parenthood II*, 171 P.3d at 581 (quoting *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 260 n.14 (Alaska 2004)); *see also Haggblom v. City of Dillingham*, 191 P.3d 991, 998 (Alaska 2008) ("We will not hold a statute void for vagueness if the statute has been shown to have a 'plainly legitimate sweep.' " (quoting *Treacy*, 91 P.3d at 260 n.14)); *Planned Parenthood I*, 35 P.3d 30, 34-35 (Alaska 2001) (concluding that our previous standard — that a statute will be upheld unless there is "no set of circumstances . . . under which" it would be constitutional — is not a "rigid requirement" (quoting *Javed v. State, Dep't of Pub. Safety*, 921 P.2d 620, 625 (Alaska 1996))).

Even under the stricter "no set of circumstances" analysis, only the effective applications of a statute authorizing or prohibiting conduct should be considered. *Los Angeles v. Patel*, 135 S.Ct. 2443, 2450-51 (2015). A law is measured for constitutional validity "by its impact on those whose conduct it affects," and the proper constitutional inquiry focuses on "the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 894 (1992).

[49] *See, e.g., State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 912 (Alaska 2001) ("Because [the regulation] infringes on a constitutionally protected interest, the State bears a high burden to justify the regulation."); *Commercial Fisheries Entry Comm'n v. Apokedak*, 606 P.2d 1255, 1261 (Alaska 1980) (noting strict scrutiny applies "when fundamental rights are at stake"); *see also Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620, 633 (N.J. 2000) (stating governmental burden on fundamental right "is deserving of the most exacting scrutiny").

[50] *See* Alaska Const. art. XII, § 5 (requiring public officers to swear to "support and defend . . . the Constitution of the State of Alaska"); *Malone v. Meekins*, 650 P.2d 351, 356 (Alaska 1982) ("[T]he judicial branch . . . has the constitutionally mandated duty to ensure compliance with the provisions of the Alaska Constitution . . . ."), *quoted with approval in Planned Parenthood of Alaska*, 28 P.3d at 913.

ensures that parents are notified so that they can be engaged in their daughters' important decisions in [pregnancy-related] matters,"[53] our holding addressed only the fundamental right to privacy.[54] We explained that "although parental notification statutes undoubtedly burden the *privacy* rights of minors," they would present potentially less restrictive alternatives than consent laws under a fundamental privacy right analysis.[55] We did not address *other* constitutional issues which might arise from a notification law — indeed, a notification law was merely hypothetical at that point.[56] And because our privacy ruling involving the consent law effectively placed all pregnant minors on an equal plane under the medical emancipation statute, we did not address the equal protection challenge to the Consent Act.[57]

The dissent and the concurring opinion unreasonably conclude we suggested that any parental notification law would pass constitutional equal protection muster — sight unseen and without regard to either its stated justification or the factual underpinning for that justification — even though we engaged in no equal protection analysis whatsoever regarding parental notification laws. Our actual conclusion that a parental notification law might survive a constitutional privacy challenge does not mean

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53 *Id.* at 579.

54 *Id.* at 584.

55 *Id.* (emphasis added).

56 *See generally id.*

57 *Id.* at 581 n. 21, 585 ("Because we conclude that the [Consent Act] violates the right to privacy under the Alaska Constitution, we need not address [whether] the Act also violates the equal protection clause . . . .").

v. State,[62] the four-person court had addressed whether the new provision passed constitutional equal protection muster, and three justices concluded that it did.[63] In *Sands* the same statutory provision was challenged on the different constitutional ground that it violated minors' due process rights of access to the court.[64] We rejected the argument — essentially the same argument raised here by the dissent and the concurring opinion — that the first decision implicitly controlled the result in the second:

> In *Evans*, we assessed the constitutionality of subsection .140(c) only within the context of equal protection. We did not address the issue that we address today: whether subsection .140(c) violates a minor's due process right to access the court system. We are similarly unpersuaded by the State's argument that we were "aware of the ramifications of [our *Evans*] decision" because "Justice Carpeneti pointedly discussed those ramifications in a detailed dissent." While the dissent in *Evans* did indeed discuss the ramifications of subsection .140(c) and argue that those ramifications constitute a denial of equal protection, it — like the lead opinion — did not consider the specific issue of due process.
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> That our *Evans* decision did not reach this particular constitutional issue merely reinforces the wisdom of the rule that courts should generally avoid deciding abstract cases.[65]

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62 56 P.3d 1046 (Alaska 2002).

63 *Id.* at 1066 (concluding "subsection .140(c)'s disparate treatment of minors under the age of eight is rationally based and furthers legitimate state interests"); *id.* at 1079-82 (Carpeneti, J., dissenting).

64 *Sands*, 156 P.3d at 1133.

65 *Id.* (alteration in original) (footnotes omitted).

> As a matter of nomenclature we refer to that portion of a law that treats two groups differently as a "classification."[69]

To determine whether the Notification Law discriminates between similarly situated classes, we first decide which classes must be compared.[70] The parties agree that the relevant classes are pregnant minors seeking termination and pregnant minors seeking to carry to term. We next determine if the challenged law has a discriminatory purpose or is facially discriminatory — i.e., whether the classes are treated unequally.[71] It is clear that the Notification Law treats the two classes of pregnant minors differently, burdening the fundamental privacy rights of those seeking termination but not the fundamental privacy rights of those seeking to carry to term.[72] So when we examine whether these classes are similarly situated, we are asking a legal question: Under the applicable scrutiny level, do the stated rationales for the Notification Law justify

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[69] *Pub. Emps. Ret. Sys. v. Gallant*, 153 P.3d 346, 349 (Alaska 2007) (emphasis added) (footnotes omitted). Similarly see *Stanek v. Kenai Peninsula Borough*, 81 P.3d 268, 270-71 (Alaska 2003) (quoting extensively from *Gonzales v. Safeway Stores, Inc.*, 882 P.2d 389, 396 (Alaska 1994)) explaining that we view statutory enactment with differential treatment as creating separate groups and that we ask whether such classification has sufficient government justification under the appropriate level of scrutiny.

[70] *State v. Schmidt*, 323 P.3d 647, 660 (Alaska 2014).

[71] *Id.* at 659 (citing *Alaska Civil Liberties Union v. State*, 122 P.3d 781, 788 (Alaska 2005); *Alaska Inter-Tribal Council v. State*, 110 P.3d 947, 956 (Alaska 2005)). "When a 'law by its own terms classifies persons for different treatment,' the law is facially discriminatory." *Id.* (quoting *Alaska Civil Liberties Union*, 122 P.3d at 788).

[72] *See* AS 18.16.020(a).

"class of one."[77] *Alaska Inter-Tribal Council* did not purport to overrule the stated framework when considering statutory enactments, used as early as 1994 in *Gonzales v. Safeway Stores, Inc.*[78] and then as recently as 2003 in *Stanek v. Kenai Peninsula Borough*,[79] and used again not long after *Alaska Inter-Tribal Council* in *Public Employees Retirement System v. Gallant*.[80]

We separately noted in *Alaska Inter-Tribal Council* that there are some occasions when a full equal protection analysis may not be necessary because it is so exceedingly clear that the two classes in question are not similarly situated.[81] When

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[77] 273 F.3d at 499. Although we do not need to delve into the matter now, a close reading of this case suggests that the federal court actually may have applied a mixed question of fact and law analysis, looking to the trial court's factual determinations about business locations and then applying independent judgment to whether, given the facts found by the trial court, the zoning board had a rational basis for its decision. *Compare id.* at n.2 and at 500-02. This would be consistent with the legal framework we use today.

[78] 882 P.2d at 396.

[79] 81 P.3d 268, 270-71 (Alaska 2003).

[80] 153 P.3d 346, 349-54 (Alaska 2007).

