IN THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA, et al., Appellants, V. PLANNED PARENTHOOD OF THE GREAT NORTHWEST, HAWAI'I, ALASKA, INDIANA, KENTUCKY, a Washington corporation, Appellee.	)	Supreme Court No.: S-19277

Trial Court Case No.: 3AN-19-11710 CI

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE JOSIE GARTON, JUDGE

BRIEF OF APPELLEES PLANNED PARENTHOOD OF THE GREAT NORTHWEST, HAWAI'I, ALASKA, INDIANA, KENTUCKY

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Constitutional provisions:

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

Alaska Constitution, Art. 1, § 22. Right of Privacy
The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

Alaska Statutes:

AS 18.16.010. Abortions
(a) An abortion may not be performed in this state unless
(1) the abortion is performed by a physician licensed by the State Medical Board under AS 08.64.200;
* * *
(c) A person who knowingly violates a provision of this section, upon conviction, is punishable by a fine of not more than $1,000, or by imprisonment for not more than five years, or by both.
* * *

ISSUES PRESENTED

AS 18.16.010(a)(1) (the "APC Ban" or the "Ban") prohibits anyone other than physicians, including otherwise qualified advanced practice clinicians ("APCs"), from performing abortions.

1. The superior court heard extensive testimony about the burdens the APC Ban imposes on patients without any medical justification. Based on that testimony, did the court correctly conclude that the Ban violates the right to abortion, as guaranteed by Alaska Constitution, article 1, section 22?
2. The superior court heard extensive testimony about how the APC Ban singles out abortion and treats it differently from any other medical care within an APC's training and scope of practice, as well as how it singles out APCs as compared to similarly situated physicians. Based on that testimony, did the court correctly conclude that the Ban violates the equal protection rights of abortion patients and APCs?

INTRODUCTION

It is long established that the Alaska Constitution's privacy clause protects a patient's fundamental right and ability to choose an abortion, recognizing that as a matter of bodily integrity, decisional autonomy, and equality, people must be able to decide for themselves whether and when to bear a child. The equal protection clause prohibits discrimination that affects the exercise of this fundamental right.

AS 18.16.010(a)(1) restricts access to early abortion by impeding, and in some cases delaying or preventing, Alaskans from accessing care. Even though there is no dispute that first-trimester abortions are extremely safe and can be safely and effectively provided by

advanced practice clinicians ("APCs"), the State prohibits anyone other than physicians from providing that care. The APC Ban starkly contrasts with Alaska policy in all other areas of medicine: it is among the states with the broadest APC scope of practice and allows APCs to provide the same medications and procedures for miscarriage patients that it bans them from providing for abortion patients. It also allows APCs to provide services of greater complexity than abortion, and indeed, they are legally permitted to provide *any* care that falls within their training and expertise, except for abortion.

This disparate treatment means that abortion patients must turn to a limited pool of providers and thus fewer appointments and less flexibility. This increases the potential for delay for pregnant Alaskans seeking abortion, but no other form of pregnancy-related care, and it means that some patients are unable to access abortion altogether. Alaskans suffer logistical, physical, and emotional harms because of the APC Ban.

Despite conceding that APCs provide abortion safely and effectively, the State argues that strict scrutiny does not apply because the APC Ban does not burden Alaskans seeking abortions, despite the superior court's factual findings to the contrary. The State did not offer a single justification for the APC Ban at trial. But even if the Court were to consider the State's newly asserted interests, none is sufficient to support the APC Ban under any level of review, much less strict scrutiny. The Court should therefore affirm the superior court's determination that the APC Ban is unconstitutional as applied to qualified APCs.

STATEMENT OF THE CASE

This appeal concerns whether Alaska can constitutionally single out abortion and block patients from receiving care from qualified, licensed APCs, even though—as the superior court properly found after four days of testimony—doing so delays, and in some cases prevents, patients from accessing abortion and compromises their health and privacy. The superior court correctly held that the APC Ban violates Alaskans' fundamental right to abortion and the guarantee of equal protection for both abortion patients and APCs.

I. Procedural History

Plaintiff-Appellee Planned Parenthood Great Northwest, Hawai'i, Alaska, Indiana, Kentucky ("Planned Parenthood") sued the State of Alaska[1] in December 2019, seeking to enjoin AS 18.16.010(a)(1) as applied to APCs. Planned Parenthood argued that, because the statute restricts the full range of qualified abortion providers and thereby reduces abortion availability, the APC Ban violates patients' fundamental right to privacy, including the fundamental right to abortion, as guaranteed by article I, section 22 of the Alaska Constitution; patients' fundamental right to liberty as guaranteed by article I, section 1 of the Alaska Constitution; and patients' and APCs' right to equal protection, as guaranteed by article I, section 1 of the Alaska Constitution. [Exc. 65–66]

In November 2021, the superior court issued a preliminary injunction (the "Preliminary Injunction") that allowed APCs to provide medication abortion (but not

[1] Planned Parenthood also sued individual members of the Medical Board and the Board of Nursing in their official capacities. This brief refers to the members of the Boards and the State of Alaska collectively as the "State."

procedural abortion) pending the court's final judgment. The court subsequently denied the parties' cross motions for summary judgment, finding that there were issues of fact as to whether the APC Ban sufficiently burdened patients' rights so as to trigger strict scrutiny review. [Exc. 85–86]

The superior court held a five-day bench trial from November 13 to 17, 2023, in which Planned Parenthood proffered fact and expert witnesses.[2]

Following post-trial briefing, the superior court issued a detailed twenty-seven-page opinion and order. [Exc. 108–34] The court concluded that, "as applied to otherwise qualified medical clinicians, [the APC Ban] imposes a substantial burden on patients' fundamental privacy rights to make reproductive decisions and access abortion care" and violates the equal protection rights of both patients and APCs "whose scope of practice otherwise includes medication or aspiration abortion." [Exc. 108–09] The court thus

