IN THE SUPREME COURT FOR THE STATE OF ALASKA

STATE OF ALASKA, Appellant and Cross-Appellee, v. PLANNED PARENTHOOD OF ALASKA, et al., Appellees and Cross-Appellants.	)	**Supreme Court No. S-11365/S-11386** Case No. 3AN-97-06014CI

On Appeal from the Superior Court for the State of Alaska
Third Judicial District at Anchorage
Sen K. Tan, Superior Court Judge

APPELLEE BRIEF OF APPELLEES/CROSS-APPELLANTS

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Marilyn May, Clerk

By _____
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ALASKA

Ak. Const. art. I, § 1
This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

Ak. Const. art. I, § 22
The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

AS § 08.65.140
(a) Except as provided in (e) of this section, a certified direct-entry midwife may not assume the care or delivery of a client unless the certified direct-entry midwife has recommended that the client undergo a physical examination performed by a physician, physician assistant, advanced nurse practitioner, or certified nurse midwife, who is licensed in this state.
(b) A certified direct-entry midwife shall inform a woman seeking home birth of the possible risks of home birth and shall obtain a signed informed consent, including the recommendation for a physical examination required under (a) of this section, from the woman before the onset of labor. The consent shall be maintained by the certified direct-entry midwives as part of the woman's record. A certified direct-entry midwife shall accept full legal responsibility for the direct-entry midwife's acts or omissions.
(c) A certified direct-entry midwife shall comply with the requirements of AS 18.15.150 concerning taking of blood samples, AS 18.15.200 concerning screening of phenylketonuria (PKU), AS 18.50.160 concerning birth registration, AS 18.50.230 concerning registration of deaths, AS 18.50.240 concerning fetal death registration, and regulations adopted by the Department of Health and Social Services concerning prophylactic treatment of the eyes of newborn infants.
(d) A certified direct-entry midwife may not knowingly deliver a woman who
(1) has a history of thrombophlebitis or pulmonary embolism;
(2) has gestational diabetes, diabetes, hypertension, Rh disease with positive titer, active tuberculosis, active syphilis, active gonorrhea, epilepsy, heart disease, or kidney disease;
(3) contracts genital herpes simplex in the first trimester of pregnancy or has active genital herpes in the last two weeks of pregnancy;
(4) has severe psychiatric illness;
(5) inappropriately uses controlled substances, including those obtained by prescription;
(6) has multiple gestation;
(7) has a fetus of less than 37 weeks gestation at the onset of labor;

(8) has a gestation of more than 42 weeks by dates and examination;
(9) has a fetus in any presentation other than vertex at the onset of labor;
(10) is a primigravida with an unengaged fetal head in active labor, or any woman who has rupture of membranes with unengaged fetal head, with or without labor;
(11) has a fetus with suspected or diagnosed congenital anomalies that may require immediate medical intervention;
(12) has pre-eclampsia or eclampsia;
(13) has bleeding with evidence of placenta previa;
(14) any condition determined by the board to be of high risk to the pregnant woman and newborn;
(15) has had a previous caesarian delivery or other uterine surgery;
(16) experienced the rupture of membranes at least 24 hours before the onset of labor; or
(17) is less than 16 years of age at the time of delivery.

(e) Notwithstanding (d) of this section, a certified direct-entry midwife may deliver a woman with any of the complications or conditions listed in (d)(1) -- (17) of this section if
(1) the delivery is a verifiable emergency; and
(2) a physician or certified nurse midwife is not available in the geographic vicinity.

(f) A certified direct-entry midwife may not attempt to correct fetal presentation by external or internal inversion unless
(1) there is a verifiable emergency; and
(2) a physician or certified nurse midwife is not available in the geographic vicinity.

AS § 09.55.556

(a) A health care provider is liable for failure to obtain the informed consent of a patient if the claimant establishes by a preponderance of the evidence that the provider has failed to inform the patient of the common risks and reasonable alternatives to the proposed treatment or procedure, and that but for that failure the claimant would not have consented to the proposed treatment or procedure.

(b) It is a defense to any action for medical malpractice based upon an alleged failure to obtain informed consent that
(1) the risk not disclosed is too commonly known or is too remote to require disclosure;
(2) the patient stated to the health care provider that the patient would undergo the treatment or procedure regardless of the risk involved or that the patient did not want to be informed of the matters to which the patient would be entitled to be informed;
(3) under the circumstances consent by or on behalf of the patient was not possible; or
(4) the health care provider after considering all of the attendant facts and circumstances used reasonable discretion as to the manner and extent that the alternatives or risks were disclosed to the patient because the health care provider

reasonably believed that a full disclosure would have a substantially adverse effect on the patient's condition.

AS 18.16.010

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

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

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

(3) before an abortion is knowingly performed or induced on an unmarried, unemancipated woman under 17 years of age, consent has been given as required under AS 18.16.020 or a court has authorized the minor to consent to the abortion under AS 18.16.030 and the minor consents; for purposes of enforcing this paragraph, there is a rebuttable presumption that a woman who is unmarried and under 17 years of age is unemancipated; and

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

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

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

(d) [Repealed, § 6 ch 14 SLA 1997.]

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

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

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

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

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

AS § 18.16.030

(a) A woman who is pregnant, unmarried, under 17 years of age, and unemancipated who wishes to have an abortion without the consent of a parent, guardian, or custodian may file a complaint in the superior court requesting the issuance of an order authorizing the minor to consent to the performance or inducement of an abortion without the consent of a parent, guardian, or custodian.

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

(1) a statement that the complainant is pregnant;

(2) a statement that the complainant is unmarried, under 17 years of age, and unemancipated;

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

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

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

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

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

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

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

(e) If the complainant makes only the allegation set out in (b)(4)(A) of this section and if the court finds by clear and convincing evidence that the complainant is sufficiently mature and well enough informed to decide intelligently whether to have an abortion, the court shall issue an order authorizing the complainant to consent to the performance or inducement of

an abortion without the consent of a parent, guardian, or custodian. If the court does not make the finding specified in this subsection, it shall dismiss the complaint.

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

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

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

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

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

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

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

without consent of another person. In the interest of justice, the supreme court, in an appeal under this subsection, shall liberally modify or dispense with the formal requirements that normally apply as to the contents and form of an appellant's brief.
(k) Each hearing under this section, and all proceedings under (j) of this section, shall be conducted in a manner that will preserve the anonymity of the complainant. The complaint and all other papers and records that pertain to an action commenced under this section, including papers and records that pertain to an appeal under this section, shall be kept confidential and are not public records under AS 40.25.110 -- 40.25.120.
(l) The supreme court shall prescribe complaint and notice of appeal forms that shall be used by a complainant filing a complaint or appeal under this section. The clerk of each superior court shall furnish blank copies of the forms, without charge, to any person who requests them.
(m) A filing fee may not be required of, and court costs may not be assessed against, a complainant filing a complaint under this section or an appellant filing an appeal under this section.
(n) Blank copies of the forms prescribed under (l) of this section and information on the proper procedures for filing a complaint or appeal shall be made available by the court system at the official location of each superior court, district court, and magistrate in the state. The information required under this subsection must also include notification to the minor that

(1) there is no filing fee required for either form;
(2) no court costs will be assessed against the minor for procedures under this section;
(3) an attorney will be appointed to represent the minor if the minor does not retain an attorney;
(4) the minor may request that the superior court with appropriate jurisdiction hold a telephonic hearing on the complaint so that the minor need not personally be present.

AS § 47.17.020
(a) The following persons who, in the performance of their occupational duties, or with respect to (8) of this subsection, in the performance of their appointed duties, have reasonable cause to suspect that a child has suffered harm as a result of child abuse or neglect shall immediately report the harm to the nearest office of the department:

(1) practitioners of the healing arts;
(2) school teachers and school administrative staff members of public and private schools;
(3) peace officers and officers of the Department of Corrections;
(4) administrative officers of institutions;
(5) child care providers;
(6) paid employees of domestic violence and sexual assault programs, and crisis intervention and prevention programs as defined in AS 18.66.990;
(7) paid employees of an organization that provides counseling or treatment to individuals seeking to control their use of drugs or alcohol;
(8) members of a child fatality review team established under AS 12.65.015(e) or 12.65.120 or the multidisciplinary child protection team created under AS 47.14.300.

(b) This section does not prohibit the named persons from reporting cases that have come to their attention in their nonoccupational capacities, nor does it prohibit any other person from reporting a child's harm that the person has reasonable cause to suspect is a result of child abuse or neglect. These reports shall be made to the nearest office of the department.
(c) If the person making a report of harm under this section cannot reasonably contact the nearest office of the department and immediate action is necessary for the well-being of the child, the person shall make the report to a peace officer. The peace officer shall immediately take action to protect the child and shall, at the earliest opportunity, notify the nearest office of the department.
(d) This section does not require a religious healing practitioner to report as neglect of a child the failure to provide medical attention to the child if the child is provided treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by an accredited practitioner of the church or denomination.
(e) The department shall immediately notify the nearest law enforcement agency if the department

(1) concludes that the harm was caused by a person who is not responsible for the child's welfare;
(2) is unable to determine
(A) who caused the harm to the child; or
(B) whether the person who is believed to have caused the harm has responsibility for the child's welfare; or
(3) concludes that the report involves
(A) possible criminal conduct under AS 11.41.410 -- 11.41.458; or
(B) abuse or neglect that results in the need for medical treatment of the child.

(f) If a law enforcement agency determines that a child has been abused or neglected and that (1) the harm was caused by a teacher or other person employed by the school or school district in which the child is enrolled as a student, (2) the harm occurred during an activity sponsored by the school or school district in which the child is enrolled as a student, or (3) the harm occurred on the premises of the school in which the child is enrolled as a student or on the premises of a school within the district in which the child is enrolled as a student, the law enforcement agency shall notify the chief administrative officer of the school or district in which the child is enrolled immediately after the agency determines that a child has been abused or neglected under the circumstances set out in this section, except that if the person about whom the report has been made is the chief administrative officer or a member of the chief administrative officer's immediate family, the law enforcement agency shall notify the commissioner of education and early development that the child has been abused or neglected under the circumstances set out in this section. The notification must set out the factual basis for the law enforcement agency's determination. If the notification involves a person in the teaching profession, as defined in AS 14.20.370, the law enforcement agency shall send a copy of the notification to the Professional Teaching Practices Commission.
(g) A person required to report child abuse or neglect under (a) of this section who makes the report to the person's job supervisor or to another individual working for the entity that

employs the person is not relieved of the obligation to make the report to the department as required under (a) of this section.
(h) This section does not require a person required to report child abuse or neglect under (a)(6) of this section to report mental injury to a child as a result of exposure to domestic violence so long as the person has reasonable cause to believe that the child is in safe and appropriate care and not presently in danger of mental injury as a result of exposure to domestic violence.
(i) This section does not require a person required to report child abuse or neglect under (a)(7) of this section to report the resumption of use of an intoxicant as described in AS 47.10.011(10) so long as the person does not have reasonable cause to suspect that a child has suffered harm as a result of the resumption.

AS § 25.20.025
(a) Except as prohibited under AS 18.16.010(a)(3),

(1) a minor who is living apart from the minor's parents or legal guardian and who is managing the minor's own financial affairs, regardless of the source or extent of income, may give consent for medical and dental services for the minor;
(2) a minor may give consent for medical and dental services if the parent or legal guardian of the minor cannot be contacted or, if contacted, is unwilling either to grant or withhold consent; however, where the parent or legal guardian cannot be contacted or, if contacted, is unwilling either to grant or to withhold consent, the provider of medical or dental services shall counsel the minor keeping in mind not only the valid interests of the minor but also the valid interests of the parent or guardian and the family unit as best the provider presumes them;
(3) a minor who is the parent of a child may give consent to medical and dental services for the minor or the child;
(4) a minor may give consent for diagnosis, prevention or treatment of pregnancy, and for diagnosis and treatment of venereal disease;
(5) the parent or guardian of the minor is relieved of all financial obligation to the provider of the service under this section.

(b) The consent of a minor who represents that the minor may give consent under this section is considered valid if the person rendering the medical or dental service relied in good faith upon the representations of the minor.
(c) Nothing in this section may be construed to remove liability of the person performing the examination or treatment for failure to meet the standards of care common throughout the health professions in the state or for intentional misconduct.

AS § 47.17.010
In order to protect children whose health and well-being may be adversely affected through the infliction, by other than accidental means, of harm through physical injury or neglect, mental injury, sexual abuse, sexual exploitation, or maltreatment, the legislature requires the reporting of these cases by practitioners of the healing arts and others to the department. It is not the intent of the legislature that persons required to report suspected child abuse or neglect under this chapter investigate the suspected child abuse or neglect before they make

the required report to the department. Reports must be made when there is a reasonable cause to suspect child abuse or neglect in order to make state investigative and social services available in a wider range of cases at an earlier point in time, to make sure that investigations regarding child abuse and neglect are conducted by trained investigators, and to avoid subjecting a child to multiple interviews about the abuse or neglect. It is the intent of the legislature that, as a result of these reports, protective services will be made available in an effort to

(1) prevent further harm to the child;
(2) safeguard and enhance the general well-being of children in this state; and
(3) preserve family life unless that effort is likely to result in physical or emotional damage to the child.

AS § 47.17.290

In this chapter…

(1) "child" means a person under 18 years of age;

(2) "child abuse or neglect" means the physical injury or neglect, mental injury, sexual abuse, sexual exploitation, or maltreatment of a child under the age of 18 by a person under circumstances that indicate that the child's health or welfare is harmed or threatened thereby; in this paragraph, "mental injury" means an injury to the emotional well-being, or intellectual or psychological capacity of a child, as evidenced by an observable and substantial impairment in the child's ability to function;

(3) "child care provider" means an adult individual, including a foster parent or an employee of an organization, who provides care and supervision to a child for compensation or reimbursement;

(4) "criminal negligence" has the meaning given in AS 11.81.900;

(5) "department means the Department of Health and Social Services;

(6) "immediately" means as soon as is reasonably possible, and no later than 24 hours;

(7) "institution" means a private or public hospital or other facility providing medical diagnosis, treatment, or care;

(8) "maltreatment" means an act or omission that results in circumstances in which there is reasonable cause to suspect that a child may be a child in need of aid, as described in AS 47.10.011, except that, for purposes of this chapter, the act or omission need not have been committed by the child's parent, custodian, or guardian;

(9) "mental injury" means a serious injury to the child as evidenced by an observable and substantial impairment in the child's ability to function in a developmentally appropriate manner and the existence of that impairment is supported by the opinion of a qualified expert witness;

(10) "neglect" means the failure by a person responsible for the child's welfare to provide necessary food, care, clothing, shelter, or medical attention for a child;

(11) "organization" means a group or entity that provides care and supervision for compensation to a child not related to the caregiver, and includes a child care facility, pre-elementary school, head start center, child foster home, residential child care facility, recreation program, children's camp, and children's club;

(12) "person responsible for the child's welfare" means the child's parent, guardian, foster parent, a person responsible for the child's care at the time of the alleged child abuse or neglect, or a person responsible for the child's welfare in a public or private residential agency or institution;
(13) "practitioner of the healing arts" includes chiropractors, mental health counselors, social workers, dental hygienists, dentists, health aides, nurses, nurse practitioners, certified nurse aides, occupational therapists, occupational therapy assistants, optometrists, osteopaths, naturopaths, physical therapists, physical therapy assistants, physicians, physician's assistants, psychiatrists, psychologists, psychological associates, audiologists and speech-language pathologists licensed under AS 08.11, hearing aid dealers licensed under AS 08.55, marital and family therapists licensed under AS 08.63, religious healing practitioners, acupuncturists, and surgeons;
(14) "reasonable cause to suspect" means cause, based on all the facts and circumstances known to the person, that would lead a reasonable person to believe that something might be the case;
(15) "school district" means a city or borough school district or regional educational attendance area.
(16) "sexual exploitation" includes
(A) allowing, permitting, or encouraging a child to engage in prostitution prohibited by AS 11.66.100 -- 11.66.150, by a person responsible for the child's welfare;
(B) allowing, permitting, encouraging, or engaging in activity prohibited by AS 11.41.455(a), by a person responsible for the child's welfare.

1997 Ak. Sess. Laws 14 § 1
Relating to a requirement that a parent, guardian, or custodian consent before certain minors receive an abortion; establishing a judicial bypass procedure by which a minor may petition a court for authorization to consent to an abortion without consent of a parent, guardian, or custodian; amending the definition of "abortion"; and amending Rules 40 and 79, Alaska Rules of Civil Procedure; Rules 204, 210, 212, 213, 508, and 512.5, Alaska Rules of Appellate Procedure; and Rule 9, Alaska Administrative Rules.
***Section 1.** PURPOSE; FINDINGS.
(a) It is the intent of the legislature in enacting this Act to further the important and compelling state interests of
(1) protecting minors against their own immaturity;
(2) fostering the family structure and preserving it as a viable social unit;
(3) protecting the rights of parents to rear children who are members of their household; and
(4) protecting the health of minor women.
(b) The legislature finds that
(1) immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences;
(2) the physical, emotional, and psychological consequences of abortion are serious and can be lasting particularly when the patient is immature;

(3) the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion are not necessarily related;

(4) parents ordinarily possess information essential to a physician's or surgeon's best medical judgment concerning the child;

(5) parents who are aware that their minor daughter has had an abortion may better ensure that the daughter receives adequate medical attention after the abortion;

(6) parental consultation is usually desirable and in the best interest of the minor; and

(7) parental involvement legislation enacted in other states has shown to have a significant effect in reducing abortion, birth, and pregnancy rates among minors.

*** Sec. 2.** AS 18.16.010 (a) is amended to read:

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

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

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

(3) <u>before an abortion is knowingly performed or induced on an unmarried, unemancipated woman under 17 years of age, consent has been given as required under AS 18.16.020 or a court has authorized the minor to consent to the abortion under AS 18.16.030 and the minor consents; for purposes of enforcing this paragraph, there is a rebuttable presumption that a woman who is unmarried and under 17 years of age is unemancipated</u> [CONSENT HAS BEEN RECEIVED FROM THE PARENT OR GUARDIAN OF AN UNMARRIED WOMAN LESS THAN 18 YEARS OF AGE]; and

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

*** Sec. 3.** AS 18.16.010 is amended by adding new subsections to read:

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

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

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

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

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

*** Sec. 4.** AS 18.16 is amended by adding new sections to read:

Sec. 18.16.020. Consent required before minor's abortion. A person may not knowingly perform or induce an abortion upon a minor who is known to the person to be pregnant, unmarried, under 17 years of age, and unemancipated unless, before the abortion, at least one of the following applies:

(1) one of the minor's parents or the minor's guardian or custodian has consented in writing to the performance or inducement of the abortion;

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

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

Sec. 18.16.030. Judicial bypass for minor seeking an abortion.

