IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

PLANNED PARENTHOOD OF THE GREAT NORTHWEST, *et al.*,	)	
Plaintiffs,	)	
v.	)	
STATE OF ALASKA,	)	
Defendant.	)	
	)	Case No. 3AN-10-12279 CI

DECISION AND ORDER

I. STATEMENT OF THE CASE

In 1997, the Alaska Legislature prohibited abortions for minors under 17 without the consent of a parent. Planned Parenthood of Alaska ("Planned Parenthood") and several physicians challenged the new law's constitutionality. The superior court concluded that the measure regulated minors terminating a pregnancy but not other pregnant minors, and so violated the equal protection clause of the Alaska Constitution.[1] Since Alaskan minors are entitled by law to contraception, treatment of sexually transmitted diseases, or pregnancy-related medical care without parental consent,[2] the Court reasoned that minors who abort are entitled to similar discretion.

[1] Alaska Const. art. I, § 1.
[2] AS 25.20.025(a)(4).

On appeal, the Alaska Supreme Court construed the privacy clause of the Alaska Constitution[3] and held that the state could regulate reproductive care of minors only to further a compelling state interest and only by the least restrictive means.[4] This *Planned Parenthood I* decision reversed the trial court's equal protection ruling as premature and remanded the case for an evidentiary hearing.

The Court framed the equal protection issue as "whether the state had compelling reasons to require parental consent or judicial authorization for one group of minors but not another." It directed the trial court to determine whether the state's interest was compelling, whether the Parental Consent Act focused narrowly on that interest, and whether the Act unfairly singled out the abortion versus the carry-to-term decision. The Court provided brief guidance:

> Other courts have identified plausible, facially legitimate grounds for treating pregnant minors who carry their children to birth differently from those who choose abortion. And at least some of the legislative findings made in support of Alaska's parental consent or judicial authorization act appear to relate more specifically to a minor's capacity to make the choice of abortion than they do to the minor's ability to make other types of medical decisions.[5]

The Court footnoted several decisions justifying such disparate treatment.[6] One referenced vague "special considerations applicable to an abortion as

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[3] Alaska Const. art. I, § 22.
[4] *State v. Planned Parenthood of Alaska* ("*Planned Parenthood I*"), 35 P.3d 30, 41 (Alaska 2001).
[5] *Id.* at 44-45 (citations omitted).
[6] *Id.* at 44 fn. 93.

opposed to some other intrusive medical procedure."[7] Another suggested a public health rationale:

> [The legislature] could reasonably, and neutrally, determine, as a matter of policy, that in the case of an unemancipated minor who is pregnant and intends to bear a child the public health interest in allowing her to obtain medical care for herself and her fetus is overriding, regardless of parental approval and whether or not the unemancipated minor is mature.[8]

The Court elaborated contrary arguments:

> Given 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." A court giving close scrutiny to the issue of compelling state interest might 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. Moreover, even if the state's interests were actually compelling, evidence concerning experiences with consent provisions in other jurisdictions, including information about the difficulties faced by minors—particularly minors in rural areas—in gaining access to courts and the judicial bypass procedure, might convince the court that Alaska's act will not actually accomplish these purposes or will not do so using the least restrictive means. Alternatively, close scrutiny of the evidence might lead the court to conclude that the state's differential treatment of minors reflects nothing more than a discriminatory intent—an attempt to "chip away at the private choice shielded by *Roe v. Wade*."[9]

On remand, the superior court held an evidentiary hearing and again concluded that the Parental Consent Act violated equal protection principles. It also found that the Parental Consent Act furthered no compelling state

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[7] *Planned Parenthood League of Mass., Inc. v. Attorney Gen.*, 677 N.E.2d 101, 106 n. 10 (Mass. 1997).
[8] *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 865 (Cal. 1997)(Mosk, J., dissenting).
[9] *Planned Parenthood I*, 35 P.3d at 45.

interest. The court enjoined the Act on state right-to-privacy and equal-protection grounds.

The Alaskan Supreme Court in *Planned Parenthood II* affirmed the court below but on different grounds.[10] It reasoned that the consent statute shifted the minor's right to choose to her parents. The Court endorsed a less intrusive statutory model termed "parental notification":

> The State's asserted interest in protecting a minor from her own immaturity by encouraging parental involvement in her decision-making process is undoubtedly compelling. But by prohibiting a minor from obtaining an abortion without parental consent, the Act effectively shifts that minor's fundamental right to choose if and when to have a child from the minor to her parents. There exists a less burdensome and widely used means of actively involving parents in their minor children's abortion decisions: parental notification. The United States Supreme Court has recognized . . . that "notice statutes are not equivalent to consent statutes because they do not give anyone a veto power over a minor's abortion decision." And many states currently employ this less restrictive approach. Because the State has failed to establish that the greater intrusiveness of a statutory scheme that requires parental consent, rather than parental notification, is necessary to achieve its compelling interests, the Parental Consent Act does not represent the least restrictive means of achieving the State's interests and therefore cannot be sustained.[11]

The Court noted that 15 states have enacted parental notification statutes. These prohibit a minor from terminating a pregnancy until one or both parents have been notified of her abortion decision and afforded a short interval for consultation. The Court reasoned that consultation constituted a lesser burden than a parental veto but was equally effective in enabling a

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[10] *State v. Planned Parenthood of Alaska (Planned Parenthood II)*, 171 P.3d 577 (Alaska 2007).
[11] *Id.* at 579 (citations omitted).

parent-child dialogue.[12] And the Court found that its invalidation on right-to-privacy grounds mooted the equal-protection issue.[13]

Subsequently, sponsors of an initiative redrafted the parental consent statute to incorporate parental notice.[14] They broadened the measure to include 17 year olds to whom the parental consent act had not applied. They crafted a detailed notification protocol. Thus modified, the initiative (the "Parental Notification Law" or "PNL") passed on the August 2010 statewide ballot.

Planned Parenthood (by then Planned Parenthood of the Great Northwest) and Alaskan physicians Jan Whitefield and Susan Lemagie sued to enjoin enforcement, again on right-to-privacy and equal-protection grounds. Initiative sponsors Loren Leman, Kim Hummer-Minnery, and Mia Costello intervened. Planned Parenthood moved to preliminarily enjoin the PNL from taking effect as of December 14, 2010. The court denied the injunction because Planned Parenthood failed to demonstrate a likelihood of success on its core right-to-privacy and equal-protection grounds. But the court did enjoin several peripheral features of the PNL thought unlikely to pass the rigorous least-restrictive-means test applicable to fundamental constitutional rights. The court subsequently denied cross-motions for summary judgment and held an evidentiary hearing from February 13 through March 2, 2012.

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[12] *Id.* at 583-584.
[13] *Id.* at 581 n. 20.
[14] AS 18.16.010 *et seq.*

II. FINDINGS OF FACT

a. General pregnancy and abortion facts

1. Pregnancy lasts 40 weeks after implantation of the fetus in the uterine wall. Since the implantation date is unknowable, a pregnancy is measured from the last day of the last menstrual period ("LDLMP"). Pregnancy is commonly divided into three roughly 12-week trimesters, with the final trimester lasting 12 to 16 weeks. A birth is no longer premature after 36 weeks.

2. Ninety percent of all abortions are performed in the first trimester, 60 percent at eight weeks or sooner. Abortions are generally performed in clinics rather than hospitals. Second-trimester abortions account for ten percent, with only one percent after 20 weeks from LDLMP.

3. Surgical abortions employ mechanical suction. It is not a painful procedure. Usually a physician injects local anesthetic into the cervix. Often no other pain medication is necessary, but a physician can administer palliatives orally or intravenously. Some patients experience minor cramping and bleeding akin to menstrual cramps.

4. A second option termed a "medication abortion" arose a decade ago. A physician prescribes the minor medication that she takes at home to induce contractions and terminate the pregnancy. Physicians only prescribe it during the first nine weeks, since its efficacy diminishes afterward. About ten percent of young women utilize this option.

b. Medical risks of pregnancy and abortion

1. Many U.S. clinics do not schedule routine follow-up visits for surgical abortions since complications are rare. Routine administration of antibiotics makes infection unlikely. Almost all other abortion complications are acute, i.e. they manifest in-clinic and are resolved there. Acute complications include uterine perforation (.1 percent) or hemorrhage. During the first nine months of 2011, Planned Parenthood experienced one complication with a minor, tissue retainage resolved by a repeat procedure.

2. There is no association between abortion and infertility. First-trimester abortions do not increase the risk of preterm labor for subsequent pregnancies. The second-trimester use of hydroscopic dilators to gradually open the cervix abates preterm labor risk for subsequent pregnancies.

3. Induced abortions are very safe in the United States. Of 1.2 million annual abortions only six result in death. Post-20-week abortions (1 percent of total abortions) account for 60 percent of these fatalities. The safest obstetrical delivery is 20 times more hazardous than a first-trimester abortion or 15 times more hazardous than a second trimester one. Even late second-trimester abortions are far safer than most surgical procedures, including a tonsillectomy or a Caesarian section. Minors are dramatically more at risk for an obstetrical complication than an abortion-related one.

4. Delivery mortality rates are also miniscule compared to most other surgical mortality rates. But pregnancy complications are significantly more

varied and health-threatening than abortion-related ones. Hospitalizations during pregnancy occur 15 percent of the time, but are vanishingly rare for abortions. Pre-eclampsia (hypertension) is the most common of the dangerous complications; it endangers the kidneys and liver. The only treatments are abortion, induction of labor, and Caesarian section. Adolescents are more subject to pre-eclampsia than are adults.