[2] Planned Parenthood called two hybrid fact-expert witnesses: Dr. Tanya Pasternack, Planned Parenthood's Alaska Medical Director, a board-certified obstetrician-gynecologist, and expert in the norms and standards for providing gynecological services, including abortion and APCs' scope of practice [Tr. 33, 34, 38]; and Amy Bender, a nurse practitioner, former Alaska Lead Clinician for Planned Parenthood, currently a per diem telehealth provider for Planned Parenthood, and expert in the provision of reproductive health care in Alaska. [Tr. 342–43, 345–47, 350] It called three additional experts: Dr. Shanthi Ramesh, the Chief Medical Officer at Virginia League for Planned Parenthood, a physician who is board certified in obstetrics and gynecology and complex family planning, and expert in the norms and standards for providing gynecological services, including abortion, and APC capabilities [Tr. 238, 242, 244]; Dr. Joanne Spetz, a professor at the University of California San Francisco and the director of its Institute for Health Policy Studies, as well as an expert in the APC workforce and how APCs are regulated [Tr. 174, 176–77]; and Dr. Ingrid Johnson, University of Alaska Anchorage associate professor and expert in intimate partner violence and rural-urban dynamics in Alaska [Tr. 565–66, 576–77] The State called the two Planned Parenthood providers but presented no other witnesses.

permanently enjoined the State from enforcing the APC Ban "against otherwise qualified medical clinicians performing medication and aspiration abortion." [*Id*.] This appeal ensued.

II. Plaintiffs and Abortion in Alaska

Planned Parenthood is a not-for-profit corporation and the only publicly-identified abortion provider in Alaska. [Exc. 113; Tr. 41, 413] It operates health centers in Fairbanks and Anchorage.[3] [Tr. 41] At its centers, Planned Parenthood provides a broad range of reproductive and sexual health services including birth control, testing and treatment for sexually transmitted infections, miscarriage care, cancer screening, gender-affirming care, pregnancy testing, and abortion. [Exc. 113; Tr. 34–35, 477–78] With the exception of abortion, which the APC Ban prohibited them from providing until it was enjoined, APCs provided most of Planned Parenthood's services, including services of greater complexity and risk than abortion. [Exc. 113–14, 121; Tr. 477–79] Unlike physicians, whom Planned Parenthood is able to staff only once a month at some locations, APCs are available at each health center every day that they are open. *Infra* at 14. This means that, since the Preliminary Injunction, abortion has been available at the health centers every day that they are open. *Infra* at 14–16.

[3] At the time of trial, Planned Parenthood also operated a health center in Juneau. However, the Juneau health center has subsequently closed, Planned Parenthood Great Nw., Haw., Alaska, Ind., Ky., *Closure Announcements*, https://www.plannedparenthood.org/planned-parenthood-great-northwest-hawaii-alaska-indiana-kentuck/patients/health-center-locations/closure-announcements (last visited June 2, 2025).

III. Abortion Is an Essential Component of Basic Health Care.

A. Abortion Generally

Approximately one in four women in the United States will have an abortion by the time she is forty-five. [Tr. 293–94] People seek abortions for a variety of medical, familial, economic, and personal reasons. For example, many are already parents and decide they cannot have another child. Some want to escape their abusive partners. Others want to continue their education. Some patients have abortions to preserve their life or health. Others become pregnant as a result of rape or incest and do not want to continue their pregnancies. [Exc. 118; Tr. 293]

In Alaska, as throughout the country, most abortions occur during the first trimester of pregnancy. [Tr. 261] Indeed, 89% occur during the first twelve weeks. [Exc. 114; Tr. 261] Planned Parenthood's APCs seek to provide only first-trimester abortions. [Exc. 108]

There are two primary methods of abortion: medication and procedural. [Exc. 114; Tr. 251] In the most common form of medication abortion, the patient takes mifepristone and misoprostol to end the pregnancy. [Exc. 114; Tr. 251] Mifepristone blocks the hormone progesterone, which is necessary to maintain pregnancy, and misoprostol, typically taken zero to forty-eight hours later, causes the cervix to open and the uterus to contract and empty as it does during a miscarriage. [Exc. 114; Tr. 251–52][4] Medication abortion is an option until eleven weeks of pregnancy. [Tr. 251]

[4] All references to medication abortion in this brief refer to the combination regimen of mifepristone and misoprostol, which was first approved by the U.S. Food and Drug Administration ("FDA") in 2000. [Exc. 115; Tr. 252] At that time, the FDA authorized mifepristone's provision by, or under the supervision of, physicians, and APCs could provide medication abortion so long as they did so under the supervision of a physician.

In a procedural abortion, a clinician uses instruments to end the pregnancy and empty the uterus. [Exc. 115; Tr. 257–58] In the first trimester, this is done by aspiration, in which the clinician gently dilates the cervix, inserts a thin, flexible plastic tube and uses suction to remove the contents of the uterus. [Exc. 115; Tr. 257–58] Aspiration abortion is not considered surgery because it does not involve incisions; instead, the tube is inserted through the natural openings of the vagina and cervix. [Exc. 115; Tr. 259]

Some patients have a medical contraindication to medication abortion and thus may need an aspiration abortion, or vice versa. [Exc. 115–16; Tr. 43–45, 254–55, 259, 443] Sometimes, for non-medical reasons, patients have a preference for either medication or aspiration abortion. [Exc. 116; Tr. 44–45, 260] For example, some prefer medication abortion because it allows the patient to disguise their abortion as a miscarriage; this is particularly important and can be a safer option for patients who want to keep their abortion private from their partners, parents, family members, or others. [Exc. 116; Tr. 256–57] Likewise, some victims of rape or patients who have experienced sexual abuse or other trauma choose medication abortion to feel more in control of the experience and to avoid further trauma from having instruments placed in their vagina. [Exc. 116; Tr. 256] And some Planned Parenthood patients choose medication abortion because, especially since the Preliminary Injunction allowed APCs to begin providing medication abortion, they can

