IN THE SUPREME COURT FOR THE STATE OF ALASKA

PLANNED PARENTHOOD OF THE GREAT NORTHWEST, JAN WHITEFIELD, M.D., and SUSAN LEMAGIE, M.D,	:	
Appellants,	:	
	:	Supreme Court Nos. S-15010, S-15030, S-15039
v.	:	Superior Court No. 3AN-10-12279CI
STATE OF ALASKA, LOREN LEMAN, MIA COSTELLA, and KIM HUMMER-MINNERY,	:	
Appellees.	:	

Appeal from the Superior Court, Third Judicial District at Anchorage,
The Honorable John Suddock

BRIEF OF *AMICI CURIAE* JUVENILE LAW CENTER, LEGAL VOICE, AND NATIONAL CENTER FOR YOUTH LAW IN SUPPORT OF APPELLANTS

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CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES OF EVIDENCE AND PROCEDURE PRINCIPALLY RELIED ON

ALASKA 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.

ALASKA CONST. art. I, § 3

No person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex, or national origin. The legislature shall implement this section. [Amended 1972].

ALASKA CONST. art. I, § 22

The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section. [Amended 1972].

AS 18.16.010. Abortions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(j) In an action under (h) of this section, there is a rebuttable presumption that an abortion was performed with the pregnant woman's informed consent if the person who performed the abortion submits into evidence a copy of the woman's written certification required under AS 18.16.060(b).

18.16.020. Notice or consent required before minor's abortion

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

(1) either

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

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

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

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

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

(A) the minor; and

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

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

(ii) a law enforcement officer;

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

(iv) a grandparent of the minor; or

(v) a stepparent of the minor.

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

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

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

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

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

(e) A physician who is informed that the pregnancy of a minor resulted from criminal sexual assault of the minor must retain, and take reasonable steps to

preserve, the products of conception and evidence following the abortion for use by law enforcement officials in prosecuting the crime.

18.16.030. Judicial bypass for minor seeking an abortion

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

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

(1) a statement that the complainant is pregnant;

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

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

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

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

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

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

(c) The court shall fix a time for a hearing on any complaint filed under (a) of this section and shall keep a record of all testimony and other oral proceedings in the action. The hearing shall be held at the earliest possible time, but not later than the

fifth business day after the day that the complaint is filed. The court shall enter judgment on the complaint immediately after the hearing is concluded. If the hearing required by this subsection is not held by the fifth business day after the complaint is filed, the failure to hold the hearing shall be considered to be a constructive order of the court authorizing the complainant to consent to the performance or inducement of an abortion without notice to or the consent of a parent, guardian, or custodian, and the complainant and any other person may rely on the constructive order to the same extent as if the court actually had issued an order under this section authorizing the complainant to consent to the performance or inducement of an abortion without such consent.

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

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

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

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

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

the court does not make the finding specified in (e) of this section, it shall proceed under (2) of this subsection;

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

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

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

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

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

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

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

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

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

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

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

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

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

Alaska Probate R. 20. Judicial Bypass Procedure to Authorize Minor to Consent to an Abortion

(a) Petition. An action for an order authorizing a minor under age 18 to consent to an abortion without notice to or the consent of a parent, guardian, or custodian is commenced by filing a petition. The petition must be under oath and must include the information required by AS 18.16.030(b). The petitioner is not required to provide an address or telephone number. Blank petition forms will be available at all court locations, on the court system website, and will be mailed, emailed, or faxed to a petitioner upon request. No fee will be charged for this service or other services provided to a petitioner.

(b) Filing. The petition may be filed in any district or superior court location in person, by mail, by email, or by fax. No filing fee will be charged. If a petition is filed in a district court location, the clerk or magistrate shall immediately notify the clerk of the nearest superior court and fax the petition to that court.

(c) Appointment of Counsel. If the petitioner is not represented by a private attorney, the clerk shall appoint the Office of Public Advocacy to represent the petitioner. The clerk shall immediately notify the Office of Public Advocacy of the appointment.

(d) Expedited Hearing. Upon receipt of the petition, the court shall schedule a hearing to be held within 48 hours, including weekends and holidays, after the petition is filed. At the hearing, the court shall follow the procedure specified in AS 18.16.030(e)-(g). Upon request, the petitioner will be allowed to participate telephonically at court system expense.

(e) Findings and Order. The court shall enter an order immediately after the hearing is concluded. The court shall grant the petition if the court finds by clear and convincing evidence that one of the statutory grounds for dispensing with parental notice or consent exists. Otherwise, the court shall deny the petition. If the petition is denied, the court shall inform the petitioner of her right to an expedited appeal to the supreme court.

(f) Constructive Order. If the court fails to hold a hearing within five days after the petition is filed, the presiding judge of the judicial district, or another judge designated by the presiding judge, shall issue a certificate stating that (1) no hearing was held within five business days after the petition was filed; and (2)

under AS 18.16.030(c), the failure to hold a hearing constitutes a constructive order of the court authorizing the minor to consent to an abortion without notice to or the consent of a parent, guardian, or custodian. A certificate should not be issued if the hearing was not held because it was postponed at the petitioner's request or because the petitioner failed to appear at the hearing.

(g) Confidentiality.

(1) Prior to the issuance of an order on the petition, the court file is confidential and access is limited to the petitioner, the petitioner's attorney, and court personnel for case processing purposes only. Judicial bypass hearings are closed to the public and recordings of those hearings are sealed. All documents and records in the case file are sealed upon the issuance of an order on the petition. Court personnel are prohibited from notifying a minor's parents, guardian, or custodian that a minor is pregnant or wants to have an abortion, and from disclosing this information to any person. The judicial bypass proceeding index is confidential, as provided in Probate Rule 3(g), and a court shall not release the name of, or any other identifying information concerning, a minor who files a judicial bypass petition.

(2) All statistical and general information that the court system may have concerning judicial bypass proceedings is confidential, except the number of petitions filed, granted, and denied statewide each year is public information.

(h) Appeal. A petitioner may appeal an order denying or dismissing a petition to bypass parental consent by filing a notice of appeal in any district or superior court, or directly with the clerk of the appellate courts. If the notice of appeal is filed in a district or superior court, the clerk or magistrate shall immediately notify the clerk of the appellate courts that the notice of appeal has been filed. The procedure for appeals is governed by Appellate Rule 220. This rule supersedes the appeal procedure established by AS 18.16.030(j).

ALASKA R. APP. P. 212(c)(9)

Brief of an Amicus Curiae. A brief of an amicus curiae may be filed only if accompanied by written consent of all the parties, or by leave of the appellate court granted on motion, or at the request of the appellate court. The brief may be conditionally filed with the motion for leave. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. Unless all parties otherwise consent, any amicus curiae shall file its brief within the time allowed to the party whose position as to affirmance or reversal the amicus brief will support, unless the court for cause shown shall grant

leave for later filing, in which event it shall specify within what period an opposing party may answer. The brief shall be in the form prescribed by this rule and shall be duplicated and served pursuant to the requirements of Rule 212(a)(2). A motion of an amicus curiae to participate in the oral argument will be granted only for extraordinary reasons.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Amici Curiae adopt by reference Appellants' Statement of Issues Presented for Review.