[81] 110 P.3d at 967. We will summarily conclude that two classes are not similarly situated only in clear cases because "[s]uch a conclusion reflects in shorthand the analysis traditionally used in our equal protection jurisprudence." *Shepherd v. State, Dep't of Fish & Game*, 897 P.2d 33, 44 n.12 (Alaska 1995). *But see id.* at 46 (Rabinowitz, J., concurring) (arguing that the shorthand analysis "inadequately analyzes the issue in this case" and "simply begs the question of whether the classification itself is reasonable and whether it justifies disparate treatment").

State v. Schmidt, 323 P.3d 647 (Alaska 2014), reflects a somewhat mixed approach. *Schmidt* involved a property tax exemption scheme for certain married property owners. *Id.* at 651-53. Same-sex couples then-barred under Alaska law from marrying raised an equal protection challenge. *Id.* at 653-54. We first cited *Alaska*

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term. We will review that legal conclusion under the framework outlined above and detailed more fully below.

3. Core equal protection analysis

Our core equal protection analysis applies a flexible three-step sliding-scale:

> First, it must be determined at the outset what weight should be afforded the constitutional interest impaired by the challenged enactment. . . . Depending upon the primacy of the interest involved, the state will have a greater or lesser burden in justifying its legislation.
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> Second, an examination must be undertaken of the purposes served by a challenged statute. Depending on the level of review determined, the state may be required to show only that its objectives were legitimate, at the low end of the continuum, or, at the high end of the scale, that the legislation was motivated by a compelling state interest.
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> Third, an evaluation of the state's interest in the particular means employed to further its goals must be undertaken. Once again, the state's burden will differ in accordance with the determination of the level of scrutiny under the first stage of analysis. At the low end of the sliding scale, we have held that a substantial relationship between means and ends is constitutionally adequate. At the higher end of the scale, the fit between means and ends must be much closer. If the purpose can be accomplished by a less restrictive alternative, the classification will be invalidated.[82]

a. Step one

Step one of our core equal protection analysis requires evaluating the importance of the personal right infringed upon to determine the State's burden in justifying its differential infringement. It has long been established that the Alaska

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82 *Alaska Pac. Assurance Co. v. Brown*, 687 P.2d 264, 269-70 (Alaska 1984).

underinclusiveness in the means-to-ends fit will be tolerated.[87]

b. Step two

Step two of our core equal protection analysis requires identifying and assessing the State's interests in differently burdening pregnant minors' fundamental privacy rights. To justify differently burdening fundamental privacy rights, the State's interests in doing so must be compelling.[88] The State asserts two main interests as justifying the Notification Law's disparate treatment of pregnant minors: (1) "aiding parents to fulfill their parental responsibilities" and (2) "protecting minors from their immaturity."[89]

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[87] *State, Dep't of Revenue, Permanent Fund Dividend Div. v. Cosio*, 858 P.2d 621, 629 (Alaska 1993) (alteration in original) (quoting *State v. Ostrosky*, 667 P.2d 1184, 1193 (Alaska 1983)).

[88] A governmental interest must be more than legitimate to be "compelling." To prove an interest compelling in the equal protection context, the State must show that the interest actually needs to be vindicated because it is significantly impaired at present. *See, e.g., Vogler v. Miller*, 651 P.2d 1, 5-6 (Alaska 1982); *Gray v. State*, 525 P.2d 524, 528 (Alaska 1974); *Breese v. Smith*, 501 P.2d 159, 172 (Alaska 1972).

Although we cite cases discussing the word "compelling" in the fundamental privacy rights context, the meaning of "compelling" as an adjective is the same in the equal protection context. Where our fundamental privacy rights and equal protection analyses differ is in the necessary justification: In the fundamental privacy rights context, the compelling interest must be important enough to justify infringing on a right, but in the equal protection context, the compelling interest must be important enough to justify treating two classes differently regarding such a right. *See supra* note 59 and accompanying text.

[89] In *Planned Parenthood II* the State asserted that the Consent Act served five governmental interests: "(1) ensure that minors make an informed decision on whether to terminate a pregnancy; (2) protect minors from their own immaturity; (3) protect minors' physical and psychological health; (4) protect minors from sexual

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harm. As we stated in *Planned Parenthood II*, "minors often do not possess the capacity to make informed, mature decisions, *and are therefore susceptible to a host of pitfalls and dangers unknown in adult life.*"[92] The State's interest in "protecting minors from their immaturity" is in protecting minors from specific pitfalls and dangers to which their immaturity makes them especially susceptible. We therefore will consider the State's interest in "protecting minors from their immaturity" in the contexts of relevant stated harms: risks to mental and physical health and from sexual abuse.[93]

c. Step three

Having determined that the Notification Law (1) burdens a class of pregnant minors' fundamental privacy rights and (2) was motivated by compelling state interests, we now examine, under strict scrutiny, whether vindicating the State's compelling interests justifies imposing disparate burdens on the two groups of pregnant minors' fundamental privacy rights. To survive strict scrutiny the Notification Law's disparate treatment of the two classes "must further a compelling state interest and be the least restrictive means available to accomplish the state's purpose."[94] If the means-to-end fit between the State's purpose and the Notification Law is not close enough — if the Notification Law is under-inclusive or over-inclusive — then it will not survive strict scrutiny.[95]

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92 *Id.* (emphasis added).

93 *See supra* note 89.

94 *Schiel v. Union Oil Co. of Cal.*, 219 P.3d 1025, 1030 (Alaska 2009).

95 *See State v. Ostrosky*, 667 P.2d 1184, 1193 (Alaska 1983) ("As the level of scrutiny selected is higher . . . we require that . . . the legislation's means-to-ends fit be correspondingly closer. On the other hand, if relaxed scrutiny is indicated, . . . a greater degree of over[inclusiveness]or underinclusiveness in the means-to-ends fit will (continued...)

need their parents' assistance and counsel when making reproductive choices; and parents who might counsel termination are as "entitled to the support of laws designed to aid [in the] discharge of [their] responsibility"[99] to guide their children as are parents who might counsel carrying to term.[100] Yet the Notification Law's effect is that only a minor seeking termination obtains parental guidance and only the parents of a minor seeking termination are given an opportunity to counsel their daughter about alternatives. But absent a compelling interest in limiting minors' pregnancy terminations and favoring their carrying to term — which the State does not assert — the State's compelling interest in fostering parental involvement extends equally to all pregnant minors and that interest's vindication does not justify treating the classes differently.

The State and the Sponsors contend that even if the importance of the State's asserted interest in parental involvement is equal for both classes, disparate treatment is justified because the State's interests eventually will be furthered for minors seeking to carry to term without parental notification, while furthering these interests for minors seeking termination requires parental notification. They contend that parents of a minor seeking to carry to term inevitably will learn of the pregnancy and then can

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[99] *Id.* (first alteration in original) (quoting *Bellotti v. Baird*, 443 U.S. 622, 639 (1979)).

[100] The dissent — alone — asserts that unequal treatment is warranted solely by the moral difference in the pregnant minors' choices: "What similarity can there be between a decision to terminate life and a decision to preserve life?" Dissent at 72. This moral distinction is unsupported by any asserted State interest justifying the Notification Law, and it can lead only to a conclusion that the "wrong choice" launches a pregnant minor into a category of dissimilarity subjecting her to greater governmental interference than a pregnant minor who makes the "right choice." It is telling that the dissent's objection to interference with parental rights to participate in a minor's pregnancy-related health care is limited to the right to counsel against an abortion, and does not include the right to counsel against the more medically dangerous decision to carry to term.

ii. Minors' physical and mental health

The State asserts an interest in protecting minors' physical and mental health. But, again, we conclude that this general interest alone cannot justify disparate treatment based upon a pregnant minor's decision to terminate or carry to term. The Sponsors more specifically argue that abortion entails unique medical risks not present when carrying to term, such as post-abortion complications, warranting parental involvement. But the superior court found that abortion raises *fewer* health concerns for minors than does giving birth, that abortion is "quintessentially" and "extraordinarily" safe, and that "the majority consensus of American psychiatry is that abortion does not cause mental illness."[103] The court noted that four doctors who had performed abortions in Alaska testified at the trial, and none indicated parental notification was medically