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[Exc. 115; Tr. 253] The FDA never required the supervising physician's physical presence, and APCs have long provided medication abortion where allowed by state law. [Exc. 115; Tr. 253] In 2016, the FDA lifted the physician supervision requirement, allowing APCs to provide medication abortion independently. [Tr. 253–54] The FDA issued further updates to its guidance on the use of mifepristone in January 2023, allowing medication abortion to be prescribed by mail. [Exc. 115; Tr. 254]

proceed more quickly than with aspiration abortion. [Tr. 44–45] Other patients choose aspiration abortion because the procedure can be completed within one day, and they can be certain their pregnancies have ended by the time they leave the health center. [Exc. 116; Tr. 260]

B. Abortion Is Very Safe.

It is uncontested that, as the superior court found, both medication and aspiration abortion are extremely safe. [Exc. 115; Tr. 33–34, 38, 238, 242, 244, 264–65, 269–71, 342–43, 345–47, 350; At. Br. 11] As uncontroverted testimony demonstrated, medication abortion is similar in risk to using common medications such as antibiotics or ibuprofen, with a risk of major complications of 0.31%. [Exc. 115; Tr. 264] The risk of major complications from first-trimester aspiration abortion is 0.16%. [Exc. 115; Tr. 265] When complications from medication or aspiration abortion occur, they are usually managed with medications at home and/or with an aspiration procedure. [Exc. 116; Tr. 265–66]

Abortion is much safer than pregnancy and childbirth. [Exc. 117–18; Tr. 269–70] Some common pregnancy complications manifest later in pregnancy, so patients who terminate their pregnancies earlier do not encounter them. [Exc. 117; Tr. 270]

Abortion is time-sensitive health care. [Exc. 118; Tr. 46] Although abortion is incredibly safe, the risks increase with gestational age. [Exc. 118; Tr. 46–47, 503] As pregnancy progresses, in addition to the risk of complications from the pregnancy itself, the abortion procedure becomes more complex. [Exc. 118; Tr. 46, 305] Thus, patients who are delayed in seeking abortion face greater medical risks compared to if they had obtained the abortion earlier. [Exc. 118; Tr. 305]

C. Alaska APCs Can Provide Abortion as Safely as Physicians.

Experts in this case testified, and the State did not contest, that APCs expand access to health care and can provide abortion safely.

1. Background on Advanced Practice Clinicians

Advanced practice clinicians include advanced practice registered nurses ("APRNs"), such as nurse practitioners and certified nurse midwives, as well as physician assistants ("PAs"). [Tr. 180–82] The superior court recognized that APCs are trained, licensed clinicians who are trusted across the country and in Alaska to provide a wide range of medical care with a high degree of autonomy, and in the past three decades have become an essential part of the health care system. [Exc. 118–19; Tr. 180–82, 185–86, 192–93, 198–99] All major medical organizations agree that APCs provide high-quality, safe health care that is comparable to that provided by physicians. [Tr. 212–15] The State has never challenged the quality of care that APCs provide.

APCs provide the majority of women's health care across the country. [Exc. 119; Tr. 273] They are often the only health care providers in rural communities. [Tr. 189, 273–74] The growth of the APC profession has led to increased access to care. [Tr. 204–07]

2. APC Scope of Practice in Alaska

As a general rule, a health care provider's scope of practice dictates what services they are permitted to provide patients. [Tr. 200, 353] In Alaska, as elsewhere, APCs' scope of practice is regulated by state boards, as well as by their own knowledge and education. [Tr. 217, 353] Drs. Spetz and Pasternack and Ms. Bender all testified to the broad scope of practice of Alaska APCs, as recognized by the Alaska Board of Medicine, which regulates

PAs, and the Nursing Board, which regulates APRNs. [Exc. 119; Tr. 60–61, 80, 179–80, 201–02, 353–54] APCs in Alaska can perform many of the same tasks as physicians, including examining, diagnosing, and treating patients, and prescribing and dispensing medication. [Exc. 119][5]

With the exception of the APC Ban, the legislature does not dictate what medical care Alaska APCs are allowed to provide; abortion is the only medical procedure that is otherwise within their scope of practice that APCs are barred by law from performing. [Exc. 119; Tr. 80, 204, 355] Absent the APC Ban, it would be within APCs' scope of practice to provide abortion in Alaska. [Tr. 80, 444] The State does not contest this.

Even prior to the Preliminary Injunction, Planned Parenthood's APCs in Alaska provided all care leading up to the abortion and nearly all follow-up and treatment of complications. [Exc. 120; Tr. 50–51, 449] APCs educate patients and obtain their consent, do their medical screenings, and conduct ultrasounds to identify patients with contraindications for medication abortion. [Tr. 445–51] APCs in Alaska also treat abortion complications that are medically identical to medication and aspiration abortion. [Exc. 120–21] For example, if a patient has excessive bleeding and cramping following a medication abortion, an APC can treat this complication with medication or aspiration, comparable to how medication or aspiration could be administered for abortion. [Exc. 120–21; Tr. 52–53, 263] There is no difference in skill or training needed to provide these

[5] AS 08.64.170 (physician assistants); AS 08.68.850 (advanced practice registered nurses).

treatments for complications as compared to using them for abortion. [Exc. 121; Tr. 263–64]

The same is true for treatment of symptoms or complications of miscarriage. The superior court found, and the State concedes, that the same treatments can be used for both abortion and miscarriage. [Exc. 117; Tr. 59–60, 261–62 356–57:, 460; At. Br. 12] The same doses and medications commonly used for medication abortion are also used for miscarriage management. [Exc. 117; Tr. 59, 262, 451–52] Providing these medications requires the same skills, knowledge, and training whether they are used for miscarriage management or medication abortion. [Exc. 117; Tr. 60, 262–63] Aspiration provided for miscarriage is also medically identical to aspiration abortion and requires the same skills and training. [Exc. 116; Tr. 60, 459–60] APCs in Alaska are legally able to treat miscarriage with medications or with aspiration, and it is within their scope of practice to do so. [Exc. 121; Tr. 52–54]