STATEMENT OF THE CASE

Amici Curiae adopt by reference Appellants' Statement of the Case.

STANDARD OF REVIEW

Amici Curiae adopt by reference Appellants' Statement of the Standard of Review.

INTEREST OF *AMICI CURIAE*[1]

Founded in 1975 to advance the rights and well-being of children in jeopardy, **Juvenile Law Center** is the oldest multi-issue public interest law firm for children in the United States. Juvenile Law Center has worked extensively on issues of children's access to medical and behavioral health care, including developing written materials as well as training programs for child-serving professionals on laws, policies and practices that affect minors' ability to obtain confidential health services. Juvenile Law Center supports laws and programs that enable minors to access medical care and services – including reproductive health care -- without parental involvement because the evidence shows that such access promotes the safety and health of our youth as well as the interests of the community at large.

Legal Voice, formerly known as the Northwest Women's Law Center, is a regional non-profit public interest organization that works to advance the legal rights of all women through public impact litigation, legislation, and legal rights education. Since its founding in 1978, Legal Voice has been dedicated to protecting and expanding women's reproductive rights, and has long focused on the threats to women's access to safe and legal abortion. Toward that end, Legal

[1] Pursuant to Alaska Rules of Appellate Procedure 212(c)(9), *amici* requested and received written consent from the parties and intervenors in the instant action to file the herein brief. Their written consent is attached at Exhibit A.

Voice has pursued legislation and has participated as counsel and as *amicus curiae* in cases throughout the Northwest and the country that seek to protect women's reproductive rights. Legal Voice serves as a regional expert and leading advocate for reproductive justice.

The **National Center for Youth Law** ("NCYL") is a private, non-profit organization that uses the law to help children in need nationwide. For more than 40 years, NCYL has worked to protect the rights of low-income children and to ensure that they have the resources, support, and opportunities they need for healthy and productive lives. NCYL provides representation to children and youth in cases that have a broad impact. NCYL also engages in legislative and administrative advocacy to provide children a voice in policy decisions that affect their lives. NCYL supports the advocacy of others around the country through its legal journal, *Youth Law News*, and by providing trainings and technical assistance.

As part of the organization's adolescent health agenda, NCYL works to ensure that all adolescents in the United States have access to appropriate, quality health care. NCYL conducts trainings on the rights of children and adolescents to health and mental health care and the circumstances under which teens are entitled to confidential medical care. NCYL has litigated a number of cases to protect adolescents' access to health care, including *American Academy of Pediatrics v. Lungren*, 940 P.2d 797(Cal. 1997). In that case, the California Supreme Court

struck down a state law that required minors seeking abortion to obtain parental consent or a court order as a violation of rights guaranteed to all, including minors, under the California Constitution.

SUMMARY OF ARGUMENT

Amici curiae respectfully urge this Court to hold that the Parental Notification Law ("PNL") violates equal protection under the Alaska Constitution, Art. I, §§ 1and 3. Pregnant minors who choose to abort are similarly situated to those who opt to carry their pregnancies to term. In fact, this Court's precedent establishes that, for purposes of equal protection analysis, pregnant females who choose to terminate their pregnancies are similarly situated to those who seek all other pregnancy-related care.[2] The PNL – when viewed against the backdrop of Alaska's medical emancipation statutes allowing pregnant minors to obtain all non-abortion health care without parental notification – creates "several potentially significant classes of similarly situated minors" which "fall within the ambit of the equal protection question" and thus "deserve careful scrutiny."[3] Application of Alaska's equal protection test to the PNL demonstrates that the law violates equal protection and thus is unconstitutional.

This Court has already found that the privacy rights of pregnant teenagers under the Alaskan state constitution, Art. I, § 22, are fundamental in nature, thus

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[2] *Alaska Dep't of Health & Social Svces. v. Planned Parenthood of Alaska*, 28 P.3d 904, 913 (Alaska 2001).

[3] *Alaska v. Planned Parenthood of Alaska*, 35 P.3d 30, 43 (Alaska 2001) (*"Planned Parenthood I"*).

satisfying the first prong of the equal protection test.[4] Given that privacy is a fundamental right, Alaska's jurisprudence dictates that the state must prove a compelling state interest for requiring parental notification when minors seek an abortion (prong two), and a compelling interest for imposing the notification requirement on minors who opt to abort while not requiring the same for minors who obtain all other pregnancy-related medical and surgical care (prong three).[5]

An examination of the record below and the reasoning of this Court's precedent demonstrate that the state has failed to establish any compelling reason for the PNL or for discriminating against a class of pregnant minors. The PNL does not advance the asserted state interests of enhancing parental involvement, promoting minors' health, and protecting youth from their own immaturity. Nor do any of these proffered reasons provide sufficient justification for burdening pregnant minors who opt to abort while not imposing the same restrictions on other pregnant minors in the exercise of their fundamental privacy rights. Because "Alaska's equal protection clause does not permit governmental discrimination," minors who opt to terminate their pregnancies "must be granted access to state health care under the same terms as any similarly situated person."[6]

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[4] *Id.* at 42.

[5] *Id.* at 44.

[6] *Dep't of Health & Social Svces.*, 28 P.3d at 913.

Moreover, the highest courts of New Jersey, California and Florida all have applied strict scrutiny to hold that similar parental notification and/or parental consent laws violated their respective state Constitutions.[7] These state Supreme Courts considered – and rejected – the same arguments asserted in this case, and found that these laws did not further a compelling interest in promoting parental involvement or protecting youth. In striking down a parental notification law, the New Jersey Supreme Court concluded that "the State [does not] offer adequate justification for distinguishing between minors seeking an abortion and minors seeking medical and surgical care relating to their pregnancies" and "there is no principled basis for imposing special burdens only on that class of minors seeking an abortion."[8] The same is true in the instant case.

Amici curiae respectfully submit that this Court should hold that the PNL violates the Alaska Constitution and invalidate it in its entirety.

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[7] *See Planned Parenthood of Central N.J. v. Farmer,* 762 A.2d 620 (N.J. 2000) (invalidating parental notification law); *American Academy of Pediatrics v. Lundgren*, 940 P.2d 797 (Cal. 1997) (holding that parental consent law violated state constitution); *N. Fla. Women's Health & Counseling Svces. v. Florida*, 866 So.2d 612 (Fla. 2003) (quashing parental notification law); *In re T.W.,* 551 So.2d 1186, 1192-93 (Fla. 1989) (striking down parental consent statute).

[8] *Farmer,* 762 A.2d at 638.