5. Minors are at higher risk than adults for preterm labor with an attendant risk of pulmonary edema. An adolescent woman experiencing preterm labor may need to make complicated decisions whether to continue her pregnancy.

6. Some anti-seizure drugs are incompatible with pregnancy and must be discontinued if the minor elects to carry to term. Adolescents with inadequate pelvic development are at higher risk for a Caesarian section, which creates risk factors for future pregnancies. The risks of vaginal delivery are considerably greater for adolescents than for women with fully developed bodies, including the risk of an obstetrical fistula. When specific pregnancy-related risks arise, termination of the pregnancy is invariably safer than carrying to term.

c. Mental health implications of pregnancy and abortion

1. Mental illness is a constellation of subjective and objective signs and symptoms ultimately causing individual distress. The illness may have genetic origins or derive from life experiences. Since the 1980's, the majority

consensus of American psychiatry is that abortion does not cause mental illness. Women obtaining abortions are at greater risk for psychiatric problems than average, but only because life circumstances that make a fetus unwanted are risk factors for mental illness. The best predictor of mental health after an abortion is mental health before the abortion. The weight of the credible evidence presented at trial establishes that abortion does not detrimentally affect mental health. In contrast, between ten and 20 percent of women who carry to term experience significant post-partum depression.

2. An abortion may occasion a wide range of emotions, most commonly relief over resolution. There is no significant difference in adjustment between minors who inform their parents of their abortion and those who do not.

d. Medical risk arising from abortion delay

1. The process of parental notice may delay a minor's abortion. Experts testified that aborting sooner is better. Ob-gyn Professor Phillip Darney testified that after eight to nine weeks, every week increases risks. After 14 to 15 weeks an incremental increase in complexity occurs, with heightened risk of uterine perforation. Even so, such later abortions do not approach the risk of most surgical procedures.

2. While delay poses risks, the risk does not increase precipitously. Adolescent medicine physician John Santelli opined that two to three week delay meaningfully increases risk. Ob-gyn Professor John Thorpe also testified that material risk factors increase by weeks rather than by days.

e. Abortion services in Alaska

1. Access to elective abortion services in Alaska is heavily constrained. Federal law prohibits medical facilities operated by the Alaska Native Tribal Health Consortium from performing elective abortions. This widespread network servicing native communities constitutes a quasi-monopoly discouraging market entry by private practitioners. Consequently, elective abortions are unavailable in much of rural Alaska.

2. The performance of elective abortion services in Alaska is to some extent stigmatized by widely extant religious and political opinion and belief, sometimes evidenced by social coercion of abortion providers. Political and social factors have diminished the number of Alaskan abortion providers.

3. Planned Parenthood is the main provider of elective abortions in Alaska. Its independent contractor physicians performed approximately 80 abortions in 2011. Planned Parenthood provides an array of reproductive health services and began offering elective abortions within Alaska in 2002. Anchorage's Alaska Women's Health Clinic once performed elective abortions but has desisted. Palmer obstetrician Dr. Susan Lemagie has semi-retired due to her age, other commitments, and frustration with parental involvement laws.

4. It is unclear how many other Alaskan physicians offer elective abortions. Testifying Alaskan physicians noted that some physicians may practice discreetly. Several witnesses appeared to be reluctant to name such

practitioners to spare them negative publicity and adverse social and economic consequences.

5. By law, second trimester abortions in Alaska (13 weeks and six days to 21 weeks and three days post LDLMP) must be performed in a hospital or a surgical center. Anchorage's Providence Hospital allows abortion solely to abate a direct threat to the mother's life. Anchorage's Alaska Regional Hospital permits an abortion only when the pregnancy is functionally over or the mother's life is at risk.

6. The Valley Hospital in Wasilla is court-ordered to perform elective second-trimester abortions, but operating room nurses and staff may opt out conscientiously. They routinely do so, at times when the health of the mother is at risk. Accordingly, elective abortions are functionally unavailable at Valley Hospital.

7. No surgery center in Alaska permits elective abortions. Other condominium owners in the Alaska Surgery Center building vetoed second-trimester abortions to avoid picketing. Investors in a new Anchorage surgery center followed suit.

8. The nearest provider for Alaskan women seeking a second-trimester abortion is in Seattle. The state of Washington does not require parental notice or consent.

9. From January to May 2011, the Alaska Women's Health Clinic performed eight to ten elective abortions on minor women. One rural minor

was denied service when she arrived at the clinic without a parent, even though her parent approved.

10. The Alaska Women's Health Clinic ceased performing elective abortions when it relocated to the Providence Hospital campus in June 2011, because its lease prohibits abortion services. Clinic physician and plaintiff Dr. Jan Whitefield was summoned to the Providence head office and informed that his off-campus abortion activities were offensive to some Providence physicians who had requested his expulsion. Dr. Whitefield testified that 50 demonstrators once protested at his home; his neighbors received flyers denouncing him. An acquaintance of Dr. Whitefield ceased performing abortions due in part to peer pressure on his school-age children. Dr. Whitefield credibly testified that abortion providers in Alaska must expect social pressure to desist. Dr. Craig Hinkle, also of the Alaska Women's Health Clinic, testified that personal and familial social stigmatization contributed to the absence of abortion providers in Fairbanks.

11. No cost, training, or complexity issues discourage physicians from performing abortions. Family practice doctors are trained to use inexpensive I-Pass equipment during medical school. Most ob-gyn physicians and family practitioners will perform the functional equivalent of an abortion following a miscarriage.

f. Planned Parenthood's procedure and experience

minor. From the PNL's inception to trial, the Anchorage office invoked the telephonic notice protocol five times.

6. Planned Parenthood's Juneau clinic contracts with two local physicians and offers abortions two days per month. The physicians cover time-critical abortions as needed. From the PNL's inception to trial, the Juneau clinic performed six abortions for minors requiring no telephonic notifications, since all six parents consented by other means.

7. Planned Parenthood's Fairbanks clinic employs a manager, two nurse practitioners, and two other staff. The clinic is open Mondays from 10 AM to 4 PM, Wednesdays from 11 AM to 7 PM, and Fridays from 8 AM to 4 PM. The clinic offers abortions twice per month over two-day periods, often separated by several weeks. Physicians from the Alaska Women's Health Clinic fly to Fairbanks for these sessions. In mid-February 2012, the clinic was scheduling abortions in March.

8. Planned Parenthood's Fairbanks manager Tammi Leroux testified that her clinic served ten minor women from the onset of the PNL in mid-December 2010 through January 2012. Of those, five were accompanied by a parent or guardian. Those accompaniers were already aware of their daughter's decision when Leroux first contacted them. She instructed each to bring necessary documentation. Ms. Leroux described several minors with particularity:

i. One minor had her own housing. Ms. Leroux contacted the Seattle legal department and determined that the minor was emancipated. Ms. Leroux instructed her to bring a lease in her name as proof of emancipation.

ii. A second minor did not wish to inform her parents. She obtained a judicial bypass without assistance from a lawyer.

iii. Thirdly, a student at the University of Alaska Fairbanks stated her out-of-state parents were aware of her decision. Ms. Leroux called her mother to confirm. She spent about an hour on the notice process.

iv. A fourth minor contacted Planned Parenthood on a Friday. The next available abortion appointment was six days later. Were the patient to miss that slot, she would exceed the 13 week 6 day limit for clinical services in Alaska. She did not wish to inform her mother or go to court. She was willing to inform her father but lacked his telephone number. She provided it two days before her scheduled appointment, and the clinic reached him with 48 hours to spare, the bare minimum for consultation. Any additional delay would have ruled out an elective abortion in Alaska.

v. A fifth minor was estranged from her parents and living with her grandmother. The grandmother consented to the procedure.

vi. Lastly, a minor called from a village in January 2012. If she missed her appointment two days later, she would start her second trimester. She needed to fly to Fairbanks the next day. Her parents approved but were snow machining in another village. Ms. Leroux faxed a consent form to the clinic in

that village. The patient's mother executed it before a notary. Ms. Leroux spent approximately two hours on the phone with the minor to make these arrangements.

g. The PNL and health of minors

1. State law emancipates Alaskan minors from their parents so they can independently receive reproductive health services without parental involvement. They need not consult with their parents regarding sexually transmitted diseases; contraception; prenatal care; obstetrical decisions including Caesarian surgery; the weighing of grave health risks of a problem pregnancy; fetal anomaly; miscarriage; adoption; or pre-PNL, abortion.

2. Doctors Kaminski, Whitefield, Hinkle, and Lemagie have performed numerous abortions in Alaska. None testified that parental involvement in the medical aspects of their abortion practices was helpful. Dr. Lemagie credibly testified that minors are competent medical historians, and that they do an excellent job with after-care instructions. Dr. Whitefield credibly testified that minors provide histories comparable in quality to adults either for prenatal care or pregnancy termination. Dr. Hinkle credibly testified that minors are as competent as adults in managing their abortion care. No parental involvement is needed to choose a competent physician. Planned Parenthood's contract physicians perform far more abortions than any other Alaskan provider, and are accordingly highly accomplished. Generally, Alaskan women seeking an abortion do not choose a specific doctor, but rather accept whomever is

available. Parental involvement is not required to manage complications, which are relatively rare and generally resolved by an obvious, immediate medical response. Dr. Phillip Darney, former chief of obstetrical services at San Francisco General Hospital, testified that minors typically bring their asthma and anti-seizure medications to their appointments and adequately describe their conditions. He supported California's rejection of parental consent, opining that parental involvement was not a medical requisite for pregnant minors.

3. No testifying provider of abortion services cited concrete instances of a minor woman suffering adverse medical consequences from an abortion due to lack of parental involvement. No witness cited credible peer-reviewed research substantiating a medical value to parental involvement in abortion-related decision making.