In addition to treating abortion complications and miscarriages, APCs in Alaska routinely provide care that is similar in risk and complexity to, and that utilizes some of the same skills as, providing medication and aspiration abortion. [Exc. 121; Tr. 62–63, 274–78, 454–59] Alaska APCs also commonly manage pregnancy and childbirth, which are medically more complex and higher risk than first-trimester abortion. [Exc. 119; Tr. 60–61, 278–79, 355–56] They also prescribe drugs, like narcotics, that carry far greater risks than the drugs used in medication abortion. [Exc. 119; Tr. 188–89, 279–80] In short, the Ban does not enhance patient safety.

3. APCs Safely Provide Abortions in Other States.

At the national level, it is clear that trained APCs can provide both medication and aspiration abortions as safely as trained physicians. [Exc. 119–20; Tr. 281–82, 286, 462–63, 478–79] APCs can legally provide medication abortion in twenty-five states and Washington, D.C., and aspiration abortion in twenty-three states and Washington, D.C.[6] The risk of complications from an abortion is no greater when an APC, rather than a physician, performs an abortion. [Exc. 120; Tr. 281–82, 462–63] Major medical organizations endorse APC provision of abortion as within their area of competency,

[6] Since the trial in this case, APC provision of abortion has been legalized in more states. *See* AP Toolkit, *State Abortion Laws and Their Relationship to Scope of Practice*, https://aptoolkit.org/advancing-scope-of-practice-to-include-abortion-care/state-abortion-laws-and-their-relationship-to-scope-of-practice/ (last visited June 3, 2025). This map does not reflect a court order in Ohio allowing APCs to provide medication abortion. *Planned Parenthood Sw. Ohio Region v. Ohio Dep't of Health*, No. A 2101148, 2024 WL 4183293 (Ohio C.P. Aug. 29, 2024) (unpublished). Additionally, Rhode Island law allows APCs to provide both procedural and medication abortion. 216-20 R.I. Code R. § 10-6.3 (repealed 2023).

The State makes much of the fact that fewer than half the state allow APCs to provide medication or aspiration abortions. [At. Br. 9–10] Notwithstanding the fact that more than half the states now allow APC provision of medication abortion, this statistic does not tell the full story. Eighteen states ban abortion at some point during the first trimester, and three more states would ban abortion during the first trimester but for interim injunctive relief. Kaiser Fam. Found., *Abortion in the United States Dashboard*, https://www.kff.org/womens-health-policy/dashboard/abortion-in-the-u-s-dashboard/ (last visited June 2, 2025); *Planned Parenthood Ass'n of Utah v. State*, 554 P.3d 998 (Utah 2024) (affirming preliminary injunction); *Access Indep. Health Servs., Inc. v. Wrigley*, 16 N.W.3d 902 (N.D. 2025) (denying stay of injunction pending appeal); *Johnson v. State*, No. 2023-CV-18853, 2024 WL 5456519 (Wyo. Dist. Ct. Nov. 18, 2024) (unpublished). Only five states (Arizona, Missouri, Nevada, Pennsylvania, and Wisconsin) allow abortion beyond the first trimester but bar APCs from performing abortions. *Compare* Kaiser Fam. Found. *with* AP Toolkit. Voters in two of these states enacted a fundamental right to abortion in the state constitution in the past year, Ariz. Const. art. II, § 8.1; Mo. Const. art. I, § 36, and all of these states have ongoing litigation about the scope of abortion rights under their state constitutions.

including the National Academy of Medicine, the American College of Obstetricians and Gynecologists, the American Association of Public Health, the World Health Organization, the American College of Nurse Midwives, and the American Academy of Physician Assistants. [Tr. 207–10, 282]

4. Alaska APCs Have Safely Provided Abortions Since the Preliminary Injunction.

Since the Preliminary Injunction, APCs have been providing nearly all medication abortions in Alaska. [Exc. 122; Tr. 74–75] The superior court recognized that Planned Parenthood's complication rate from medication abortions has remained very low. [Exc. 122] Since the Preliminary Injunction, there have been no complications out of the ordinary as compared to when physicians were providing all medication abortions; no complications required hospitalization. [*Id*.; Tr. 75–76, 467–68]

IV. The APC Ban Burdens Patients Seeking Abortion in Alaska by Reducing the Pool of Qualified Health Care Professionals Who Can Provide that Care.

The superior court found that the APC Ban increases patients' barriers to abortion: "[w]hen APCs are barred from providing abortion, there are fewer available providers, fewer appointments, and potential for greater delay." [Exc. 129] Limiting abortion appointments harms patients by delaying their access to time-sensitive care, forcing them to return to health centers for additional visits, pushing them past gestational age limits, making them travel when it would otherwise be unnecessary, preventing them from seeing the provider of their choice, and compromising patient privacy.