ARGUMENT

I. PREGNANT MINORS WHO SEEK ABORTIONS ARE SIMILARLY SITUATED TO PREGNANT MINORS WHO CARRY TO TERM AND OBTAIN ALL OTHER PREGNANCY-RELATED HEALTH CARE

Article I, section 1 of the Alaska Constitution provides, in relevant part, "that all persons are equal and entitled to equal rights, opportunities, and protection under the law."

> The constitutional right to equal protection is a command to state and local governments to treat those who are similarly situated alike. The common question in equal protection cases is whether two groups of people who are treated differently are similarly situated and thus entitled to equal treatment. Equal protection jurisprudence concerns itself largely with the reasons for treating one group differently from another. In reviewing equal protection claims we view the enactment in question as creating, by its differential treatment, separate groups.[9]

The PNL requires parental notification or a judicial bypass before a minor may obtain an abortion. By contrast, pursuant to Alaska's medical emancipation statutes, pregnant minors may consent to all other pregnancy-related medical and surgical care without parental involvement and without having to petition a court.[10]

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[9] *Gonzales v. Safeway Stores, Inc.*, 882 P.2d 389, 396 (Alaska 1994). *Accord Public Employees Retirement System v. Gallant,* 153 P.3d 346, 349 (2007) (citing *Gonzales*).

[10] "State law emancipates Alaskan minors from their parents so they can independently receive reproductive health services without parental consent. They need not consult with their parents regarding sexually transmitted diseases; contraception; prenatal care; obstetrical decisions including Caesarian surgery; the

This schism creates "several potentially significant classes of similarly situated minors" which "fall within the ambit of the equal protection question" and thus "deserve careful scrutiny."[11]

A. Precedent Dictates That Pregnant Minors Who Seek Abortions Are Similarly-Situated To Other Pregnant Minors

This Court's precedent establishes that pregnant minors who seek abortions are similarly-situated to pregnant minors who seek other pregnancy-related health care.[12] Specifically, this Court held that

> a woman who carries her pregnancy to term and a woman who terminates her pregnancy exercise the same fundamental right to reproductive choice. Alaska's equal protection clause does not permit governmental discrimination against either woman: both must be granted access to state health care under the same terms as any similarly situated person.[13]

The New Jersey Supreme Court, in striking down a parental notification law, found that minors who seek abortions are similarly situated to those who carry their pregnancies to term for purposes of equal protection. Like Alaska, New Jersey's state constitution contains a right to privacy and an equal protection

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weighing of grave health risks of a problem pregnancy; fetal anomaly; miscarriage; adoption; or pre-PNL, abortion." (Exc. 178)

[11] *Planned Parenthood I*, 35 P.3d at 43.

[12] *Dep't of Health & Social Svces*, 28 P.3d at 913.

[13] *Id.*

clause.[14] The New Jersey Supreme Court similarly recognizes that minors have a fundamental right to privacy in their reproductive health care decisions.[15] And as is the case in Alaska, New Jersey's medical emancipation statutes allow pregnant minors to obtain all other pregnancy-related medical and surgical care without parental notification or consent.[16] In *Planned Parenthood of Central New Jersey v. Farmer*, 762 A.2d 620 (N.J. 2000), the court stated,

> The Parental Notification for Abortion Act is designed to impose restrictions on young women who seek an abortion, treating them differently than it treats young women who decide to carry to term. We employ [a] balancing test to determine whether that differential treatment unfairly burdens only one class of young women, thereby violating the State Constitution's guarantee of equal protection.[17]

Alaska's PNL – like the parental notification statute held unconstitutional by the New Jersey Supreme Court – imposes "restrictions on minors who seek an abortion, treating them differently than it treats young women who decide to carry to term."[18]

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[14] *Farmer*, 762 A.2d at 630 (citing N.J. Const. Art. I, ¶ 1).

[15] *Id.*at 622.

[16] *Id.*at 636.

[17] *Id.*at 632.

[18] *Farmer, supra.*

B. The PNL Runs Contrary To The Core Rationale of Medical Emancipation Laws Which Are Intended To Encourage Youth To Obtain Health Care

In the instant case, the Superior Court unpersuasively suggests that once a minor decides to have an abortion "she is no longer similarly situated with other pregnant minors with respect to the familial consultation issue" and "the core rationale underpinning medical emancipation no longer applies to her; she no longer requires encouragement to see a doctor to protect her own health and that of her fetus." (Exc. 221-222) The Superior Court's reasoning is flawed in several respects.

First, the court below takes an overly narrow view of what it means for two classes to be similarly situated. A pregnant minor stands at a fork in the road – she may decide to terminate the pregnancy or carry it to term. Once she makes that decision, she falls into one subgroup or another. For purposes of equal protection, there is no other factor that distinguishes the two subgroups. Indeed, under the Superior Court's analysis, it would be difficult to find that any two seemingly identical groups are similarly situated.

Moreover, the same rationale for medical emancipation laws – encouraging youth to seek health care – applies whether a pregnant minor chooses to carry to term or to seek an abortion. The Superior Court's description of the rationale for medical emancipation laws inaccurately portrays obtaining health care as a one-

time event instead of a series of actions that the state wishes to encourage among minors. The state continues to have an interest in a teenager seeking health care after, for example, the teenager is diagnosed and treated for a single episode of a sexually transmitted disease (STD), or after a single pregnancy test comes back negative. There is a strong societal interest in encouraging that teenager to avail herself of contraceptives that will help prevent both outcomes in the future. Similarly, there is a public interest in encouraging a minor who chooses to abort to obtain contraceptives to avoid unwanted pregnancy and STDs going forward.[19]

Medical emancipation laws are enacted to encourage youth to seek health care, and are based on the recognition that parental involvement may not foster that societal goal:

> [T]he focus [of medical emancipation laws] is on the harm of requiring parental consent. The targeted treatments all involve situations in which the traditional assumption--that parents can be counted on to respond to their children's medical needs in a way that promotes the child's interest--simply might not hold. For example, some parents may become angry upon learning of their child's drug use or sexual activity. Moreover, even if most parents would act to promote their children's welfare, adolescents may be reluctant to get help if they are required to inform their parents about their condition, either because they fear their parents' reactions or because they do not want to disclose private information. Removing this obstacle encourages adolescents to seek treatment that may be critically important to their health. Of course, society also has an interest in

[19] *See, e.g.*, testimony of Dr. John Santelli (Tr. 2/13/2012 at 173-75, 182-83) (describing the importance of confidentiality in providing healthcare to adolescents, so that adolescents will make return visits and seek out healthcare in the future).

> reducing the incidence of sexually transmitted diseases, substance abuse, mental illness, and teenage pregnancy. Together, these social benefits largely explain why lawmakers shift the boundary of childhood for the purpose of encouraging treatment of these conditions.[20]

Indeed research has shown that confidentiality is a key factor for minors in seeking health care, and privacy concerns can cause youth to delay obtaining health services or forego care altogether. [21] At least one study found that the prevalence of characteristics that put adolescent girls at higher risk for treatable health concerns – such as sexual activity and substance use – is much greater for those who cite confidentiality as a major consideration in whether they access health care.[22] "It is often these young people who have the most pressing needs for health care but who are most likely to be deterred from seeking it by confidentiality concerns."[23] Medical emancipation laws are "[c]onsistent with both the evidence gained from research and the guidance provided by health care professional

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[20]Elizabeth S. Scott. *The Legal Construction of Adolescence*. 29 Hofstra L. Rev. 547, 568 (Winter 2000) (citations omitted).