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[103] *See also Gonzales v. Carhart*, 550 U.S. 124, 183 n.7 (2007) (Ginsburg, J., dissenting) ("[N]either the weight of the scientific evidence to date nor the observable reality of 33 years of legal abortion in the United States comports with the idea that having an abortion is any more dangerous to a woman's long-term mental health than delivering and parenting a child that she did not intend to have . . . ." (quoting Susan A. Cohen, *Abortion and Mental Health: Myths and Realities*, 9 GUTTMACHER POL'Y REV. 8 (2006))); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 429 n.11 (1983) ("There is substantial evidence that developments in the past decade, particularly the development of a much safer method for performing second-trimester abortions . . . have extended the period in which abortions are *safer* than childbirth." (emphasis added)), *overruled on other grounds by Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882 (1992); *Beal v. Doe*, 432 U.S. 438, 445 (1977) (accepting assertion that "an early abortion poses less of a risk to the woman's health than childbirth"); *Roe v. Wade*, 410 U.S. 113, 149 (1973) ("Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than rates for normal childbirth."); *Isaacson v. Horne*, 716 F.3d 1213, 1224 (9th Cir. 2013) ("The Supreme Court has recognized that . . . improvements in medical technology will . . . push later in pregnancy the point at which abortion is safer than childbirth . . . ."); *cf. Casey*, 505 U.S. at 860 ("We have seen how time has overtaken some of *Roe*'s factual assumptions: advances in maternal health care allow for abortions safe to the mother later in pregnancy . . . .").

The concurring opinion echoes another State argument that "[p]regnant minors seeking to carry their pregnancies to term and pregnant minors seeking to terminate their pregnancies do not face the same choice" because "the pregnant minor who seeks to carry her pregnancy to term does not strictly need medical treatment" while "[t]he pregnant minor who seeks to terminate her pregnancy . . . cannot do so without medical treatment."[105] This arbitrary distinction is untethered to the State interests justifying the Notification Law and is inconsistent with the rationale for medical emancipation.

Until actually seeking pregnancy-related medical care the only difference between a minor seeking to terminate a pregnancy and a minor seeking to carry to term is the constitutionally protected *choice* each is making.[106] But once both minors seek pregnancy-related medical care, the Notification Law allows the minor seeking to carry to term to immediately consent to and receive treatment while requiring parental notification before the minor seeking termination may consent to and receive treatment. The statutory mandate that abortions be performed by doctors does not eliminate the justification for medical emancipation — encouraging minors to seek timely legal

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[104] (...continued)
made, under its own theory the Notification Law is *detrimental* to the State's compelling interest in protecting the health of minors seeking termination.

[105] *See* AS 18.16.010(a)(1) ("An abortion may not be performed in this state unless . . . by a physician . . . .").

[106] *Cf. Planned Parenthood of Alaska, Inc.*, 28 P.3d at 913 ("[A] woman who carries her pregnancy to term and a woman who terminates her pregnancy exercise the same fundamental right to reproductive choice.").

before us demonstrate that vindicating the State's compelling interest in protecting minors from sexual abuse justifies requiring that parents of minors seeking termination be notified without requiring the same for parents of minors seeking to carry to term. And neither the dissent nor the concurring opinion expressly disputes this conclusion.

d. Conclusion

We must conclude that the State's asserted interests do not justify a distinction between pregnant minors seeking to terminate and those seeking to carry to term. Despite the factual difference between the two classes of pregnant minors, as a matter of law they are similarly situated with respect to the Notification Law. The Notification Law is under-inclusive because the governmental interests asserted in this case are implicated for all pregnant minors — as they face reproductive choices and as they live with their decisions — and the asserted justifications for disparate treatment based upon a minor's actual reproductive choice are unconvincing. The Notification Law's discriminatory barrier to those minors seeking to exercise their fundamental privacy right to terminate a pregnancy violates Alaska's equal protection guarantee.[109]

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[109] We make another observation about the dissent, which — unlike all of the parties — contends that the Notification Law is not a real barrier to a mature minor's ability to obtain the medical care necessary to terminate a pregnancy. The dissent argues that as a practical matter the Notification Law is not a barrier to abortion access because: (1) only one parent has to be notified; (2) there is an exception for the protection of the minor's life; and (3) the "easily navigable" judicial bypass mechanism presents "an almost negligible hurdle." Dissent at 75-76. The obvious counter-argument would be that if the Notification Law really is not a barrier to medical treatment for a minor seeking to terminate a pregnancy, it really would not be a barrier to a minor seeking to carry to term. Yet the dissent acknowledges that for a minor seeking to carry to term, parental notification would be a potential barrier to access to prenatal care. It is virtually undisputed that a minor's access to any kind of pregnancy-related health care is burdened by parental involvement — there otherwise would be no need for medical emancipation statutes. The question here is whether — given its stated justifications — the State

(continued...)

immaturity, fostering family communications, and protecting parents' rights to raise their children — and determined that mandatory parental notification of planned pregnancy terminations did not further those interests.[114] The court concluded that "the New Jersey Constitution does not permit the State to impose disparate and unjustifiable burdens on different classes of young women when fundamental constitutional rights hang in the balance."[115] The court also made the following prescient statement, with which we agree:

> We emphasize that our decision in no way interferes with parents' protected interests, nor does it prevent pregnant minors or their physicians from notifying parents about a young woman's choice to terminate her pregnancy. Simply, the effect of declaring the notification statute unconstitutional is to maintain the State's neutrality in respect of a minor's child-bearing decisions and a parent's interest in those decisions. In effect, the State may not affirmatively tip the scale against the right to choose an abortion absent compelling reasons to do so.[116]

The dissent nonetheless contends we are out of the mainstream of judicial reasoning, pointing to other jurisdictions with either parental consent or parental notification laws in place. But this contention is unsupported by any serious judicial reasoning tied to the required equal protection analysis under the Alaska Constitution: Relevant inquiries about each jurisdiction's laws are conspicuously absent.

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[114] *Id.* at 636-39. The court noted evidence that cesarean sections, which did not have a parental notification requirement, were more dangerous for pregnant minors than were abortions and that minors seeking terminations for the most part were not immature. *Id.* at 636-37.

[115] *Id.* at 638.

[116] *Id.* at 622.

example, relying on *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[118] the dissent asserts that the United States Supreme Court "has clearly explained" that a state may legitimately enact laws "designed to encourage a woman contemplating abortion to be informed regarding the effects that abortion may have on her and regarding alternatives to abortion."[119] The dissent therefore concludes that the State has a legitimate interest in the Notification Law that today's decision "trivializes."[120]

We do not disagree with the dissent's characterization of *Casey*. But *Casey* involved the balancing of a woman's liberty interest and a state interest in preserving unborn life *under the United States Constitution*.[121] In the case before us: (1) the fundamental right of privacy and the right of equal protection under *the Alaska Constitution* are at issue; (2) the State expressly disavowed any governmental interest in the ultimate reproductive choice made by pregnant minors, i.e., the State did not assert a compelling interest in preserving unborn life;[122] and (3) as discussed extensively above, the compelling State interests justifying the Notification Law do not include requiring pregnant minors to be informed of the "effects" of abortion or the alternatives to abortion, but rather include aiding parents to fulfill their parental responsibilities and

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118 505 U.S. 833 (1992).

119 Dissent at 65.

120 Dissent at 66.

121 505 U.S. at 869-79.

122 Any balancing — under the Alaska Constitution — of a woman's fundamental privacy right of reproductive choice and a hypothetical government interest in limiting abortions and preserving unborn life is not before us. To avoid any future misunderstanding, we note that our *Casey* discussion here is not intended to be an explicit or implicit approval or disapproval of any position on such an abstract question.

reiterate that our *Planned Parenthood II* conclusion indicating a parental notification law *might* satisfy Alaska's constitutional privacy standard does not necessarily mean that any particular parental notification law *will* do so. We also reiterate that today's equal protection decision is based on the limited State interests asserted to justify the Notification Law's discrimination against minors seeking to terminate a pregnancy, and that a similar law with different supporting justifications would require a new equal protection analysis.