4. The overwhelming weight of the credible evidence at trial established that parental involvement is not medically necessary for high quality abortion care. Although the state has a compelling interest in the health of Alaskan minors, the legislature has implicitly determined that parental input into a minor's reproductive health decisions other than abortion does not sufficiently advance that goal to outweigh its disadvantages.

5. Given the safety of abortion; the absence of choice in selecting physicians; the competence of minors as self-historians; the universally recognized capacity of minors to furnish informed consent; the limited options

to address abortion complications; those complications' rapid and obvious manifestation to physicians; 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.

h. The PNL and adult sexual predators

1. No state law requires pregnant minors to divulge the father's age or identity. Attending physicians do not ask.

2. The PNL does not require that medical staff inquire about the father's age or identity before performing an abortion.

3. Planned Parenthood does not ask for the father's age or identity prior to performing abortions.

4. The age of consent for minors is 16. About 70 percent of abortions by minors in Alaska are of those 16 or 17 years old.

5. The PNL does not prevent a young woman from guarding the identity of the father. She may avoid disclosure of her pregnancy to her parents by invoking the judicial bypass. Bypass judges do not require minor women to disclose the age or identity of their sexual partners.

6. A young woman impregnated at age 14 by her adult soccer coach testified at trial. That illicit relationship was revealed by chance and not by operation of her home state's PNL, which she readily thwarted.

7. The state interest in protecting minor women from illicit sexual relationships is not meaningfully advanced by the PNL.

i. The PNL and immaturity risks to minors

1. A study referred to by the parties as "Henshaw and Kost" titled "Parental Involvement in Minors' Abortion Decisions" found that 74 percent of minors electing to abort were either 16 or 17 years old, and only eight percent younger than 15. The younger the minor, the more likely she was to inform her parents of her pregnancy. Few children under 13 did not inform their parents. Eighty-eight percent of mothers of pregnant minors 14 and younger were aware of their daughter's pregnancy. And if a parent knew of the pregnancy, that parent virtually always knew of the abortion.[15]

2. Studies cited by Henshaw and Kost have found that minors are more likely to choose abortion if they have high educational accomplishments or aspirations. One study concludes that minors who elect to abort tend to have a greater ability to conceptualize the future, and a greater sense of control over their lives. Another study concluded that no discernible disparity in abortion decision-making competence distinguishes minors from adults aged 18 to 21.[16] Some display independent indicia of maturity: 43 percent of those minors not

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[15] S. Henshaw & K. Kost, *Parental Involvement in Minors' Abortion Decisions*, Family Planning Perspectives, Vol. 24 (Sept. 1992), at 197, 200 (Plaintiffs' Ex. 1040).
[16] *Id.* at 196.

informing parents were working full or part-time, and fifteen percent lived apart from parents.[17]

3. Among the minors surveyed by Henshaw and Kost were some whose parents were aware, some showing objective indicia of maturity, some at risk if they informed their parents, and some who involved a non-parent adult in their decision-making. Setting those categories aside, only seven percent remained as candidates for intervention for protection from immaturity, including only two percent younger than age 16.[18] And nothing suggests that members of the remaining seven percent were less capable in their decision-making skills than the others.

4. Adolescent decision-making competence is not uniform across distinct subject areas or "domains." For example, even young teenagers can acquire adult knowledge about risky behavior such as smoking or unprotected sex. The application of that knowledge may be compromised by impulsivity or peer pressure. But not all adolescent decisions are similarly vulnerable to such factors. There is adequate time for reflection and consultation with helpful adults during the abortion decision. That decision implicates readily apparent long-term consequences. 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.

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[17] *Id.* at 206.
[18] *Id.*

5. Research in neuro-biological development of the adolescent brain has established differences from the adult brain. But this research does not assess the competence of adolescent decision making in any particular domain.

6. From a cognitive perspective, minors aged 13 through 17 process information similarly to adults. They understand the mechanics of the abortion procedure and its risks and benefits. They accurately assess their own lack of physical, financial, intellectual, and emotional resources for parenthood. They are aware of their goals, desires, and agendas that conflict with parenting, and which parenthood would likely curtail or preclude. Accordingly, 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.

7. A minor's decision to carry to term is less demonstrably a mature one. State's witness Dr. David Elkin, a professor of child development, testified that although young women demonstrate relatively adult decision making by age 16 or 17, they may exaggerate their own competence and harbor unrealistic expectations regarding their abilities to cope with the rigors of motherhood: sleep deprivation, incessant crying, diapering, etc. They may choose to carry to term without realizing all the factors working against their baby's prospects for a decent childhood. They may harbor unrealistic appraisals of their ability to

finish school or to acquire a suitable marriage partner. Dr. Elkin also noted that unrealistic fears about abortion may underlie the carry-to-term decision.

8. In jurisdictions from which data are available bypass judges grant a judicial bypass to virtually all minors seeking it, finding them sufficiently mature to make the decision on their own.

j. The PNL and family cohesion

1. No expert at trial disagreed that parental involvement in the abortion decision-making process by supportive, non-abusive, non-controlling parents is good for minors. Such parental involvement comforts the minor during a time of stress, relieves her of sole responsibility for her decision, and avoids perceived betrayal of familial solidarity by the keeping of secrets.

2. Data collected by Henshaw and Kost in states not mandating parental involvement show that 45 percent of minors electing to abort voluntarily informed their parents of their pregnancy, 15 percent of parents discovered it, and 39 percent of parents were not informed. Only 38 percent of these abortion-seeking minors lived with both parents; 46 percent lived with their mother but not their father, merely five percent with their father alone, and 12 percent with neither. Included within the 51 percent living with one parent only were the ten percent living with a parent and a step-parent.[19]

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[19] *Id.* at 197-198.

3. By the time the surveyed minors had their abortion, only seven percent of the aware mothers, and eight percent of the aware fathers still wanted their daughter to carry to term; and some of those nonetheless supported her abortion decision. Two-thirds of the time, when one parent disapproved of the abortion the other parent approved if aware.[20]

4. The survey found that adolescents are better at foreseeing their parents' emotional reaction to pregnancy than they are at predicting that serious consequences would ensue, such as banishment from the home. Approximately six percent of disclosing or discovered minors actually encountered serious problems with their parents: violence in the home, beatings, or banishment from the home. Eighty-seven percent of aware parents supported the minor's decision to abort.[21]

5. Dr. Phillip Darney, former chief of the Ob-Gyn Department at San Francisco General Hospital and a professor at UCSF, estimated that 55 to 60 percent of minors withholding parental notice report having good relationships with their parents. Adolescent medicine professor John Santelli endorsed that estimate. Both testified for Planned Parenthood.

6. These statistics suggest that 55 to 60 percent of the 39 percent non-disclosing minors, or about 22 percent of pregnant minors, do not disclose to their parents despite having decent relationships with them.

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[20] *Id.* at 204.
[21] *Id.* at 196, 207.

7. A non-abusive parent will not always be helpful to a pregnant minor deciding whether to abort. A parent may violate the minor's right to privacy by disclosing her dilemma to others. An assertive parent opposed to abortion may induce the minor to carry to term against her self-perceived best interests, and so effectively exercise a parental veto.

h. The judicial bypass

1. In the fourteen months the PNL was in effect pretrial, nine minors filed bypass petitions. Eight were granted, and one was withdrawn.

2. The Alaska Court System accepts email filings of bypass petitions any day of the year. The petition instructions provide a magistrate's toll-free number. The magistrate directs the minor to the appropriate court and appoints counsel for unrepresented minors.

3. Stephanie Pawlowski of the Office of Public Advocacy currently represents minors seeking a judicial bypass. She receives notice from the court system within an hour or two of a petition's lodging. She is notified of the date and time of the hearing. She immediately contacts the minor.

4. Ms. Pawlowski prepared three minors for their hearings exclusively by telephone, twice due to distance and once due to local logistics and the minor's preference. She met in person with three other minors. All conferences occurred within 24 hours of the initial contact.

5. All six bypass hearings were held within 48 hours of the filing of the petition. Two involved 16 year olds; the rest were 17. Two hearings were held

in Kenai; the others were in Fairbanks, Palmer, Homer, and Anchorage. One minor appeared telephonically by request. The judges ruled immediately from the bench. All bypass petitions were granted, five on maturity grounds and one on abuse grounds.

6. The minors testified from counsel's table. Most were nervous but testified without difficulty. Ms. Pawlowski questioned her clients regarding, *inter alia,* age, school, career plans, life goals, relations with family and other adults, exploration of options, adult consultations, predicted parental reaction, emotional and financial ability to raise a child, timing of conception, prenatal medical care, and familiarity with abortion procedure and risks. In the abuse case, the impregnating boyfriend and his mother corroborated the abuse. That hearing lasted two hours. All others lasted an hour, except one lasting 30 minutes.

7. None of the six minors testified that her parents would approve of her abortion. Factors driving the bypass petitions included parents' strong religious beliefs, potential ostracism by a religious community, and a premonition of emotional abuse, ejection from the family home, or disinheritance. One minor thought her parents would eventually move on.

8. Ms. Pawlowski was unaware whether all four judges applied a clear and convincing standard, although most indicated that the minor's testimony met that standard. Law professor Theresa Collett testified that the majority of notification or consent statutes do not articulate an evidentiary standard. In

states with an articulated statutory or common law standard, a slight majority apply the clear and convincing evidence standard.

9. Texas family-court lawyer Rita Lucido represents minors in bypass proceedings. Texas does not have a clear and convincing standard. She credibly estimated that she has prevailed in 149 of 150 bypass hearings. In Texas most bypass proceedings occur in chambers or a jury room.