[21] Carol A. Ford *et al. Foregone Health Care Among Adolescents.* 282 JAMA 2227, 2227-2228 (1999).

[22] J.A. Lehrer *et al. Forgone Health Care Among U.S. adolescents: Associations Between Risk Characteristics and Confidentiality Concern*. 40 J. Adolesc. Health 218, 218 (2007).

[23]Carol A. Ford. *Editorial: More Evidence Supports The Need To Protect Confidentiality In Adolescent Health Care*. 40 J Adolesc Health 199, 199 (2007).

organizations" precisely because they facilitate minors' access to confidential health care.[24]

Other state Supreme Courts have recognized that laws such as the PNL undermine the public policy rationale of allowing minors to consent to various health care services. In *American Academy of Pediatrics v. Lundgren*, 940 P.2d 797 (Cal. 1997), the California Supreme Court overturned a statute mandating that a minor obtain parental consent or judicial bypass to obtain an abortion. The court explained:

> [M]edical emancipation statutes identify circumstances in which a minor in need of medical care may be reluctant, for a variety of reasons, to inform his or her parents of the situation or condition that has created the minor's need for such care, and in which, because of such reluctance, there is a substantial risk that minors will fail to seek medical care—"to the detriment of themselves, their families, and society"—were minors required to inform their parents and obtain parental consent before being allowed to receive medical care.
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> ***
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> [E]ach of these statutory provisions embodies a legislative recognition that, particularly in matters concerning sexual conduct, minors frequently are reluctant, either because of embarrassment or fear, to inform their parents of medical conditions relating to such conduct, and consequently that there is a considerable risk that minors will postpone or avoid seeking needed medical care if they are required to obtain parental consent before receiving medical care for such conditions. [25]

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[24] *Id.* at 199-200.

[25] *Lundgren,* 940 P.2d at 801-802 (citing to Wadlington, *Medical Decision Making for and by Children: Tensions Between Parent, State and Child* (1994) 1994 U. Ill. L.Rev. 311, 323–324; Wadlington, *Consent to Medical Care for Minors,* in Children's Competence to Consent (Melton *et al.* edits.1983) pp. 61–64).

Requiring parental notification for abortion will deter youth from timely seeking health care – both abortion and a wide array of non-abortion services -- in the future, with negative consequences both for the youth as well as the larger community.

Finally, when a minor decides to abort, society has a strong interest in having that youth seek the assistance of a qualified health care provider, and not attempt to abort herself or seek an abortion from individuals with no medical training or licensing, both of which pose great risk to her health and welfare. The Supreme Courts of New Jersey and California were particularly concerned that laws mandating parental involvement may cause minors to put themselves at grave risk. As the California Supreme Court cautioned,

> [I]n some instances, a minor who does not wish to continue her pregnancy but who is too frightened to tell her parents about her condition or go to court may be led by the statutory restrictions to attempt to terminate the pregnancy herself or seek a "back-alley abortion"—courses of conduct that in the past have produced truly tragic results—or, alternatively, to postpone action until it is too late to terminate her pregnancy, leaving her no choice but to bear an unwanted child.[26]

Similarly, the New Jersey Supreme Court was "troubled by the prospect … that in attempting to exercise their rights minors may elect to leave the State

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[26] *Lundgren*, 940 P.2d at 817.

or, in cases where the delay is significant, may use unlicensed doctors or unorthodox procedures in procuring an abortion."[27]

Because pregnant minors who choose to abort are similarly-situated to those who carry to term, the PNL must be reviewed under Alaska's equal protection clause. As discussed fully in Part II *infra*, the PNL fails this test.

II. APPLICATION OF ALASKA'S EQUAL PROTECTION TEST DEMONSTRATES THAT THE PNL IS UNCONSTITUTIONAL BECAUSE IT DISCRIMINATES AGAINST PREGNANT MINORS WHO CHOOSE TO ABORT WITHOUT SERVING A COMPELLING STATE INTEREST

A. The PNL must be analyzed under strict scrutiny.

The first step or prong in Alaska's equal protection analysis is to determine the nature of the right burdened by the PNL.[28] Article I, section 22 of the Alaska Constitution provides in relevant part, "The right of the people to privacy is recognized and shall not be infringed." The Court's prior holdings make clear that the right to make reproductive choices under the privacy provision is fundamental and applicable to minors.[29]

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[27] *Farmer*, 762 A.2d at 634.

[28] *Planned Parenthood I*, 35 P.3d at 42.

[29] *See Planned Parenthood I*, 35 P.3d at 42 (holding that with respect to the right to privacy, "minors and adults start from the same constitutional footing"); *Alaska v. Planned Parenthood of Alaska,* 171 P.3d 577, 581(2007) *(Planned Parenthood II)*

In *Planned Parenthood I*, this Court stated that "[g]iven the fundamentality of the right to privacy and the nature of the statutory classification at issue, we certainly recognize that evidence presented in support of the challenged act is "'deserving of the most exacting scrutiny.'"[30] Such exacting scrutiny is warranted here in determining whether the classification created by the PNL violates Alaska's equal protection clause.

The Supreme Courts of New Jersey, California and Florida all have similarly applied strict scrutiny to statutes requiring parental involvement in minors' abortion decisions. In *Farmer*, the New Jersey Supreme Court held that the classification created by a parental notification law "is deserving of the most exacting scrutiny."[31] Indeed, this Court specifically cited to this language in *Farmer* to hold that the parental consent law at issue in *Planned Parenthood I* must be analyzed under strict scrutiny.[32]

(holding that the right to privacy under the Alaskan constitution affords Alaskans, including pregnant minors, broader protection than the United States Constitution).

[30] *Planned Parenthood I,* 35 P.3d at 45 (*quoting Planned Parenthood of Central N.J. v. Farmer,* 762 A.2d 620 (N.J. 2000) (emphasis added). *See also Gallant,* 153 P.3d at 349-50 ("[W]hen a classification is based on a suspect factor (for example, race, national origin, or alienage) or infringes on fundamental rights (for example, voting, litigating, or the exercise of intimate personal choices) a classification will be upheld only when the enactment furthers a `compelling state interest' and the enactment is `necessary' to the achievement of that interest.") (emphasis added).

[31] *Farmer,* 762 A.2d at 633.

[32] *Planned Parenthood* I, 35 P.3d at45 (*quoting Farmer*) (emphasis added).