C. Cross-Appeal

In light of our ruling, we do not need to reach the issues raised in the State's and the Sponsors' cross-appeals.

V. CONCLUSION

The Parental Notification Law violates the Alaska Constitution's equal protection guarantee. We REVERSE the superior court's decision to the extent that it upholds the Parental Notification Law, and we REMAND for further proceedings, including entry of judgment consistent with our decision.

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[124] (...continued)
Fisherman's Coop. Ass'n v. State, 628 P.2d 897, 908 (Alaska 1981))).

lens through which to analyze such laws, including the parental notification statute at issue in this case.

When fundamental rights are at issue, our right-to-privacy analysis closely resembles our equal protection analysis. Both modes of analysis require identification of a compelling governmental interest, advanced by the least restrictive means.[4] They differ in what aspect of a law is subjected to this strict review: its infringement of the fundamental right or its discriminatory treatment of the fundamental rights of two different groups. In my view the notification law infringes on a minor's fundamental right to reproductive choice in a manner that is not the least restrictive means of accomplishing the government's compelling interests, but it does not treat similarly situated groups dissimilarly.

As we have recognized, the State has compelling interests in "protecting minors from their own immaturity and aiding parents in fulfilling their parental

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[3] (...continued)
that the [Parental Consent Act] violates the right to privacy under the Alaska Constitution, we need not address the plaintiffs' arguments that the Act also violates the equal protection clause or that the superior court erred in interpreting the Act to include a medical emergency exception."); *State v. Planned Parenthood of Alaska* (*Planned Parenthood I*), 35 P.3d 30, 41, 45 (Alaska 2001) (holding that "[t]o justify the [Parental Consent Act's] restriction of a minor's right to terminate a pregnancy, . . . the state must establish a compelling interest in restricting the minor's right to privacy" and declining to decide the equal protection question until further evidentiary hearings were held); *Valley Hosp.*, 948 P.2d at 969 (explaining that "reproductive rights are . . . encompassed within the right to privacy expressed in . . . the Alaska Constitution"). *But see State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska*, 28 P.3d 904, 908-13 (Alaska 2001) (applying equal protection analysis in striking down a statute that denied Medicaid funding for medically necessary abortions).

[4] *See, e.g.*, *Planned Parenthood II*, 171 P.3d at 581 (fundamental right to privacy); *Titus v. State, Dep't of Admin., Div. of Motor Vehicles*, 305 P.3d 1271, 1278 (Alaska 2013) (equal protection).

pregnancy, in contrast, cannot do so without medical treatment.[9] As the superior court noted, "once 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 or that of her fetus." Instead, she *must* seek medical treatment, and the risk of delay or avoidance that animates the exception to the general parental consent requirement for "diagnosis, prevention or treatment of pregnancy, and for diagnosis and treatment of venereal disease" is qualitatively different.

The State may not discriminate between women in order to influence their reproductive choices.[10] And carrying a pregnancy to term may entail risks to a minor's physical and mental health that are equal to the corresponding risks from terminating a pregnancy. But pregnant minors seeking to carry their pregnancies to term and pregnant minors seeking to terminate their pregnancies face significantly different incentives to delay or avoid medical assistance and significantly different risks from that delay or avoidance. Thus, an equal protection analysis of the Parental Notification Law should not treat these groups as similarly situated.

Moreover, in *Planned Parenthood II* "we determine[d] that the constitution permits a statutory scheme which ensures that parents are notified so that they can be engaged in their daughters' important decisions" in matters related to pregnancy.[11] By holding up parental notification laws as a less restrictive alternative to the parental consent law then at issue, we indicated that at least some such laws would pass

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[9] *See* AS 18.16.010(a) ("An abortion may not be performed in this state unless . . . by a physician . . . in a hospital or other facility approved for the purpose.").

[10] *See State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska*, 28 P.3d 904, 913 (Alaska 2001).

[11] 171 P.3d 577, 579 (Alaska 2007).

II. THE LAW VIOLATES THE RIGHT TO PRIVACY.

The right to privacy, enshrined in the Alaska Constitution,[14] protects the fundamental right to reproductive choice for minors as well as adults.[15] A law that burdens this interest "must be subjected to strict scrutiny and can only survive review if it advances a compelling state interest using the least restrictive means of achieving that interest."[16]

In *Planned Parenthood II* we held that a parental consent law failed strict scrutiny by prohibiting a pregnant minor from terminating her pregnancy without first obtaining the consent of her parents, unless she had been granted a judicial bypass.[17] That parental consent law was not the least restrictive means of achieving the State's interests because "[t]here exists a less burdensome and widely used means of actively involving parents in their minor children's abortion decisions: parental notification."[18] This does not mean, however, that any and all parental notification laws comport with strict scrutiny; as we recognized, "parental notification statutes undoubtedly burden the privacy rights of minors."[19] These laws must still achieve their aims without any unnecessary burden on minors' privacy rights; that is, they must use the least restrictive means of achieving the State's compelling interests. The parental notification law at issue here does not achieve its goals using the least restrictive means: In fact, it is one

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[14] *See* Alaska Const. art. I, § 22 ("The right of the people to privacy is recognized and shall not be infringed.").

[15] *See Planned Parenthood II*, 171 P.3d at 581-82.

[16] *Id.* at 582.

[17] *See id.* at 583.

[18] *Id.* at 579.

[19] *Id.* at 584.

grounds of abuse (rather than folding evidence of abuse into the best interest inquiry) requires proof by clear and convincing evidence.[25]

The standard of proof can have a real, significant impact on these cases: As observed in the child custody context, "in close cases, a higher standard of proof will place the risk of erroneous factfinding on the child."[26] Here, that risk is acute. The "clear and convincing" requirement in the Parental Notification Law would require that a trial court deny a judicial bypass to some minors even if it finds that they are *likely* (though not clearly and convincingly) sufficiently mature, or victims of abuse, or best served by a bypass. The high standard of proof yields a particularly stark outcome in the case of a minor who has been abused by a parent or guardian, where a trial judge would be required to deny judicial bypass for a pregnant minor who was likely abused by her own parent but cannot provide sufficient evidence to satisfy the clear and convincing

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[24] (...continued)
preponderance of the evidence, limiting the severity of this standard of proof for the best interest analysis. *See* FLA. STAT. § 390.01114(4)(d).

[25] *See* FLA. STAT. § 390.01114(4)(d) (no notice required if court finds abuse by preponderance of the evidence); 750 ILL. COMP. STAT. 70/20(4) (no notice required if minor declares abuse or neglect to physician in writing); IOWA CODE § 135L.3(3)(m)(4)-(5) (no notice required if minor declares abuse to physician and it has been previously reported to authorities); MD. CODE ANN., HEALTH-GEN. § 20-103(c)(1)(i) (no notice required if physician judges that notice may lead to abuse); MINN. STAT. § 144.343(4)(c) (no notice required if minor declares abuse or neglect to physician, who must then report abuse); *see also* COLO. REV. STAT. § 12-37.5-105(1)(b) (no notice required if minor declares abuse or neglect to physician), *invalidated by Planned Parenthood of the Rocky Mountains Servs.*, 287 F.3d 910.

[26] *Evans v. McTaggart*, 88 P.3d 1078, 1095 (Alaska 2004) (Fabe, C.J., dissenting).

will likely be foreclosed to many of the young women it is designed to protect.[31] Requiring a signed and notarized declaration from a witness, therefore, unduly restricts these minors' rights. Nor does the judicial bypass — even if it were not overly restrictive itself — cure the unreasonably restrictive nature of this provision. As we held in *Planned Parenthood II*, "the inclusion of [a] judicial bypass procedure does not reduce the restrictiveness" of the provision in question.[32] So for a daughter who was abused by a parent or guardian — perhaps the very person she is required to notify under this law — neither the judicial bypass nor the witnessed declaration provides a constitutionally adequate alternative to the law's parental notification requirement.