10. If an Alaskan minor invokes the sufficient-maturity prong in her bypass petition, her petition will invariably be granted. The evidence was compelling that women ages 13 through 17 have adequate ability to understand the nature and quality of the abortion decision. They grasp their unpreparedness to care for a demanding newborn baby. Such young women realize that childrearing at their age does not comport with their aspirations and goals.

11. National statistics on judicial bypass outcomes are not systematically collected and reported. But studies from Minnesota and Massachusetts provide data. In Minnesota, nine of 3,573 petitions, or .25 percent, were denied. In Massachusetts, 13 of 15,000 were denied, and 11 of the 13 were reversed on appeal, a denial rate of .013 percent.[22]

i. The medical emergency provision

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[22] "Family Planning & Contraceptive Research," University of Chicago Medical Center, May 20, 2010.

1. Under the PNL, minors need not give notice of an abortion to parents during medical emergencies.[23] A medical emergency exists when the delay required to notify a parent or to obtain a judicial bypass would "create serious risk of medical instability caused by a substantial and irreversible impairment of a major bodily function of the pregnant minor."[24]

2. Dr. Whitefield testified that the term "medical instability" is not commonly used in medicine. He was concerned about his criminal liability under the PNL were he to terminate a non-viable pregnancy without notice. Examples included a pregnant woman whose water breaks at 15 weeks, precluding a successful pregnancy. He opined that failing to act promptly might create a risk of infection leading to sepsis and sterility; he was unsure whether that risk would be deemed sufficiently serious and imminent to excuse parental notice. He also questioned whether he would be justified in terminating an ectopic pregnancy without notice.

3. Dr. Whitefield's colleague at the Alaska Women's Health Clinic, Dr. Hinkle, considered heavy bleeding and ectopic pregnancies to be emergencies treatable immediately. He testified that the statutory term "risk of medical instability" does not present serious interpretive difficulties.

III. APPLICABLE LAW

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[23] AS 18.16.010(g).
[24] AS 18.16.010(g)(3).

Article I, section 22 of the Alaska Constitution provides, "The right of the people to privacy is recognized and shall not be infringed." In *Planned Parenthood I*, the Alaskan Supreme Court held that this privacy clause applies to pregnant minors; accordingly, the state may limit a minor's fundamental right to manage her pregnancy only to advance a compelling state interest, and even then only if no less restrictive way exists to advance that interest.[25] No precise standard governs how lightly a burden must tread or how minimally the state need advance a compelling interest to survive scrutiny in a given case:

> In cases involving the right to privacy, the precise degree to which the challenged legislation must actually further a compelling state interest and represent the least restrictive alternative is determined, at least in part, by the relative weight of the competing rights and interests. [26]

As noted in *Planned Parenthood II,* this right to privacy affords Alaskans including pregnant minors broader protection that the U.S. Constitution.[27]

A minor's right to manage her pregnancy may be constrained to protect her health or to involve her family in her decision-making process. *Planned Parenthood II* held that these compelling goals can trump a minor's right to manage her pregnancy, to withhold awareness of it from her family, and to terminate it free of parental guidance:

> We decide today that the State has an undeniably compelling interest in protecting the health of minors and in fostering family involvement in a minor's decisions regarding her pregnancy. And contrary to the arguments of Planned Parenthood, we determine

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[25] *Planned Parenthood I*, 35 P.3d 30, 41.
[26] *Planned Parenthood II*, 171 P.3d 577, 581.
[27] *Id.* at 581.

> that the constitution permits a statutory scheme which ensures that parents are notified so that they can be engaged in their daughters' important decisions in these matters.[28]

Article I, section 1 of the Alaska Constitution provides: "all persons are equal and entitled to equal rights, opportunities, and protection under the law." To the extent the PNL treats minors opting to carry to term differently from minors opting to abort, a court must apply Alaska's three-part equal protection test. The first and second prongs mirror privacy-clause analysis; how fundamental is the individual's right, and how compelling is the countervailing state interest restricting that right:

> In *State v. Erickson* we adopted as a measure of Alaska's equal protection provision a flexible, three-step sliding-scale test. Under this test, we initially establish the nature of the right allegedly infringed by state action, increasing the state's burden to justify the action as the right it affects grows more fundamental: at the low end of the sliding scale the state needs only to show that it has a legitimate purpose; but at the high end—when its action directly infringes a fundamental right—the state must prove a compelling governmental interest. We next examine the importance of the state purpose served by the challenged action in order to determine whether it meets the requisite standard. We last consider the particular means that the state selects to further its purpose; a showing of substantial relationship between means and ends will suffice at the low end of the scale, but at the high end the state must demonstrate that no less restrictive alternative exists to accomplish its purpose.[29]

The third prong requires that the state justify disparate treatment of similarly-situated persons, avoiding under-inclusive or over-inclusive categories. In the

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[28] *Id.* at 579.

[29] *Planned Parenthood I,* 35 P.3d at 42 (citations omitted).

instant case, the state must justify its hands-off approach to minors carrying to term versus its regulation of those opting to terminate.[30]

IV. DISCUSSION

Planned Parenthood II held that the State has a compelling interest in promoting family involvement in a young woman's pregnancy decisions and that the Alaska Constitution permits parental notification.[31] The decision referenced exemplar notice statutes in other states. The PNL incorporates provisions routinely included in such statutes, including a notification procedure, a waiting period for consultation, an anonymity requirement, an emergency health-crisis exception, a judicial bypass procedure, expedited appeals, and civil and criminal sanctions for notice violations. Notice statutes have been challenged in other states and upheld by the U.S. Supreme Court.[32] This court must now decide whether the PNL's particular features comport with the more rigorous standards of the Alaska Constitution, in the light of *Planned Parenthood II.*

a. State interest in family cohesiveness

At trial no expert disagreed that parental involvement in the termination decision is beneficial to the minor absent abuse or coercion. But the trial illumined the diversity of family situations. For example, a young woman might

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[30] *See id.* at 44.
[31] *Planned Parenthood II* at 579.
[32] *Hodgson v. Minnesota*, 497 U.S. 417, 110 S.Ct. 2926 (1990). *Cf. Bellotti v. Baird*, 443 U.S. 622, 99 S.Ct. 3035 (1979)(parental consent statute must include judicial bypass with opportunity to prove maturity or best interests regarding abortion decision).

not disclose her abortion to spare an overburdened mother additional stress. A mother who is a victim of domestic violence makes cost-benefit decisions about her marriage, and lives under difficult and compromised circumstances. That family structure may lack the resiliency to accommodate the additional stress of a pregnancy and abortion; the outcome of disclosure may be destruction rather than the enhancement of the family unit. And not all parents respect their daughter's autonomy; some overbear her legitimate preferences. Given such contingencies the court acknowledges both the PNL's benefits and its detriments regarding the promotion of worthwhile familial consultation.

Yet the evidence does suggest that the PNL will prod some pregnant minors to alert their parents without adverse consequence. In the case of the young woman from Fairbanks who did not know her absent father's telephone number, the PNL induced her to call him. He consented and thereby supported her. Perhaps this contributed familial value; perhaps it amounted to no more than a stressful disclosure to a virtual stranger. But in other instances minors may be pleasantly surprised when underestimated parents support, comfort and affirm them. Or a teen might overlook available resources. Her parents might help raise the child, and so make college or military service feasible. Parental notification undoubtedly can open doors to unconsidered options for an otherwise isolated young woman.

Planned Parenthood's witnesses lauded autonomy in decision-making as a primary public health value. Those witnesses perceived maximal public

health outcomes when their patient, rather than the state or a parent, ultimately guided decisions. They applauded dialogue between a flexible, supportive parent and a minor, but only so long as she wished to have that conversation. This endorsement of patient autonomy was an oft-repeated theme of Planned Parenthood witnesses; it was seemingly a part of their DNA. No Planned Parenthood witness endorsed as worthwhile state-mandated parental consultations that the young woman herself did not affirm. In contrast, equally qualified state's witnesses heralded family involvement as a preeminent public health value. Voters adopting the PNL implicitly endorsed this latter view. They voted to reaffirm parental involvement as a societal norm.

The court recognizes that statistics cited in its findings of fact are dated and non-specific to Alaska. Nonetheless they provide order-of-magnitude or scope data that permit discussion of the issue without reliance on bromides. These data reveal that over 60 per cent 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.

But the state and the interveners presented evidence that the PNL to some unknowable degree advances family involvement with pregnant minors otherwise disinclined to inform parents. In non-notice states about 20 percent of pregnant minors, i.e. half of all non-reporting minors, would likely not face serious consequences if they did consult a parent or guardian. The PNL may

induce such merely-reluctant minors to disclose, and the ensuing consultation has potential to foster family solidarity and comfort the minor.

This likelihood should not be exaggerated. Of minors who desire not to disclose, only about 38 percent live in a two-parent nuclear family; the majority of non-disclosing minors live with only one or neither parent. These minors can select which parent to notify, and they are free to gravitate to the less-involved parent whose participation in their decision may be *pro forma*.

Thus it appears that the PNL is a fairly tentative mechanism to advance family consultation which actually strengthens a familial bond. But it also appears that dire outcomes are relatively rare. Eighty-seven percent of aware parents support a minor's decision to abort, and only six per cent of aware parents cause serious problems for their daughters. All seriously concerned minors can avoid disclosure via an admittedly daunting bypass procedure with a virtually assured outcome.