(a) A woman who is pregnant, unmarried, under 17 years of age, and unemancipated who wishes to have an abortion without the consent of a parent, guardian, or custodian may file a complaint in the superior court requesting the issuance of an order authorizing the minor to consent to the performance or inducement of an abortion without the consent of a parent, guardian, or custodian.

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

(1) a statement that the complainant is pregnant;

(2) a statement that the complainant is unmarried, under 17 years of age, and unemancipated;

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

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

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

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

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

(c) The court shall fix a time for a hearing on any complaint filed under (a) of this section and shall keep a record of all testimony and other oral proceedings in the action. The hearing shall be held at the earliest possible time, but not later than the fifth business day after the day that the complaint is filed. The court shall enter judgment on the complaint immediately after the hearing is concluded. If the hearing required by this subsection is not held by the

fifth business day after the complaint is filed, the failure to hold the hearing shall be considered to be a constructive order of the court authorizing the complainant to consent to the performance or inducement of an abortion without the consent of a parent, guardian, or custodian, and the complainant and any other person may rely on the constructive order to the same extent as if the court actually had issued an order under this section authorizing the complainant to consent to the performance or inducement of an abortion without such consent.

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

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

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

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

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

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

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

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

(j) If the complainant files a notice of appeal authorized under this section, the superior court shall deliver a copy of the notice of appeal and the record on appeal to the supreme court within four days after the notice of appeal is filed. Upon receipt of the notice and record, the

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

(k) Each hearing under this section, and all proceedings under (j) of this section, shall be conducted in a manner that will preserve the anonymity of the complainant. The complaint and all other papers and records that pertain to an action commenced under this section, including papers and records that pertain to an appeal under this section, shall be kept confidential and are not public records under AS 09.25.110 - 09.25.120.

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

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

(n) Blank copies of the forms prescribed under (l) of this section and information on the proper procedures for filing a complaint or appeal shall be made available by the court system at the official location of each superior court, district court, and magistrate in the state. The information required under this subsection must also include notification to the minor that

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

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

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

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

Sec. 18.16.090. Definitions. In this chapter,

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

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

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

(C) remove a dead unborn child;

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

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

(B) become employed and self-subsisting;

(C) been emancipated under AS 09.55.590 ; or

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

*** Sec. 5.** AS 44.21.410 (a) is amended to read:

(a) The office of public advocacy shall

(1) perform the duties of the public guardian under AS 13.26.360 - 13.26.410;

(2) provide visitors and experts in guardianship proceedings under AS 13.26.131;

(3) provide guardian ad litem services to children in child protection actions under AS 47.17.030 (e) and to wards and respondents in guardianship proceedings who will suffer financial hardship or become dependent upon a government agency or a private person or agency if the services are not provided at state expense under AS 13.26.112 ;

(4) provide legal representation <u>in cases involving judicial bypass procedures for minors seeking abortions under AS 18.16.030 ,</u> in guardianship proceedings to respondents who are financially unable to employ attorneys under AS 13.26.106 (b), to indigent parties in cases involving child custody in which the opposing party is represented by counsel provided by a public agency, to indigent parents or guardians of a minor respondent in a commitment proceeding concerning the minor under AS 47.30.775 ;

(5) provide legal representation and guardian ad litem services under AS 25.24.310 ; in cases arising under AS 47.15 (Uniform Interstate Compact on Juveniles); in cases involving petitions to adopt a minor under AS 25.23.125 (b) or petitions for the termination of parental rights on grounds set out in AS 25.23.180 (c)(3); in cases involving petitions to remove the disabilities of a minor under AS 09.55.590 ; in children's proceedings under AS 47.10.050 (a) or under AS 47.12.090 ; in cases involving appointments under AS 18.66.100 (a) in petitions for protective orders on behalf of a minor; and in cases involving indigent persons who are entitled to representation under AS 18.85.100 and who cannot be represented by the public defender agency because of a conflict of interests;

(6) develop and coordinate a program to recruit, select, train, assign, and supervise volunteer guardians ad litem from local communities to aid in delivering services in cases in which the office of public advocacy is appointed as guardian ad litem;

(7) provide guardian ad litem services in proceedings under AS 12.45.046 ;

(8) establish a fee schedule and collect fees for services provided by the office, except as provided in AS 18.85.120 or when imposition or collection of a fee is not in the public interest as defined under regulations adopted by the commissioner of administration;

(9) provide visitors and guardians ad litem in proceedings under AS 47.30.839;
10) provide legal representation to indigent parents under AS 14.30.195 (e).

***Sec. 6.** AS 18.16.010 (d) is repealed.

***Sec. 7.** AS 18.16.030 (c), added by sec. 4 of this Act, has the effect of amending Rule 40, Alaska Rules of Civil Procedure, by setting a specific timetable for hearing certain cases.

*** Sec. 8.** AS 18.16.030 (j), added by sec. 4 of this Act, has the effect of amending Rules 204, 210, 212, and 213, Alaska Rules of Appellate Procedure, by establishing specific time limits applicable to certain appeals and by instructing the supreme court to modify or dispense with formal requirements applicable to certain briefs.

*** Sec. 9.** AS 18.16.030 (k), added by sec. 4 of this Act, has the effect of amending Rule 512.5, Alaska Rules of Appellate Procedure, by making certain appellate records and papers confidential.

*** Sec. 10.** AS 18.16.030 (m), added by sec. 4 of this Act, has the effect of amending Rule 9, Alaska Administrative Rules; Rule 79, Alaska Rules of Civil Procedure; and Rule 508, Alaska Rules of Appellate Procedure, by prohibiting filing fees and assessment of court costs in certain actions.

OTHER JURISDICTIONS

CONN. GEN. STAT. § 19a-601 (2000)

(a) Prior to the performance of an abortion upon a minor, a physician or counselor shall provide pregnancy information and counseling in accordance with this section in a manner and language that will be understood by the minor. The physician or counselor shall:

(1) Explain that the information being given to the minor is being given objectively and is not intended to coerce, persuade or induce the minor to choose to have an abortion or to carry the pregnancy to term;

(2) Explain that the minor may withdraw a decision to have an abortion at any time before the abortion is performed or may reconsider a decision not to have an abortion at any time within the time period during which an abortion may legally be performed;

(3) Explain to the minor the alternative choices available for managing the pregnancy, including: (A) Carrying the pregnancy to term and keeping the child, (B) carrying the pregnancy to term and placing the child for adoption, placing the child with a relative or obtaining voluntary foster care for the child, and (C) having an abortion, and explain that public and private agencies are available to assist the minor with whichever alternative she chooses and that a list of these agencies and the services available from each will be provided if the minor requests;

(4) Explain that public and private agencies are available to provide birth control information and that a list of these agencies and the services available from each will be provided if the minor requests;

(5) Discuss the possibility of involving the minor's parents, guardian or other adult family members in the minor's decision-making concerning the pregnancy and whether the minor believes that involvement would be in the minor's best interests; and

(6) Provide adequate opportunity for the minor to ask any questions concerning the pregnancy, abortion, child care and adoption, and provide information the minor seeks or, if the person cannot provide the information, indicate where the minor can receive the information.

(b) After the person provides the information and counseling to a minor as required by this section, such person shall have the minor sign and date a form stating that:

(1) The minor has received information on alternatives to abortion and that there are agencies that will provide assistance and that a list of these agencies and the services available from each will be provided if the minor requests;

(2) The minor has received an explanation that the minor may withdraw an abortion decision or reconsider a decision to carry a pregnancy to term;

(3) The alternatives available for managing the pregnancy have been explained to the minor;

(4) The minor has received an explanation about agencies available to provide birth control information and that a list of these agencies and the services available from each will be provided if the minor requests;

(5) The minor has discussed with the person providing the information and counseling the possibility of involving the minor's parents, guardian or other adult family members in the minor's decision-making about the pregnancy;

(6) If applicable, the minor has determined that not involving the minor's parents, guardian or other adult family members is in the minor's best interests; and

(7) The minor has been given an adequate opportunity to ask questions.

(c) The person providing the information and counseling shall also sign and date the form and shall include such person's business address and business telephone number. The person shall keep a copy for such minor's medical record and shall give the form to the minor or, if the minor requests and if such person is not the attending physician, transmit the form to the minor's attending physician. Such medical record shall be maintained as otherwise provided by law.

(d) The provision of pregnancy information and counseling by a physician or counselor which is evidenced in writing containing the information and statements provided in this section and which is signed by the minor shall be presumed to be evidence of compliance with the requirements of this section.

(e) The requirements of this section shall not apply when, in the best medical judgment of the physician based on the facts of the case before him, a medical emergency exists that so complicates the pregnancy or the health, safety or well-being of the minor as to require an immediate abortion. A physician who does not comply with the requirements of this section by reason of this exception shall state in the medical record of the abortion the medical indications on which his judgment was based.

MD CODE, Health—Gen. § 20-103 (2000)

(a) Except as provided in subsections (b) and (c) of this section, a physician may not perform an abortion on an unmarried minor unless the physician first gives notice to a parent or guardian of the minor.

(b) The physician may perform the abortion without notice to a parent or guardian if:

(1) The minor does not live with a parent or guardian; and

(2) A reasonable effort to give notice to a parent or guardian is unsuccessful.

(c)

(1) The physician may perform the abortion, without notice to a parent or guardian of a minor if, in the professional judgment of the physician:

(i) Notice to the parent or guardian may lead to physical or emotional abuse of the minor;

(ii) The minor is mature and capable of giving informed consent to an abortion; or

(iii) Notification would not be in the best interest of the minor.

(2) The physician is not liable for civil damages or subject to a criminal penalty for a decision under this subsection not to give notice.

(d) The postal receipt that shows an article of mail was sent by certified mail, return receipt requested, bearing a postmark from the United States Postal Service, to the last known address of a parent or guardian and that is attached to a copy of the notice letter that was sent in that article of mail shall be conclusive evidence of notice or a reasonable effort to give notice, as the case may be.

(e) A physician may not provide notice to a parent or guardian if the minor decides not to have the abortion.

ISSUES PRESENTED FOR APPEAL

1. Whether the Superior Court, based on findings of fact supported by substantial evidence, correctly held that the Act violates the equal protection and privacy rights under the Alaska Constitution of pregnant minors seeking abortions?

2. Whether the Superior Court, in holding the Act unconstitutional for violating the equal protection guarantee of the Alaska Constitution, was correct in holding that the State failed to meet its burden of establishing that the classifications drawn by the Act further a compelling governmental interest for which the Act is narrowly tailored and that employs the least restrictive means?

3. Whether the Superior Court, in holding the Act unconstitutional for violating the privacy guarantee of the Alaska Constitution, was correct in holding that the State failed to meet its burden of establishing that the Act furthers a compelling interest by the least restrictive means.

STATEMENT OF THE CASE

I. Introduction

As the Superior Court found, enforcement of the Act would harm the health and well-being of pregnant Alaska minors.[1] First, the Act would force some young women to

[1] (Exc. 290 ¶ 28, 296-97 ¶ 50, 304-05 ¶¶ 68-69, 311 ¶ 84 [decision on remand].)

delay obtaining an abortion, increasing the risks associated with the procedure.[2] Second, the Act would prevent young women from obtaining an immediate abortion in order to avoid a medical emergency, forcing them to delay receiving medical care until they had either obtained parental consent or judicial approval, or until their condition had worsened to the point where it would come within the Act's narrow medical emergency provision.[3] Third, the Act would make young women in abusive families vulnerable to additional abuse.[4] Fourth, the burdens imposed by the Act would force some young women to carry unwanted pregnancies to term, and would "increase the probability that a minor may not be able to receive a safe and legal abortion."[5]

Moreover, the State failed to meet its burden of showing that the Act would further any of its asserted interests. The court's findings establish that the Act is not likely to benefit Alaska minors or their families. Very few pregnant minors in Alaska obtain an abortion without voluntarily involving a parent, and the younger the minor, the more likely she is to involve a parent. Those who do not involve a parent are generally well-justified in their decision, and uniformly obtain assistance from another adult. As another state supreme court recognized in a similar case, that the Act would likely affect only this small percentage of minors who do not voluntarily inform their parents "suggests that the . . . Act places

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[2] (Exc. 295 ¶ 47, 311 ¶ 84.)
[3] (Exc. 296-97 ¶¶ 49-50.)
[4] (Exc. 289-90 ¶¶ 27-28, 304-05 ¶¶ 68-69.)
[5] (Exc. 310 ¶ 82; *see also id.* at 290 ¶ 28.)

burdens on minors in furtherance of a goal that is illusory for some families and unnecessary for others."[6]

Further, the State failed to establish that the classifications it has drawn under the Act are narrowly tailored to further the asserted interests. Pregnant minors face two and only two options—they can carry their pregnancy to term or they can terminate the pregnancy. The evidence conclusively demonstrates that the justifications for treating pregnant minors who choose abortions differently from those who carry to term are based on speculation that is not borne out by scientific studies.

Thus, as the Superior Court noted in finding that the Act's discrimination is unjustified, "a minor [could] make the decision to put her own life at risk without parental consent, but the same minor [could not] choose to avoid putting her life at risk by electing an abortion without parental consent."[7]

II. Statement of Facts

A. Minors Seeking Abortions

Studies demonstrate that many minors want to and do consult with at least one parent before having an abortion.[8] The evidence demonstrates that Alaska abortion providers

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6 *Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620, 641 (N.J. 2000).

7 (Exc. 296-97 ¶ 50.)

8 (Adler ["Adl."] FL 545:2-547:1 (Nancy Adler, Ph.D., is a vice-chair of the Department of Psychiatry at the University of California in San Francisco [Adl. FL 470 7-8, 12-15, 471 7-11, 17-23, 472 1-8]; over the last 25 years she has conducted research on decision making by adults and minors in the area of reproductive health and the psychological aspects of abortion. [Adl. FL 475 15-21, 476 7-10.]) (Dr. Adler's testimony was received by the Court through previous testimony given in a similar case in Florida and deposition testimony given in this case. References to Dr. Adler's Florida testimony will be designated as Adl. FL. References to Dr. Adler's and other witnesses' deposition testimony will be designated by

("providers") encourage parental involvement in minors' abortion decisions.[9] As the Superior Court found, the younger the pregnant minor is, the more likely it is that she will communicate with her parents about her pregnancy.[10] Indeed, Dr. Henshaw estimated that the number of minors in Alaska under 13 who would seek an abortion without a parent knowing about the abortion would be one every 8 years.[11]

Although on appeal the State is dismissive of every reason a minor may have not to inform her parents,[12] it has previously conceded, and the evidence bears out, that those minors who choose not to seek the consent of a parent or guardian for an abortion may

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Dep.); Zabin ["Zab."] Trial Transcript ["TR"] 2350:21-2351:22 (Laurie Schwab Zabin, Ph.D., is a professor of family health sciences and of obstetrics and gynecology at Johns Hopkins University [Trial Exhibit ["TE"] 160; Zab. TR 2322:3-7]; she has conducted extensive research in the area of adolescent reproductive health. [Zab. TR 2327:5-13, 2329:10-23, 2330:14-21].); Henshaw ["Hen."] TR 296:19-299:11, 300:20-301:19 (Stanley Henshaw, Ph.D., is a reproductive epidemiologist whose research focuses primarily on abortion services and statistics. [Hen. TR 249:11-14.]); TE 123, Table 8; TE 150; TE 157; TE 164.) *See also Farmer*, 762 A.2d at 634.

9 (Lemagie ["Lem."] TR 102:14-25 (Dr. Susan Lemagie is a board-certified obstetrician-gynecologist who practices in Palmer, Alaska, [Lem. TR 14:9-13, 18 11-12] and is the Medical Director for Planned Parenthood of Alaska.]) *See also Farmer*, 762 A.2d at 634. The State's assertion that minors who are not encouraged to inform their parents of a pregnancy and desire for an abortion do not inform their parents (Appellant's Brief [hereafter "Applnt."] at 9) is not supported by the accompanying citation and is irrelevant since the providers in Alaska do encourage minors to involve their parents.

10 (Exc. 285 ¶ 17; Zab. TR 2440:8-15; Lem. TR 101:10-14, 112:14-16; Anderson ["And."] TR 1863:16-1864:18; TE 252; Hen. TR 299:12-24; TE 123, Table 8 [noting that the study revealed that for 68% of minors under 17 at least one parent knew of the minor's intent to have an abortion, and for minors under 15, 90% were aware].)

11 (Hen. TR 299:25-300:12.)

12 (Applnt. Br. at 4 and ns. 33 and 34.)

have valid reasons for their decision.[13] Some do not live with a parent,[14] some come from dysfunctional families where parental communication and support are lacking,[15] and some fear adverse consequences.[16] The Superior Court determined that such fears are often well-founded.[17] Moreover, an overwhelming amount of evidence, including much from the State's experts, reveals that teenagers who are sexually active are *more* likely to come from dysfunctional homes, many involving abuse.[18]

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[13] (TE 63; Plaintiffs' Discovery Requests to Defendant State or Alaska and Responses at No.23.)

[14] (Exc. 285 ¶ 19; Christiansen ["Chr."] TR 1942:20-23; Murphy ["Mur."] TR 2216:6-14; Zab. TR 2353:16-2354:24.) For example, the evidence showed that it is very common on the North Slope and in the Bethel area for a minor to live with a relative for a few years without legal custody being transferred, because parents may be attending school or working out of the community. (Patkotak ["Pat."] TR 1210:23-1211:16 (Elise Patkotak lived in Barrow, Alaska, for 28 years, and held various positions within the health and legal systems, in which she had direct interaction with young Native Alaskans. [Pat. TR 1170:6-9, 12-14, 1170:23-1171:22; 1181:9-24, 1182:5-7, 1183:5-16.]); Cooke ["Coo."] TR 1282:10-1284:1 (Christopher Cooke, currently in private practice in Anchorage and Bethel, [Coo. TR 1239:18-1240:3,] was a Superior Court judge in Bethel for nearly ten years. [Coo. TR 1236:7-12, 1239:12-14, 6-7; TE 3.]) Twelve percent of the minors Dr. Henshaw surveyed did not live with either biological parent. (Hen. TR 302:25-305:9.)