Third, the Parental Notification Law burdens physicians and all involved families by imposing verification requirements that have no analogue in the notification laws of other states. Most of the 11 states other than Alaska that have notification laws do not specify how the identity of a notice recipient is to be established, and those that do simply require that the recipient produce government-issued identification[33] or that the physician record the number dialed and the date and time of the phone call.[34] In

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[31] As the superior court explained, witnesses at trial testified that the opportunity for exemption by means of a witnessed affidavit is "largely illusory" because it requires the minor to disclose her pregnancy to a family member who witnessed the abuse but "who has to that moment remained silent." And as the superior court recognized, "[i]t is unlikely that an adolescent would recall the name of an OCS worker or a police officer who was involved with the family at a prior time, or will desire to reveal her pregnancy to such a stranger." Therefore, the superior court concluded, "only a small percentage of abuse victims will avail themselves of the [law's] affidavit-of-abuse exception to notice."

[32] 171 P.3d 577, 584 (Alaska 2007).

[33] *See* GA. CODE ANN. §§ 15-11-681(2); 15-11-682(a)(1)(A).

[34] *See* FLA. STAT. § 390.01114(3)(a).

Thus, this parental notification scheme is not the least restrictive means of advancing the State's compelling interests.

Fourth, the statute's imposition of civil liability for all violations of the Parental Notification Law is more punitive and chilling than penalties in equivalent notification laws in other states. Again, although the superior court enjoined the operation of this portion of the statute, the State and its co-appellants argue that the injunction against it should be lifted. Of the five states that make physicians civilly liable for failure to provide notice, two require that the physician's failure be "willful."[39] Only one of the remaining three discusses punitive damages, and then only to clarify that the statute does not specifically prohibit such damages.[40] In contrast, Alaska's Parental Notification Law explicitly allows punitive damages against physicians without requiring any finding of willfulness.[41] This is yet another way in which this statute is an outlier, at odds with our constitution's express recognition of the fundamental right to privacy and its requirement that any burden on that right must be the least restrictive means of achieving a compelling government interest.

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[38] (...continued)
STAT. ANN. § 132:33(II) (same); S.D. CODIFIED LAWS § 34-23A-7 (same); W. VA. CODE § 16-2F-3(a) (requirement met if "physician has given [notice] or caused [notice] to be given"); *see also* COLO. REV. STAT. § 12-37.5-104(1)(a) (notice may be provided by, among others, any person older than 18 who is not related to the minor), *invalidated by Planned Parenthood of the Rocky Mountains Servs., Corp. v. Owens*, 287 F.3d 910 (10th Cir. 2002).

[39] *See* S.D. CODIFIED LAWS § 34-23A-22; *see also* COLO. REV. STAT. § 12-37.5-106(1), *invalidated by Planned Parenthood of the Rocky Mountains Servs.*, 287 F.3d 910.

[40] *See* DEL. CODE ANN. tit. 24, § 1789B; *see also* MINN. STAT. § 144.343(5) (establishing civil liability but not damages); N.H. REV. STAT. ANN. § 132:35 (same).

[41] *See* AS 18.16.010(e).

These aspects of the law further demonstrate that the statutory scheme as designed was one of the most restrictive and burdensome in the country.

And not only does this law achieve its aims by overly restrictive methods, it also adopts an overly expansive scope by sweeping in minors whose maturity in reproductive choices the legislature has formerly recognized. The parental consent act we considered in *Planned Parenthood II* applied only to minors 16 and younger.[47] Both the court and the dissent in that case noted that this represented "a serious effort to narrowly tailor the scope of the [Parental Consent Act]"[48] by excluding "the population of teenage girls most likely competent, by virtue of maturity and experience, to make the decision regarding abortion without adult assistance."[49] The notification law at issue in this appeal does not demonstrate a serious effort at narrow tailoring. Indeed, while a 17-year-old living independently from her parents may make her own, uninfluenced decisions about all other medical questions,[50] the Parental Notification Law would not allow her the same independence with regard to her reproductive choice,[51] a decision

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[46] (...continued)
avoid these two particular problems, their inclusion in the original statutory text provides yet another indication that the law as enacted did not use the least restrictive means available.

[47] *See Planned Parenthood II*, 171 P.3d 577, 583 (Alaska 2007).

[48] *Id.*

[49] *Id.* at 587 (Carpeneti, J., dissenting).

[50] *See* AS 25.20.025(a)(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.").

[51] AS 18.16.010(a)(3) (parental notification law applies to all "pregnant, (continued...)

The "legislative intent" prong of our severability test incorporates the widely accepted principle that "the touchstone for any decision about remedy is legislative intent, for a court cannot 'use its remedial powers to circumvent the intent of the legislature.' "[55] In assessing legislative intent, our recent cases have considered whether the act in question contained a severability clause, reading such a clause as the primary "indicat[ion] that the legislature intended the remainder of the Act to stand if part of it were invalidated."[56] In both *Alaskans for a Common Language v. Kritz* and *State v. Alaska Civil Liberties Union*, the presence of a severability clause was central to our conclusion that the remaining portions of the acts could stand alone after severing the constitutionally invalid portions. Other state high courts and the U.S. Supreme Court have taken a similar approach to severability clauses, generally removing only the challenged portions if a severability clause exists but striking the entire law in the absence of such a clause.[57]

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[55] *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 330 (2006) (quoting *Califano v. Westcott*, 443 U.S. 76, 94 (1979)) (Powell, J., concurring in part and dissenting in part).

[56] *Alaskans for a Common Language*, 170 P.3d at 209 (quoting *Alaska Civil Liberties Union*, 978 P.2d at 633).

[57] *E.g.*, *Ayotte*, 546 U.S. at 331 (allowing certain portions of the challenged law to stand in part because "the Act contains a severability clause"); *Ruiz v. Hull*, 957 P.2d 984, 1002 (Ariz. 1998) ("[W]e decline to sever the invalid portions of the Amendment . . . because [it] does not contain a severability clause and . . . because the record is devoid of evidence that the voters would have enacted such a rewritten and essentially meaningless amendment."); *Dallman v. Ritter*, 225 P.3d 610, 638 (Colo. 2010) (holding that, when assessing "the autonomy of the portions remaining" and "the intent of the enacting legislative body," the court "must take into account any severability clause, which demonstrates the lawmaking body's intent that the law remain largely in force despite particular, limited infirmities").

and complete in itself"[61] in the absence of all these provisions. Thus, under our prior case law, we cannot presume the remaining portions were intended to stand on their own. The law therefore fails the legislative intent prong of the *Lynden* test.

Next, although the failure of one *Lynden* prong is sufficient to conclude that the invalid portions cannot be severed, in this case the statute likely fails the "legal effect" prong of the test as well. Specifically, I have serious doubt that "legal effect can be given"[62] to this law once critical aspects of virtually all the core provisions are found unconstitutional. As other courts engaging in similar severability analyses have noted, the challenged portions of a statute may "represent a vital part of the statutory scheme," such that altering or removing them "would create a program quite different from the one the people actually adopted."[63] The Ninth Circuit, for instance, has held that constitutionally flawed provisions of a law cannot be severed when doing so "would essentially eviscerate the statute."[64]

The Supreme Court of Colorado undertook a similar analysis in a recent case challenging an amendment to the state constitution, which limited certain types of political campaign contributions, and which had been passed by voter initiative.[65] After striking the invalid provisions, the court explained, the entire law must fall "if what remains is so incomplete or riddled with omissions that it cannot be salvaged as a

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61 *Id.*

62 *Lynden Transp., Inc. v. State*, 532 P.2d 700, 713 (Alaska 1975).

63 *Spokane Arcades, Inc.*, 631 F.2d at 139 (internal alterations omitted) (quoting *Sloan v. Lemon*, 413 U.S. 825, 834 (1973)).