A. The APC Ban Sharply Limits the Availability of Abortion Appointments.

Planned Parenthood APCs provide the vast majority of its health services and are at the health centers every day they are open. Planned Parenthood hires per diem physicians to provide care that APCs cannot provide, but the doctors are at the clinics on a limited number of days per week. [Tr. 35, 45–46, 50, 55, 63, 67] Prior to the Preliminary Injunction, Planned Parenthood's per diem physicians were able to offer medication abortion approximately one to two times per week at each clinic, depending on physician availability, including by telemedicine.[7] [Exc. 125; Tr. 43, Tr. 50, 64–67, 479–80; R. 2409]

After the Preliminary Injunction, all of Planned Parenthood's APCs began providing medication abortion. [Tr. 63, 68–69, 488, 498; R. 2928][8] As a result, each Planned Parenthood clinic could offer medication abortion every day it is open, giving patients who are seeking medication abortions greater scheduling flexibility.[9] [Exc. 126; Tr. 64, 67, 69–70, 498; R. 2409] Between the year preceding the Preliminary Injunction and the year

[7] When providing care through telemedicine, Planned Parenthood generally utilizes a "site-to-site" model, meaning that the provider is at one Planned Parenthood health center while the patient is at another Planned Parenthood health center. [Tr. 65–66]

[8] Subsequent to the Preliminary Injunction, Planned Parenthood's physicians rarely provide medication abortion and are instead able to focus on performing procedural abortions and on addressing complex gynecological issues. [Tr. 74–75, 300]

[9] At the time of trial, the Juneau clinic was open Tuesday through Thursday; the Fairbanks clinic Tuesday through Friday; and the Anchorage clinic Monday through Friday and two Saturdays a month. [Tr. 64]

following the Preliminary Injunction, medication abortions increased by approximately 33%. [Exc. 26–27, 126; Tr. 70–74][10]

At the time of trial, because of the APC Ban, Planned Parenthood was only able to offer aspiration abortion through thirteen weeks, six days once per month in Fairbanks[11] and Juneau, and aspiration and other procedural abortion through seventeen weeks, six days once per week in Anchorage, because those are the days on which it is able to staff per diem physicians. [Exc. 125; Tr. 45–46, 67] Planned Parenthood providers testified at trial that, if APCs were able to provide aspiration abortions, they would be able to provide aspiration abortion more often, particularly in Fairbanks, which would allow patients to

[10] The State argues that the increase in medication abortions was due to factors other than the Preliminary Injunction. [At. Br. 20, 26] For example, it asserts that Planned Parenthood changed the gestational age cut off for medication abortion, but, as the State has previously acknowledged, this occurred in 2020, before the Preliminary Injunction. [R. 2369] The State also argues that Planned Parenthood eliminated a "require[ment]" that patients remain close to emergency departments after a medication abortion as well as to attend an in-person follow-up appointment. However, Planned Parenthood's witnesses explained that it was always a patient's choice whether to actually stay within that area after receiving treatment, [Tr. 475–76], and medication abortion follow-up appointments had a high no-show rate, suggesting many patients did not stay in the area. [Tr. 473–74] Planned Parenthood has expanded medication abortion access consistent with medical evidence, but the APC Ban remains a scientifically unjustified barrier to abortion access in Alaska. [Tr. 425–26]

The State next claims that the increase in medication abortions in Alaska is part of a broader national trend, but the State mischaracterizes the exhibit it introduced for this proposition, arguing that it shows that the nationwide increase continued after the Preliminary Injunction; in fact, but this chart includes no national medication abortion data after the Preliminary Injunction. [Exc. 28] The superior court made no findings as to whether these factors impacted the increase of medication abortions in Alaska after the Preliminary Injunction. [Exc. 126]

[11] In the past, Planned Parenthood sometimes was able to provide aspiration abortion twice per month in Fairbanks based on physician availability. [Tr. 480]

obtain earlier abortions, give physicians greater ability to treat patients needing later abortions, and reduce barriers to care. [Tr. 94, 504–05]

On days that health centers are staffed with physicians, there is no decrease in the number of APCs available. Thus, permitting APCs to provide abortions expands the number of clinicians available for abortion services and expands the number and timing of available abortion appointments. [Exc. 120; Tr. 300–01]

B. Limited Appointment Availability Burdens Patients Financially, Logistically, Physically, and Emotionally.

The superior court heard uncontroverted testimony that limited appointment availability makes it harder for patients to access abortion. It is common sense that, when abortion is offered every day Planned Parenthood's Alaska health centers are open, some patients are able to access abortion sooner than they would be able to if appointments were available on fewer days. When there are fewer appointments available for abortion, some patients will be delayed in their ability to obtain that care—and some will be denied entirely the ability to obtain time-sensitive care in Alaska. After the Preliminary Injunction, patients were able to obtain abortions, including aspiration abortions, earlier in their pregnancies, and fewer patients in that time period were pushed beyond the gestational age limit for a medication abortion. [Exc. 126–27; Tr. 94, 500][12] At the time of trial, with the APC Ban still in effect as to aspiration abortions, patients needing an aspiration abortion still faced delay in scheduling appointments due to limited physician availability. [Tr. 501–03]

[12] Ms. Bender could not recall any patients since the Preliminary Injunction who had been pushed past the gestational age limit for medication abortion, whereas before this happened not "infrequent[ly]." [Tr. 483]

Evidence at trial showed that the APC Ban caused delays in receiving an abortion in many circumstances. For example, as the superior court found, patients who scheduled appointments on days when a physician was not available would have to return to a health center for a second time to obtain an abortion. [Exc. 123; Tr. 76–77, 105–106, 481, 662–64] The court credited testimony "that patients reported challenges and concerns regarding their ability to return to the clinic on a day a physician was available." [Exc. 123; Tr. 482, 484–86] Some patients were forced to continue their pregnancies because they were not able to return for second abortion appointments in time. [Exc. 124] When the Ban was in effect, any time a patient was forced to reschedule their abortion appointment, they usually needed to wait a week or more for another appointment. [Exc. 127; Tr. 92] The same was true if the patient came to the health center for a scheduled abortion but it could not be completed on that day, for example because the patient was further along in their pregnancy than anticipated. [Tr. 500–01] Patients also commonly learned they were pregnant at non-abortion appointments, but with the APC Ban in place, they generally could not receive an abortion that day, even if they knew they did not want to carry their pregnancy to term. [Tr. 488, 499] If APCs can provide abortions, whenever rescheduling is necessary, the abortion often can be rescheduled for just a day or two later, and, for a patient already at the clinic, the abortion can be provided the same day the patient learns they are pregnant, if desired. [*see* Exc. 127; Tr. 301–302]