The PNL has a small but real upside; a small but real downside; an enormous symbolic significance to the adopting electorate; and the implicit approval of the Alaska Supreme Court expressed in *Planned Parenthood II*. Alaska case law does not articulate the degree of furtherance of a compelling state interest required to uphold a measure impinging on fundamental constitutional rights. The court concludes that the PNL sufficiently fosters a potential for worthwhile family involvement that it passes constitutional muster, so long as it is implemented by least restrictive means.

b. The PNL and immaturity of minors

Planned Parenthood II recognized a compelling state interest in a related interest, that of protecting a minor from her own immaturity. To the extent that minors lack experience and judgment they are vulnerable to life's vicissitudes and pitfalls.[33] But the Court made no explicit findings applying this principle to the specific circumstances of pregnant minors seeking to abort.

Any evaluation of the quality of adolescent judgment should not be viewed in isolation from the specific topic at hand. The abortion decision, shorn of moral or religious implications the court may not consider, is not a complicated one. Abortion is safe. The minor is unequipped to rear a child and has other age-appropriate agendas. Alaska's primary abortion provider is ethical, protective of minor's who are unsure of their decision, and provides highly competent physicians. The procedure entails no real mental or physical health risks, in contrast with the decision to carry to term. In what can be viewed as a laboratory experiment, judges in Massachusetts and Minnesota have collectively adjudicated over 18,500 bypass requests, and approved them with virtual unanimity. This leads ineluctably to the conclusion that all minors surpass the maturity bar that judges employ in judicial bypasses.

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[33] *Planned Parenthood II* at 582.

Statistics cited in the findings of fact indicate that three-quarters of the youths subject to the PNL will be either 16 or 17 years old. Younger minors overwhelmingly inform their parents, or consult other adults. Seventeen year olds conceiving in the latter quarter of their 17th year can simply wait the PNL out and make their own decision at age 18. Seventeen year olds were thought by the legislature to be sufficiently mature that that they were excluded from the application of the now-invalidated parental consent law. All pregnant minors are legislatively exempted from parental consultation regarding reproductive medical services other than abortion. Some decisions faced by such minors are medically complex; the decisions faced by aborting minors are not medically complex. Medical emancipation necessarily signals a legislative judgment that, guided by physicians, minors do not require an additional layer of parental involvement to protect them from immaturity. All aborting minors must give informed consent for the procedure; this requires physician judgment that they are sufficiently mature. Additional affirmation of maturity by parents is in this sense redundant.

The court recognizes that the immaturity of minors is real and justifies state protections in varying contexts. But in the context of minor abortions, relevant factors for this court's decision include the adequate cognitive abilities of minors of childbearing age; their near universal decision to consult with some adult if not a parent; the lack of medical or psychiatric risk; the intrinsic rationality of their perception that childbearing is not in their best interest at a

young age; the participation of a physician in the process; the legislatively endorsed competence of minors carrying to term; the *de facto* consensus of the referenced bypass judges that all minors are sufficiently mature to make the decision on their own; and the holding of *Planned Parenthood II* that Alaska's right-to-privacy clause demands that nothing more than a 48-hour waiting period or a brief court hearing may stand in the way of the right of any minor at any age to make the decision on her own. In these special circumstances, the court concludes that its validation of the PNL must rest on familial-consultation grounds rather than on protection-from-minor-immaturity grounds.

d. State interest in the health of pregnant minors

The state argues that the PNL advances not only family involvement but also affords health benefits. The court finds that the PNL does not meaningfully advance a medical safety interest for young women undergoing abortions. Authorized by Alaska statutes, pregnant minors manage their own reproductive care, including difficult decisions during medical crises, without parental involvement. Such statutes implicitly acknowledge that a physician's guidance shields a minor from harm. It is implausible that these same pregnant minors require parental aid only with respect to abortion, a quintessentially safe procedure.

Earnest state witnesses, often opposed to abortion, recounted several hypothetical instances where parents might add value. But they did not

support these conclusions with peer-reviewed studies or convincing anecdotal evidence. In contrast, physicians experienced in performing abortions testified that nurturing parental involvement is helpful emotionally but not medically. These physicians testified convincingly that minors are adequate self-historians, compliant with directions, and able to manage their own aftercare. Many states require parental notification, but some populous states such as California, New Jersey, Washington and Oregon do not. No peer-reviewed literature suggests PNL states enjoy better public health outcomes. Modern abortion is an extraordinarily safe procedure. Accordingly, the court concludes that the PNL does not advance a compelling state interest in the health of minors.

e. The preliminary injunction

The court must consider whether the PNL enhances family consultation by the least restrictive means available. While it is not the court's role to micromanage the PNL's implementation procedures, *Planned Parenthood I* mandates "exacting scrutiny" of each such feature.[34] And the court deems widely available abortion services to be a necessary precursor for a woman's exercise of privacy rights. Three urban hubs provide services supported by physicians from two Alaskan cities. Vociferous advocacy has intimidated some physicians. Such a climate may so diminish willing providers as to impede

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[34] *Planned Parenthood I*, 35 P.3d at 45.

exercise of the constitutional right to reproductive privacy. The court is mindful that seemingly neutral statutes can lead to consequences jeopardizing rights. It is appropriate to consider whether the PNL imposes unnecessary delay, unduly discourages physicians from providing services, endangers a minor's anonymity, or otherwise fails to enhance familial consultation by means least restrictive of a minor's right to privacy.

The court preliminarily enjoined features it considered unduly burdensome. With insight provided by the detailed evidentiary presentation of the parties, the court recedes from some of those preliminary decisions, and reaffirms others, as follows:

1. The requirement that a parent show "documentation of the person's relationship to the minor", such as a birth certificate or an adoption order, when notified in person

This provision[35] to some extent clashes with the realities of rural Alaska. For example, a mother accompanying her daughter from rural Alaska to Fairbanks may fail to bring a birth certificate. An abortion provider convinced of her identity would be unable to proceed. Time might be of the essence, as has recently occurred twice in the Fairbanks clinic when the second-trimester was imminent. A creative clinician might telephone the already-present mother; telephonic notification followed by written parental permission does not require documentation of parentage.[36] But that solution might not occur to

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[35] AS 18.16.020(b)(1).

[36] AS 18.16.020(b)(2).

clerical staff, or it might be considered imprudent in light of the PNL's draconian criminal penalty.[37]

But the evidence indicates that parental walk-ins without prior consultation are atypical. Appointments are prearranged, and staff gives parents telephonic notification or instructs about required documentation. The court concludes that its concerns were more theoretical than real, and that the documentation requirement is a tolerable mechanism to assure parental identity.

2. The requirement that an abortion provider use "published telephone directories" to verify the parent's telephone number

The court preliminarily enjoined this provision[38] as unduly burdensome, given the multiplicity of phone directories in rural Alaska and the widespread use of unlisted cell phones. The court was not aware that Planned Parenthood is essentially the sole abortion provider in Alaska. Planned Parenthood is able to maintain a phonebook bank. Moreover, Planned Parenthood can verify a landline's owner by telephoning a city government, a community's health aid, or directory assistance; the statute does not require actual possession of the directory, only "a review" of one. The requirement is a reasonable safeguard against fraud and is not unduly burdensome.

3. The provision that notice by mail may begin only after telephone or in-person notification is unsuccessful

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[37] AS 18.16.010(c).
[38] AS 18.16.020(b)(2).

The PNL allows constructive notification by mail to a parent, but only after failed attempts at telephonic notification:

> If actual notice is attempted unsuccessfully after reasonable steps have been taken as described under [the notice protocol (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.[39]

The court's preliminary injunction authorized immediate issuance of the notice letter, contingent on completion of the telephonic protocol. At trial no party contested this modification.

The PNL's telephone and constructive notice sequencing causes delay without corresponding benefit. For example, were a minor to contact the Fairbanks Planned Parenthood clinic on a Friday (one of the three days it is open) and explain that her parents were unreachable, the clinic would still have to attempt to notify by phone over a minimum eight-hour period (five calls spaced at least two hours apart within a 24 hour period). Given the clinic's office hours, the notification process would start the following Monday. Telephonic notification will often occur during two business days given the spacing requirement; the Fairbanks clinic would have to work around its Tuesday closure. Constructive notice mailed at 10:00 AM on Tuesday would become effective Saturday morning, eight days after the minor's initial clinic contact. In contrast, if the PNL permitted provisional mailing of constructive

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[39] AS 18.16.020(c).

notice, effective if telephonic notice failed, notice delay would be dramatically shortened. A provisional constructive notice issued at first contact would be effective four days later, saving up to four days.

A superfluous four-day period exposes Alaskan minors to cascading consequences impacting her health. The Fairbanks clinic offers abortions two days per month, two weeks apart. A four-day notice delay could postpone an abortion for 16 days. Air travel from rural communities to the Fairbanks hub is weather dependent, adding another risk factor. Thus an unnecessary four-day delay could entail magnified consequences including ineligibility for an Alaska abortion. Notably, in the fourteen months between the PNL's inception and the trial, the Fairbanks clinic had two close calls with pregnancies nearing the second trimester.

The Supreme Court in Probate Rule 20 lessened by three days the five-day window for a judicial bypass hearing. This suggests that gratuitous delay is unacceptable to the Court. The PNL notice protocol enables such unnecessary delay. It thereby fails to advance the state's interest in familial consultation by the least restrictive means.

The court's preliminary injunction cured that flaw by redrafting the PNL. But that remedial effect would be accomplished less obtrusively by construing the phrase "[i]f actual notice is attempted unsuccessfully after reasonable steps

have been taken"[40] to require only initial steps such as phone number verification and a first attempt, rather than all required attempts. The constructive notice letter could then issue on the day of a minor's initial contact, to become effective only after completed telephonic attempts. Accordingly the court adopts this less-intrusive remedial interpretation of the PNL.