[15] (Exc. 285 ¶ 18, 289-90 ¶ 27, 304 ¶ 68; *see, e.g.,* Elkind ["Elk."] Dep. 109:9-17.)

[16] (Elk. Dep. 97:15-19; Sabino ["Sab."] TR 2557:25-2558:8, 2595:24-2596:18 (Jamie Sabino, J.D., is co-chair of an association of attorneys who represent minors seeking a judicial bypass under the Massachusetts parental consent statute. [Sab. TR 2515:3-7; 2513:8-13]).)

[17] (Exc. 289-90 ¶ 27; Sab. TR 2558:9-20; Hen. TR 310:5-21.) Moreover, as the Florida trial court found, even if some minors' fears were unfounded, such fear may still motivate those minors to go to great lengths to avoid telling their parents, including concealing their pregnancy, traveling to another state for an abortion, or seeking an illegal abortion. *See N. Fla. Women's Health and Counseling Servs., Inc. v. State*, No. 99-3202, slip op. 7 (Fla. Cir. Ct. May 12, 2000), *aff'd*, 866 So.2d 612 (Fla. 2003) (attached hereto in Appellees'/Cross-Appellants' Appendix of Unreported Opinions).

[18] (And. TR 1860:22-1861:2; Elk. Dep. 108:7-23; Tsao-Wu ["Tsa."] TR 1343:3-11; Stotland ["Sto."] TR 754:24-755:24 (Nada Stotland, M.D., Ph.D., M.P.H., is a psychiatrist who holds a position in the departments of psychiatry and obstetrics and gynecology at Rush Medical College in Chicago; she has authored or edited numerous publications on the topics of

Those pregnant minors who choose not to involve a parent in their decision to abort are not alone. Studies establish, and both parties' experts and lay witnesses confirm, that virtually all minors actively involve someone to whom they feel close in their decision—such as other relatives, teachers, school counselors, and pastors—and that those adults can provide a sufficient support network.[19] One-hundred percent of the minors in Dr. Henshaw's study said that there was at least one other person who knew about their abortion decision and was involved in the minor's receipt of the abortion, and 96 percent of the minors had someone accompany them to the clinic.[20] The State concedes that some minors under 17 seeking an abortion may obtain adequate emotional and practical support in deciding to have the abortion, during the procedure, and for post-surgical care from a person other than her parent.[21]

Additionally, as the Superior Court found, those minors who do not voluntarily involve their parents in their decision to have an abortion tend to demonstrate traits of

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psychiatry and obstetrics and gynecology. [Sto. TR 715:22-716:2, 716:9-11].); TE 28; Josephson ["Jos."] TR 1453:22-1455:3; Pat. TR 1185:5-1186:1, 1190:4-17; Martin ["Mar."] TR 959:17-960:16 (Judge Gerald Martin is a state district court judge in Duluth, Minnesota [Mar. TR 952:5-14], and currently presides over hearings on petitions filed by minors seeking to bypass the Minnesota parental notice requirement. [Mar. TR 953:3-8, 954:14-17].); Coo. TR 1249:11-19; Reichard ["Rei."] TR 934:25-935:25 (Deborah Reichard is an attorney employed as a guardian ad litem in Bethel. [Rei. TR 917:3-5.]); Chr. TR 1966:14-1967:9.)

[19] (Lem. TR 101:15-22, 111:1-5, citing TE 252, "The Adolescent's Right to Confidential Care When Considering Abortion," American Academy of Pediatrics, at p.147; Greene ["Gre."] 83:4-84:11; Mar. TR 966:7-966:13; Chr. TR 1969:13-18, 1970:11-21.) For example, Dr. Zabin's study revealed that some homes have "parent surrogates," or adults to whom an adolescent is responsible but who would not be considered a parent or guardian under the law; she found that a number of study participants consulted parent surrogates about the fact that they were or might be pregnant. (Zab. TR 2351:20-2353:8; TE 164.)

[20] (Hen. TR 303:20-23, 305:10-16; TE 123, Table 8.)

[21] (TE 63 at No. 49; *see also* Gre. Dep. 86:4-21; Figley ["Fig."] TR 1918:1-1919:2.)

maturity.[22] Such traits include being future-oriented, having a greater sense of self, having some degree of financial independence, and having the ability to navigate the health care and/or judicial bypass system.[23]

B. Minors Are Competent to Make All Pregnancy Decisions

Adolescents are as competent as adults to make informed decisions regarding abortions.[24] Studies of pregnant minors[25] and direct experience with minors in that context[26] demonstrate that minors are rational competent decision makers about whether to have an abortion or carry a pregnancy to term, can make considered choices that weigh the costs and benefits of the decision, and do not act solely on impulse. The Superior Court found that minors' decision-making capability is domain specific; generalizations about impulsive and limited decision making by minors—relied upon by the State[27]—are not readily applicable to pregnancy decisions.[28] As the Superior Court noted, the Legislature has

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22 (Exc. 285 ¶ 19.)

23 *Id.*; (Zab. TR 2353:9-15, 2360:12-2364:16; TE 161; Adl. FL 512:11-25, 545:17-546:23; Hen. TR 304:16-305:9; Mar. TR 968:17-25, 972:25-973:15.) Notably, the State's assertion that "[v]ulnerable pregnant adolescent girls often succumb to pressure and power differentials deciding to seek abortion" (Applnt. Br. at 9 n.8) is *contradicted* by the citation listed in support. (*See* Adl. FL 603:14-604:11 [stating that witness disagreed with the statement above].)

24 (Adl. FL 515:21-516:6, 527:5-530:14, 531:6-21, 533:17-23; Sto. TR 727:4-8.)

25 (Adl. FL 516:17-518:19.)

26 (Richey ["Ric."] TR 856:5-861:11, 868:7-22, 872:8-18, 873:5-875:23 (Dr. Sherrie Richey is a board-certified obstetrician and gynecologist and maternal-fetal specialist who practices in Anchorage. [Ric. TR 828:1-9, 17-19, 841:12-14.].)

27 (*See* Applnt. Br. at 9-10.)

28 (Exc. 283 ¶ 12.) The State's assertion that Dr. Lemagie "believes that girls up to the age of 15 need adult involvement in their medical decision making," citing TR 170, is incorrect. Dr. Lemagie testified that as a general matter minors up to a certain age benefit from adult

acknowledged, and the evidence from other states with mandatory parental involvement laws supports, many minors are mature enough to make a decision about their pregnancy.[29]

The Superior Court found that there is no material distinction between the maturity levels of 15, 16, 17 or 18-year olds,[30] and no evidence that minors in the age range of 11-13 are incapable of making a decision about whether or not to have an abortion.[31] Thus, the State's argument that chronological age is "extremely significant" with respect to a minor's ability to make a decision about whether to have an abortion is contradicted by the evidence.[32]

Significantly, the Superior Court found that there is no qualitative difference between the maturity level necessary to decide whether to have an abortion and the maturity level necessary to decide to carry a pregnancy to term.[33] The State has provided no explanation for how its unsupported assertions that a minor's age, lack of experience, impulsivity, tendency for avoidance, inability to process information and make long-term decisions, and brain development make a minor ill-prepared to make the decision to have an abortion

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involvement, regardless of whether the adult is a parent, but that maturity and decision-making ability should be addressed on an individual basis, and not presumed based on the age of the minor. (*See* Lem. TR 169:10-170:18.)

[29] (S*ee* Exc. 287; *see also id.* at 309-10 ¶ 80, 312 ¶ 86; Zab. TR 2360:12-2362:14; *see also* And. TR 1866:18-1867:2.) *See also Farmer*, 762 A.2d at 638 (other statutes in reproductive health area demonstrate the state's recognition of a minor's maturity in such matters).

[30] (Exc. 283 ¶ 11.)

[31] (*Id.*)

[32] (*See* Applnt. Br. at 7, mis-citing Dr. Adler's testimony for proposition that age relates significantly to experience when the cited testimony *disassociates* age from experience.)

[33] (Exc. 284 ¶ 15; *contra* Applnt. Br. at 19.)

without forced parental consent,[34] but fully prepared to make the decision to carry a pregnancy to term. In fact, the argument that the decision-making process is somehow different with respect to pregnancy care and birth was rejected by the Court, and is contrary to the testimony of both sides' witnesses.

The decision-making process of pregnant women of all ages considering an abortion is the same as the decision-making process of women considering carrying a pregnancy to term and keeping the child or giving the child up for adoption.[35] The State's witness Dr. Elkind agrees that the decision to give a child up for adoption is as complex as the decision to have an abortion.[36] To the extent that both parties' experts believe that minors in general, or a particular minor who is pregnant, are not psychologically capable of making a decision to abort and/or would benefit from parental advice, they also do not believe those minors are psychologically capable of making the decisions to carry the pregnancy to term and to keep or relinquish the baby.[37]

In fact, the Superior Court's findings demonstrate that to the extent that maturity is a concern regarding a minor's ability to make a decision about her pregnancy, it would be more of a concern with respect to minors carrying to term than for those who choose to abort.

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[34] (*See* Applnt. Br. at 7-11.)

[35] (Sachdev ["Sac."] Dep. 31:7-33:12 (Paul Sachdev, Ph.D., is a professor in the Social Work School at Memorial University in Newfoundland, Canada; he has conducted research on the decision-making process and emotional impact of abortion and adoption. [Sac. Dep. 6:14-25, 16:9-22:3, 30:8-18, 113:22-114:6; TE 322.]); Sto. TR 745:18-746:15.)

[36] (Elk. Dep. 125:19-23.)

[37] (Gre. Dep. 81:11-82:3; Sto. TR 727:9-15; Jos. TR 1498:12-19; *see also* Calhoun ["Cal."] TR 1690:2-7.)

The Court noted that minors who do not voluntarily involve their parents in their decision to abort often demonstrate traits of maturity.[38] It further noted that the evidence shows that a subsection of minors who remain pregnant will act passively towards their pregnancy and that those minors are less mature than other minors who affirmatively decide either to carry their pregnancy to term or to abort.[39] Finally, the Court correctly found that to the extent that minors assess long-term effects of a pregnancy decision differently than adults, they are less able to consider the effects and demands of motherhood than the effects of an abortion.[40]

The State's assertions (without supporting citation)[41] that minors cannot give informed consent for an abortion without a parent is belied by the evidence and the practice of medicine in Alaska.[42] Dr. Adler's study comparing abortion patients aged 14 to 17 with patients 18 to 21 found no differences in the patients' ability to give informed consent, concluding only that the younger group was more likely to have talked to someone else about their decision.[43] Providers are already required by law to obtain informed consent before

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[38] (Exc. 285 ¶ 19; Zab. TR 2353:9-15, 2360:12-2362:14, 2363:9-2364:16; Adl. FL 512:11-25, 545:17-546:23; Hen. TR 304:16-305:9; Mar. TR 968:17-25, 972:25-973:15; And. TR 1866:18-1867:2; TE 161.)

[39] (Exc. 284 ¶¶ 13, 15; Zab. TR 2361:18-2362:14.)

[40] (Exc. 285-86 ¶ 20.; Elk. Dep. 33:15-34:7, 43:19-45:1, 54:9-55:3, 104:20-105:10; Jos. TR 1504:23-1512.)

[41] (Applnt. Br. at 13-16.)

[42] (Exc. 299-300 ¶¶ 57-58; Sto. TR 779:1-5-780:5; Lem. TR 97:3-18; Ric. TR 875:10-16; Whitefield (Whi.) TR 1115:12-16 (Dr. Jan Whitefield is a board-certified obstetrician and gynecologist who has practiced in Anchorage for 18 years. [Whi. TR 1005:2-6.]).)

[43] (Adl. FL 508:2-17; *see also* Lem. TR 116:6-19, citing TE 252.)

providing treatment.[44] A significant percentage of parents who know that their daughter is obtaining an abortion do not accompany her daughter to the clinic, and thus do not participate in the informed consent process.[45] Moreover, even when accompanied by a parent, it is the minor, and not the parent, who provides informed consent.[46] Indeed, even the State concedes that some minors under 17 are capable of giving informed consent for an abortion.[47] Based on this evidence, the Superior Court found that minors are capable of giving informed consent for abortion.[48]

Finally, but significantly, the Superior Court found, and the State does not dispute, that doctors are able to obtain informed consent from minors for other invasive procedures related to pregnancy, such as amniocentesis and treatment for sexually transmitted diseases ("STD's").[49] The State offers no explanation as to why a minor would not be able to provide informed consent for an abortion, but would be able to provide it for these other equally or more complicated and risky procedures.[50]

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44 *See* AS § 09.55.556.

45 (Hen. TR 305:17-306:3; TE 123, Table 8.)

46 (Whi. TR 1019:7-14.)

47 (TE 63 at No. 38.)

48 The State has not asserted that the trial court's findings are clearly erroneous or unsupported by substantial evidence.

49 (Exc. 299 ¶ 58.) *See also* AS § 25.20.025; AS § 08.65.140.

50 (*See* Exc. 288-89 ¶¶ 25-26, 295 ¶ 47; Tsa. TR 1348:20-1349:2; Lem. TR 33:9-39:13.) Notably, while the State attempts to distinguish pregnancy-related care and STD treatment from abortion (Applnt. Br. at 19-21) it does not address the fact that minors are permitted to, and therefore must be competent to, give informed consent for those services.

C. Abortion Poses Less Risk to Minors than Carrying a Pregnancy to Term

The Superior Court found that abortion is a very safe procedure and that complications are very rare.[51] The court further found that the physical risks associated with abortion are comparable to other invasive procedures used to treat STD's and the administration of pregnancy-related care, such as amniocentesis,[52] which are provided to minors without parental consent.[53]

The court correctly noted that delays in seeking medical care for complications following a medical procedure—whether it is pregnancy-related care, STD treatment, or

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[51] (Exc. 291 ¶¶ 32, 34; Hen. TR 267:8-14.) The State irresponsibly attempts to perpetuate the myth that abortion causes an increased risk of breast cancer. (Applnt. Br. at 11 & n.13.) This assertion is contradicted by the definitive statements to the contrary of numerous medical associations. The following medical groups agree that there is no association between abortion and an increased risk of breast cancer: the American Cancer Society (TE 191), the World Health Organization (TE 190), the National Breast Cancer Coalition, and the American College of Obstetricians and Gynecologists. (Bri. Dep. 88:9-95:9; Sha. TR 649:14-651:16; *see also* National Cancer Institute, "Abortion, Miscarriage, and Breast Cancer Risk," March 21, 2003, available at http://cis.nci.nih.gov/fact/3_75.htm. (National Cancer Institute fact sheet concluding that, based on a review of the credible studies, there is no association between abortion and breast cancer risk). Loss of the potential protective effect against breast cancer from termination of the pregnancy is not a "risk" associated with abortion because a woman who has an abortion is in the same position as a woman who has never been pregnant. (Palmer ["Pal."] Dep. 96:3-17 (Julie Palmer, Ph.D, is a senior epidemiologist at the Slone Epidemiology Unit at Boston University [Pal. Dep. 8:3-7, 15-20], has published numerous articles on breast cancer, [Pal. Dep. 12:4-13:15, TE 1], and has conducted two studies examining the relationship of abortion to breast cancer. [Pal. Dep. 13:16-22, 15 7-10.].) That the State's experts Dr. Shadigian and Dr. Brind, both of whom oppose abortion, hold steady in their radical belief that abortion is associated with an increased risk of breast cancer seriously undermines their credibility.

[52] (Exc. 295 ¶ 47; Lem. TR 33:9-39:13.)

[53] *See* AS § 25.20.025(a)(4) (providing that minors may consent to medical treatment for STDs or pregnancy).

abortion—could result in hospitalization.[54] In addition, the court found that serious complications would be rare for minors who have abortions: "[o]f the minors who [would] choose to have an abortion without voluntarily informing their parents, very few [would] suffer post-abortion complications. Of those, even fewer [would] neglect to seek prompt medical treatment for the complications."[55] The State's ominous suggestions of likely "disastrous" results for minors who obtain abortions without parental consent are, therefore, unfounded.[56]

As the Superior Court noted, the evidence demonstrates not only that abortion is extremely safe as a general matter, but also that it is significantly safer than carrying a pregnancy to term.[57] The risk of a woman dying from giving birth is at least 10 times greater than the risks of early abortion.[58] In contrast to the small rate of complications associated with abortion,[59] the rate of hospitalization during pregnancy for reasons other

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54 (Exc. 290 ¶ 30.)

55 (Exc. 291 ¶ 32.) The Court found that minors are as able as adults to follow physician instructions as to when to contact the office due to complications of pregnancy, STDs or abortions and that those instructions are virtually the same. (*Id.*; *see also* Hen. TR 267:8-14, 406:9-407:6; Ric. TR 875:5-9; Lem. TR 35:19-25, 38:5-13.)

56 (*See* Applnt. Br. at 16-18.) Although relied on by the State for the proposition that a minor is "more likely to receive timely and adequate post-abortion . . . care if her parents(s) are aware of her pregnancy" (Applnt. Br. at 16-17), Dr Anderson's testimony that minors whose parents knew about their abortion prior to the development of complications arrived at the hospital for care sooner than those whose parents didn't know is not credible. He conceded that he does not ascertain which parents were informed of the abortion prior to the procedure. (And. TR 1875:21-1878:11.)

57 (Exc. 291-92 ¶ 34, 295 ¶ 47, 302; Hen. TR 269:2-18; Tsa. TR 1352:6-12; Ric. TR 851:5-9.)

58 (Lem. TR 86:2-18; TE 248; Hen. TR 266:15-267:1.)

59 (Exc. 291-92 ¶¶ 32, 310; Hen. TR 267:8-14.)

than delivery ranges from 10 to 22 percent.[60] In addition, at least 22-25 percent of births involve cesarean section, which involves major abdominal surgery.[61] Pregnancy can be complicated, and therefore considered high-risk, by pre-existing maternal health conditions, conditions caused by the pregnancy, fetal abnormalities, or multiple fetuses.[62] In addition to the Superior Court's overall findings that abortion is less risky than carrying to term, testimony from witnesses for both sides establishes that pregnancy is riskier for minors than it is for adults.[63]

Moreover, as the Superior Court found, the evidence shows that abortion is not associated with long-term psychological harm.[64] The predominant emotional response experienced by minors following abortion is relief.[65] Women who have unwanted pregnancies experience complex emotional responses, regardless of whether they choose to carry to term or abort,[66] and the rare negative response following abortion is usually

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60 (Lem. TR 93:2-24.)