64 *Id.*

65 *Dallman v. Ritter*, 225 P.3d 610, 616-17, 638-40 (Colo. 2010).

own cases,[71] as well as similar approaches used by other courts,[72] caution against wholesale revision of statutory language in this manner. Nor can we simply modify the constitutionally problematic provisions as the dissent suggests,[73] because we must refrain from this "quintessentially legislative work" of "rewriting [the] law to conform it to constitutional requirements."[74] Thus, at the point where we would be essentially rewriting every major provision of a statute, the entire statute instead must be struck down. Here, where the unconstitutional portions of the law affect every element of the statutory scheme, the law reaches the point where it is so riddled with constitutional holes that it cannot be salvaged.

Accordingly, because the Parental Notification Law fails both prongs of the *Lynden* test, I would conclude that the constitutionally invalid portions of the law are not severable from the remaining provisions, and thus the entire law must fall. I therefore would hold that the Parental Notification Law impermissibly violates a minor's fundamental right to privacy because it does not advance the compelling state interest by

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[71] *See, e.g., State, Dep't of Commerce, Cmty. & Econ. Dev., Div. of Ins. v. Alyeska Pipeline Serv. Co.*, 262 P.3d 593, 598 (Alaska 2011) (declining to alter the meaning of a statute even when it was likely misdrafted).

[72] *Ayotte*, 546 U.S. at 329-30 (noting that, when deciding whether to sever a portion of a statute, courts should refrain from rewriting the law in question); *Ruiz v. Hull*, 957 P.2d 984, 1002 (Ariz. 1998) (declining to perform "judicial surgery" because it would leave a "rewritten and essentially meaningless [law]"); *Dallman*, 225 P.3d at 638 ("[W]e cannot rewrite or actively reshape a law in order to maintain its constitutionality." (citing *Ayotte*, 546 U.S. at 330)).

[73] Dissent at 90.

[74] *Ayotte*, 546 U.S. at 329 (quoting *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397 (1988)).

STOWERS, Justice, dissenting.

I dissent from today's opinion because it unjustifiably departs from our earlier approval of parental notification in *Planned Parenthood II*,[1] misapplies our equal protection case law by comparing two groups that are not similarly situated, and fails to consider how other states have handled similar questions related to parental notification laws. I also disagree with the concurring opinion that the Parental Notification Law violates the Alaska Constitution's Privacy Clause. But, for argument's sake, even if it does, I believe that any privacy concerns could be resolved by severing certain provisions of the Parental Notification Law.

Moreover the majority and concurrence ignore in practical effect the interests and rights of the State and parents in taking steps to assist a minor who is seeking an abortion in receiving information and counseling concerning all aspects of that decision. The United States Supreme Court has clearly explained that the State has a legitimate right to enact laws designed to encourage a woman contemplating abortion to be informed regarding the effects that abortion may have on her and regarding alternatives to abortion. In *Planned Parenthood v. Casey*, Justice Sandra Day O'Connor wrote for the Court and stated:

> [I]t must be remembered that *Roe v. Wade* speaks with clarity in establishing not only the woman's liberty but also the State's "important and legitimate interest in potential life." That portion of the decision in *Roe* has been given too little acknowledgment and implementation by the Court in its subsequent cases. Those cases decided that any regulation touching upon the abortion decision must survive strict scrutiny, to be sustained only if drawn in narrow terms to further a compelling state interest. Not all of the cases

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[1] *State v. Planned Parenthood of Alaska*, 171 P.3d 577 (Alaska 2007) (*Planned Parenthood II*).

I. INTRODUCTION

> [T]he right to the care and custody of one's own child is a fundamental right recognized by both the federal and state constitutions. This right is one of the most basic of all civil liberties.[4]

This appeal raises questions about the Parental Notification Law through the lens of minors' equal protection and privacy rights, but it also raises questions about parents' fundamental rights to be informed that their minor daughter is seeking an abortion *and* parents' rights to discuss this potentially life-changing decision with their daughter before she undergoes this procedure.[5] In 1997 the Alaska Legislature enacted a law that provided that minors could not obtain abortions without their parents' *consent*, subject to certain exceptions.[6] Planned Parenthood challenged this Alaska Parental

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[4] *Seth D. v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.*, 175 P.3d 1222, 1227-28 (Alaska 2008) (citations omitted). I acknowledge that this quote is frequently found in the context of court decisions concerning the termination of parental rights. But it seems reasonable to conclude that parents' fundamental rights to provide care for their children include the right to know that their minor daughter is planning to obtain an abortion and the right to counsel their daughter concerning the "philosophic and social arguments of great weight" recognized by the Supreme Court in *Planned Parenthood v. Casey*, quoted above.

[5] The majority argues that the issue before this court has nothing to do with parents' constitutional rights to parent their children and that this case instead involves only the questions of whether the Notification Law violates minors' equal protection or privacy rights. In my view, this case is more about the rights of parents to be informed about and involved in their daughter's decision to have an abortion than anything else. Nevertheless, the legal analysis in this dissent responds to the court's majority and concurring opinions that rest upon equal protection and privacy grounds and conclude that the Parental Notification Law does not violate either equal protection or the right to privacy.

[6] Ch. 14, §§ 1-10, SLA 1997.

> decision." And many states currently employ this less restrictive approach. Because the State has failed to establish that the greater intrusiveness of a statutory scheme that requires parental consent, rather than parental notification, is necessary to achieve its compelling interests, the Parental Consent Act does not represent the least restrictive means of achieving the State's interests and therefore cannot be sustained.[10]

The court concluded by again lauding the benefits of a parental notification statute in language that, given today's decision, can only be regarded as ironic:

> These expressed legislative goals — increased parental communication, involvement, and protection — are no less likely to accompany parental notification than the parental "veto power" [over a minor's decision to have an abortion].
>
> . . . .
>
> Notification statutes protect minors by enhancing the potential for parental consultation concerning a [minor's] decision. In fact, to the extent that parents who do not have a "veto power" over their minor children's abortion decision have a greater incentive to engage in a constructive and ongoing conversation with their minor children about the important medical, philosophical, and moral issues surrounding abortion, a *notification requirement may actually better serve the State's compelling interests.*[11]

In reasonable reliance on the court's approval of parents' rights to be notified of their daughters' intent to have an abortion, the Alaska Legislature enacted the Parental Notification Law in accordance with a voter initiative passed by Alaska

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10 *Id.* (quoting *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 511 (1990)) (emphasis added).

11 *Id.* at 585 (second alteration in original) (emphasis added) (citations omitted).

fact,[13] subject to reversal by an appellate court only if the trial court that made that factual finding clearly erred.[14]

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[13] The majority today does not agree that whether two groups are similarly situated is a question of fact. The majority acknowledges that this court has held in a unanimous decision as recently as two years ago that "[w]hether two entities are similarly situated is generally a question of fact." *State v. Schmidt*, 323 P.3d, 647, 655 (Alaska 2014). But today, being confronted with this inconvenient holding, the majority now claims that this statement "may have created some ambiguity about the standard of review for 'similarly situated' when examining an equal protection challenge under the 'shorthand analysis' — is it a question of fact or is it a mixed question of fact and law?" Opinion at 26. The majority rationalizes that "rather than resolving the 'similarly situated' issue purely as a factual matter" in *Schmidt*, "we considered the superior court's factual findings . . . and held as a matter of law that same-sex couples who would marry if allowed to do so were . . . similarly situated to married couples." Opinion at 26 n.82. But the majority also claims that "[w]e do not need to address that question [raised by *Schmidt* regarding the 'similarly situated' standard of review] here" because we are not using a shorthand analysis. Opinion at 26-27.