With the APC Ban in effect, if someone is unable to take off school or work on the particular day of the week that an abortion can be provided, they are delayed or prevented from obtaining an abortion in a way they would not be if abortions were available every

day the clinic is open. [Tr. 301–03] The limit on abortion availability caused by the APC Ban is especially harmful because people seeking abortions are disproportionately likely to be low-income and have limited transportation, inflexible job schedules, and/or caregiving responsibilities, all of which constrain their ability to travel and thus to be able to get to the clinic closest to them on the specific day they can be scheduled for an abortion. [Exc. 127; Tr. 301] Since Planned Parenthood operates health centers in only two locations, many patients must pay for travel and child care and take time off work to get an abortion. [Exc. 127; Tr. 91–92, 106, 431–32] All of these costs increase when patients must travel farther to access an abortion, further delaying access to care. One delay can have a ripple effect—as, for example, when scheduling is delayed for a patient who lives closest to the Fairbanks clinic and who was a candidate for aspiration abortion is delayed, pushing the patient past the gestational age limit in Fairbanks, so that the patient then has to arrange travel to Anchorage, where abortion services at a later gestational age are available. [Exc. 127–28; Tr. 47, 91, 91–92, 296, 300, 303, 502–03]

The barriers to care imposed by the APC Ban disproportionately burden Alaskans living in rural areas and people experiencing intimate partner violence. [Exc. 113] Patients living in rural areas have to travel long distances to access services, which compounds the logistical challenges, including problems due to weather. [Exc. 113, 118, 127, 129; Tr. 41, 492–93, 498–99, 611, 613–14, 616–18] Intimate partner violence affects over half of women in Alaska in their lifetime, and Planned Parenthood routinely sees patients in abusive relationships. [Tr. 486, 579–585, 600–04] Because abusers often try to control a

partner's reproductive health or monitor their travel, appointment flexibility is particularly important for those experiencing intimate partner violence. [Exc. 113; Tr. 602, 618–19]

The delays imposed by the APC Ban cause some patients to be too far along into pregnancy for a medication abortion, against their preference or medical contraindication. [Tr. 44, 255, 493, 496] If a patient whose closest health center is in Fairbanks is pushed past thirteen weeks, six days of pregnancy, the patient will need to travel—if they are able—to Anchorage to obtain an abortion. [Tr. 47, 303–04, 502–03] If a patient is pushed past seventeen weeks, six days, they will need to leave Alaska altogether—if they are able—to obtain an abortion. [Exc. 123–24 (crediting Ms. Bender's testimony that it was "not uncommon" for a patient to need to leave Alaska to access abortion as a result of a need to return for a second appointment); Tr. 46–47, 486–87, 495–96] Travel out of state is both more expensive and more time-consuming than obtaining an abortion within Alaska, forcing these patients to incur additional expenses and missed work and childcare obligations in order to obtain an abortion. [Tr. 46–47, 91–92, 296, 300–03, 495–96] Some patients, unable to obtain an abortion at a time and place they can access, are forced to continue a pregnancy against their will. [Exc. 128; Tr. 493] People who want an abortion but are forced to carry their pregnancies to term face socioeconomic consequences, including being less likely to bring themselves and their families out of poverty, continue working, or finish school. [Exc. 128; Tr. 307] All of these harms are imposed by the APC Ban. [Tr. 501–02]

For any patient, delay means the patient is forced to stay pregnant for longer than they otherwise would have, with all of the attendant risks of pregnancy. *See supra* at 8.

Continuing a pregnancy has medical consequences. [Exc. 128] Simply being pregnant is not medically safe for some, such as patients with severe heart disease. [*Id*.; Tr. 48] Patients diagnosed with cancer or other serious diseases may want to get an abortion as soon as possible so they can proceed with their treatment. [Tr. 47–48] Even for healthy patients, the longer the person must remain pregnant, the longer they may have to suffer typical symptoms such as nausea and vomiting, which impact people's abilities to complete work or home tasks. [Exc. 128; Tr. 46, 304]

Delay in obtaining an abortion can be psychologically and physically harmful and can erode patient autonomy. [Exc. 128; Tr. 304, 493–94] When people decide that they want an abortion and are firm in their decision, they generally want to get that abortion as soon as they are able. [Tr. 305, 486] Being forced to wait to terminate a pregnancy can cause distress and anxiety. [Tr. 46, 126] Patients who became pregnant as a result of an assault face particular trauma when forced to extend an unwanted pregnancy. [Exc. 128] Delay in the ability to access an abortion may also increase the difficulty of keeping a pregnancy confidential. [*Id*.; Tr. 304] This can pose a particular danger for people in relationships marked by intimate partner violence, since they face an increased risk of violence during pregnancy. [Tr. 304–05, 486]; *see also supra* at 18–19.

Limited appointment availability also compromises privacy for those who wish not to have family, friends, or employers learn of their pregnancy or decision to have an abortion, including adolescents and people experiencing intimate partner violence. [Tr. 448, 496–97, 693] Because a medication abortion will generally result in bleeding and cramping, the APC Ban, by limiting the days when abortions are available, limits the ability

of patients to control when that bleeding and cramping occurs. [Tr. 496–97] The APC Ban deprives some of those patients of their privacy and autonomy. [*Id*.]

The APC Ban disrupts continuity of care and bars patients from seeing a provider of their choosing. [Exc. 120; Tr. 283–88, 292–93, 298–99] Prior to the Preliminary Injunction, APCs provided every aspect of medication abortion care short of handing over the medications to the patient. [Tr. 50–51]; *supra* at 10–11. Patients at Planned Parenthood expressed frustration that they could not receive their abortion from their preferred provider—the APC who had already counseled them and with whom they had established a relationship. [Exc. 120; Tr. 449, 660] In addition to seeing a different provider, they often had to wait longer for their abortion appointment. [Tr. 485–86]

As the above summary of facts from the trial shows, the superior court had ample bases for finding that the APC Ban deters and infringes on Alaskans' ability to obtain an abortion.