61 (Hen. TR 267:14-18.)

62 (Ric. TR 841:22-846:23, 847:24-850:18; Jos. TR 1717:18-21.)

63 (*See* Exc. 291-92 ¶ 34; Ric. TR 847:10-23, 850:18-851:4; Cal. TR 1716:6-11, 1717:3-13, 1760:1-10, 1765:8-1766:2; TE 2055; Pal. Dep. 88:16-89:14.)

64 (Exc. 297 ¶ 52; Sac. Dep. 33:13-39:9, 44:6-12, 45:22-48:4, 129:20-130:22, 139:23-141:13; Adl. FL 477:19-478:4, 480:19-481:2, 488:17-21, 497:3-498:8; Lem. TR 119:8-13, citing TE 252; Sto. TR 730:6-732:5; TE 2048.)

65 (Exc. 297 ¶ 52; Adl. FL. 488:22-489:7; Zab. TR 2375:7-13; Sac. Dep. 36:2-8.) Contrary to the State's assertion (Applnt. Br. at 12), post-traumatic stress disorder ["PTSD"] is not a risk associated with abortion. The rate of PTSD in women following an abortion is significantly less than the rate in the general population. (Sac. Dep. 125:13-126:9; 141:14-142:7; Sto. TR 760:21-761:16; TE 2048.) Being pregnant or having an abortion is not a triggering event for PTSD for women of any age. (Sto. TR 759:9-760:20.)

66 (Exc. 297 ¶ 52; Sto. TR 726:3-20.)

attributed to the unwanted nature of the pregnancy,[67] a preexisting condition, separate risk factors, or the need to terminate a wanted pregnancy.[68] The Court found that it is not possible to separate the experience of the abortion from the experience of an unwanted pregnancy.[69] Thus, studies that show a temporal association between abortion and negative psychological reactions do not establish a causal relationship because they do not distinguish between the experience of unwanted pregnancy and abortion.[70]

Studies, including those conducted by witnesses who testified at trial, have shown that whether a minor is satisfied with her pregnancy decision is not related to whether she discussed the decision with a parent or which option she chose, but is primarily related to whether she received support and whether she felt that *she* made the final decision.[71]

The Superior Court rejected the State's unsupported assertions that the psychological risks associated with abortion are common, severe, and particularly prevalent for minors. Despite the State's attempts to make it appear so,[72] no testimony from Plaintiffs' experts

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[67] (Adl. FL 486:10-487:12, 565:3-566:1; Sto. TR 728:6-13, 729:14-730:5; Shadigian (Sha.) TR 484:13-15.)

[68] (Zab. TR 2375:7-2376:7; Adl. FL 491:11-23, 506:3-6; Sto. TR 744:23-745:17, 730:14-731:3, 732:19-22; Sha. TR 484:16-25, 620:20-621:3; And. TR 1854:19-1855:9.)

[69] (Exc. 297 ¶ 51; Adl. FL 486:10-487:12, 565:3-566:1; Sto. TR 728:6-13, 729:14-730:5.)

[70] (Exc. 297 ¶¶ 51-52; Sha. TR 484:13-15.) Similarly, because so many intervening events occur, it would be very difficult to determine which problems, if any, that women experience 5 to 10 years following an abortion were related to the procedure. (Exc. 297 ¶ 51; Sac. Dep. 126:16-127:8; Sto. TR 798:18-799:10; Zab. TR 2374:5-23, 2444:18-2446:11.)

[71] (Zab. TR 2354:25-2356:19; Adl. Dep. 65:2-7; *see also* Lem. 119:5-11, TE 252.)

[72] (*See* Applnt. Br. at 12.)

supports such assertions,[73] and even some of the State's experts agree that no reliable studies show significant adverse psychological effects on women from having an abortion.[74] The testimony of the State's experts regarding the alleged negative psychological consequences of abortion[75] is undermined by reliance on methodologically flawed studies,[76] overstatements and misstatements of the research, and selective citation from articles that the witnesses testified were unreliable on other points.[77]

Finally, the State's assertion that minors are at greater risk than adult women for negative emotional and mental effects following an abortion,[78] is unsupported by the

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[73] The citations to testimony by Dr. Adler (Adl. FL 565-66, 610.) do not support the state's proposition. Similarly, while Dr. Lemagie testified that abortion has potential psychological consequences, she did not testify that those consequences were negative—in fact, she said the most common psychological consequence was the feeling of relief. (Lem. TR. 209-10.) The State also falsely asserts that Dr. Lemagie refers 100 percent of her abortion patients for counseling, when in fact she simply "offer[s] a hundred percent of them [a] counseling referral." (*See* Applnt. Br. at 12; Lem. TR 210:16-211:15.)

[74] (Gre. Dep. 114:5-119:1.)

[75] (Cited by the State at Applnt. Br. at 11-13.)

[76] The evidence shows that all of the studies the State and its experts rely on for the proposition that women who have abortions have significant psychological reactions are unreliable and methodologically unsound. For example, testimony by the State's experts regarding abortion and suicide are based on studies that show only a temporal association but not a causal connection. (Sha. TR 501:10-502:8, 583:3-12; Jos. TR 1483:3-21.) As the author of one study notes, "[t]he age-adjusted risk for violent death, accident, suicide, homicide was increased for women with a recent abortion compared to other women, *probably because of factors related to social class and lifestyle*." (TE 205 [emphasis added]; Sha. TR 610:11-22, 603:12-17; Jos. TR 1532:20-1533:7, 1536:1-12.)

[77] For example, in offering their opinions on rates of depression following abortion both Dr. Shadigian and Dr. Josephson failed to note that in the study relied upon depression was higher only among *married* women, a group that would *not* be affected by the Act. (Sha. TR 685:15-690:8; TE 2048; TE 2062.)

[78] (Applnt. Br. at 12 n.14.)

accompanying citations. To the contrary, the evidence shows that age is not a risk factor for adverse psychological sequelae following abortion.[79]

In contrast to the lack of evidence showing negative psychological effects caused by abortion, the evidence shows that pregnancy and childbirth are associated with negative psychological responses,[80] as is relinquishment for adoption.[81] The rate of depression and other psychiatric illnesses is approximately five times higher after childbirth than it is after abortion.[82] Approximately 10 to 20 percent of women who carry pregnancies to term experience postpartum depression.[83] With respect to minors in particular, those who give birth are more likely to suffer from psychological problems than those who obtain abortions.[84] Moreover, studies conducted by witnesses who testified at trial, as well as other studies, show that women, including minors, who relinquish a child for adoption experience pain, guilt, grief, and regret for much of the rest of their life.[85]

D. The Alaska Parental Consent Law Would Harm Minors

The Superior Court found that the harms that would result from implementation of the Act are numerous.[86] These findings are well supported by the evidence. First, the Act

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79 (Sto. TR 739:13-22; Adl. FL 487:1-24, 506:8-20; Adl. Dep. 56:23-57:10; Zab. TR 2372:22-2375:6, 2364:17-2365:9; Sac. Dep. 121:5-122:10.)
80 (Exc. 289 ¶ 26.)
81 (Elk. Dep. 124:8-23; Sac. Dep. 33:13-34:20, 53:11-58:10, 59:22-60:13.)
82 (Sto. TR 732:23-733:10.)
83 (Sto. TR 728:14-22; And. TR 1873:14-23; Sac. 35:17-25.)
84 (Zab. TR 2369:18-2370:19; *see also* Elk. Dep. 102:24-103:14, 106:9-14.)
85 (Sac. Dep. 33:13-34:20, 53:11-58:10, 59:22-60:13; TE 317.)
86 (Exc. 290 ¶ 28, 296-97 ¶ 50, 304-05 ¶¶ 68-69, 311 ¶ 84.)

would delay the time at which minors would obtain abortions in several ways. As the Court noted, minors generally seek abortions later in pregnancy than adults,[87] and the evidence shows that the Act would cause some minors to further delay obtaining an abortion.[88] Minors in Alaska who seek abortions already face several obstacles to obtaining them, and minors living in the Bush encounter additional obstacles not faced by minors who have road access to services.[89] The judicial bypass in the Act would also cause delay.[90] Evidence from other states demonstrates that minors who proceed through the judicial bypass experience delay for a variety of reasons, including making arrangements with attorneys, courts, family and school.[91] Such delays would increase the risks and costs associated with an abortion.[92]

Second, the Superior Court also found that the Act would hinder minors from receiving timely emergency medical care.[93] Medical emergencies are not excepted from the Act's prohibitions as constitutionally required, but physicians may raise medical emergency as

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87 (Hen. TR 286:16-287:7, 295:25-297:10.)

88 (Exc. 295 ¶ 47, 311 ¶ 84; Hen. TR 282:25-284:8, 286:16-287:7, 423:10-19; Uhlenberg ["Uhl."] TR 1607:25-1608:16, 1639:19-1640:18, 1642:23-1644:4; Sto. TR 747:20-748:25; Tsa. TR 1358:24-1359:5; Zab. TR 2338:19-2339:25, 2405:2-2407:18; TE 120; TE 121, Table 5; TE 2155.)

89 (Exc. 309 ¶ 78, 310-12 ¶¶ 82-85.)

90 (Exc. 310 ¶ 82.)

91 (Exc. 310-35 ¶¶ 82-84; Sab. TR 2532:6-14, 2537:4-2538:22, 2540:3-16, 2565:10-2569:9, 2571:5-15, 2574:25-2575:14, 2612:14-16; Mar. TR 963:2-15; Miller ["Mil."] TR 1406:10-13.)

92 (Exc. 295 ¶ 47; Lem. TR 107:20-113:16, 115:4-116:9, 119:24-120:11; Adl. FL 547:17-20; Hen. TR 290:24-291:20; Sab. TR 2569:10-20, 2570:24-2571:4; TE 252.)

93 (*See* Exc. 296-97 ¶ 50.)

an affirmative defense if prosecuted for violating the Act.[94] In addition, the narrow definition of "medical emergency" under the Act employs concepts that are "inconsistent," "not terms of art that [providers] are used to in the medical field," and does not cover all circumstances that physicians would, in the absence of the Act, treat as medical emergencies.[95] Thus, the narrow statutory definition would cause providers to delay care that they would give immediately to an adult woman, which would increase the health risks for the minor.[96]

Third, the Act would result in some minors being forced to carry an unwanted pregnancy to term.[97] The evidence established that some minors would be forced to carry to term by their parents whom they were forced to tell, others would carry to term because the fear of telling their parents they desired an abortion would be too great, and others would carry to term because the delays caused by the Act would push them into the second trimester, making it impossible for them to obtain the abortion because of a lack of providers, increased cost, or decreased comfort level.[98] It is well-established that such minors would be subjected to higher physical, psychological, economic, vocational and

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[94] In order to avoid finding the Act unconstitutional for failing to provide such an exemption, the Superior Court interpreted the affirmative defense as an exception, placing the burden of proof to disprove a medical emergency on the State. (Exc. 283.) Plaintiff/Appellees have cross-appealed on that issue, arguing that the Court's construction exceeds its judicial authority. (*See* Appellees/Cross-Applnts. Br. at 21-34.) The State takes the position that the provision is constitutional as written. (*See* Applnt. Br. at 62-63.)

[95] (And. TR 1845:18-1852:1.)

[96] (*See* Exc. 296-97 ¶ 50; Whi. TR 1075:18-1076:1.)

[97] (Exc. 289 ¶ 26, 290 ¶ 28, 312 ¶ 85.)

[98] (Hen. TR 295:24-296:18.)

educational risks associated with teen pregnancy and motherhood.[99] The Court accurately concluded that these social problems would be exacerbated if the minor were to become a parent unwillingly. It also noted, in accordance with concessions by the State's experts, that forcing a woman to carry an unwanted pregnancy to term may have negative emotional and psychological consequences.[100]

Fourth, as the Superior Court found, the Act may also increase emotional and physical abuse of minors.[101] The Superior Court noted the existence in Alaska of highly dysfunctional and unsupportive families, where the minor has, in effect, "no adequate parent, perhaps because of the parent's alcoholism, drug addiction, or emotional disability."[102] The Court correctly found that forcing a minor who lives in such a household to consult a parent about an abortion may be detrimental to the minor.[103] As the Court also found, even in non-abusive homes, forcing a minor to inform a parent about a decision to obtain an abortion may adversely impact the parent-child relationship.[104]

Moreover, as Dr. Henshaw testified, abuse and other adverse consequences would occur in Alaska if, as a result of the Act, minors were forced to consult their parents against

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[99] (Exc. 290 ¶ 28; Elk. Dep. 105:11-106:8; Cal. TR 1760:19-1761:23, 1764:1-8.) Dr. Zabin's studies demonstrated that minors who gave birth also had a higher subsequent pregnancy rate than those who obtained abortions. (Zab. TR 2368:22-2369:17; TE 161, p. 5, Tables 5 and 6.)

[100] (Exc. 289 ¶ 26; Gre. Dep. 87:2-11; Jos. TR 1552:8-24.)

[101] (Exc. 289-90 ¶ 303, 304 ¶ 68.)

[102] (Exc. 304 ¶ 68; *see also id.* at 285 ¶ 18; Elk. Dep. 97:15-19.)

[103] (Exc. 304 ¶ 68, 290 ¶ 28; Sab. TR 2558:9-20; Hen. TR 310:5-21.)

[104] (Exc. 305 ¶ 69; Zab. TR 2349:8-19, 2359:19-25; *see also* Sto. TR 746:16-747:19.)

their better judgment.[105] The State's experts agree that some parents may abuse their minor daughter if they learned that she was pregnant,[106] and teenagers who get pregnant are more likely to have been abused or neglected than the general population.[107] As the Superior Court found, evidence from Alaska and other states shows that many minors who fear telling their parents about their desire to have an abortion fear abuse, stress in the home, or being kicked out of the house, and their fears are often warranted.[108]

Fifth, the evidence shows that the Act may lead minors to obtain illegal or unsafe abortions or to self-induce abortions.[109] In her practice, Dr. Richey has seen young women in Alaska and elsewhere inflict life-threatening injuries from attempts to self-abort, and she fears that the parental consent requirement would increase the incidence of this dangerous behavior.[110]

Sixth, the uncontested evidence demonstrates that the Act would likely deter minors from seeking all types of reproductive health care—not just abortion care. Many medical associations that oppose forced parental involvement laws recognize that lack of

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105 (Hen. TR 310:22-311:06.)

106 (Tsa. TR 1360:20-22; And. TR 1893:7-10; Adl. FL 548:7-14; Hen. 308:18-310:4, 358:14-358:22; Sto. TR 750:20-751:4.)

107 (Sto. TR 726:21-727:3.)

108 (Exc. 289-90 ¶ 27; Mar. TR 960:12-961:3, 967:14-968:4; Sab. TR. 2557:25-2559:3; Lem. TR 112:3-113:14, quoting TE 252; Hen. TR 308:18-310:4, 358:14-359:15; TE 123, Table 7; Chr. TR 1964:2-5, 1965:10-11, 1971:10-20; *see also* Gre. Dep. 88:9-13.)

109 (Hen. TR 271:10-272:5, 311:7-312:18, 430:6-433:3; TE 124, Table 7; Sto. TR 750:20-751:4; Lem. TR 115:4-24.)

110 (Ric. TR 867:3-868:6, 912:7-913:8.)

confidentiality would deter minors from seeking reproductive health care.[111] The State's experts who do not support parental consent laws for minors seeking treatment for sexually transmitted diseases or pregnancy-related care oppose such laws because they do not want to discourage minors from seeking treatment. They recognize that parental involvement laws would delay or deter minors from seeking care.[112]

Finally, as the Superior Court found, a minor who goes through the judicial bypass process would face several harms. The judicial bypass process would not only delay a minor in obtaining a desired abortion,[113] it would compromise her privacy and ability to maintain confidentiality because she would be forced to disclose her decision to numerous people.[114] These disclosures might in turn result in her parents learning about her decision.[115] The Superior Court found that having to go through the bypass system in order to obtain an

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111 (Lem. TR 27:17-30:5, 137:21-139:1; TE 246 (American College of Obstetricians and Gynecologists, "Confidentiality in Adolescent Health Care"); TE 249 (American College of Obstetricians and Gynecologists, "Statement on Providing Effective Contraception to Minors"); TE 252 (American Academy of Pediatrics, "The Adolescent's Right to Confidential Care When Considering Abortion"); TE 253 (American Medical Association Council on Ethical and Judicial Affairs, "Mandatory Parental Consent to Abortion.")

112 (Tsa. TR 1319:19-1321:19, 1352:13-1353:12.) In Dr. Tsao-Wu's opinion, the importance of confidentiality to a minor seeking contraception, pregnancy-related care or STD treatment trumps any possible benefits that might result from a parental consent or notification law for such care. (Tsa. TR 1347:19-1348:9, 1349:7-1350:2, 1352:13-1353:12; *see also* And. TR 1889:20-1890:1 [a parental involvement law for STD's may delay treatment because minors do not want to involve their parents].)

113 (Exc. 311 ¶ 84.)

114 (Exc. 311 ¶ 83; Mar. TR 973:19-974:11; Sab. TR 2532:6-14, 2554:13-25, 2572:1-7, 2574:14-24; Pat. TR 1198:24-1199:24, 1209:10-1210:3, 1211:23-1213:20; Rei. TR 925:2-926:5, 928:8-929:8, 931:19-932:12, 947:22-948:17.) *See also Farmer*, 762 A.2d at 636.

115 (Exc. 310-11 ¶ 83; Sab. TR 2572:7-2573:2.)

abortion may cause the minor significant emotional distress;[116] it would take away the minor's feeling of control over her decision, and stigmatize her choice.[117] Furthermore, the mechanics of the judicial bypass procedure may be so burdensome that some minors may not seek a desired abortion.[118]

As the Superior Court noted, navigating the bypass system would be particularly difficult for minors living in the Bush, adding to existing obstacles and resulting in both delay and an increased likelihood that such minors may not be able to receive a safe and legal abortion.[119] These difficulties would include obtaining and completing the judicial bypass forms, accessing an attorney and the court system, and being able to participate confidentially in a court hearing in person or by telephone.[120] Cultural differences combined with the need to appear in court and discuss a personal decision with strangers may greatly unnerve some rural Alaska minors, which would cause them to delay seeking a bypass, with the attendant increase in physical risks associated with the abortion.[121] In addition, given the

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116 (Sab. TR 2532:6-22; Mar. TR. 961:23-962:7; Coo. TR 1276:2-11; Rei. TR 924:16-925:2, 926:14-25.)