4. The criminal sanction

Under the PNL a knowing violation of the act is a felony carrying a five-year, $1,000 penalty.[41] No showing of harm is required. The PNL criminalizes any knowing staff error no matter how insignificant. For example, if a staffer relies upon a failed telephonic attempt occurring one minute outside the 24-hour window for effective notice, she commits a felony. The court granted a preliminary injunction against the criminal sanction as unduly burdensome to abortion providers.

The state argues that such statutes have never been enforced and are functionally irrelevant. But the court is confronted with an overly-broad high-penalty criminal statute in a context that requires the state to act in a least restrictive manner. No evidence suggests felony liability is necessary to address an existing or anticipated pattern of abuse. The PNL functioned well pretrial without it. Other states impose misdemeanor sanctions.

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[40] AS 18.16.020(b)(2).
[41] AS 18.16.010(c).

Yet courts avoid interference with legislative authority to decree criminal penalties. The state is undoubtedly correct that no reasonable prosecutor would prosecute a medical staffer who transgressed in some minor way. The court concludes that the matter is best addressed in an as-applied rather than facial constitutional challenge.

5. Civil penalties

The PNL imposes strict liability without fault on a physician for noncompliance with the PNL's notification provisions, but fails to otherwise delineate the elements of this *sui generis* tort.[42] Liability does not explicitly hinge on proximate causation of damage. During the preliminary-injunction oral argument the sponsors envisioned wrongful death damages including loss of consortium.

Thus the tort is disturbingly undefined. A physician fails to comply with the notice provisions if he mails a constructive notice letter after only four telephonic attempts at notice. Parents might or might not read the letter before the abortion. Deficiently notified parents might in fact approve of the abortion. Their daughter's decision might be unalterable. What is the significance of such facts? Does the PNL confer a claim on both the approving parent and the intransigent daughter for loss of a child neither desired?

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[42] AS 18.16.010(e).

A minor's right to reproductive privacy is diminished if physicians refuse to offer abortion services due to open-ended civil liability. The PNL's civil liability clause entails such a disincentive. And any remedial judicial gloss would require intrusive judicial legislation. For example, a court might craft a proximate causation of damage element as follows:

> A physician who performs an abortion upon an unemancipated pregnant minor is liable either to the custodial parent or parents, or to a caregiver standing *in loco parentis* as to her, for failure to give notice pursuant to AS 18.16.020, if the following is proven by a preponderance of the evidence:
>
> 1. The physician or his staff failed to give actual or constructive notice in accordance with the procedures of AS 18.60.020;
>
> 2. But for the failure to follow procedure, the parental figure would have received actual notice and had 48 hours to consult with the minor;
>
> 3. The parental figure was not already aware of the minor's desire to have an abortion, such that the parental figure had not already been afforded a reasonable opportunity to discuss the matter with the minor;
>
> 4. The parental figure if notified would have attempted to categorically dissuade the minor from having an abortion; and
>
> 5. The consultation would have caused the minor not to have an abortion.

This degree of judicial legislation is untenable. And it would still leave physicians vulnerable to damage awards based on self-serving testimony as to what the parent, custodian, and minor would have said and done. A physician's errors and omissions insurance might not apply, for deficient notice

is an administrative rather than a medical error. Inevitably a strict-liability wrongful death action would dissuade most physicians from providing abortion services. Accordingly it cannot be said to advance parental involvement in the least restrictive manner.

6. The requirement that the physician performing the abortion personally provide notice

The act requires that telephonic, in-person, or constructive notice to a parent be effected solely by the physician who will perform the abortion.[43] A staff member may initiate a notification telephone call, but the physician must personally confirm identity and provide notification. If a parent comes to a clinic to consent in person, the physician must still verify identity. This procedure is incompatible with the constraints imposed by a physician's busy practice, and with the independent contractor structure used by Planned Parenthood. It does not facilitate parental involvement with children in a least restrictive way.

For example, the Fairbanks clinic cannot foresee the moment of telephonic contact with a putative parent. At that moment the Anchorage contractor might be delivering a baby, conducting hospital rounds, or otherwise be unavailable. The Fairbanks staffer cannot divulge the purpose of the call to the answering putative parent, for only the physician may verify parental identity, and only then disclose the purpose of the call. So the staffer

[43] AS 18.16.020(b-c).

must ask the contacted-but-uninformed putative parent to hold while he or she attempts to telephone the Anchorage physician. Such a convoluted procedure risks loss of contact with the putative parent at a moment when time may be of the essence.

Notice initiation cannot readily be shifted to the Alaska Women's Health Clinic staff. Its lease precludes it from offering abortion services. The clinic itself has no contractual relationship with Planned Parenthood. And its staffers would face many of the same obstacles faced by Fairbanks staffers. The notification protocol is time-specific, requiring five two-hour spaced calls within 24 hours. A staffer cannot reasonably be expected to coordinate that procedure with random moments of physician availability. Moreover, the procedure hampers in-person notification or consent. A parent could not consent in person in advance of the abortion date at any Planned Parenthood clinic, even if attended by complete documentation, because the physician who must personally verify identity is not co-located. And the statute does not permit Planned Parenthood to mail a constructive notice letter; that as well must be done by the physician.

The state defended the provision at trial by inquiring of Planned Parenthood contractor physicians whether they were averse to telephonic contact with parents of pregnant teenagers; all were willing to be helpful within the constraints of their busy practices. But the state failed to present any affirmative rationale justifying physician-only notice. The state did not contend

that staffers are less capable than physicians to verify identity, provide notice, or answer questions. A parent can convey health-related information to the staffer or can telephone the physician directly.

The notice-by-physician provision is cumbersome and irrational. Because the procedure adds no value and instead jeopardizes the right of an Alaskan young woman to a timely abortion, it does not advance family involvement in pregnancy decisions in the least restrictive way.

The court grants injunctive relief. The preliminary injunction ordered both textual insertions and deletions to strike physician-only notice. The court here accomplishes the same goal through deletions only, modifying AS 18.16.020(b) as follows:

> (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 . . .

The court also inserted text into AS 18.16.020(b) allowing a physician's "designee" to provide constructive notice. Instead, the court now simply construes that statutory section to permit constructive notice by a designee, a natural inference in light of the now-revised section .020(b).

7. The clear and convincing standard of proof for a judicial bypass

The court preliminarily enjoined the PNL's provision that a judicial bypass requires clear and convincing evidence, noting that the elevated standard "applies to relatively few aspects of civil law, often where the state seeks to impinge on a citizen's fundamental right."[44] At oral argument the state recognized that the vast majority of bypass petitions will be granted. But it regarded the bypass procedure to be sufficiently daunting as to encourage the alternative of notification. The state is undoubtedly correct; the prospect of disclosing intimate life details to a judge inspires trepidation. If the state's goal of parental notification is advanced by the intimidating nature of courts, it would be further enhanced were the minor informed of judicial skepticism requiring clear and convincing testimony. But the state did not defend the clear-and-convincing standard on this or any other basis at trial.

The United States Supreme Court ruled in *Bellotti v. Baird* that parents may not exercise an absolute veto power regarding abortion; such power may only reside in the state:

> [A[s we held in Planned Parenthood of Central Missouri v. Danforth, "the State may not impose a blanket provision . . . requiring the consent of a parent or person in loco parentis as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy." Although . . . such deference to parents may be permissible with respect to other choices facing a minor, the unique nature and consequences of the abortion decision make it inappropriate "to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent." We therefore conclude that if the State

[44] Order on Prelim. Inj. 14, Dec. 13, 2011.

> decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained. A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; 2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests. The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained. In sum, the procedure must ensure that the provision requiring parental consent does not in fact amount to the "absolute, and possibly arbitrary, veto" that was found impermissible in Danforth.[45]

Bellotti framed the best-interest bypass prong as whether the abortion itself, and not parental consultation *per se*, advantaged the minor. The trial court was to substitute its judgment for the parents'; any veto power would reside with the court. *Bellotti* explained this relegation of parental power to the state, reciting both grave risks to the minor and alternative court-envisioned outcomes:

> Moreover, the potentially severe detriment facing a pregnant woman is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor. In addition, the fact of having a child brings with it adult legal responsibility, for parenthood, like attainment of the age of majority, is one of the traditional criteria for the termination of the legal disabilities of minority. In sum, there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.

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[45] *Bellotti v. Baird*, 443 U.S. 622, 643-644 (citations omitted).

> Yet, an abortion may not be the best choice for the minor. The circumstances in which this issue arises will vary widely. In a given case, alternatives to abortion, such as marriage to the father of the child, arranging for its adoption, or assuming the responsibilities of motherhood with the assured support of family, may be feasible and relevant to the minor's best interests.[46]

Thus, under *Bellotti* state trial judges must at times weigh options of marriage, adoption, or forced motherhood on behalf of an immature minor. The prejudices, myths, biases, religion, and politics of an individual trial judge could conceivably affect such a decision. Dissenting U.S. Supreme Court justices have expressed this reservation:

> The constitutional defects in any provision allowing someone to veto a woman's abortion decision are exacerbated by the vagueness of the standards contained in this statute. The statute gives no guidance on how a judge is to determine whether a minor is sufficiently "mature" and "capable" to make the decision on her own. The statute similarly is silent as to how a judge is to determine whether an abortion without parental notification would serve an immature minor's "best interests." Is the judge expected to know more about the woman's medical needs or psychological makeup than her doctor? Should he consider the woman's financial and emotional status to determine the quality of life the woman and her future child would enjoy in this world? Neither the record nor the Court answers such questions. As Justice Stevens wrote in *Bellotti II*, the best interest standard "provides little real guidance to the judge, and his decision must necessarily reflect personal and societal values and mores whose enforcement upon the minor-particularly when contrary to her own informed and reasonable decision-is fundamentally at odds with privacy interests underlying the constitutional protection afforded to her decision." It is difficult to conceive of any reason, aside from a judge's personal opposition to abortion, that would justify a finding that an immature woman's best interests would be served by forcing her to endure pregnancy and childbirth against her will.[47]

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[46] *Id.*

[47] *Hodgson v. Minnesota*, 497 U.S. 417, 474-475.