The California Supreme Court also applied strict scrutiny in reviewing a parental consent law, albeit under the state constitution's privacy clause. As the *Lundgren* court held, "when a challenged action or regulation directly invades an interest fundamental to personal autonomy,... a compelling interest must be present to overcome the vital privacy interest"[33] and "under the California constitutional privacy clause, a statute that impinges upon the fundamental autonomy privacy right of either a minor or an adult must be evaluated under the demanding 'compelling interest' test."[34] And the Florida Supreme Court, in invalidating first a parental consent and then a parental notice law, similarly held that the state must demonstrate a compelling interest in infringing on pregnant minors' fundamental right to privacy under that state's constitution.[35]

B. The State Has Failed to Establish a Compelling Interest for Infringing on the Privacy Rights of Pregnant Minors Who Seek Abortions

Given that the right to privacy is fundamental, the state must prove the existence of a compelling state interest for requiring parental notification when minors seek an abortion (prong two), and a compelling interest for imposing the

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[33] *Lundgren*, 940 P.2d at 811(citations and internal quotations omitted).

[34] *Id.* at 819 (emphasis added).

[35] *N. Fla. Women's Health & Counseling Svces. v. Florida*, 866 So.2d 612, 631 (Fla. 2003); *In re T.W.*, 551 So.2d 1186, 1192-93 (Fla. 1989).

notification requirement on minors who opt to abort while not requiring the same for minors who obtain all other pregnancy-related medical and surgical care (prong three).[36] An examination of the record below, as well as the reasoning of this Court's precedent and that of other state courts striking down similar statutes, demonstrates that the state has failed to establish that the PNL advances any compelling state interest.

1. Contrary to the Superior Court's Findings, the PNL Does Not Promote Parental Involvement In Their Minor Children's Reproductive Health Care Decisions And Instead Increases Risk of Harm to Youth

The Superior Court held that among the various reasons proffered by the state, only the state's interest in engaging families in minors' abortion decisions was compelling. (Exc. 195) However, the Superior Court's findings demonstrate that the state failed to establish that the PNL advances the state's interest in promoting the involvement of parents in the health care of their pregnant children. At best, the findings are inconclusive as to the PNL's efficacy in achieving this end. Absent a stronger showing, the state is unjustified in burdening the exercise

[36] *Planned Parenthood I*, 35 P.3d at 44. ("Alaska's test of equal protection inseparably links the third step of equal protection analysis (here, whether the state had compelling reasons to require parental consent or judicial authorization for one group of minors but not another) to the second step (the nature and importance of the state's interest in requiring parental consent or judicial authorization to abortion.")

of the privacy rights of pregnant minors who opt to terminate their pregnancies. Indeed, the high courts of New Jersey, California, Florida all have found that laws such as the PNL do not promote familial consultation and involvement.

The Superior Court found that the PNL raises both benefits and detriments to the promotion of familial consultation. (Exc. 193) The court below noted that the PNL "has a small but real upside [and] a small but real downside" and is a "fairly tentative mechanism to advance family consultation which actually strengthens a familial bond." (Exc. 195) The Superior Court also stated that the PNL will prompt some youth to inform their parents without adverse consequences, (Exc. 193), and the dire outcomes are relatively rare. (Exc. 195) Because the "PNL to some unknowable degree advances family involvement with pregnant minors otherwise disinclined to inform parents," (Exc. 194), the court concluded that [the PNL] "passes constitutional muster, as long as it is implemented by the least restrictive means." (Exc. 195) Such an ambivalent finding as to the efficacy of the PNL in promoting familial involvement cannot justify the infringement on a fundamental constitutional right under strict scrutiny analysis.

Moreover, the Superior Court cited to national data demonstrating that in states not mandating parental involvement in abortion decisions, 45% of minors voluntarily informed their parents and 15% of parents discovered it; only 39% of

parents were not informed. (Exc. 184) The Superior Court specifically found that "over 60 percent of parents of pregnant teenagers are informed or become aware of the pregnancy, and will learn of any abortion decision independently from the PNL; as to them the PNL is irrelevant." (Exc. 194) (emphasis added). That 60% of the minors seeking abortions in Alaska already involve their families undercuts the state's key rationale for the PNL.

The New Jersey Supreme Court similarly found that "abortion providers already encourage minors to consult with their parents or another adult figure" and "ninety percent of minors under age fifteen notify at least one parent about their intent to obtain an abortion."[37] The California Supreme Court found that "the majority of pregnant minors consult their parents before obtaining an abortion, without being compelled to do so by statute."[38] This evidence suggests "that [parental notification laws] place[] burdens on minors in furtherance of a goal that is illusory for some families and unnecessary for many others."[39]

Additionally, studies have shown that "legislation mandating parental involvement does not achieve the intended benefit of promoting better family

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[37] *Farmer,* 762 A.2d at638.

[38] *Lundgren,* 940 P.2d at 828.

[39] *Farmer*, 762 A.2d at 638.

communication but increases risk of harm to minor by promoting delay."[40] The New Jersey Supreme Court rejected the state's asserted aim to "facilitate and foster familial communications" because "[t]he reality is that [notification] applies to many young women who are justified in not notifying a parent about their abortion decisions. Their reasons include abusive home environments and parental inadequacy...."[41] The *Farmer* court found that in these situations, mandated disclosure to a parent "may ... cause serious emotional harm to the minor" and "often precipitates a family crisis, characterized by severe parental anger and rejection of the minor."[42] The California Supreme Court also was greatly concerned that statutes mandating that minors inform their parents prior to obtaining an abortion may cause more harm to abused youth:

> [M]any minors who do not voluntarily consult their parents have good reason to fear that informing their parents will result in physical or psychological abuse to the minor (often because of previous abusive conduct or because the pregnancy is the result of intrafamily sexual activity).... [T]o the extent [that a statute] were to cause a pregnant minor from an abusive or potentially abusive family to seek parental consent, the statute would endanger the minor by leading her to place

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[40] Committee on Adolescence, American Academy of Pediatrics, *The Adolescent's Right to Confidential Care When Considering Abortion,* 97 Pediatrics 746, 746 (1996) (citations omitted).

[41] *Farmer*, 762 A.2d at 637 (citing American Medical Association's Council on Ethical and Judicial Affairs, *Mandatory Parental Consent to Abortion,* 269 *JAMA* 82, 83 (1993)).

[42] *Id.*

herself at physical or mental risk and would exacerbate the instability and dysfunctional nature of the family relationship.[43]

Mandatory notification requirements put abused minors at risk for more violence or becoming homeless, and do not promote healthy communication between minors and their abusive parents.[44] A minor in an abusive household risks harm if she discloses that she is pregnant, where an abusive or controlling parent may prevent her from having abortion or otherwise cause her physical or emotional harm.[45] It is precisely because of the risk of abuse that the American Medical Association and many other organizations of health care providers support the provision of confidential health care to adolescents.[46] Health care providers are uniquely positioned to work one-on-one with the youth to determine when it will

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[43] *Lundgren,* 940 P.2d at 829.

[44] Testimony of Dr. Suzanne Pinto (Tr. 2/14/2012 at 310-12, 321); Testimony of Rita Lucido (Tr. 2/17/12 at 798-804); Testimony of Susan Lemagie (Tr. 2/17/12 at 897, 913).