117 (Exc. 290 ¶ 28; Zab. TR 2365:25-2368:16; Sac. Dep 36:2-12, 37:14-39:9, 47:21-48:4; TE 161, p. 4.)

118 (Exc. 312 ¶ 85; Coo. TR 1249:24-1251:22, 1252:17-1253:3; Pat. TR 1213:11-1214:11; Mil. TR 1402:25-1403:20; TE 179; TE 180, p. vii; TE 180, p. ix, 1-7, 14-17, 19-22, 25, 33, 48-50, 94-104, 108-118; TE 178, p. 11.)

119 (Exc. 310-11 ¶¶ 82-84.)

120 (Exc. 310 ¶ 82; Rei: TR 929:16-930:21, 943:9-944:1; Pat. TR 1201:16-1202:6, 1208:15-1209:9; Pat. TR 1213:21-1215:22; Mil. TR 1402:25-1403:20, 1406:14-1407:5; Coo. TR 1255:10-21, 1257:22-1259:5; TE 2005; TE 179.)

121 (Exc. 311 ¶ 84; Coo. TR 925:1-7, 1254:5-1259:5; Pat. TR 1211:23-25, 1212:13-1213:3, 1213:21-1215:22.)

size of Bush villages and the number of people to whom a minor would have to disclose her abortion decision in order to proceed with a bypass, the process would likely result in the minor's decision being made public.[122]

Abused minors would face additional problems, including the added fear that they would be harmed if the abuser were to find out that they were seeking a bypass.[123] The uncontested testimony from several witnesses shows that abused minors would be unlikely to disclose their abuse in the bypass process.[124]

III. **Summary of Proceedings**

The Act was passed by the Alaska Legislature in 1997. Plaintiffs challenged the Act priot to its effective date asserting that it violates several provisions of the Alaska Constitution. On February 25, 1998, the Superior Court granted summary judgment to Plaintiffs on equal protection grounds, holding that "no compelling state interest had been established to justify the classification of minors based upon their reproductive choices."[125] The State appealed that ruling.

On November 16, 2001, this Court held that the Act infringes on minors' right to privacy guaranteed under the Alaska Constitution, and therefore Plaintiffs' equal protection

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[122] (Exc. 311 ¶ 83; Mar. TR 973:19-974:11; Sab. TR 2532:6-14, 2554:13-25, 2572:1-7, 2574:14-24; Pat. TR 1198:24-1199:24, 1209:1-1210:3, 1211:23-1213:20; Rei. TR 925:16-926:6, 928:8-929:8, 931:18-932:12, 947:22-948:17.)

[123] (Elk. Dep. 100:8-101:24; Sab. TR 2557:25-2559:3.) *See also Farmer*, 762 A.2d at 635 (bypass mechanisms would impose far greater burdens on precisely those minors who, for very good reasons, would be unable to communicate with their parents).

[124] (Rei. TR 933:18-935:25, 944:13-945:10; Pat. TR 1184:10-1185:4, 1186:2-8, 1190:18-1191:3; Elk. Dep. 98:10-100:1.)

[125] (Exc. 61 [decision on summary judgment, Feb. 25, 1998].)

claim would be subject to the "most exacting scrutiny."[126] This Court remanded for trial, however, holding that the equal protection claims required an evidentiary hearing to determine "whether it is permissible to selectively burden the exercise of the privacy right by requiring women under age 17 to seek parental or judicial consent before obtaining an abortion."[127] This Court recognized that whether minors are similarly situated may not readily lend itself to disposition as a matter of law and may require the resolution of disputed issues of fact.[128] It further determined that an evidentiary hearing was necessary to determine whether the law would further a compelling state interest using the least restrictive means.[129] It noted that the Superior Court may view the Legislature's willingness to allow minors to consent on their own to most forms of reproduction-related medical treatment as evidence that the State's ostensible interests are not particularly compelling.[130] Even if the State's interests were actually compelling, evidence about the difficulties faced by minors--particularly minors in rural areas--in gaining access to courts and the judicial bypass procedure may convince the Superior Court that the Act would not actually accomplish these purposes or would not do so using the least restrictive means.[131]

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126 *Planned Parenthood*, 35 P.3d 30, 41, 43, 45 (Alaska 2001). Accordingly, contrary to the suggestion of one of the amici supporting the State (*see* Fam. Res. Coun. Br. at 6), this Court does not need to revisit the question of whether the Act infringes minors' right to privacy.
127 *Planned Parenthood* at 46. (*See also* Exc. 278.)
128 *Id.* at 43 n.88.
129 *Id.* at 46.
130 *Id.* at 45.
131 *Id.*

On October 7, 2002, Plaintiffs moved again for summary judgment, arguing that the Act violates the Alaska Constitution because it fails to exclude abortions performed in medical emergencies. On January 2, 2003, the Superior Court denied Plaintiffs' motion, but construed the statute to make "the lack of a medical emergency [] an element of the offense, and not an affirmative defense."[132] Plaintiffs/Appellees have cross-appealed that ruling.[133]

Trial on the merits was held between January 6 and January 24, 2003. On October 13, 2003, the Superior Court ruled the Act unconstitutional under the privacy and equal protection provisions of the Alaska Constitution.[134] It found that for any state interest that might be compelling, the Act would not further the interest or would not do so by the least restrictive means.[135] The Superior Court found, *inter alia*, that the Act would arbitrarily treat those pregnant minors who chose to terminate a pregnancy differently than those who chose to carry to term.[136] After detailing the abundant evidence demonstrating that the risks associated with pregnancy and childbirth are greater than those associated with abortion, the Court concluded that "[i]f the purpose of the Act is to protect the health of pregnant minors, it is incongruous to burden the decision to choose the safer procedure, but allow minors to choose the more dangerous course without parental consent."[137]

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132 (Exc. 200 [Order on Mot. for Summ. J., Jan. 2, 2003].)
133 (*See* Appellee/Cross Applnt. Br. at 12-34.)
134 (Exc. 314.)
135 (Exc. 301-02, 314.)
136 (Exc. 302.)
137 (*Id.*)

The Superior Court issued final judgment on January 7, 2004, declaring the Act unconstitutional under the equal protection and privacy guarantees under the Alaska Constitution,[138] and the State appealed that ruling.

APPLICABLE STANDARD OF REVIEW

Questions of law, including constitutional issues, are reviewed de novo.[139] A court's factual determinations will be reversed only if clearly erroneous.[140] Because the State does not argue that any of the Superior Court's findings of fact are not supported by the record, under the proper standard of review none of these findings should be "disturbed on appeal."[141]

Perhaps because it is faced with factual findings by the Superior Court that are well supported by the evidence, the State *does not* argue that the Superior Court's findings of fact were clearly erroneous; rather, it argues that the Superior Court findings are legislative, rather than adjudicative, facts and thus subject to de novo review. The State's position is, however, incorrect.[142] Not only are the Superior Court findings of fact adjudicative facts, but there is no support for the State's novel theory that legislative facts are subject to something other than a clearly erroneous standard of review.

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138 (Exc. 315-16 [Judgment, Jan. 7, 2004].) There is no merit to the arguments by amici in support of the State that it is unclear on which grounds the Superior Court decision rested. (*See* Ak. Leg. Br. at 4; Family Research Council Br. Amicus Curiae at 5.)

139 *Carr-Gottstein Props. v. Benedict*, 72 P.3d 308, 310 (Alaska 2003); *Sonneman v. State*, 969 P.2d 632, 636 (Alaska 1998).

140 *Carr-Gottstein Props.*, 72 P.3d at 310; Ak. R. Civ. P. 52(a).

141 *See* Ak. R. Civ. P. 52(a).

That the Superior Court's findings of fact are adjudicative is clear from prior rulings of this Court, holding that "a 'legislative fact' [ ] is not the type of factual issue for which trial is necessary."[143] Thus, for example, in *Atlantic Richfield Co. v. State*,[144] this Court found that summary judgment concerning the constitutionality of a method used to determine an oil tax was proper because the oil tax was "at most a legislative fact," and therefore a trial was unnecessary.[145]

By contrast, in reversing summary judgment and remanding this case back to the Superior Court for trial, this Court recognized the existence of many adjudicative facts for which trial was necessary. On remand, the Superior Court was to give the parties "an opportunity to present evidence supporting their respective positions," so that the Superior Court could resolve factual disputes.[146] That the State offers broad policy reasons in support of the Act does not change the fact that, as this Court recognized, the considerations under an equal protection analysis may be shaped by many factual determinations.

Robison v. Francis[147] is instructive on this point. In *Robison*, this Court assessed the constitutionality under the privileges and immunities clause of a residence-discriminatory

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[142] This request is unlike the one made in *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 269-270 (Alaska 2004), where the Superior Court had legal authority to hold a *de novo* trial following administrative agency review of the constitutionality of a city ordinance.

[143] *Id.* at 428 (citing *State v. Erickson,* 574 P.2d 1, 4-6 (Alaska 1978)).

[144] 705 P.2d 418 (Alaska 1985).

[145] *Id.* at 428.

[146] *Planned Parenthood*, 35 P.3d at 46 ("Given the importance of the interests at stake, we are reluctant to pass judgment on the quality of this evidence or its substantive implications without the benefits of a full adversarial process."); *id.* at 46 n.103 ("[I]n conducting the evidentiary hearing on remand, the superior court will have broad latitude to determine the admissibility and scope of evidence that bears on these difficult questions.").

labor law; the State argued that the law was justified because "non-residents are a 'peculiar source of evil' of unemployment."[148] This Court explained that the "substantiality of the [State's] justification" "is in the first instance a factual question."[149] It further held that, since the trial court's findings of fact on these issues were supported by the record, they "are not clearly erroneous and may not be disturbed on appeal."[150]

Even if the facts in this case were "legislative," it is not true that this Court should review them de novo. *State v. Erickson*,[151] relied on by the State, is inapposite. The relevant issue in *Erickson* was the assessment of "the wisdom and propriety of considering on appeal materials which were *not* presented to the trial court."[152] This Court concluded that it may be appropriate to consider such materials when legislative facts are at issue.[153] The Court by no means stated that the clearly erroneous standard of review no longer applied to the trial court's findings when legislative facts, rather than adjudicative facts, were at issue. In fact, the Court acknowledged the limited reliability of facts ascertained from materials considered for the first time on appeal, namely the absence of the advantage of cross-examination of witnesses.[154] Here, the State is not trying to present new evidence on

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147 713 P.2d 259 (Alaska 1986).
148 *Id.* at 265-66.
149 *Id.* at 266.
150 *Id.* (citing Ak. R. Civ. P. 52(a)).
151 *State v. Erickson*, 574 P.2d 1, 5, 7 (Alaska 1978).
152 *Id.* at 4.
153 *Id.* at 4-5.
154 *Id.* at 6. Questions about the reliability of such documents applies equally in this case to the many documents that the State included in the Joint Excerpt of Record over Appellees/Cross-Appellants objections, and cites as "trial exhibits" in its brief, which were

appeal, as was the issue in *Erickson*—rather, it boldly asks this Court to *reconsider* the evidence presented to the Superior Court and to give no deference to the court's findings of fact. This unprecedented request should be rejected and the Superior Court's findings of fact, not challenged as clearly erroneous, should be upheld.

ARGUMENT

I. THE ACT VIOLATES THE EQUAL PROTECTION GUARANTEES OF THE ALASKA CONSTITUTION.

To assess whether a law violates the equal protection guarantee of the Alaska Constitution, a court must first determine whether the government treats two similarly situated classes of people unequally.[155] If a law discriminates against similarly situated classes, it is invalid unless the State can prove a constitutionally sufficient justification for the discrimination.[156] As the evidence presented at trial established, the Act would discriminate between several similarly situated classes of persons, and the State has failed to justify these classifications.

The Act establishes as a class for differential treatment pregnant minors under the age of 17 who desire abortions. The law would discriminate *inter alia* among: pregnant minors

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never admitted or referred to by any witness at trial, but rather were simply assigned an exhibit number for identification purposes.

155 *See Evans ex rel Kutch v. State*, 56 P.3d 1046, 1068 (Alaska 2002) (citing *Matanuska-Susitna Borough Sch. Dist. v. State*, 931 P.2d 391, 397 & n.7 (Alaska 1997).)

156 *Evans*, 56 P.3d at 1052.

under 17 who choose to have an abortion and pregnant minors under 17 who choose to carry to term and minors under 17 seeking other reproductive health care.[157]

A. The Superior Court's Findings of Fact Demonstrate that Pregnant Minors Under 17 Seeking Abortions Are Similarly Situated to Other Groups Not Affected by the Act.

1. Pregnant Minors Who Choose to Carry to Term

The Superior Court's findings of fact, based on substantial evidence, lead to the single conclusion that pregnant minors who seek to terminate their pregnancies are similarly situated to those who choose to carry to term.[158] Whether a pregnant minor makes the decision to terminate or to continue her pregnancy, "the consequences of her decision may have a profound impact on her entire future life."[159]

As the Superior Court correctly found, and experts for both sides agree, there is no qualitative difference between the maturity level necessary to decide whether to have an abortion and the maturity level necessary to carry a pregnancy to term.[160] Abortion, pregnancy and childbirth all involve medical risks,[161] with pregnancy and childbirth posing

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157 *See, e.g.*, *Planned Parenthood*, 35 P.3d at 43 ("[T]he act's express terms create several potentially significant classes of similarly situated minors") (citing AS § 25.20.025(a)(1) [permitting financially independent minors to make medical and dental decisions] and (a)(4) [permitting minors to make medical decisions regarding diagnosis and treatment of pregnancy or sexually transmitted diseases]).

158 (*See* Exc. 284 ¶ 15, 285 ¶17, 286, 290 ¶¶ 29-30, 294 ¶ 44, 297 ¶ 52, 301-02.)

159 *Planned Parenthood*, 35 P.3d at 49 (Matthews, J., dissenting).

160 (Exc. 284 ¶ 15, 286; Gre. Dep. 81:11-82:3; Sto. TR 727:9-15; Jos. TR 1514:8-13; *cf.* Applnt. Br. at 19.)

161 (And. TR 1882:6-9.)

higher risks than abortion, especially for minors.[162] Similarly, as the Superior Court found, the evidence shows that abortion is not associated with long-term psychological harm,[163] while the psychological risks associated with childbirth and keeping the child or relinquishing the child for adoption can be great.[164]

Moreover, as the Superior Court found, many of the conditions that pose an increased risk for an abortion also pose an increased risk for carrying a pregnancy to term,[165] and thus obtaining a medical history in order to provide pregnancy-related care is at least as important as it is for abortion.[166] Similarly, it is important for patients to follow post-procedure instructions and watch for complications, whether that patient has had an abortion or has received a procedure such as amniocentesis or given birth.[167] As the State's experts agreed, to the extent that the assistance of a conscientious and caring parent would be an asset to a pregnant minor for decision making, providing medical history, giving

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162 (Exc. 301-02; Hen. TR 269:2-18; Tsa. TR 1352:6-11; Ric. TR 851:5-9.) The State cannot avoid this result by characterizing the Act as distinguishing between types of surgery, or between surgical procedures and other medical treatment. First, abortion does not necessarily involve surgery (*see* Lem. TR. 48:18-51:24), but the Act requires consent for all abortions. Second, surgery is at times a recommended treatment during pregnancy, but minors may consent to such treatment without parental consent.

163 (Exc. 297 ¶ 52; Sac. Dep. 33:13-39:9, 44:6-12, 45:22-47:9, 47:21-48:4, 129:20-130:22, 139:23-141:13; Adl. FL 477:19-478:4, 480:19-481:2, 488:17-21, 497:3-498:8; Lem. TR 119:8-13, quoting TE 252; Sto. TR 730:6-732:5; TE 2048.)

164 *See also American Academy of Pediatrics v. Lungren*, 940 P.2d 797, 827 (Cal. 1997); *In re T.W.*, 551 So.2d 1186, 1194-95 (Fla. 1989).

165 (Exc. 294 ¶ 44; Lem. TR 95:25-97:2; Whi. TR 1033:4-11.)

166 (Exc. 294 ¶ 44; Lem. TR 55:16-19, 59:24-60:4; Whi. TR 1025:3-7, 1026:23-1027:4, 1030:6-1031:17.)

167 (Exc. 290 ¶¶ 29-30.)

informed consent, or monitoring complications, it would be an asset regardless of whether the minor sought to carry her pregnancy to term or to terminate the pregnancy.[168]

The State argues that its interest in "making sure that a girl makes an informed decision about whether or not to terminate her pregnancy" "transcends appreciation of medical risks" and includes "advice, adapted to her unique family situation, that covers the moral, social and religious aspects of the abortion decision."[169] The State cannot credibly argue, however, that parents would not want to provide "moral, social, or religious" advice to their daughter contemplating teen motherhood. To the extent that the State has an interest in this type of parental involvement, it applies at the time the minor makes her decision, and therefore when abortion and carrying to term are both under consideration. The State's suggestion that there is a distinction in this regard based on the fact that the minor is choosing abortion simply reveals animosity towards abortion.

The State's other attempts to distinguish these similarly situated groups are unavailing. Every argument put forth by the State to support the Act applies with equal force to a minor making an affirmative or passive decision to carry to term.

For example, the State's attempt to distinguish pregnant minors choosing abortion from those carrying to term by characterizing abortion as "elective" and pregnancy-related care as "medically necessary"[170] is false and contradictory. In the first instance, minors

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168 (Exc. 285 ¶ 17; Cal. TR 1689:11-1690:7, 1701:1-10, 1705:3-1706-5; Tsa. TR 1306:15-1307:10, 1310:23-1312:12, 1351:21-1352:1, 1354:11-1355:8; Gre. Dep. 32:15-33:17, 41:9-42:10; And. TR 1875:7-11, 1885:8-24.)

169 (Applnt. Br. at 56-57.)

170 (Applnt. Br. at 32-33; *see also* Ak. Leg. Br. at 13-15.) Moreover, to distinguish abortion from carrying to term because the latter is "the natural biological consequence of being

seeking medically necessary abortions are not excluded from the Act.[171] Moreover, a woman considering an abortion is under compulsion. She does not have a choice not to be pregnant. Comparing the decision to have an abortion to elective surgery such as cosmetic surgery, which is not forced by any time-sensitive considerations and for which the status quo can be maintained if the surgery is not chosen, trivializes and indeed ignores the nature of pregnancy.[172] Thus, the State's attempt to distinguish the two based on "medical necessity" fails.