The standard of review can be critical to the outcome of a case. If the issue presented concerns a factual finding by the trial court, this court will review that finding under a very deferential clear error standard: only if the trial court's finding is clearly erroneous will we reverse that finding. *Planned Parenthood II*, 171 P.3d at 581. But if the issue presented involves a question of law, this court will be free to substitute its own judgment for that of the trial court. This court reviews such questions de novo, adopting the rule of law "in light of precedent, reason, and policy." *Id.*

It is ironic, at the least, that the majority today must disavow precedent even with respect to the standard of review in order to also disavow its approval of a parental notification law repeatedly championed in *Planned Parenthood II*. The law on the standard of review had been settled and is straightforward: whether the two groups are similarly situated has been traditionally understood to be a question of fact. Now the majority unjustifiably uses its "independent judgment" to "clarify" the law to avoid applying the clearly erroneous standard of review to the superior court's factual finding that minors seeking abortions are not similarly situated to minors who want to carry their pregnancies to term.

[14] *Schmidt*, 323 P.3d at 655 (" 'Whether two entities are similarly situated is (continued...)

Under its ruling today, *no* parental notification law recognizing parents' fundamental legal rights to notification of, much less meaningful involvement in, their minor daughters' decisions to have abortions will be upheld by this court under its strained jurisprudence defining minors' rights to equal protection. And notwithstanding its broad approval in *Planned Parenthood II* of a parental notification law being an acceptable lesser restrictive alternative to a parental consent law, the concurrence's opinion today that the Parental Notification Law violates a minor's right to privacy suggests that this court will always find a lesser restrictive alternative that will defeat the legislature's effort to craft a constitutional parental notification law.

I cannot see how the court can reach these results under our standard of review for constitutional questions: "adopting the most persuasive rule of law in light of precedent, reason, and policy."[17] I have explained above why the Parental Notification Law does not violate equal protection: the two classes of minors are not similarly situated. Given the critical balance between a woman's right to decide to have an abortion, the State's legitimate and compelling interests in the health of the minor who is seeking an abortion, and the parents' fundamental rights to be informed of and involved in their minor daughter's decision making, I conclude that so long as there is an effective, reasonably simple way for a sufficiently mature minor to bypass the parental notification requirements under the statute, our precedent, reason, and policy compel upholding the Parental Notification Law as a legitimate exercise of the people's power to initiate law and of legislative power to enact law. In the balance, a mature minor's right to privacy, whatever its contours, is protected by the judicial bypass mechanism contained in the statute; an immature minor's right to privacy, if any, is not so protected nor should it be — because she is immature.

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[17] *Id.* at 581.

"sufficiently mature and well enough informed to decide intelligently whether to have an abortion without notice to . . . a parent, guardian, or custodian."[21]

Even in the absence of abuse, the bypass process presents an almost negligible hurdle to access to an abortion with the inclusion of the "mature and well-informed" language in AS 18.16.030(b)(4)(A). The superior court found that under this broad provision "[i]f an Alaskan minor invokes the sufficient-maturity prong in her bypass petition, her petition will invariably be granted."[22] While filing a petition and appearing in court may seem to be a challenging experience for a minor, it is not difficult for an appropriately mature and well-informed minor to obtain judicial bypass, not only because of the broad scope of the language in AS 18.16.030(b)(4)(A), but also because access and cost are not barriers in either theory or practice.

First, the statute itself ensures that access and cost are not barriers to judicial bypass. The statute explicitly provides that an attorney will be appointed if the minor does not retain one of her own[23] and that there is no cost to obtain the necessary forms, file these forms, or appear in court.[24] The statute also provides that the minor must be informed that she may request a telephonic hearing to avoid an in-person hearing and that the court may excuse a minor from school to participate in her hearing.[25]

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[21] AS 18.16.030(b)(4)(A).

[22] During the 14 months that this Parental Notification Law was in effect, 9 minors filed bypass petitions. Of those petitions, 8 were granted and 1 was withdrawn. The superior court also noted that studies from Minnesota and Massachusetts indicated their rates of denied petitions to be 0.25% and 0.013%, respectively.

[23] AS 18.16.030(d).

[24] AS 18.16.030(*l*), (m).

[25] AS 18.16.030(n).

privacy[27] and that even though the State's interests in "protecting minors from their own immaturity and aiding parents in fulfilling their parental responsibilities" were compelling,[28] the Parental Consent Act could not stand because it failed to use the least restrictive means available to advance the State's compelling interests.[29]

While this court held that the Parental Consent Act improperly balanced the minor's right to privacy and these compelling government interests, the court also endorsed "a statutory scheme which ensures that parents are notified so that they can be engaged in their daughters' important decisions in these matters."[30] More specifically, this court held that "[t]here exists a less burdensome and widely used means of actively involving parents in their minor children's abortion decisions: parental notification."[31] The court identified the option of parental notification as a constitutionally acceptable lesser restrictive means of achieving the State's compelling interests; the court claimed that "[b]ecause the State has failed to establish that the greater intrusiveness of a statutory scheme that requires parental consent, rather than parental notification, is necessary to achieve its compelling interests, the Parental Consent Act does not represent the least restrictive means of achieving the State's interests and therefore cannot be sustained."[32] That last holding was based on the idea that the legislature could have achieved the same

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27 *Id.* at 581-82.

28 *Id.* at 582.

29 *Id.* at 583-85.

30 *Id.* at 579.

31 *Id.*

32 *Id.*

> Notification Law's discriminatory barrier to those minors seeking to exercise their fundamental privacy right to terminate a pregnancy violates Alaska's equal protection guarantee.[37]

But a law requiring parental notification of a minor's abortion *necessarily* differentiates between minors seeking an abortion and minors who intend to carry to term. This is because Alaska minors who intend to carry to term are able to consent to pregnancy-related care without parental notification or consent.[38] The legislature could have required parental notification for any pregnancy-related treatment of a minor. But the parties agreed in the superior court that "no useful purpose is served by withdrawing medical emancipation and requiring parental consultation for carry-to-term decisions." And the superior court found that medical emancipation for carry-to-term decisions encouraged minors "to obtain prenatal care [that] advances important interests in maternal and fetal health." This is all the more important in light of the superior court's findings regarding the serious health risks pregnant minors face when carrying to term.

Furthermore, the majority of states whose laws we cited in *Planned Parenthood II* make a similar distinction.[39]

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[37] Opinion at 37.

[38] AS 25.20.025(a)(4).

[39] *Planned Parenthood II*, 171 P.3d 577, 583 (Alaska 2007) ("Although the precise details of [the parental notification statutes cited in note 40 of *Planned Parenthood II*] vary, *they all prohibit minors from terminating a pregnancy until their parents have been notified* and afforded an appropriate period of time to actively involve themselves in their minor children's decision-making processes." (emphasis added)). The following list sets forth the status of this distinction in the states we cited in *Planned Parenthood II*, note 40: COLO. REV. STAT. §§ 12-37.5-101 to -108 (requiring parental notification), § 13-22-103.5 (providing medical emancipation for care related to an intended live birth); DEL. CODE ANN. tit. 13, § 710 (providing medical emancipation for, (continued...)

today's opinion suggests that there is something wrong with *this* notification statute and that some other notification statute might survive an equal protection challenge. But it is difficult to see how any parental notification law could survive unless there are significant changes to Alaska's medical emancipation laws, such that minors intending to carry to term are subject to parental notification as well. Neither party endorses such changes.

B. The Two Groups Are Not Similarly Situated.

The Alaska Constitution provides equal protection only among those who are similarly situated.[40] If the groups being compared are similarly situated "we apply a sliding scale of scrutiny to the challenged practice."[41] "[W]e first determine the importance of the constitutional right . . . . We then examine the [S]tate's interests . . . . Finally, we consider the means the [S]tate uses to advance its interests."[42]

The majority concedes that there is a "factual difference between the two classes of pregnant minors." However, the majority concludes that "the State's asserted interests do not justify a distinction between pregnant minors seeking to terminate and those seeking to carry to term."

As explained in the Introduction, the Parental Notification Law does not violate Alaska's guarantee of equal protection because the two groups are not similarly situated. I agree with the reasoning set forth in the superior court's decision on this matter, with which the concurrence also agrees.

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[40] *Shepherd v. State, Dep't of Fish & Game*, 897 P.2d 33, 44 (Alaska 1995) ("The Equal Rights and Opportunities Clause of the Alaska Constitution requires equal treatment *only for those who are similarly situated.*" (emphasis added)).