[45] Testimony of Deborah Downs (Tr. 2/15/2012, at 564-68, 584-85).

[46] *Farmer*, 762 A.2d at 637 (citing American Medical Association's Council on Ethical and Judicial Affairs, *Mandatory Parental Consent to Abortion,* 269 *JAMA* 82, 83(1993)). "The American Medical Association, the Society for Adolescent Medicine, the American Public Health Association, the American College of Obstetricians and Gynecologists, the AAP, and other health professional organizations have reached a consensus that minors should not be compelled or required to involve their parents in their decisions to obtain abortions, although they should be encouraged to discuss their pregnancies with their parents and other responsible adults." *Id.*

be potentially harmful to notify her parents, as compared to when her family is in a position to offer support.[47]

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[47]That the PNL contains a judicial bypass provision and an abuse exception does not alleviate its burden on minors who are abused. As the California Supreme Court found:

> several witnesses testified that past experience in other jurisdictions demonstrates that at least some minors who are too frightened or ashamed to consult their parents also will be too frightened or ashamed to go to court (often fearing that their presence at the courthouse might be discovered and disclosed by a neighbor or acquaintance), and may resort to the dangerous alternatives of either attempting to terminate their pregnancy themselves or seeking an illegal, back-alley abortion.

Lundgren, 940 P.2d at 829.

Similarly, in the instant case a number of witnesses testified that the judicial bypass requires minors to disclose what the minor sees as shameful information to strangers, and navigating the court system may be intimidating to some abused minors. The abuse exception is also problematic for a number of reasons. The corroboration requirement is harmful because it sends a message to abused youth that no one will believe them and their word is not enough. Again, minors must divulge sensitive information to strangers, e.g., a local notary public. Obtaining a notarized statement increases the risk that word will get out, including to the youth's abusers; this is especially problematic in rural areas. It will sometimes be difficult for abused minors to secure individuals to corroborate as they may simply not want to get involved. Both the judicial bypass procedure and abuse exceptions can cause further delays in minors seeking abortions, and putting together the necessary paperwork may be daunting to teenagers. And abused minors who don't see either as an option may become homeless, or attempt to induce an abortion, obtain an illegal abortion, or attempt harm to themselves. Testimony of Dr. John Santelli (Tr. 2/14/12 at 315-324); Testimony of Deborah Downs (2/15/13 at 564-576; 584-85); Testimony of Rita Lucido (Tr. 2/17/12 at798-803, 808-812, 816-819, and 822-23); and Testimony of Barbara Malchick (Tr. 2/22/2012 at 1211-1217, 1222-1224,1260-61).

Moreover, the state cannot sustain its burden of demonstrating a compelling need to foster family involvement when Alaska authorizes pregnant minors to seek all other care pregnancy-related medical and surgical care without parental notification.[48] The Florida Supreme Court's decision in *In Re T.W.*[49] explains how this fact undermines a finding that the PNL serves a great public need to promote family engagement. The *In Re T.W.* court struck down a statute requiring a minor to secure parental consent or a court order to obtain an abortion.[50] As in Alaska, Florida law permits a minor to obtain all other medical or surgical care related to pregnancy without parental involvement, and a minor can consent to all such care for her own child[51] – "no matter how dire the possible consequences".[52] *In Re T.W.* specifically noted that Florida did not find preserving family unity compelling enough to justify a parental consent requirement when minors sought non-abortion care. "[T]he selective approach employed by the legislature evidences the limited nature of the ... interest being furthered by these provisions...."[53] The Florida Supreme Court later applied the same reasoning in *N. Fla. Women's Health &*

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[48]*See n. 10 infra (summarizing Alaska's medical emancipation laws).*

[49]*In re T.W.*,551 So.2d 1186 (Fla. 1989)

[50]*Id.* at 1188.

[51]*Id.* at 1195.

[52]*Id.* at 1191.

[53]*Id.* at 1195 (citations and internal quotations omitted) (emphasis added).

Counseling Svces. v. Florida, to invalidate a parental notification law.[54] In the instant case, the "selective approach" employed by the PNL demonstrates the "limited nature" of the proffered interest in burdening the privacy rights of minors who seek abortions when pregnant minors who choose to deliver are not also burdened.

Similarly, the New Jersey Supreme Court rejected the state's proffer that the notification statute served a compelling state interest of increasing family engagement precisely because such notification was not required for other types of health care, including major operations:

> Cesarean sections are major surgical procedures and are more dangerous than normal delivery. Yet, the State does not require notification of a cesarean section; only the considerably less difficult abortion procedure is burdened in the name of protecting minors. Moreover, the State also claims that parents provide information about a minor's health otherwise not available. We cannot conceive of a better time than before a major operation such as a cesarean section for a doctor to be fully knowledgeable about a patient's health status. The State's differential treatment is therefore difficult to justify.[55]

Likewise, the Superior Court in this case found that abortion is a safe procedure and minors are more at risk for obstetrical complications than for abortion-related ones. (Exc. 169-170) Thus, "[a]lthough the state has a compelling interest in the health of Alaskan minors, the legislature has implicitly determined

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[54]866 So.2d 612, 633-34 (Fla. 2003).

[55]*Farmer*, 762 A.2d at 636 (emphasis added).

that parental input into a minor's reproductive health decisions other than abortion does not sufficiently advance that goal to outweigh its disadvantages." (Exc. 179) Thus, the Superior Court's findings support a holding that promoting parental input is not a compelling reason to discriminate against minors who seek to exercise their fundamental right to privacy in seeking an abortion.

2. The PNL Fails to Promote A Compelling State Interest in Protecting the Health of Minors

The Superior Court did correctly hold that the PNL does not meaningfully advance a compelling state interest in protecting the health of minors. (Exc. 180, 198-199) The court found that given the safety of abortion, the competence of minors as medical historians and to give informed consent, "and the experienced based judgment of Alaskan physicians that parental involvement in abortion-related medical decisions is unnecessary, such parental involvement advances no compelling state interest in the health of minor women." (Exc. 179-180)

The Superior Court's findings align with that of other courts that have found that parental notification and consent laws are not necessary to protect minors' health. For example, the California Supreme Court found that the state's contention that the

> restrictions imposed by [the] statute upon a minor's constitutionally protected right of privacy are necessary to protect the physical and emotional health of a pregnant minor is undermined by the circumstance that California law authorizes a minor, without parental

> consent, to obtain medical care and make other important decisions in analogous contexts that pose at least equal or greater risks to the physical, emotional, and psychological health of a minor and her child as those posed by the decision to terminate pregnancy.[56]

Similarly, the fact that Alaska's statutes permit pregnant minors to obtain all non-abortion medical and surgical care – some of which pose at least equal or greater risk to the minor – without parental consent, undermines the state's contention that the PNL is necessary to protect the health of minor women who choose to terminate their pregnancies.