In a case known as *Akron II* the United States Supreme Court held that a bypass provision sufficing for a parental consent statute will also suffice for a notification statute.[48] A subsequent Supreme Court case discussing a bypass provision strikingly like the PNL's clarified that a bypass judge in a notice jurisdiction must still weigh the pluses and minuses of the minor's abortion:

> [R]espondents cite no Montana state-court decision suggesting that the statute permits a court to separate the question whether parental notification is not in a minor's best interest from an inquiry into whether abortion (without notification) is in the minor's best interest.[49]

In a concurring opinion, Justice Stewart stated his view that either of two findings, that notice was problematic or that abortion served the minor's best interest, would suffice.[50] The significance for Alaska superior court judges is that the bypass decision can implicate issues of considerable complexity, raised at an expedited hearing by a lawyer afforded scant time to prepare.

Clear and convincing evidence is a quantum of proof producing a firm belief about the truth of something.[51] It is a rarely employed, elevated benchmark beyond the routine civil standard, more likely true than not true, i.e. probably true. Several hypothetical situations may illuminate challenges the elevated standard poses to a bypass judge:

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[48] *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 511, 110 S.Ct. 2972, 2979 (1990).
[49] *Lambert v. Wicklund*, 520 U.S. 292, 298, 117 S.Ct. 1169, 1172 (1997)
[50] *Id.* at 302.
[51] *In re Johnstone*, 2 P.3d 1226, 1234-35 (Alaska 2000).

1. A minor testifies that her father has threatened to banish her if she becomes pregnant. Would he actually do so?

2. A minor testifies to a supportive mother but an overbearing father who would divorce rather than tolerate an abortion. Does she accurately gauge the situation?

3. A minor testifies that her father has a terrible temper and has slapped her on the face twice leaving bruises. She believes he will beat her if she discloses. Is she correct?

4. A minor testifies that her father has called her a fat pig, a useless slob and a bitch. Did he actually call her demeaning names, and does this conduct arise to the level of emotional abuse?

5. A minor testifies that her parents are religiously opposed to abortion, beliefs she does not share. She believes she lacks the strength to act contrary to their wishes and will carry to term against her better judgment. Is she correct that her parents will not respect her right to make the final decision after consultation?

In each situation, a judge might endorse probable correctness but not firm belief. The young woman might be exaggerating, engaging in teenage black and white thinking, or manipulating the judge; perhaps the parent would surprise both the minor and the judge with a reasonable and compassionate response to the daughter's crisis. But if the minor's fears prove true, she will endure a bitter consequence: homelessness, loss of paternal contact, an assault, verbal abuse, or an unwanted child. The standard of proof can be determinative. The higher standard allocates the risk of judicial miscalculation to the minor; the preponderance standard affords her the benefit of the judge's doubts.

In a decision subsequently overruled by the U.S. Supreme Court, the Sixth Circuit held that allocation of the risk of error to the minor impermissibly intrudes on her right to reproductive privacy:

> [W]e conclude that the risk of erroneous deprivation of the mature minor's constitutional right to proceed without parental intervention is significantly increased by the imposition of the clear and convincing standard of proof. Our conclusion in this regard is bolstered by the Supreme Court's observation that the clear and convincing standard of proof has generally been employed "to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with 'a significant deprivation of liberty' or 'stigma.'" In the present case, the Ohio statute has the effect of placing the primary allocation of the risk of error upon the minor complainant, the precise individual whose fundamental liberty interest is at stake. We agree with the district court that the imposition of this heightened standard of proof unduly burdens the minor plaintiff's right to seek an abortion, and thus cannot withstand constitutional scrutiny.[52]

The U.S. Supreme Court in *Akron II* overruled with scant discussion, on the ground that an elevated standard of proof is "acceptable" in an *ex parte* proceeding.[53] The dissent discussed the unique nature of a bypass proceeding:

> The majority reasons that the preponderance standard is unsuited to a *Bellotti II* bypass because, if the minor presents any evidence at all, and no evidence is put forth in opposition, the minor always will present the greater weight of the evidence. Yet, as the State explained at argument, the bypass procedure is inquisitorial in nature, where the judge questions the minor to discover if she meets the requirements set down in *Bellotti II*. The judge will be making this determination after a hearing that resembles an interview, not an evidentiary proceeding.[FN3] The District Court

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[52] *Akron Center for Reproductive Health v. Slaby*, 854 F.2d 852, 863-864 (6th Cir. 1988)(citations omitted, overruled *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 110 S.Ct. 2972 (1990) (*Akron*)).

[53] *Akron*, 497 U.S. at 516.

> observed, "the judge's decision will necessarily be based largely on subjective standards without the benefit of any evidence other than a woman's testimony." Thus, unlike the procedure the majority seems to envision, it is not the quantity of the evidence presented that is crucial in the bypass proceeding; rather, the crucial factors are the nature of the minor's statements to the judge and her demeanor. Contrary to the majority's theory, if the minor presents evidence that she is mature, she still must *satisfy* the judge that this is so, even without this heightened standard of proof. The use of a heightened standard in the very special context of *Bellotti*'s court-bypass procedure does little to facilitate a fair and reliable result and imports an element from the adversarial process into this unique inquiry where it has no rightful place.[54]

Akron II is distinguishable as a due process decision not decided pursuant to an express constitutional privacy clause imposing a least-restrictive-means standard. The court concludes that requiring clear and convincing proof unacceptably constrains a judge deciding momentous questions at a rapid-fire hearing, usually without corroborating witnesses.

f. The bypass as a least restrictive impingement on the right to privacy

The PNL's bypass procedure[55] in conjunction with Probate Rule 20 and forms prepared by the court system appears to work well. While the bypass forms are difficult to locate in the court system's on-line form bank, they are readily findable via a Google search. For example the search phrase "Alaska pregnant teen" brings to the screen a Planned Parenthood web page with links to relevant instructions and forms. A teen learns she may file in any court in Alaska, in person, electronically, or by fax. The website informs her that she

[54] *Id.* at 535-536 (dissenting opinion).
[55] AS 18.16.030.

will be assigned an attorney. The court system alerts the Office of Public Advocacy attorney on a dedicated cell phone at all hours. The PNL requires a bypass hearing within five business days, but Probate Rule 20 compresses that to 48 hours. The minor can request the court to excuse her from school to attend the bypass hearing, in person or telephonically.

The bypass poses risks to anonymity. Former OPA attorney Barbara Malchik testified that some village postmaster notaries habitually peruse documents. Modifying Probate Rule 20 to allow self-certification in all cases would resolve this vulnerability; after all, the minor will soon testify under oath. Or she may opt for a hearing at a relatively more anonymous urban courthouse or appear telephonically.

OPA attorney Stephanie Pawlowski testified that bypass hearings stress her clients. Hearings would be less imposing if held in the judge's office or a jury room. The risk of bypass denial is minimal; at the rate of eight hearings per year, Alaska courts approximating the Massachusetts rate would deny a bypass once in a 962 year period. The PNL's judicial bypass is an acceptable least restrictive means to accommodate Alaskan minors who in their judgment believe they should not inform their parents.

g. Equal protection

Planned Parenthood argues that the PNL impermissibly treats minors who abort differently from those carrying to term. The latter may independently manage all medical decisions and refrain from parental

consultation about their carry-to-term decision; the former must undergo a 48-hour consultation period or a judicial bypass.

Setting religious or moral concerns aside as the court must, the carry-to-term decision may involve far weightier consequences than termination. The risks of pregnancy are greater, and can lead to lifetime challenges from delivery of an unhealthy or impaired baby. Having a child affects continued education, opportunity for military service, and marital prospects; raising a child is enormously expensive and challenging. Motherhood by an unprepared adolescent can end in the abuse and neglect courts often see in child-in-need-of-aid cases. While the minor may avoid these risks through adoption, the evidence at trial showed this rarely occurs. Few 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.

The U.S. Supreme Court has been dismissive of this argument.[56] Many state courts concur, regarding the abortion decision as qualitatively different from the decision to carry to term. Yet the state supreme courts of New Jersey[57], California[58], and Florida[59] have accepted the equal protection

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[56] *See Bellotti v. Baird*, 443 U.S. at 650 n. 30 (declining to reach the equal protection issue); *Planned Parenthood of Cent. New Jersey v. Farmer*, 762 A.2d 620, 630 (N.J. 2000)(noting absence of equal protection discussion in U.S. Supreme Court).
[57] *Planned Parenthood of Cent. New Jersey v. Farmer*, 762 A.2d 620 (N.J. 2000).
[58] *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797.
[59] *In re T.W.*, 551 So.2d 1186 (Fla. 1989)

rationale. Notably, California and Florida, along with Alaska, are three of the four American states whose constitutions have express privacy clauses.

The New Jersey decision ("*Farmer*") held that New Jersey's PNL treated similarly situated minors differently, did not advance a compelling state issue familial consultation, and so violated New Jersey equal protection principles. The *Farmer* court recited a litany of potential harms inflicted on minors by the PNL. New Jersey lacks a right to privacy clause; otherwise, the *Farmer* court would likely have invoked it to decide the case.