The State also misses the mark when it states that "denying prenatal care to an adolescent girl would be detrimental to her health, whereas denying an abortion may or may not be in the girl's best interests."[173] Given the potential health and social consequences,

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pregnant" (*see* Applnt. Br. at 31), has no bearing on whether those pregnant minors who choose abortion over carrying to term are similarly situated.

[171] (Ric. TR 856:5-861:11, 868:7-22; Cal. TR 1740:19-24.) Although the State claims that medically necessary abortions are exempted from the Act's requirements (*see* Applnt. Br. at 33), *no* medically necessary abortions are exempted from the Act as written, *see* AS § 18.16.010 (providing an affirmative defense in circumstances constituting "medical emergencies" as defined by the Act), and, as the Court found, the language of the statute does not include all medical emergencies and its opposition would be detrimental to the health of minors. (Exc. 296 ¶¶ 48, 50; And. TR 1845:18-1852:2; Whi. TR 1075:17-24.) *See also supra* at 18-24.

[172] *See Bellotti v. Baird*, 443 U.S. 622, 642 (1979) ("The pregnant minor's options are much different from those facing a minor in other situations, such as deciding whether to marry. A minor not permitted to marry before the age of majority is required simply to postpone her decision. . . . A pregnant adolescent, however, cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy."); *Lungren*, 940 P.2d at 815-16 (decision whether to continue a pregnancy not only has profound consequences but is unlike many other choices in that it cannot be postponed until adulthood).

[173] (Applnt. Br. at 33; *see also* Ak. Leg. Br. at 16-17.) With these comments, the State and the Legislature appear to acknowledge what they deny elsewhere—that the Act may very well result in *denying* a minor a desired abortion, rather than facilitating parental involvement in carrying out her decision.

deciding to carry a pregnancy to term may or may not be in a minor's best interests and parents will have differing views on what is best for their daughter. Moreover pregnant minors are free to decide whether or not to seek prenatal care, even though the failure to do so would not be in their best interests. In addition, medical decision-making in pregnancy is not always based solely on what is in the minor's "best interests." Some decisions require the minor to weigh her own health interests against her desire to continue the pregnancy.[174] As noted by the Superior Court, minors carrying a pregnancy to term may choose a course of treatment that is not in their best interests, and is in fact, life-endangering.[175]

The State also argues that pregnant minors who choose to carry to term are not similarly situated to those who choose to abort because "in almost all cases" parents would become involved in their daughter's care if she were to carry to term, whereas they wouldn't necessarily become involved in their daughter's decision to abort. That some parents might eventually learn that their daughter is pregnant, at a time well after the option of abortion is foreclosed, does not, however, make minors who eventually carry to term differently situated than those who choose abortion at the moment of choice. The State's argument ignores that some parents would believe that abortion, rather than carrying to term, was in their daughter's best interest and that they may not learn of the pregnancy in time to express their views.[176] Even if parents did become involved once the pregnancy became apparent, that

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[174] (Sha. TR 581:16-23; *cf.* Exc. 291 ¶ 33 [discussing risks involved in all invasive medical procedures].)

[175] (Exc. 295 ¶ 47, 296-97 ¶ 50.)

[176] (Exc. 284 ¶ 14 [noting that some minors hide their pregnancies until is it too late to obtain an abortion.].) *See also N. Fla. Women's Health and Counseling Servs., Inc. v. State*, No. 99-3202, slip op. 13 (Fla. Cir. Ct. May 12, 2000) ("By the time a minor 'shows,' it may be too late

fact does not change the fact that many parents would not be involved early in their daughter's pregnancy, when it would be important that she seek prenatal care.[177]

The State's failure to cite any evidence in support of its argument highlights that its underlying assumption—that parents eventually become involved in a minor daughter's pregnancy and facilitate the receipt of pregnancy-related care— is unfounded.[178] There are, in fact, minors who deny they are pregnant up until the time they deliver a baby and do not receive any pregnancy-related care.[179]

The Alaska Legislature suggests that minors seeking abortions are distinguishable from those carrying to term on the grounds that abortion "involves the death of a child." [180] Without saying so directly, the Legislature appears to believe that the Act furthers an interest in potential life. While the legitimacy of such an interest is questionable, [181] the Act would

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for a parent to counsel her child as to the abortion decision as it may be too late to safely, or legally, choose abortion. Thus, just as an abortion cannot be undone, neither can the decision to carry the pregnancy to term be revoked after a certain point.")

[177] (Exc. 298-99 ¶ 56; *see also* Whi. TR. 1028:1-14.)

[178] (*See* Exc. 285 ¶ 18 [noting that some parents are unable to help a child make important decisions].)

[179] (Tsa. TR 1353:13-1354:10; Lem. TR 41:1-10, 158:20-159:13; Ric. TR 883:1-10; Whi. TR 1020:10-18; Gre. Dep. 74:1-13; *see also* Gre. Dep. 89:8-90:1; Tsa. TR 1314:15-1315:7.) To the extent that Defendant argues that a parental consent law for carrying a pregnancy to term is unnecessary because most parents eventually know their daughter is pregnant, such an argument relates to the "fit" of the Act, but has no bearing on whether pregnant minors are similarly situated.

[180] (Ak. Leg. Br. at 6 n.3; *see also* Liberty Legal Institute Br. Amicus Curiae at 11.

[181] *See Valley Hosp. Ass'n, Inc. v. Mat-Su Coalition for Choice*, 948 P.2d 963, 972 (Alaska 1997) (invalidating a quasi-public hospital's policy, based on "sincere moral belief," prohibiting "elective" abortions; "constitutional rights 'cannot be made to yield simply because of disagreement with them'")(citations omitted).

only further such an interest through the impermissible means of parental veto of a minor's decision or the establishment of impassable obstacles to her ability to carry out her decision.

Moreover, requiring consent in order to place obstacles in the way of a woman desiring a pre-viability abortion, however, constitutes an improper purpose. For example, the State could not impose a spousal consent requirement on adult women seeking a pre-viability abortion on the grounds that such a provision would further the state's interest in potential life.[182] And while the Legislature may be able to impose restrictions on the fundamental rights of minors that cannot be imposed on adults, those restrictions must be related to minority.[183] Thus, the State cannot impose a parental consent requirement on minors in order to further an interest in potential life.[184] Accordingly, classifying women by which reproductive choice they pursue so as to further an improper purpose—of discouraging abortion—violates equal protection.[185]

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2. Other Minors Seeking Reproductive Health Care.

Minors under 17 seeking an abortion are similarly situated to an even larger group—the group of women and men under 17 seeking reproductive health care. Without the Act in

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182 *See Lungren*, 940 P.2d at 813 (there would be "no question" that a consent requirement for adult women would be unconstitutional).

183 *See Planned Parenthood*, 35 P.3d at 40-41.

184 *See id.* ("[I]t is not appropriate … to lower the applicable constitutional standard under which the statute is to be evaluated simply because the privacy interests at stake are those of minors." [citing *Lungren*, 940 P.2d at 819]). Even if such a justification could support a parental consent requirement, the Act would clearly not be narrowly tailored to further that goal because it does not direct parents to influence their daughter's decision in favor or against abortion.

185 *See Robison*, 713 P.2d at 266-67 (discrimination for improper purpose cannot be upheld under equal protection clause).

effect, all minors are able to obtain confidential reproductive health care without seeking parental consent.[186] The evidence demonstrates that visits for all reproductive health care, be it contraception, pregnancy-related treatment or treatment of sexually transmitted diseases, require the taking of medical history, decision making regarding treatment, and consideration of risks.[187] Minors under 17 seeking abortions are not unique in this respect. Moreover, sexually transmitted diseases sometimes pose risks equal to, or greater than, the risks posed by abortion, especially if the course of treatment is not properly followed.[188] The State's bold assertion without evidentiary support that abortion is "significantly different" than the "acquisition and use of contraception"[189] ignores this evidence.

B. The Superior Court's Findings Establish that the State Cannot Justify the Act's Discrimination Against Women Under 17 Choosing An Abortion.

In remanding this case back to the Superior Court, this Court has already determined that the right of minors to choose an abortion is a fundamental right under the Alaska Constitution, and that the Act would infringe on the rights of pregnant women under 17 who seek an abortion.[190] The only questions left under the equal protection analysis are therefore whether the State has proven (1) that it has a compelling governmental interest in enacting the legislation; (2) that the classifications drawn by the Act would further that

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186 AS § 25.20.025(a)(4).

187 (Exc. 291 ¶ 33, 293 ¶ 41; Lem. TR 33:9-39:13, 55:16-57:13, 79:16-19; Whi. TR 1014:1-20, 1025:3-7, 1028:6-8, 1054:18-1055:2; Sha. TR 581:24-582:13; Tsa. TR 1348:20-1349:2.)

188 (Lem. TR 33:9-39:13; *see also* Exc. 295 ¶ 47.)

189 (Applnt. Br. at 38.)

190 *Planned Parenthood*, 35 P.3d at 39-43 (The Act is subject to the compelling interest/least restrictive means analysis because it infringes on the fundamental right to privacy).

interest; and (3) that the classifications drawn by the Act are narrowly tailored and the least restrictive means to promote the State's interest.[191]

Perhaps recognizing its inability to justify its classifications under this exacting scrutiny, the State tries to avoid application of this well-established test. It asks the Court to apply a balancing test, focusing solely on the infringement on the right to privacy rather than the classifications which must be judged under the Alaska Constitution's guarantees of equal protection. For example, the State argues that the Act would "[satisfy] Alaska constitutional standards because it effectively serves to advance compelling state interests without unnecessarily burdening the privacy rights of young Alaskan girls."[192] It further incorrectly states that "from the equal protection 'tailoring' standpoint, the proper question is whether the risks of abortion are such that parental consent or judicial authorization *will advance the state's compelling interest* in protecting the health of minor girls who seek medical care."[193] But that, of course, is only part of the test, and does not address the State's classifications. Not only must the State show that it has a compelling interest that the Act is alleged to serve, but it must also prove that the classifications further that interest, and that the *classifications* are

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191 *Planned Parenthood*, 35 P.3d at 32, 42, 44; *Treacy*, 91 P.3d at 266. Several of the amici supporting the State incorrectly argue that this Court must begin its analysis of the Act with the presumption that it is constitutional. (*See* Applnt. Br. at 30; Fam. Res. Coun. Br. at 3-6; Lib. Leg. Inst. Br. at 9-10.) To the contrary, since this Court has already determined that the Act would infringe on a fundamental right, *Planned Parenthood*, 35 P.3d at 41, it is presumptively *unconstitutional*, and it is the State that bears the burden of proving otherwise.

192 (Applnt. Br. at 3; *see also id.* at 41 (same); Fam. Res. Coun. Br. at 13.)

193 (Applnt. Br. at 49 [emphasis in original].)

narrowly tailored to serve that interest—that is, the classifications are neither underinclusive or overinclusive.[194]

As the Superior Court determined, the State has failed to meet its burden and the Act cannot survive "the most exacting scrutiny" [195] that is applied to these discriminatory classifications. Rather, as the Superior Court's findings of fact demonstrate, the Act reflects nothing more than the Legislature's impermissible intent to "chip away at the private choice shielded by *Roe v. Wade*."[196]

The Act lists four interests in support of its enactment: (1) protecting minors against their own immaturity; (2) fostering the family structure and preserving it as a viable social unit; (3) protecting the rights of parents to rear children who are members of their household; and (4) protecting the health of minor women.[197] In this Court, the State asserts that the Act would serve two other compelling interests: ensuring that doctors obtain

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[194] *See Treacy*, 91 P.3d at 266; *State v. Enserch Alaska Constr., Inc.*, 787 P.2d 624, 634 (Alaska 1989); *see also N. Fla. Women's Health and Counseling Servs., Inc. v. State*, 866 So.2d 612, 647 (Fla. 2003) ("[U]nder strict scrutiny review, the State cannot meet its heavy burden simply by stating that the interests are compelling without *proof* from the State that the compelling interests are *in fact furthered* by the statutory intrusion into the protected fundamental rights, and that the [classifications are] the *least instrusive means* to achieve that goal") (emphasis added). Contrary to the assertion by one of the amici supporting the State (*see* Fam. Res. Coun. Br. at 9), under and over-inclusiveness of a statute is of the utmost importance in an equal protection analysis. *See Enserch*, 787 P.2d at 634 (stating that even if government interest passed equal protection analysis, the Court would hold statute unconstitutional under equal protection analysis because the over and under-inclusiveness of statute demonstrates that the "fit" between the objective and the statute was not close).

[195] *Planned Parenthood*, 35 P.3d at 45 (internal quotations and citations omitted).

[196] *Id.*

[197] 1997 Ak. Sess. Laws 14 § 1 (1997) (containing legislative findings for statute codified at AS § 18.16.010 *et seq.*).

informed consent from their minor abortion patients and helping to protect minor girls from sexual abuse.[198]

The State's failure to offer sufficient proof to justify the classifications it creates is consistent with the findings in other states. No state court has upheld a parental consent or notification law when applying strict scrutiny in states where the constitution contains an explicit privacy clause.[199] As these courts have recognized, many of the interests that the State puts forth as justification for the Act are not compelling; however, even for the ones that may be compelling, the State has failed to prove that the classifications drawn by the Act are narrowly tailored to further such interests and do so in the least restrictive way.[200] As the Superior Court's decision makes clear, this Act too must fail.

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198 (*See* Applnt. Br. at 53, 57.)

199 *See N. Fla. Women's Health*, 866 So.2d 612 (upholding trial court's ruling that parental notification requirement for abortion violated fundamental right to privacy explicitly guaranteed under Florida constitution); *Lungren*, 940 P.2d 797 (parental consent requirement for abortion created a classification based on the exercise of a right protected by the State's explicit right of privacy; classification could not survive the strict scrutiny review applied to equal protection claims based on the exercise of fundamental rights); *see also* W*icklund v. Montana*, No. ADV 97-671, slip op. (Mont. 1st Jud. Dist. Ct. Feb. 4, 1999) (striking on equal protection grounds a parental notice statute that created classifications based on the exercise of the right to privacy explicated protected in Montana Constitution) (attached hereto in Appellees'/Cross-Appellants' Appendix of Unreported Opinions); *see also Planned Parenthood v. Farmer*, 762 A.2d 620 (N.J. 2000) (striking parental notification law on equal protection grounds under state constitution, given stronger privacy rights under state constitution than federal constitution).

200 As the Florida Supreme Court has emphasized, the level of inconsistency in requiring parental consent for *only* abortion, but not any other equally or more risky and complex reproductive procedures, may indicate that an interest is important, but not necessarily compelling. *See T.W.*, 551 So.2d at 1195; *N. Fla. Women's Health*, 866 So.2d at 632-34.

1. The Superior Court Correctly Found that the Classifications Drawn by the Act Are Not Narrowly Tailored to Further a Compelling State Interest in Protecting Minors Against Their Own Immaturity.

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The Superior Court correctly held that the State does not have a compelling interest in enacting a statute to protect minors under 17 from their immaturity. However, even if such an interest were compelling, the State has not met its burden of showing that the classifications drawn by the Act are narrowly tailored to further this interest.

As the Superior Court found, the Act would affect only the small group of those minors choosing an abortion who would not voluntarily involve their parents in their decision.[201] The Alaska Legislature has acknowledged, and evidence from other states shows, that these minors demonstrate traits of maturity. [202]

To the extent that the immaturity from which the Act would purportedly protect minors relates to their ability to make a rational decision about abortion, the State has not proven that the Act would further such an interest. The Superior Court correctly found that minors are competent and rational in making decisions about their pregnancy options.[203] And the testimony established that providers always obtain informed consent from their minor patients, as required by law.[204]

Significantly, the Superior Court correctly determined that the classifications drawn by the Act are not narrowly tailored to serve the State's purported interest in protecting minors

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[201] (Exc. 291 ¶ 32; *see also* Hen. TR. 281:1-10, 299:22-300:3.)
[202] (Exc. 285 ¶ 19.) *See also supra* at 6-10.
[203] (Exc. 283 ¶ 12, 285 ¶ 19, 287, 301.)
[204] (Exc. 292-93 ¶ 37); AS § 09.55.556.

from their own immaturity. There is no qualitative difference between the maturity level necessary to decide whether to have an abortion and the maturity level necessary to decide to carry a pregnancy to term.[205] As the Superior Court found, "the decision to carry the pregnancy to term has as much, if not more, long-term effects on the life of the minor than the decision to have an abortion. To the extent that minors are less mature than adults, they are less able to consider the long-term effect and demands of motherhood."[206] Thus, the Act is underinclusive.

Unable to dispute the Superior Court's findings and the evidence, the State argues that requiring parental consent for carrying a pregnancy to term would not be necessary to "accomplish the state's compelling interest in protecting minors from their own immaturity" because pregnancy *eventually* becomes self-evident.[207] That a pregnancy would become self-evident is not, however, relevant to whether parental *consent* would be necessary to protect minors from possible immature decision-making at the time when both abortion and carrying the pregnancy would be available options. Nor is it relevant to the myriad decisions a minor makes, or needs to make, before her pregnancy would be evident to her parents with regards to seeking prenatal care, who shall be her doctor, or the provision of medical history.

The State further argues that requiring consent for carrying to term "would be fundamentally different," "makes no sense as a practical matter," and would violate the

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[205] (Exc. 284 ¶ 15; Applnt. Br. at 19.)
[206] (Exc. 285 ¶ 20.)
[207] (Applnt. Br. at 47-48.)

federal constitution.[208] The first argument simply reflects the State's favored view towards carrying a pregnancy to term and the second two are simply incorrect. The State correctly asserts that it would be unconstitutional to permit parents to veto a pregnant minor's choice to carry a pregnancy to term.[209] Similarly, it would be unconstitutional to permit parents to veto a minor's choice to have an abortion.[210] The same state and federal constitutional principles would apply to the validity of a law requiring parental consent for pregnancy-related care as apply to the validity of a parental consent for abortion law.

2. The Superior Court Correctly Found that the Classifications Drawn by the Act Are Not Narrowly Tailored to Further a Compelling State Interest in Ensuring That Doctors Obtain Informed Consent From Their Minor Abortion Patients or in Otherwise Protecting The Health of Minor Women.