STANDARDS OF REVIEW

The Court reviews the superior court's factual findings for clear error.[13] It "find[s] clear error only when a review of the entire record leaves [it] with a definite and firm conviction that the superior court has made a mistake."[14] It "review[s] the superior court's

[13] Alaska R. Civ. P. 52(a); *Alaska Far E. Corp. v. Newby*, 630 P.2d 533, 534 (Alaska 1981) ("A finding of fact is not clearly erroneous merely because the supreme court might have found the facts differently had it been the trier of fact.").

[14] *Jude M. v. State Dep't of Health & Soc. Servs., Off. of Child.'s Servs.*, 394 P.3d 543, 550 (Alaska 2017) (quoting *David S. v. State, Dep't of Health & Soc. Servs., Off. of Child.'s Servs.*, 270 P.3d 767, 774 (Alaska 2012) (internal quotations omitted)).

evidentiary rulings for an abuse of discretion."[15] The Court applies its "independent judgment to review" constitutional questions.[16]

ARGUMENT

Nearly thirty years ago, this Court first recognized that the Alaska Constitution protects the fundamental right to abortion.[17] In every case to have considered a privacy or equal protection challenge to Alaskans' right to abortion, this Court has applied strict scrutiny.[18] Strict scrutiny has also been applied in every other state with a fundamental right to abortion where a court has issued a final determination specifically on the constitutionality of a law like Alaska's APC Ban. *Infra* at 36–37. Yet the State maintains that strict scrutiny is not warranted under either a privacy or an equal protection analysis because, essentially, the APC Ban does not harm *enough* abortion patients. [*E.g.*, At. Br. 29] This is incorrect, both as a matter of fact and as a matter of law. As is amply demonstrated by the superior court's detailed factual findings after four days of testimony,

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[15] *Guilford v. Weidner Inv. Servs., Inc.*, 522 P.3d 1085, 1093 (Alaska 2023) ("Errors in the admission or exclusion of evidence warrant reversal only if necessary to ensure 'substantial justice.'" (quoting *Loncar v. Gray*, 28 P.3d 928, 930 (Alaska 2001)).

[16] *State v. Planned Parenthood of the Great Nw.*, 436 P.3d 984, 991 (Alaska 2019) ("*Planned Parenthood V*").

[17] *Valley Hosp. Ass'n, Inc. v. Mat-Su Coal. for Choice*, 948 P.2d 963 (Alaska 1997) ("*Valley Hosp.*").

[18] *Valley Hosp.*, 948 P.2d at 969; *State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 909 (Alaska 2001) ("*Planned Parenthood I*"); *State v. Planned Parenthood of Alaska*, 35 P.3d 30, 44 (Alaska 2001) ("*Planned Parenthood II*"); *State v. Planned Parenthood of Alaska*, 171 P.3d 577, 582 (Alaska 2007) ("*Planned Parenthood III*"); *Planned Parenthood of the Great Nw. v. State*, 375 P.3d 1122, 1145 (Alaska 2016) ("*Planned Parenthood IV*"); *Planned Parenthood V*, 436 P.3d at 991.

the APC Ban imposes substantial burdens on abortion access, including reducing the number of qualified providers available to provide that care, which in turn delays care, compromises privacy, and harms the provider-patient relationship. For these reasons, strict scrutiny should apply—and the State must offer a compelling justification for infringing on the right to abortion. It has not and cannot do so. Indeed, the APC Ban fails any level of applicable review. This Court should therefore affirm the superior court's determination that the APC Ban infringes Alaskans' right to privacy and to equal protection and uphold its judgment permanently enjoining the APC Ban as to APCs for whom medication and aspiration abortion is within their scope of practice.

I. The APC Ban Violates Alaskans' Right to Privacy.

In Alaska, reproductive rights, including the right to abortion, "are fundamental[.] . . . [T]hey are encompassed within the right to privacy expressed in article I, section 22 of the Alaska Constitution."[19] For this reason, "[t]hese rights may be legally constrained only when the constraints are justified by a compelling state interest, and no less restrictive means could advance that interest."[20] Here, the APC Ban "legally constrain[s]" abortion access in Alaska, and therefore warrants strict scrutiny. Under that—or any level—of scrutiny, it fails.

A. The Superior Court Properly Applied Strict Scrutiny.

In a constitutional challenge under Alaska's privacy guarantee, strict scrutiny applies when a law infringes on a fundamental right. At the heart of this appeal is what it

[19] *Valley Hosp.*, 948 P.2d at 969; *Planned Parenthood III*, 171 P.3d at 588.

[20] *Valley Hosp.*, 948 P.2d at 969.

takes to show infringement. This Court has held that strict scrutiny applies when a law "constrain[s],"[21] "places a burden on,"[22] "restrict[s],"[23] "interferes with,"[24] or "deters"[25] a fundamental right. In the context of the right to reproductive freedom, the Court has applied strict scrutiny when a law compromises the private nature of the patient's decision, threatens the relationship between a patient and their health care provider, or reduces the availability of abortion providers.[26] The APC Ban does all of these.

1. The APC Ban Constrains, Places a Burden on, Restricts, Interferes with, or Deters Patients Seeking Abortion.

As the superior court found, "[w]hen APCs are barred from providing abortion, there are fewer available providers, fewer appointments, and potential for greater delay." [Exc. 129] This means that, "[a]s a result of [the APC Ban], some patients experience delays in obtaining abortions, some delays result in those patients no longer being eligible to obtain their preferred type of abortion, some patients are forced to travel greater distances to access abortion care, including out of state, and some patients do not receive abortion care even when they desired to terminate their pregnancy." [Exc. 130] Furthermore, the superior court properly credited Planned Parenthood's testimony that

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[21] *Id*. at 969.