In a less polemic fashion, the supreme courts of Florida ("*In Re T.W.*") and California ("*Lungren*") also afforded centrality to the seeming contradiction between statutes empowering minors to manage their reproductive health, and parental consent laws retracting that power as to abortion only. Both courts employed this equal-protection style reasoning to find a violation of their respective privacy clauses. *Lungren* cites *In Re T.W.* with approval:

> In our view, the Florida Supreme Court's reasoning in In re T.W is persuasive. As the court observed, the state's contention that the imposition of a parental consent requirement in the abortion context was necessary in order to protect the physical, emotional, or psychological health of the minor and to preserve the parent-child relationship was belied by the numerous, analogous circumstances in which Florida authorized a pregnant minor to obtain other medical care, or to make equally significant decisions affecting herself and her child, without parental consent.[60]

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[60] *Lungren*, 940 P.2d 797, 825-826 (citations omitted), quoting *In re T.W.*, 551 So.2d at 1195 (fn. omitted).

The *Lungren* court affirmed the trial court's findings that most pregnant adolescents freely consult their parents, and that non-disclosing minors generally have good reasons. It criticized the judicial bypass for causing delays and inflicting gratuitous emotional and psychological stress.[61]

The *Farmer*, *Lungren* and *In Re T.W.* cases are thus consistent in their critique of parental involvement laws. *Farmer* is an equal protection decision, because New Jersey has no privacy clause; the other two are privacy clause cases. The three cases reveal the degree to which, in the abortion context, privacy clause and equal protection analyses are parallel and consistent, rising and falling together. All three decisions held that the existence of medical emancipation statutes fatally undercuts any rationale for a parental involvement law treating abortion differently.

Alaska law, in contrast, has taken a markedly different course. *Planned Parenthood II* affirmed the constitutionality of the PNL under Alaska's privacy clause, squarely rejecting *Lungren* and *In Re T.W.* Alaska's medical emancipation laws do not vitiate the PNL, belying any compelling interest under the privacy clause. Such a decision strongly implies that the Court would also reject the nearly identical *Farmer* equal protection decision. It is hard to fathom the Alaska Supreme Court overturning the PNL on equal protection grounds notwithstanding *Planned Parenthood II's* privacy-clause

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[61] *Id.* at 828-829.

affirmance. The Court's formal reservation of the equal protection issue in that decision seems to this court more theoretical than real.

When a minor becomes pregnant it is important that she see a doctor. Early consultation allows a physician to determine fetal age accurately, to discourage drugs and alcohol, to ensure intake of micro-nutrients, and to discontinue contraindicated medication. Medical emancipation encourages minors to see a doctor without fear of coerced parental notice. This encouragement to obtain prenatal care advances important interests in maternal and fetal health. All parties agree no useful purpose is served by withdrawing medical emancipation and requiring parental consultation for carry-to-term decisions. The sponsors point out that such a course clashes with a minor's privacy rights, since she at all times retains the option to change her mind and opt for an undisclosed abortion.

Planned Parenthood argues that if the PNL cannot apply to both classes it should apply to neither. But once a minor elects an imminent abortion, the core rationale underpinning medical emancipation no longer applies to her; she no longer requires encouragement to see a doctor to protect her own health and that of her fetus. Other considerations such as familial involvement no longer tend to defeat her health interest, and so may be considered in a new light. When a minor decides to opt out of pregnancy, she is no longer similarly situated with other pregnant minors with respect to the familial consultation

issue. Accordingly, this court holds that the PNL does not violate Alaska's equal protection clause.

h. Vagueness challenge to the medical emergency exception

The PNL at AS 18.16.010(g) provides a medical emergency exception to parental notice:

> (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 [requiring parental notice] 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;
>
> (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.

Planned Parenthood argues that this passage's complexity renders it vague, particularly in light of a physician's criminal exposure. The formulation is undeniably convoluted; the sponsors intended to delimit the exception narrowly so that no physician could perform an immediate abortion based on

some remote health threat, using the medical emergency exception as an excuse.

The PNL applies indiscriminately to minors who wish to abort and those intending to give birth. Most Alaskan minors get their prenatal care from physicians who do not perform elective abortions, and give birth in hospitals which do not permit elective abortions. If a medical development renders her pregnancy definitively non-viable, no legitimate purpose of the PNL is furthered by requiring her to confer with her parents about the merits of abortion. For example, if her uterine sac is perforated in her second trimester and she loses substantial amniotic fluid, her pregnancy is over, whether or not the fetus clings to life. Her parents might already know about the pregnancy; they might even have accompanied her to medical appointments. But the PNL would require the physician to institute the exacting and perhaps unfamiliar notification protocol. If parents were unavailable at a fish camp or on a sailboat, such a minor could be forced to remain in a hospital to avoid infection risk. Requiring such a minor to continue with a non-viable fetus is at best useless and at worst macabre. Applied to her the PNL lacks any rational basis, much less furthers a compelling state interest.

Accordingly, the court finds that when a pregnant minor suffers a medical event rendering her pregnancy no longer viable the PNL fails to advance a compelling state interest in familial consultation in the least restrictive way; there is no longer an option to discuss. To preserve the PNL's

constitutionality, the court finds that the electorate did not intend it to apply to medical conditions rendering fetal death inevitable, whether or not retention of the fetus in the womb during a notice period would be catastrophic. If a woman is hemorrhaging, has lost too much amniotic fluid, is suffering an ectopic pregnancy, or experiences an incomplete miscarriage, a physician may act immediately in anticipation of inevitable fetal death; the PNL and its medical emergency provision no longer apply.

This statutory construction regarding inevitable fetal death addresses all the scenarios Planned Parenthood physicians cited as problematic under the PNL's medical emergency provision, and so moots the vagueness objection. The court notes that in the alternative, the Supreme Court could amend Probate Rule 20 to require a telephonic bypass hearing on one hour, day-or-night telephonic notice from a physician treating such a condition, with the physician as the sole testifying witness.

i. Parental abuse

Planned Parenthood witness Suzanne Pinto, a Ph.D. clinical psychologist, testified to the dilemma of abused teenagers. She spoke of teens sexually or physically abused by adults in their lives. For such adolescents, the PNL carries terrifying potential for physical harm, emotional pain, rejection, or homelessness. The corroboration-by-affidavit provision excusing notice[62]

[62] AS 18.16.020(a)(4).

subtly echoes the perpetrator's taunt that no authority figure will accept the young woman's word. Victims of abuse are avoidant, and may not disclose their life stories until well into adulthood. For such persons recourse to the court system may be frightening, and the PNL may paralyze them into inaction until their options are foreclosed.

Witnesses Barbara Malchik and former OCS abuse investigator Deborah Downs testified that the PNL's provision exempting minors who obtain an abuse affidavit from specified individuals is largely illusory. The minor must disclose her pregnancy to the potential affiant, who has to that moment remained silent and so may have guilt issues or oppose abortion. It is unlikely that an adolescent would recall the name of an OCS worker or a police officer who was involved with the family at a prior time, or will desire to reveal her pregnancy to such a stranger. Accordingly, only a small percentage of abuse victims will avail themselves of the PNL's affidavit-of-abuse exception to notice.

But courts cannot overturn statutes based on worst-case scenarios. While an abused minor's fear of recourse to the court system may undoubtedly be real, it is also misplaced in the following sense. No minor who does not wish to reveal abuse to a judge need do so; virtually all such abused minors would qualify for a judicial bypass on maturity or best interest grounds. The bypass application instructions might be revised to make that clear, such that a minor who does not wish to report abuse need not do so.

V. ORDER

The court upholds the constitutionality of the PNL under the right-to-privacy clause of the Alaska Constitution because it advances a compelling state interest in familial participation in the decision-making of minors. Similarly the court finds that the PNL does not violate the Alaska constitution's equal-protection clause, because minors opting to abort remove themselves from the rationale of Alaska's medical emancipation law and so justify modest

V. ORDER

The court upholds the constitutionality of the PNL under the right-to-privacy clause of the Alaska Constitution because it advances a compelling state interest in familial participation in the decision-making of minors. Similarly the court finds that the PNL does not violate the Alaska constitution's equal-protection clause, because minors opting to abort remove themselves from the rationale of Alaska's medical emancipation law and so justify modest parental involvement in this important decision. The court vacates its preliminary injunction along with any statutory redrafting regarding: in-person parental documentation of parentage, recourse to published telephone directories, the medical emergency exception, and the criminal sanction. The court also vacates it injunctive revision of the statute regarding the onset of the constructive notice period, in favor of a judicial construction of the PNL arriving at the same result without redrafting. The court grants a permanent injunction against the civil liability statute as drafted, while noting that a narrower and specific statute would be constitutionally acceptable. The court grants a permanent injunction against the personal-notice-by-physician provision, vacating its redrafting of the statute at the preliminary injunction stage in favor of simple deletion of language to accomplish the same goal. The court also enjoins the requirement of clear and convincing evidence at bypass hearings. The court construes the PNL as not applying to acute medical developments rendering continuation of a minor's pregnancy impossible. With

the statute so construed, the court finds that the medical emergency provision is not unconstitutionally vague.

ENTERED at Anchorage, Alaska this 8th day of October, 2012.

John Suddock
Superior Court Judge

I certify that on 10-8-12
a copy of the above was mailed
to each of the following at their
addresses of record:
Jeffrey Feldman/ Susan Orlansky
Janet Crepps / Laura Einstein
John Treptow / Mary Lundquist
Dario Borghesan / Margaret Paton-Walsh
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