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a. The Act Does Not Further the State's Asserted Interest.

The State incorrectly asserts that the Act would serve to protect minor's health.[211] As the Superior Court found, however, and the evidence shows, the Act would actually *harm* minors' health. The Act would delay the time in which minors obtain abortions, and would

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208 (Applnt. Br. at 46; *see also* Ak. Leg. Br. at 7-8, 13-14.)

209 (*See* Applnt. Br. at 32.)

210 *Planned Parenthood v. Danforth*, 428 U.S. 52, 72-74 (1976).

211 *See Planned Parenthood*, 35 P.3d at 45; *see also T.W.*, 551 So.2d at 1195 (noting that the "selective approach employed by the legislature evidences the limited nature of the . . . interest being furthered by these provisions" [quoting *Ivey v. Bacardi Imports Co. Inc.*, 541 So.2d 1129, 1139 (Fla. 1989)]). While protecting the health of minors is an important interest, it is questionable, as this Court noted, whether such an interest rises to the level of "compelling" with respect to abortion and the entire age group at issue because the State has not chosen to further such an interest by restricting any other reproductive health service for that group. *Planned Parenthood*, 35 P.3d at 45.

thereby increase the risks associated with the procedure.[212] Moreover, as the Superior Court found, by placing the parent in a position to veto the minor's decision to have an abortion or to force her to go through the judicial bypass process, the Act would jeopardize the psychological health of minors.[213] The evidence shows that the Act would further harm minors by forcing some minors to carry unwanted pregnancies to term and by causing others to attempt to self-abort their pregnancies or obtain illegal abortions.[214] Additionally, the Act would harm the health and well-being of minors by forcing minors in abusive or dysfunctional homes to suffer adverse consequences as a result of seeking consent and by deterring minors from seeking all types of reproductive health care.[215] What is more, the State essentially acknowledges that the Act would "run counter to the state's compelling interest[] in the minor's health" by delaying and deterring minors from seeking health care by asserting that any such comparable law for STD treatment and testing would have such an effect.[216]

The State does not explain even theoretically how the Act would further its interest in protecting minors' health, much less meet its burden of proving that fact. Nor can it, as the Act would not directly mandate any action that would further the health of minors seeking abortions. It would not require a parent to discuss the abortion decision with his or her daughter, assist in choosing a doctor, accompany a minor to the doctor's office in order to

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212 *See supra* at 18-24.
213 (Exc. 289-90 ¶¶ 27-28.)
214 (Exc. 290 ¶ 28, 312 ¶ 85.) *See also Lungren*, 940 P.2d at 827-28.
215 (Exc. 289-90 ¶¶ 27-28, 291 ¶ 31, 304 ¶ 68.) *See also Lungren*, 940 P.2d at 827-28.
216 (Applnt. Br. at 53 n.62; *see also* Ak. Leg. Br. at 18, 23, 27.)

assist with the medical history and informed consent,[217] or to monitor the minor after treatment. Similarly, the Act would not require an abortion provider to obtain medical history from a parent, provide post-operative instructions to a parent, discuss the abortion procedure with a parent, or in any way attempt to involve a parent in the provision of the medical service.

To the extent that the State's argument is based on the presumption that minors would go through the process of seeking an abortion alone, without learning about the risks associated with abortion and without giving informed consent, the evidence shows that that presumption is false.[218] The Superior Court found that providers are already obtaining appropriate informed consent,[219] as they are required to do by law.[220] None of the providers has encountered a minor who was not capable of giving informed consent. Similarly, minors are able to provide adequate medical histories prior to abortions, and that information is supplemented by physical examinations, lab tests, and, if necessary, consultation with other physicians.[221] The providers' minor patients have not experienced complications as a result of an incomplete medical history.[222]

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[217] The State has admitted that the Act's requirement that "the minor's parents or the minor's guardian or custodian has consented in writing," does not require the person providing consent to appear in-person at the facility where the abortion is to be performed. (TE 66 [Defendant's Response to Plaintiff's Fifth Set of Interrogatories].)

[218] *See supra* at 4-6.

[219] (Exc. 292-93 ¶ 37.)

[220] AS § 09.55.556.

[221] (Exc. 294 ¶ 43.)

[222] (Exc. 294 ¶ 45.)

Moreover, the evidence shows that the Act would not protect minors' health by improving monitoring after an abortion. As the Superior Court found, minors are able to understand their physician's post-abortion instructions and to detect and seek treatment for complications.[223] It would be very rare that a minor would delay seeking post-abortion care,[224] and the providers have not had minors delay seeking treatment for complications as a result of their parents not being informed of the abortion.[225] Moreover, nothing in the Act would require a parent to monitor a minor after a procedure. Finally, minors whose judicial bypass petitions were granted would not have a parent participating in the provision of medical history, informed consent process, or monitoring for post-abortion complications.[226]

The State also argues from the false presumption that parental veto power necessarily results in supportive parental involvement. This presumption is not only false, it is also irrelevant. The evidence demonstrates that many parents who know of a daughter's abortion do not become involved in her decision or procedure.[227] However, even if the Act were to lead to more parental involvement, a theory that has no evidentiary support, the evidence

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223 (Exc. 291 ¶ 32.) *See also N. Fla. Women's Health*, 866 So.2d at 631 (reversing intermediate court's decision upholding parental notification law on the grounds that it furthered interest in parents assisting in post-abortion care; the intermediate court's holding ignored contrary findings of trial court supported by record).

224 (Exc. 291 ¶ 32.) *See also supra* at 13.

225 *See supra* at 13 & n. 58.

226 That a judicial bypass option is required under the federal constitution (*see* Applnt. Br. at 50-51) is irrelevant to the equal protection analysis under the Alaska Constitution as to whether the Act furthers its purported interests.

227 (Hen. TR 305:17-306:3; TE 123, Table 8.)

shows that such involvement would not affect informed consent. Even when accompanied by a parent, it is the minor, and not the parent, who provides informed consent for the abortion.[228]

b. The Act is Not Narrowly Tailored to Further the State's Asserted Interests.

The State failed to prove that the Act would further a government interest in ensuring that doctors would obtain informed consent from their minor abortion patients or would otherwise protect the health of minor women. It has also failed to prove that the classifications drawn by the Act—applying only to those minors who are pregnant and seeking an abortion—are narrowly tailored to achieve those goals. The Act's classifications are both underinclusive and overinclusive.

To the extent that parental involvement would be helpful or necessary for the provision of abortion services, it would be equally, if not more, helpful or necessary for pregnant minors carrying to term. The State's experts believe that it is important to have parents involved in providing the medical history of a minor seeking prenatal care and other pregnancy-related treatment,[229] and that parental involvement is important for a minor to give informed consent for all pregnancy treatment.[230] As the Superior Court found, virtually every condition that would potentially increase the risk of abortion would also pose an increased risk to a minor carrying a pregnancy to term.[231] Furthermore, the evidence

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228 (Whi. TR 1019:7-14.)
229 (Cal. TR 1701:1-4, 1705:3-25, 1706:1-5; Tsa. TR 1351:21-1352:1.)
230 (Tsa. TR 1310:23-1311:17, 1312:7-12.)
231 (Exc. 294 ¶ 44; Lem. TR 95:25-97:2; Whi. TR 1033:4-11.)

shows that the medical history obtained from patients who are seeking pregnancy-related care is *more* detailed as to genetic history than that obtained from abortion patients.[232] Moreover, as previously discussed, both the physical and psychological risks associated with pregnancy, childbirth, and relinquishing a child for adoption are greater than those associated with abortion.[233]

The State's argument that beneficial parental involvement in pregnancy-related care occurs without the need for legal involvement because the pregnancy eventually becomes evident,[234] is incorrect as a factual matter. All of the Alaska obstetricians and other doctors who testified in this case had personal experience with minors presenting for delivery without their parents being aware of the pregnancy.[235] Many minors do not obtain all of the pregnancy-related care recommended by physicians,[236] even though the evidence shows that minors should begin in pregnancy-related care as soon as possible.[237] And as the Superior Court acknowledged, delay in seeking pregnancy-related care could increase risks and these risks may be present before the time when the pregnancy is obvious.[238] The State's physician experts have acknowledged that minors do not always follow their

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232 (Lem. TR 59:24-60:4; Whi. TR 1026:23-1027:4, 1030:6-1031:17.)
233 (Exc. 291-92 ¶ 34, 301-02; Whi. TR 1026:23-1027:4, 1030:6-1031:17; Lem. TR 42:13-43:8; Sha. TR 581:16-23, 595:6-23.) *See also supra* at 16-17.
234 (Applnt. Br. at 52; *see also* Ak. Leg. Br. at 12-13.)
235 (Tsa. TR 1353:13-1354:10; Lem. TR 41:1-10, 158:20-159;13; Ric. TR 883:1-10; Whi. TR 1020:10-18; Gre. Dep. 74:1-13; *see also* Gre. Dep. 89:8-90:1; Tsa. TR 1314:15-1315:7.)
236 (Cal. TR 1709:22-1710:10; Tsa. TR 1353:13-1354:10; Uhl. TR 1021:14-1022:6; Whi. TR 1021:14-1022:3.)
237 (Exc. 298-99 ¶ 56; *see also* Whi. TR 1028:1-14; Ric. TR 844:24-845:7.)
238 (Exc. 298-99 ¶ 56.)

recommendations for pregnancy-related care and that failure to do so can pose serious threats to both the minor and the fetus.[239]

Based on this evidence, the Superior Court correctly determined that with respect to protecting the physical, emotional and psychological risks of minors, the Act is underinclusive, stating:

> Again, the Act only burdens one set of medical risks, the risks associated with abortions. The Act does not burden other sets of medical risks, among them the risks associated with pregnancy and childbirth. The risks to the health of the mother that are associated with pregnancy and childbirth are higher than the risks associated with abortion. If the purpose of the Act is to protect the health of pregnant minors, it is incongruous to burden the decision to choose the safer procedure, but allow minors to choose the more dangerous course without parental consent.[240]

It is easy to imagine numerous classifications and statutory requirements that would be more narrowly tailored to further the State's asserted interest in ensuring providers obtain informed consent from their minor patients and in protecting the health of minors than one imposing requirements solely upon those pregnant minors who choose an abortion. First, as the Superior Court acknowledged, to accomplish its goals the State could pass a statute that applies to the receipt of pregnancy-related care[241] and *all* other reproductive health care, rather than solely targeting abortion. Second, any statute that the State passes could *directly*

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239 (Cal. TR 1709:22-1710:10; Gre. Dep. 96:14-24.)

240 (Exc. 301-02.) *See also Farmer*, 762 A.2d at 638 (given greater danger associated with cesarean section than abortion, "the State's differential treatment [of abortion] is therefore difficult to justify").

241 As the Superior Court suggested, the State could enact a law requiring parental notification of a pregnancy test. (Exc. 298-99 ¶ 56.) The State's argument that such a requirement is "illogical" (Applnt. Br. at 52; *see also id.* at 53 n.62) ignores the facts that if such a statute could be drafted to meet constitutional requirements for abortion it would be possible to do so for parental notification of a positive pregnancy test.

require parental involvement in a minor's receipt of reproductive health care, rather than just providing parents with veto power over the receipt of such care.[242]

Furthermore, even within the abortion context, the State could have passed a more narrowly tailored statute. In fact, it is ironic that the only thing that the Act is narrowly tailored to do is permit a means by which a third party can force a minor to submit, against her will, to a medical course that may be dangerous for her. For example, if the State believes that the Providers are not providing proper care to their patients, or are not encouraging their minor patients to involve their parents in their abortion decision, it could have passed laws addressing those matters. Connecticut requires that a physician or counselor provide specified information and counseling to a minor before performing an abortion, including discussing the possibility of involving parents, guardians or other adult family members in the minor's decision making.[243] Maryland has a parental notice statute that permits waiver of the notice requirement when the physician, in his or her professional judgment, determines that notice may lead to abuse of the minor, the minor is mature, or notification will not be in the minor's best interest.[244]

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[242] Plaintiffs/Appellees do not concede that such requirements would be constitutional, only that they would be more narrowly tailored than the Act to further the State's asserted interests.

[243] *See* CONN. GEN. STAT. § 19a-601 (2000); *see also N. Fla. Women's Health*, 866 So.2d at 642 (the very existence of less intrusive schemes that serve same purpose validates conclusion that requirement of open disclosure of a minor's pregnancy and decision to terminate or the filing of a lawsuit for waiver of disclosure is not narrowly tailored or the least restrictive means to further the interest).

[244] *See* MD. CODE, Health--Gen. § 20-103 (2000).

Moreover, even if the State concluded that it was necessary to enact a parental consent statute, it could have done so in a manner that sought to protect the minor's health, rather than unnecessarily place it at risk. The State could have included an exception in the Act for abortions performed when the minor's health or life was at stake, rather then establishing only a narrow affirmative defense for medical emergencies. As it stands, the Act would require minors to accept a risk of substantial and irreversible impairment of some bodily functions if they had not obtained parental consent or judicial waiver.

3. The Superior Court Correctly Held That the Classifications Drawn by the Act Are Not Narrowly Tailored to Further a Compelling State Interest in Fostering the Family Structure and Protecting Parental Rights.

The State's assertion that its interests in fostering the family structure and protecting the rights of parents to rear their children justify the Act is incorrect as a matter of law in Alaska. Previous Alaska Supreme Court decisions establish that parental rights, including parents' interests in providing their children with "love, nurture and guidance," and in "the family unit," are *important*, but do *not* justify infringements upon a child's rights.[245] This Court has consistently refused to permit the rights of parents to overcome the rights of children to make important, self-determining decisions.[246] This has been the case even when the child's rights at issue were *statutorily*, rather than constitutionally, based.[247] There is no basis – as a matter of law or fact – to conclude otherwise here.

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245 *In re C.L.T.*, 597 P.2d 518, 524-25 (Alaska 1979); *Wagstaff v. Superior Court*, 535 P.2d 1220, 1227 (Alaska 1975).

246 *See, e.g., Wagstaff*, 535 P.2d at 1227 (choice of counsel); *RLR v. State,* 487 P.2d 27, 39-40 (Alaska 1971) (due process right to service of petition for delinquency of minors apart from parents).

247 *See Wagstaff*, 535 P.2d at 1226-27.

Amici's claims of parental rights are similarly unavailing. As the Supreme Court of New Jersey observed, the United States Supreme Court cases discussing "parental rights" "stand for the proposition that the *State* may not interfere with a parent's upbringing of a child, but they say nothing about a parent's right to prevent or even be informed about a child's exercise of her own constitutionally protected rights."[248] Similar "federal parental rights" arguments have been rejected by courts that have examined parents' federal liberty interest to rear their children in the context of the provision of reproductive health care services.[249]

The Superior Court concluded that the Act "would only peripherally further preservation of the family structure and parental role, and then only in certain families."[250] In Alaska there are many types of families other than the intact nuclear family, including those where minors are raised by surrogate parents who do not have legal guardianship.[251] The Act would exclude these families from "protection."

As to those families the Act purportedly does protect, the State highlights the benefits of voluntary communication between parents and children, trying to brush over the fact that the Act would force coercive and mandatory communication while having no impact on the

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248 *Farmer*, 762 A.2d at 642 (internal citations and quotations omitted and emphasis added).

249 *Lungren*, 940 P.2d at 816 n.22 ("[A] parent's right under the federal Constitution to direct the upbringing of one's child does not include the right to decide whether a pregnant daughter will continue her pregnancy or have an abortion."); *see also Doe v. Irwin*, 615 F.2d 1162 (6th Cir. 1980); *Curtis v. Sch. Comm. of Falmouth*, 652 N.E.2d 580 (Mass. 1995).

250 (Exc. 305.)

251 (Exc. 302-03 ¶¶ 64-65 [noting that the State offered no explanation as to what constitutes a "family structure"]; Zab. TR 2351:20-2353:8, 2430:2-2431:15; TE 164.)

voluntary communication that would take place regardless of the Act.[252] There is no evidence, however, that forced parental involvement laws would create better communication between parents and minors.[253] To the contrary, the evidence demonstrates that good family communication is developed over time and does not suddenly happen in moments of crisis.[254]

In fact, the Superior Court found that forced family communication, especially in the context of parental consent for abortion, can have negative results.[255] The evidence demonstrates that enforcement of the Act could result in minors being subjected to physical or emotional abuse, being forced from the home, or being forced to carry an unwanted pregnancy to term.[256] The Court correctly found that the Act would not promote the purpose of improving the parental role in such circumstances.[257]

Nor is there any evidence that allowing a parent to veto a daughter's abortion decision would improve the family in any way. The exercise of raw parental authority, which may or

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[252] (Applnt. Br. at 59-60.) The State incorrectly refers to the number of minors informing their parents about an abortion decision in Massachusetts and Texas—states with parental involvement laws in effect—as "the number of minor girls *voluntarily* involving their parents in their abortion decisions." (*Id.* at 60 [emphasis added].)

[253] (Gre. Dep. 82:22-83:1; Zab. TR 2360:8-11; Hen. TR 301:3-302:5; TE 157; Lem. TR 107:20-113:16, 115:4-116:9; TE 252.) *See also Farmer*, 762 A.2d at 640.

[254] (Zab. TR 2350:8-2351:3; TE 164.)

[255] (Exc. 304-05 ¶¶ 68-69; Zab. TR 2359:19-25; *see also* Sto. TR 746:16-747:19.)

[256] (Exc. 304-05 ¶¶ 68-69; Tsa. TR 1360:20-22, 1366:22-1367:7; And. TR 1893:7-10, 1900:8-1901:3; Sab. TR 2557:25-2559:8; Adl. FL 548:7-14; Hen. TR 271:10-272:5, 295:24-296:18, 308:18-310:4, 310:22-311:06, 358:14-359:15; Sto. TR 750:20-751:4; Lem. TR 112:3-113:15; TE 252; TE 123, Table 7; Mar. TR 960:12-961:3, 967:14-968:4; Chr. TR 1964:2-5, 1965:10-11, 1969:4-12, 1971:10-20; Pat. TR 1192:16-1194:4; Whi. TR 1082:7-1083:1.)