3. The PNL Does Not Advance The Purported State Interest of Protecting Youth From Their Own Immaturity

In the instant case, the Superior Court properly rejected the state's assertion that the PNL is necessary to promote the state interest of protecting youth from immature decision-making as to health care. (Exc. 196-198) The court below observed that adolescent development scholarship shows that "[a]dolescent decision-making competence is not uniform across distinct subject areas or `domains;'" and "it is an over-simplification to conclude that merely because adolescents are prone to situational immaturity they are therefore incompetent when faced with the abortion versus carry-to-term decision." (Exc. 182) The court also cited to studies that demonstrate that with regard to abortion, there is no

[56] *Lundgren,* 940 P.2d at 826.

significant difference in decision-making capacity between minors and young adults ages 18 to 21. (Exc. 181) Moreover, the court noted that in jurisdictions from which data are available, judges grant judicial bypasses to almost all petitioning minors upon finding that they are mature enough to make the decision. (Exc. 184) Finally, the Superior Court found that

> the decision to abort almost invariably has a rational basis as a mature decision, even if the minor herself cannot be characterized as mature due to lack of a broad information base, well-developed psycho-social skills or consistently sound judgment in all contexts. A minor's decision to carry to term is less demonstrably a mature one. (Exc. 183) (emphasis added).

Again, the Superior Court's findings align with those of other state supreme courts. In *Farmer*, the New Jersey Supreme Court also rejected the state's assertion of a need to protect minors from their own immaturity as justification for a parental notification act.[57] That court noted that

> [H]ealth care professionals' collective opinion [is] that minors are quite capable of making informed, thoughtful decisions about the risks of and the reasons for both abortion and childbirth. Those professionals state that minors recognize their own immaturity and financial inability in respect of raising children, demonstrate their maturity in the first instance by actually locating an appropriate family planning facility, and are quite capable of providing satisfactory informed consent.[58]

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[57] *Farmer*, 762 A.2d at 636.

[58] *Id.*

The Florida Supreme Court likewise rejected the state's contention that involving parents in minors' abortion decisions advance the compelling interest of protecting youth from their own immaturity because Florida statute permits pregnant minors to consent to non-abortion medical and surgical services – including "highly dangerous medical procedures" -- for herself and her child. [59]

Thus, Alaska's medical emancipation statutes belie any such assertion that the PNL is necessary to protect minors' health.

C. The State Has Failed to Establish A Compelling Interest in Infringing on The Fundamental Rights of One Class of Pregnant Minors Where the State Does Not Burden Similarly-Situated Minors

The third prong of Alaska's equal protection test requires the State to show a compelling interest for infringing on a fundamental right of one class of citizens while not impinging on the same fundamental right of other like classes.[60] A "classification"– defined as a law that treats two similarly-situated groups differently – that burdens the exercise of a fundamental right will only be sustained

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[59] *T.W.*, 551 So.2d at 1191.

[60] *Planned Parenthood I*, 35 P.3d at 44 (noting that in equal protection analysis, the state must show compelling reasons to require parental consent for one group of minors but not another).

when the law furthers a compelling state interest and the law is necessary to further that end.[61]

1. The PNL Places Burdens Solely on Pregnant Minors Who Choose to Abort

As stated above, the PNL creates two classes of pregnant minors in Alaska – those whose parent must be notified prior to obtaining an abortion, and those who may obtain every other type of pregnancy-related medical or surgical care without parental notification. As such, the PNL unnecessarily burdens minors seeking abortions.

Specifically, the PNL increases delays and elevates the risk that minors will decide to forego the abortion altogether, seek illegal abortions or carry to term an unwanted pregnancy. The Superior Court found that access to abortion services in Alaska is "heavily constrained." (Exc. 172) Federal law prohibits medical centers operated by the Alaska Native Tribal Health Consortium from performing elective abortions; consequently, abortions are unavailable in much of rural Alaska. (Exc. 172) Planned Parenthood is the main provider in Alaska, (Exc. 173), operating three clinics – in Anchorage, Fairbanks and Juneau -- to serve the entire state. (Exc. 175) Abortions are performed on only select days in the month, (Exc. 175-176), and individuals living in rural areas have to travel great distances and even

[61] *Gallant*, 153 P.3d at 349-50.

take flights to reach one of the clinics. (Exc. 177) Access to elective second trimester abortion in Alaska is even more restricted. The evidence below established that elective second trimester abortions are "functionally unavailable" in Alaska, and the nearest provider is in Seattle, Washington. (Exc. 173)

Because of the scarcity of abortion services in Alaska, any delay that causes a patient to miss an appointment may have serious consequences for the patient, including requiring her to travel out of state for the procedure if the delay takes her into her second trimester. (Exc. 177) This situation is compounded by the fact that "pregnant minors as a group take much longer to make the decision whether to have an abortion."[62] Minors, who often have irregular menstrual cycles, may take longer to recognize that they are pregnant, and do not have as much experience in navigating the health care system.[63] "Those factors create time delays that affect the cost and availability of an abortion even without the demands of a statutory notification process."[64] Delay may cause a youth to attempt to self-abort or seek the services of unlicensed individuals, or to forego an abortion altogether and continue with an unwanted pregnancy.[65]

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[62] *Farmer,* 762 A.2d at 633.

[63] *Id.*

[64] *Id.*

[65] *Lundgren*, 940 P.2d at 817. *See also*testimony of Dr. John Santelli, Tr. 2/14/2012 at 210-11; Testimony of Dr. Suzanne Pinto, Tr. 2/14/2012 at 322-23; Testimony of Rita Lucido, Tr. 2/17/2012 at 798-99, 808-809, 811-812.

PNL's notice and documentation requirements will also operate to increase the chances of delay and these other adverse consequences. It is important to note that the PNL's notice and documentation requirements -- requiring telephonic notice to be provided "in not less than two-hour increments, for not less than five attempts, in a 24-hour period"; that providers use published telephone directories to verify parent/guardian's phone numbers; and that a parent/guardian produce documentation of their relationship to the minor (Exc. 200-201, 208) -- are even more burdensome than those in the New Jersey parental notification law invalidated in *Farmer*.[66] As the New Jersey Supreme Court recognized, "[i]n many cases, as a practical matter, a notification requirement will have the same deterrent effect on a pregnant minor seeking to exercise her constitutional right as does a consent statute."[67]

As was the case in New Jersey, Alaskan "minors who choose abortion are therefore subject to burdens not imposed on minors who do not. … The record reflects that the Act significantly burdens unemancipated women seeking abortions."[68]

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[66] *Farmer*, 762 A.2d at 623.

[67] *Id.* at 633 (internal quotations and citations omitted).

[68] *Id.*

2. There Is No Compelling Reason For Infringing on The Fundamental Rights of Pregnant Minors Who Seek Abortion Care Where the State Does Not Burden Pregnant Minors Who Seek Other Pregnancy Related Health Care.