[41] *Alaska Inter-Tribal Council v. State*, 110 P.3d 947, 966-67 (Alaska 2005).

[42] *Id.* at 967 (footnotes omitted).

consent[45] laws that are currently in effect.[46] The Supreme Court of the United States has held that a law requiring parental notification is not unconstitutional under federal law.[47] Several of these state laws have been challenged and declared constitutional under their respective state constitutions,[48] including some that have survived equal protection

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[45] Twenty-six states have active parental consent statutes. ALA. CODE §§ 26-21-1 to -8; ARIZ. REV. STAT. ANN. § 36-2152; ARK. CODE ANN. § 20-16-801 to -810; IDAHO CODE ANN. § 18-609A (as amended by 2015 IDAHO SESS. LAWS 141); IND. CODE § 16-34-2-4; KAN. STAT. ANN. § 65-6705; KY. REV. STAT. ANN. § 311.732; LA. REV. STAT. ANN. § 40:1299.35.5; MASS. GEN. LAWS. ch. 112, § 12S; MICH. COMP. LAWS §§ 722.901-.908; MISS. CODE ANN. §§ 41-41-51 to -63; MO. REV. STAT. § 188.028; NEB. REV. STAT. §§ 71-6901 to -6911; N.C. GEN. STAT. §§ 90-21.6 to .10; N.D. CENT. CODE § 14-02.1 to -03.1; OHIO REV. CODE ANN. § 2919.121 *unconstitutional provisions severed in Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 364 (6th Cir. 2006); OKLA. STAT. tit. 63, §§ 1-740.1 to .6; 18 PA. CONS. STAT. ANN. § 3206; R.I. GEN. LAWS § 23-4.7-6; S.C. CODE ANN. § 44-41-31; TENN. CODE ANN. 37-10-301 to -308; TEX. OCC. CODE ANN. § 164.052(a)(19); UTAH CODE ANN. § 76-7-304.5; VA. CODE ANN. § 16.1-241(W) (creating a process whereby a minor may petition a court for the ability to consent to an abortion), § 54.1-2969(J) (excluding abortion from a list of procedures to which a minor may independently consent unless the minor complies with § 16.1-241); WIS. STAT. § 48.375; WYO. STAT. ANN. § 35-6-118. *But see* CAL. HEALTH & SAFETY CODE § 123450 (requiring parental consent) *invalidated under state constitution in Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 800 (Cal. 1997).

[46] The majority argues that I cite these jurisdictions without "[r]elevant inquiries about each jurisdiction's laws." Opinion at 39. But in *Planned Parenthood II* the dissent cited these jurisdictions for similar propositions, and I believe it is fair to cite them for similar purposes here. *Planned Parenthood II*, 171 P.3d 577, 596 (Alaska 2007) (Carpeneti, J., dissenting).

[47] *H.L. v. Matheson*, 450 U.S. 398, 409 (1981) (citing *Bellotti v. Baird*, 443 U.S. 622, 640, 649 (1979)).

[48] *Ex parte Anonymous*, 531 So. 2d 901, 905 (Ala. 1988); *Planned Parenthood Ariz., Inc. v. Am. Ass'n of Pro-Life Obstetricians & Gynecologists*, 257 P.3d 181, 186 (Ariz. App. 2011); *Hope Clinic for Women, Ltd. v. Flores*, 991 N.E.2d 745, (continued...)

accepted limits on the right to privacy and equal protection[51] and shows a marked disrespect to the people's and the legislature's expression of the State's interests in both the health and well-being of its minor citizens and the minors' parents' rights to be informed and involved in their daughters' decision making.

IV. THE RIGHT TO PRIVACY

While I agree with that part of the concurrence's equal protection discussion concluding that the two classes of pregnant minors are not similarly situated, I disagree with the concurrence's conclusion that the Parental Notification Law violates the Alaska Constitution's Privacy Clause. The plain language of the Privacy Clause does not address this question, nor is there any suggestion in the history of the constitutional amendment creating the right to privacy in Alaska that the amendment was intended to overturn parents' rights to be informed that their minor daughters were intending to obtain abortions.[52] As explained above, in *Planned Parenthood II* this court determined — correctly — that the State's interests in "protecting minors from their own immaturity and aiding parents in fulfilling their parental responsibilities" are compelling.[53] It is only a misapplication of the "strict scrutiny/narrow tailoring of

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[51] *See Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 871-72 (1992).

[52] *See Gray v. State*, 525 P.2d 524, 528 (Alaska 1974) ("In 1972 Alaska amended its constitution expressly providing that, 'The right of the people to privacy is recognized and shall not be infringed.' *There is no available recorded history of this amendment* . . . . But the right of privacy is not absolute. Where a compelling state interest is shown, the right may be held to be subordinate to express constitutional powers such as the authorization of the legislature to promote and protect public health and provide for the general welfare." (emphasis added) (internal citations omitted)).

[53] *Planned Parenthood II*, 171 P.3d 577, 582 (Alaska 2007).

under the rubric of right to privacy or equal protection. The court's "lesser restrictive alternative" analysis today reminds me of Zeno's paradox of the race between the Tortoise and Achilles (purporting to prove that the faster runner can never win the race because, when one artificially divides the distance of the racecourse in half, then again in half, and again and again ad infinitum, the runner can never cross the finish line because there will always be some small incremental half-distance remaining).

In my view, once it is understood that the Parental Notification Law contains an effective, reasonably simple judicial bypass mechanism that will permit sufficiently mature minors to bypass parental notification,[56] and provides for bypass if there is evidence of parental abuse,[57] then the court should respect the people's and the legislature's policy decisions and line drawing with respect to the remaining details of the Notification Law. For example, the concurrence finds it objectionable that the legislature drew a line at age 16 in the Parental Consent Act[58] but drew the line at age 18 in the Parental Notification Act.[59] I do not find this difference to be of constitutional magnitude. Though a minor aged 16 to 17 is brought within the Notification Act, if she is sufficiently mature, or if there is evidence of parental abuse, then she will be able to bypass parental notification. I find this entirely reasonable and do not think it is the court's constitutional responsibility or prerogative to second guess this legislative policy call.

Finally, assuming for the sake of argument that the Parental Notification Law as written does violate the Privacy Clause, I also cannot join in the concurrence's

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[56] AS 18.16.030(b)(4)(A).

[57] AS 18.16.030(b)(4)(B).

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

[59] AS 18.16.010(a)(3).

Notification Law is one of the strictest in the country. Second, the concurrence suggests that the heavy burden the Notification Law places on physicians and families is overbroad compared to similar laws in other jurisdictions. The concurrence notes that a parent or guardian must show government identification and proof of their relationship to the minor before receiving notice. The concurrence also argues that the Parental Notification Law places physicians under a heavy burden, as they are required to both verify that the phone number they use to provide notice is that of the parent or guardian and to ask questions to verify the identity of the parent or guardian once the physician reaches them. Finally, the concurrence suggests that the Parental Notification Law is too expansive in scope because it applies to minors over the age of sixteen, while *Planned Parenthood II* only considered a notification law applicable to minors aged sixteen and younger.

I disagree with the concurrence's conclusions that this law "does not demonstrate a serious effort at narrow tailoring" and that these aspects of the Parental Notification Law are overbroad. As just one example, consider the clear and convincing evidence standard, which requires a minor to make certain showings by clear and convincing evidence before bypassing the Notification Law. Practically, this standard is no more strict than similar laws in other states. When a minor seeking a judicial bypass appears before the court alleging she is sufficiently mature to make her own decision, she in all probability will be the only witness present. Her testimony will be persuasive on the merits or it will not be. If it is persuasive to the court, it will be found to be clear and convincing; if it is found unpersuasive, the testimony would not meet the preponderance of the evidence standard.

Furthermore, the superior court has already enjoined certain portions of the Parental Notification Law while upholding others. The superior court enjoined the civil liability portion of the statute as well as the personal-notice-by-physician provision.