[257] (Exc. 304-05 ¶¶ 68-69.) *See also Lungren*, 940 P.2d at 828 (parental consent law "was likely to be detrimental both to the health of such minors and to their family relationships").

may not be in the child's best interest, does nothing to foster or preserve the family.[258] As the State's expert Dr. Figley testified, stress in the family would occur if parents denied consent for an abortion and a minor was forced to carry an unwanted pregnancy to term, or if she was forced to go through the judicial bypass process.[259] As the State's expert Dr. Elkind explained, parents who force their daughter to carry a pregnancy to term based solely on their religious beliefs about abortion may not be acting in her best interests.[260]

Finally, to the extent that the Act would protect the family structure or strengthen the parent-child relationship, the Act is underinclusive. The State has failed to show that its interests in this regard are greater when a minor seeks an abortion than when she chooses to carry her pregnancy to term, assuming only that parents would inevitably discover a daughter's pregnancy, and thus there is no need for forced parental involvement. As the evidence demonstrates, however, many parents do not learn of a minor's pregnancy until it is too late for her to obtain an abortion, and thus are completely foreclosed from participation in the decision-making process.[261] Moreover, the State has not presented any evidence or a plausible argument why requiring parental consent for abortion would preserve the family unit and the parents' rights to rear their children, but parental consent for other pregnancy-related care would not.

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[258] (Sto. TR 749:19-750:1.)

[259] (Fig. TR 1925:2-14.) Approximately 10 percent of the minors who seek a judicial bypass in Massachusetts tried unsuccessfully to get consent from their parents. (Sab. TR 2611:6-11.)

[260] (Elk. TR 129:23-130:3.)

[261] (Tsa. TR 1353:13-1354:10; Lem. TR 41:1-10, 158:20-159:13; Ric. TR 883:1-10; Whi. TR 1020:10-18; Gre. Dep. 74:1-13; *see also* Gre. Dep. 89:8-90:1; Tsa. TR 1314:15-1315:7.)

4. The Superior Court Correctly Found That the Classifications Drawn by the Act Are Not Narrowly Tailored to Further a Compelling State Interest in Protecting Minor Girls From Sexual Abuse.

As the Superior Court found, the Act would not further the public interest in discovering, reporting and prosecuting sexual or physical abuse of minors. First, the Act would require no direct action that would prevent sexual abuse—as the Superior Court noted, such a law *already exists.*[262] Second, to the extent that the state interest concerns conduct that might come within the scope of the mandatory reporting statute, the Act does nothing to address it.[263] The Act would not require a pregnant minor to reveal the identity of her sexual partner, a parent to report the partner to the police, or require any law enforcement action based on a report resulting from parental consent. The testimony of the State's own witnesses shows that even when parents know about the sexual activity of their daughters, even resulting in pregnancy and abortion, many do not stop the relationship or are unsuccessful in their attempts to do so, and do not report such situations to the authorities even though the sexual activity was illegal due to age disparity.[264] Even when sexual abuse

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[262] (Exc. 300 ¶ 60, citing AS § 47.17.020.)

[263] As relevant to the act, "practioners of the healing arts" are required to make a report to the Alaska Department of Health and Social Services whenever they "have reasonable cause to suspect that a child has suffered harm as a result of child abuse or neglect . . . ." AS § 47.17.020(a)(1). "Child abuse or neglect" is defined as "physical injury or neglect, mental injury, sexual abuse, sexual exploitation, or maltreatment of a child under the age of 18 by a person under circumstances that would indicate that the child's health or welfare is harmed or threatened thereby . . . ." AS § 47.17.290(2).

[264] (Roberts ["Rob."] TR 2248:13-2249:1, 2256:23-2257:19, 2484:8-12, 2487:15-2488:1.)

based on age disparity is reported, many of these cases are not investigated or prosecuted.[265] As one of the State's expert agreed, there is no evidence that parental involvement laws have resulted in an increase in prosecutions for sexual abuse based on age disparity.[266]

As the Superior Court found, among the low percentage of minors under 17 whose parents would not know about their abortion before they obtain it, many "are impregnated by legal consensual sex with partners their own age."[267] Moreover, the evidence establishes that providers already fulfill their duty under AS 47.17.020 by reporting instances of suspected abuse or neglect.[268] "When a State, as here, burdens the exercise of a fundamental right, its attempt to justify that burden as a rational means for the accomplishment of some significant state policy requires more than a bare assertion, based on a conceded complete absence of supporting evidence, that the burden is connected to such a policy."[269]

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265 (Rob. TR 2256:23-2257:19; Foster ["Fos."] TR 2473:19-2474:7, 2481:1-2484:12, 2498:7-21.)

266 (Uhl. TR 1674:21-25.)

267 (Exc. 301 ¶ 63.)

268 (Whi. TR 1051:1-15.) The State's suggestions that Dr. Whitefield and Dr. Lemagie do not comply with the State's mandatory reporting requirements (Applnt. Br. at 58-59) is wholly unfounded. In fact, Dr. Whitefield has taken it on himself to save products of conception in situations when he suspects sexual abuse of a minor, even without a formal request by law enforcement. (Whi. TR 1051:16-1052:7.) Similarly, the tape recordings of telephone conversations with Alaska Women's Health Services and Planned Parenthood do not demonstrate that a problem exists with mandatory reporting by Alaska abortion providers. Significantly, the information provided by the caller did not include sufficient identifying information to trigger the reporting requirements of AS § 47.17.010. (*See* TE 2013-2020.)

269 *Carey v. Population Servs. Int'l*, 431 U.S. 678, 696 (1977). As the Supreme Court of California noted, "a statute that impinges upon a fundamental constitutional right cannot be upheld on the basis of unsupported speculation that the Legislature believed that health care

Finally, as the Superior Court concluded, even if the Act would or could further the goal of detecting abuse, the classification drawn by the Act is not narrowly tailored, for it is both underinclusive and overinclusive.[270] If the Act were to lead to detection and prosecution of sexual abuse, it would do so because the parent would be notified of the *sexual activity*—not of the abortion. Thus, a more appropriately tailored classification would require parental consent for prescriptive contraception, STD treatment and pregnancy care,[271] or require notification of the abortion. The classifications drawn by the Act are overinclusive in that, as the Superior Court found, "[m]any minors are impregnated by legal consensual sex with partners their own age, yet these minors are included in the Act."[272]

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professionals would not perform their duties in an honest and ethical manner." *Lungren,* 940 P.2d at 830.

[270] (Exc. 300-01 ¶¶ 60-63.)

[271] (Exc. 301 ¶ 62.) In fact, the Superior Court's findings illustrate the underinclusiveness of the Act for detecting sexual abuse. (Exc. 301 ¶ 61.) Contrary to the State's assertions, adult sexual partners of minors do not encourage minors to abort their pregnancy. The greater the difference between the age of the minor and the age of her sexual partner, the more likely she is to continue her pregnancy. (Hen. TR 213:19-214:8; Uhl. TR 1669:17-1671:9; Col. TR 2097:16-2098:2; TE 147, Table 2; TE 2169.)

[272] (Exc. 301 ¶ 63.) The State has not argued on appeal that the Act is justified on the grounds that parental consent for abortion will reduce teen pregnancy. Such a justification would, in any event, be unavailing because, as this Court has previously held, "benevolent social theory" does not furnish justification for dispensing with constitutional safeguards." *In re E.M.D.*, 490 P.2d 658, 660 (Alaska 1971) (citing *RLR v. State*, 487 P.2d 27, 30-31 (Alaska 1971)). The social goal of reducing teen pregnancy does not, therefore, justify infringement on the constitutional rights of Alaska minors.

II THE ACT UNJUSTIFIABLY INFRINGES ON THE RIGHT TO PRIVACY GUARANTEED BY THE ALASKA CONSTITUTION.

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A. The Parental Consent Requirement Violates Minors' Right To Privacy.

This Court has held that the Act infringes on the privacy rights of minors under the Alaska Constitution.[273] Accordingly, "the state can constrain a minor's privacy right only when necessary to further a compelling state interest and only if no less restrictive means exist to advance that interest."[274]

Applying that standard, the Superior Court held the Act unconstitutional under the privacy clause of the Alaska Constitution.[275] As the Superior Court found, enforcement of the Act would harm minors who wish to terminate their pregnancies. [276] The Superior Court's findings also demonstrate that the Act does not further a compelling state interest by the least restrictive means.[277] The evidence shows, for example, that abortion is a very safe procedure, that minors are capable of making mature decisions about abortion, and that minors can give informed consent and adequate medical histories for the procedure. Taken together, these findings show that the Act will not further any of the State's asserted interests.

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[273] *Planned Parenthood*, 35 P.2d at 41-43.

[274] *Planned Parenthood*, 35 P.3d at 41 (citing *Valley Hosp.*, 948 P.2d at 969).

[275] (Exc. 308-09.)

[276] *See supra* at 18-24.

[277] Although the Superior Court's ruling that the Act violates the privacy rights of minors focused on the judicial bypass process, a review of the court's findings of fact reveals that the Act also falls because the parental consent requirement fails to further a compelling interest by the least restrictive means.

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Moreover, all of the state's asserted interests could be furthered by less restrictive means. For example, given that the State has no interest in preventing minors from obtaining abortions necessary to preserve their health,[278] a less restrictive statute geared at protecting minors' health would provide an exception from the parental consent requirement for all medically necessary abortions. The Act, however, provides an affirmative defense that applies only to medical emergencies.[279] In addition, a physician bypass in cases where the minor is mature or where parental consent would not be in her best interests would be a less burdensome alternative than the Act's judicial bypass procedures.[280] The record amply demonstrates that the state failed to prove that the infringement on the privacy rights of minors was justified, and therefore the parental consent requirement is unconstitutional.

B. The Judicial Bypass Provision Violates Minors' Right to Privacy.

The Superior Court found that not only would the judicial bypass option under the Act not mitigate the harms created by parental consent, as argued by the State,[281] but it would create additional harms for some minors seeking bypass, and thus would itself infringe

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278 *See State, Dept. of Health & Social Servs. Inc. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 913 (Alaska, 2001) ("[A]lthough the State has a legitimate interest in protecting a fetus, at no point does that interest outweigh the State's interest in the life and health of the pregnant woman.").

279 Although the Superior Court construed the medical emergency provision as an "exception" rather than an affirmative defense, a ruling that Appellees contest, it is indisputable that the circumstances in which an abortion may be medically necessary are broader than those meeting the Act's narrow definition of "medical emergency."

280 *See* MD. CODE, Health--Gen. § 20-103 (2000).

281 (Applnt. Br. at 61.)

on the privacy rights of minors. Under the Act, any pregnant minor who sought an abortion who did not wish to inform her parents, or whose parents refused to provide consent, would have to go through the judicial bypass process.[282] The Superior Court correctly concluded that the State failed to show that the judicial bypass process would further a compelling state interest by the least restrictive means.[283]

The Superior Court found that, "[t]he judicial bypass system [would] increase [] problems, delay the abortion, and increase the probability that the minor may not be able to receive a safe and legal abortion."[284] The delays caused by the abortion may be medically significant.[285] As the Superior Court found, the judicial bypass option may also result in a minor being forced to carry to term because a judge may deny her petition, she may avoid the system altogether as a result of her fear of the process or inability to reveal intimate personal information to an attorney and a judge, or the delay caused by the process may prevent her from obtaining an abortion due to unavailability or cost.[286]

For many minors in Alaska, a judicial bypass would not be a realistic option because they do not have meaningful access to the courts or find the court system too intimidating.[287] Additionally, many minors would not be able to complete a bypass petition

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[282] (Exc. 309 ¶¶ 79-80 [describing bypass procedures set forth in AS § 18.16.030].)

[283] (Exc. 314.)

[284] (Exc. 310 ¶ 82.)

[285] (Exc. 311 ¶ 84.) The Alaska State Legislature's assertion that there is no "proof" that the judicial bypass mechanism under the Act will be detrimental to minors' health (Ak. Leg. Br. at 39) is therefore incorrect.

[286] (Exc. 310 ¶ 82, 312 ¶ 85.)

[287] (Exc. 310-12 ¶¶ 82, 84, 85; TE 180: p. vii; ix, 1-7, 14-17, 19-22, 25, 33, 48-50, 94-104, 108-118; TE: p.11; TE 179; Coo. TR 1249:24-1251:22, 1252:17-1253:3; Pat. TR 1213:21-

successfully because of their reading level, and would face language barriers at all levels in the process; many minors would not understand the requirement that the petition be notarized or under what circumstances notarization is not required.[288] Moreover, it would be difficult for many village minors to contact their attorneys and to discuss private information with an attorney and a judge that they hadn't met before, especially if they had been abused.[289] In some cases it would be difficult for judges to make the necessary assessments during the hearing, especially given the unforgiving "clear and convincing evidence" standard of proof, because of culturally differing means of communication amongst some Alaska natives, compounded by their fear of the court system.[290] Such assessments would be especially

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1214:11; Mil. TR 1402:25-1403:20.) *See also N. Fla. Women's Health*, 866 So.2d at 655 (Pariente, J., specially concurring) ("[T]he judicial bypass procedure, even at its best, is a cumbersome and burdensome method of avoiding the notification requirement [and] daunting for any young person to navigate."). While it is true, as the Alaska State Legislature suggests, that a minor living in the Alaska Bush could seek a judicial bypass in the city in which she intends to obtain an abortion (Ak. Leg. Br. at 36-37), to do so she would need to make the trip without knowing if her bypass petition would be granted, possibly have to pursue an appeal, and then need to secure an appointment with a physician following the granting of her petition.

[288] (Rei. TR 927:1-930:21, 943:19-944:1; Pat. TR 1201:16-1202:6, 1208:15-1209:9; TE 2005; TE 2006; Mil. TR 1406:14-1407:5.)

[289] (Exc. 310 ¶ 82; Elk. TR 100:8-101:24; Sab. TR 2557:25-2559:3; Rei. TR 921:6-21, 925:1-7, 933:18-935:9, 935:17-25, 944:13-945:10; Pat. TR 1184:10-1185:4, 1186:2-8, 1190:18-1191:3, 1211:23-25, 1212:13-1213:3, 1213:21-1215:22; Elk. Dep. 98:10-100:1; Coo. TR 1254:5-1255:9-1259:5.)

[290] (Coo. TR 1254:5-1259:5; Rei. TR 921:6-21; Pat. TR 1211:23-25, 1212:13-1213:3; Rei. TR 925:1-7; Pat. TR 1213:21-1215:22.)

difficult when the hearings were conducted via telephone.[291] For many of those who would be able to navigate the process, it would cause significant stress.[292]

As the Superior Court found, a minor would inherently sacrifice her confidentiality when seeking a judicial bypass, but the system itself would further increase the possibility that a minor's confidentiality would be breached, especially in the villages of Alaska.[293] In smaller areas, it is very possible that a minor would know the local notary, someone working at the courthouse, or run into someone near the courthouse.[294] Also, many minors do not have access to a private phone, fax machine, or mail pick up so that they could confidentially talk to an attorney, participate in the hearing, or receive the necessary materials.[295] In many places, participation in a bypass hearing would count as an unexcused school absence and the minor's parents would be notified.[296]

The Superior Court correctly found that the judicial bypass mechanism would not further any compelling interest put forth by the State[297]—nor does the State even argue that

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291 (Pat. TR 1213:21-1215:22; Coo. TR 1255:10-21, 1257:22-1259:5.)

292 (Exc. 311 ¶ 84; Sab. TR 2532:6-22; Mar. TR 961:23-962:7; Coo. TR 1276:2-11; Rei. TR 924:16-925:2; 926:14-25; TE 63.)

293 (Exc. 310-11 ¶ 82-84; Mar. TR 973:19-974:11; Sab. TR 2532:6-14, 2554:13-25.)

294 (Sab. TR 2572:1-7; 2574:14-24; Rei. TR 931:18-932:12; Pat. TR 1209:10-1210:3; Mar. TR 973:19-974:11.)

295 (Pat. TR 1198:24-1199:24, 1211:23-1213:20; Rei. TR 925:16-926:5, 928:8-929:8, 947:22-948:17; *see also* Exc. 310 ¶ 82.)

296 (Sab. TR 2571:16-2573:2; Arndt ["Arn."] TR 2685:14-18, 2674:10-2675:10, 2676:23-2677:1 (Todd Arndt is a supervisor of high school education in the Anchorage School District. [Arn. TR 2673:21-24, 2674:5-9]); TE 62, Section II-3; TE 63; Exc. 310-11 ¶ 83.)

297 (Exc. 309.)

it would.[298] Rather, the State argues that the mechanism is "vital," because without it, "the federal Constitution would forbid the state from pursuing any of its interests."[299] The State does not, however, have a compelling state interest in infringing on the state constitutional rights of its citizens in a way that accords with the federal constitution. The State appears reluctant to face the notion underlying this lawsuit and the concept of federalism that there may be laws that do not violate the federal constitution, but do violate the state constitution.[300]

Even if the judicial bypass mechanism did further a compelling state interest in comporting with the federal constitution, it is not narrowly tailored to further that interest. The Act could have provided a less-intrusive alternative to parental consent than a judicial proceeding,[301] as Maryland has done by permitting a physician to waive the parental notice requirement if the minor is mature, at risk of abuse, or if notice would not be in the minor's best interest.[302] Alternatively, the Legislature could have made the judicial bypass process less burdensome by adopting the preponderance of evidence standard, rather than the clear and convincing standard used in the Act, or omitting the notarization requirement.

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298 (*See* Ak. Leg. Br. at 31 ["The judicial bypass exists not to 'benefit' or promote the *State's* interests." (emphasis in original)].) And contrary to the Alaska State Legislature's suggestion, the State offered no evidence that contradicts the Court's findings that the judicial bypass process would be harmful.

299 (Applnt. Br. at 61.)

300 *See Valley Hosp.,* 948 P.2d at 969.

301 (*See* Exc. 309-12 ¶¶ 78-86.)

302 *See* MD. CODE, Health--Gen. § 20-103 (2000).

CONCLUSION

Equally applicable in this case is the holding by the New Jersey Supreme Court that "the evidence presented . . . leads inexorably to the conclusion that the proffered . . . reasons for requiring parental [involvement] are not furthered by the statute."[303] Accordingly, Plaintiffs/Appellees respectfully request that this Court affirm the judgment of the Superior Court invalidating the Act under Article I, sections 1 and 22 of the Alaska Constitution.

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[303] *Farmer*, 762 A.2d at 642.

CERTIFICATE OF TYPEFACE

Pursuant to Appellate Rule 513.5 (c)(1)(B) and (c)(2), I hereby certify that Appellees'/Cross-Appellants' Brief is typed in 13 point Garamond.

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