Pursuant to this Court's jurisprudence, the State must establish a compelling interest – one that can withstand strict scrutiny – for discriminating against minors who opt to terminate their pregnancies. The State has failed to so.

The compelling state interest identified by the Superior Court in the instant case – promoting family involvement in the minor's health care – applies equally if not with greater force to a minor who chooses to carry to term as compared to the minor who opts for an abortion. As the Superior Court found, "[f]ew life decisions could benefit more from consultation with supportive parents than a minor's decision to carry to term; the decision to abort, comparatively, involves far fewer enduring consequences." (Exc. 218) Thus, fostering familial involvement cannot be the reason for the disparate treatment of these two similarly situated groups.

The New Jersey Supreme Court's decision in *Farmer* is instructive on this point. The *Farmer* court analyzed the state's justifications for the "differential treatment" and "classification" of minors who seek to abort versus minors who seek medical and surgical care during their pregnancy[69] using "the most exacting

[69] *Farmer*, 762 A.2d at 621.

scrutiny."[70] The court applied a three-part "balancing test" that is similar to Alaska's three-part equal protection test; specifically, the court considered the nature of the affected right, the public need for the restriction on the exercise of that right, and the extent to which the restriction impinges on the right.[71]

The *Farmer* court flatly rejected the state's contention that the notification act was necessary to "foster[] and preserve the family structure," finding that it was an inadequate reason for "the State to impose disparate and unjustifiable burdens on different classes of young women when fundamental constitutional rights hang in the balance."[72] The evidence in the *Farmer* record -- that the notification act applied to young women who have good reasons, including fear of abuse, for not telling their parents; that many parents in both notice and non-notice states are aware of their children's childbearing decisions; and that abortion providers encourage their patients to involve a parent or other responsible adult – demonstrated that the public did not have a compelling need to burden one group and not the other.[73] The New Jersey Supreme Court concluded that the State did not "offer adequate justification for distinguishing between minors seeking an abortion and minors seeking medical and surgical care relating to their

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[70] *Id.* at 633.

[71] *Id.* at 632 (citation omitted).

[72] *Id.* at 638.

[73] *Id.* at 637-38.

pregnancies" and "there is no principled basis for imposing special burdens only on that class of minors seeking an abortion."[74]

Likewise in the instant case, the Superior Court recognized that young women may have good reasons for not involving their parents in this decision, (Exc. 186), and that many parents are already aware of their children's reproductive health care decisions. (Exc. 175-177, 184) And evidence presented below indicates that Alaska's abortion providers already urge minor patients to tell a parent or responsible adult. [75] As explained in Part I.B.1 *supra*, the Superior Court's findings do not support a holding that the PNL is necessary to promote parental involvement in their children's health care. Therefore, the PNL's discriminatory effect cannot be justified on that ground.

Nor can the state's interest in protecting youth justify burdening only minors who seek to abort. The Superior Court found that the PNL does not advance the compelling state interests of promoting minors' health and protecting them from their own immaturity. *See* Parts I.B.2 and I.B.3 *supra*. It therefore follows that the state cannot establish that these are compelling reasons for discriminating against minors who opt to terminate their pregnancies.

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[74] *Id.* at 638.

[75] *See, e.g.*, testimony of Dr. Anna Kaminski (Tr. 2/14/2012 at 416) (noting that Planned Parenthood strongly encourages minors to involve their parents when making a decision about abortion).

Minors who choose to terminate their pregnancies are similarly situated to minors who opt to carry to term. Given the burdens placed on minors who seek to abort by the PNL, and the state's failure to establish a compelling reason for discriminating against minors seeking abortion care, the PNL's classification is unable to withstand equal protection's strict scrutiny. "Alaska's equal protection clause does not permit governmental discrimination" and therefore minors who opt to terminate their pregnancies "must be granted access to state health care under the same terms as any similarly situated person."[76] Stated differently, this Court must ensure that the State remains "neutral" and does not interfere in either the reproductive health care decisions of minors who seek to abort or their parents' involvement in those choices. As the New Jersey Supreme Court concluded,

> Simply, the effect of declaring the notification statute unconstitutional is to maintain the State's neutrality in respect of a minor's childbearing decisions and a parent's interest in those decisions. In effect, the State may not affirmatively tip the scale against the right to choose an abortion absent compelling reasons to do so.[77]

To ensure the state's neutrality, this Court must strike down the PNL.

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[76] *Dep't of Health & Social Svces,* 28 P.3d at 913.

[77] *Farmer*, 762 A.2d at 622. *See also N. Fla. Women's Health & Counseling Svces.*, 866 So.2d at 615 (noting that decision striking down a parental notification law "in no way interferes with a parent's right to participate in the decision making process or a minor's right to consult with her parents. Just the opposite. Under our decision, parent and minor are free to do as they wish in this regard, without government interference.")

CONCLUSION

For the foregoing reasons, *Amici Curiae* Juvenile Law Center *et al.* respectfully requests that this Court reverse the ruling of the Superior Court and hold that the PNL violates the equal protection clause of the Alaskan state constitution.

Respectfully submitted,

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DATED: May 14, 2013

EXHIBIT A

Consent of Parties and Intervenors to Filing of Brief of *Amici Curiae* Juvenile Law Center *et al.*

From: Kevin Clarkson [mailto:kclarkson@brenalaw.com]
Sent: Thursday, April 25, 2013 6:43 PM
To: Janet Crepps; 'Borghesan, Dario (LAW)'; 'Paton-Walsh, Margaret A (LAW)'
Subject: RE: Consent for an amicus brief

The Intervenors have no objection either.

We will have amici also at some point asking for similar consents.

Kevin

From: Janet Crepps [mailto:JCrepps@reprorights.org]
Sent: Thursday, April 25, 2013 1:29 PM
To: Borghesan, Dario (LAW); Paton-Walsh, Margaret A (LAW); kclarkson@brenalaw.com
Subject: RE: Consent for an amicus brief

Thank you.

Janet Crepps*

Senior Counsel

U.S. Legal Program

Center for Reproductive Rights

864-962-8519

*Admitted in Alaska and South Carolina

From: Borghesan, Dario (LAW) [mailto:dario.borghesan@alaska.gov]
Sent: Thursday, April 25, 2013 5:16 PM
To: Janet Crepps; Paton-Walsh, Margaret A (LAW); kclarkson@brenalaw.com
Subject: RE: Consent for an amicus brief

Janet,

The State has no objection to the Juvenile Law Center filing an amicus brief.

Dario Borghesan

Assistant Attorney General

Opinions, Appeals, and Ethics Section

Alaska Department of Law

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From: Janet Crepps [mailto:JCrepps@reprorights.org]
Sent: Thursday, April 25, 2013 12:00 PM
To: Paton-Walsh, Margaret A (LAW); Borghesan, Dario (LAW); kclarkson@brenalaw.com
Subject: Consent for an amicus brief

Counsel – The Juvenile Law Center is preparing an amicus brief. Can they indicate that you consent to the filing? Thanks.

Janet Crepps*

Senior Counsel

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