[22] *Planned Parenthood III*, 171 P.3d at 582; *see Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977).

[23] *Planned Parenthood II*, 35 P.3d at 41.

[24] *Fraternal Order of Eagles v. City & Borough of Juneau*, 254 P.3d 348, 355 (Alaska 2011); *Valley Hosp*., 948 P.2d at 971; *see also Zablocki v. Redhail*, 434 U.S. 374 (1978).

[25] *Planned Parenthood I*, 28 P.3d at 909 (applying strict scrutiny when the law "tends to deter exercise of" a fundamental right).

[26] *See, e.g.*, *Valley Hosp*., 948 P.2d at 968 n.8.

some patients who wanted an abortion had to return to the health center if a physician was not available at the time they made their decision. [Exc. 123–24] The court determined as a factual matter that the APC Ban forced patients to a health center for a second appointment and that such patients were sometimes pushed past the gestational age limit for medication abortion, or for abortion in Alaska entirely. *Supra* at 17. The APC Ban, the superior court found, often delayed abortion appointments by a week or more, while APC provision of abortion "can significantly reduce the impact of delay, even when patients need to reschedule for their own reasons." [Exc. 127]

These factual findings are amply supported by uncontroverted testimony from Planned Parenthood providers, which the superior court found credible. [*Contra* At. Br. 28–29] This was not clear error. With respect to "their knowledge and experience of patients who were impacted by delay caused by [the APC Ban"]," the court rightfully found, after fulsome testimony, that Planned Parenthood's witnesses testified credibly. [Exc. 123] The only part of their testimony the court did not credit was about the precise number of patients who would be prevented from obtaining a medication abortion. [Exc. 122, 124] Providing a precise number of patients prevented from obtaining an abortion, however, is not Planned Parenthood's burden. *Infra* at 26-27. The State also attacks the superior court's evidentiary ruling that testimony from Planned Parenthood providers that relied on patient reports of their inability to access abortion. [At. Br. 33] But this type of testimony directly relates to patients' medical histories and the providers' ability (or inability) to provide treatment to patients, as well as what type of treatment, based on the gestational age of the patient's pregnancy. It is thus admissible under Alaska Rule of

Evidence 803(4). Moreover, the testimony is also admissible under Alaska Rule of Evidence 803(23) because the statements have circumstantial guarantees of trustworthiness because they were made in an effort to secure medical treatment—an abortion—a context in which declarants are motivated to provide accurate information.[27] Thus, the superior court's ruling was not an abuse of discretion.

The State argues that the type of restrictions and impairments shown at trial are not enough to support strict scrutiny because for strict scrutiny to apply, the infringement must be "substantial" or "significant." [At. Br. 23–24] By this, the State means that a relatively large number of people must be affected. [*E.g.*, At. Br. 29] However, contrary to the State's assertions, these terms refer not to the *number* of individuals who are unable to get an abortion because of a law, but to the *extent* of the barrier the law poses to those who are adversely affected.[28] The extent of the barriers posed by the APC Ban is both "substantial" and "significant," as the superior court properly found. [*See, e.g.*, Exc. 130] ("Even though the number of patients affected in the foregoing ways is relatively low, those impacts constitute a substantial burden on a fundamental constitutional right to reproductive choice.").

The State further argues that to actually warrant strict scrutiny, Planned Parenthood has to show that the APC Ban "prevent[s] women from accessing abortion care." [At. Br.

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[27] *Sluka v. State*, 717 P.2d 394, 399 (Alaska Ct. App. 1986).

[28] *See Planned Parenthood II*, 35 P.3d at 35 ("The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 894 (1992), *overruled on other grounds by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022)).

25–27] As the State notes, this Court has used the term "deter" to describe the showing required to trigger strict scrutiny review. [*E.g.*, At. Br. 1] But "deter" does not only mean "prevent" [*see* At. Br. 25–26]; it also means to "discourage" or "inhibit."[29] Certainly, one way to meet the threshold for strict scrutiny is to show that the law denies or delays access to the right in question (which the APC Ban does),[30] but that is not the only way.[31] This Court's jurisprudence makes clear that these barriers need "not forbid individual exercise of constitutional rights"[32] in order to be "substantial" or "significant" for purposes of triggering strict scrutiny review.

Both *Valley Hospital* and *Planned Parenthood III* illustrate this point. In *Valley Hospital*, this Court applied strict scrutiny in a challenge to a policy prohibiting most abortions in a 36-bed hospital based on a moral opposition to abortion. Despite citing no patients who were ultimately prevented from or delayed in obtaining an abortion, the Court found that fundamental privacy and personal autonomy rights were implicated because of

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[29] Merriam-Webster, *deter*, https://www.merriam-webster.com/dictionary/deter (last visited June 3, 2025).

[30] *Carey*, 431 U.S. at 688.

[31] *Valley Hosp.*, 948 P.2d at 968 n.8 (discussing the privacy right to have candid conversations with a health care provider and to refrain from disclosing a pregnancy to others); *see also Carey*, 431 U.S. at 688–89 (considering a regulation requiring contraceptives to be distributed by licensed pharmacists and finding that "substantially limiting access to the means of effectuating [the private] decision" by restricting "distribution channels [for contraceptives] to a small fraction of the total number of possible retail outlets renders contraceptive devices considerably less accessible to the public [and] reduces the opportunity for privacy of selection and purchase").

[32] *Planned Parenthood I*, 28 P.3d at 909–10.

the policy's potential impact on the provider-patient relationship.[33] The Court did not require the plaintiffs to quantify how many people would be denied an abortion or delayed in obtaining one as a result of the hospital policy, nor allow the defendant to continue its policy just because abortion remained available elsewhere in Alaska.

Similarly, in *Planned Parenthood III*, the Court applied strict scrutiny based on the nature of the law: the statute "require[d] minors to secure either the consent of their parent or judicial authorization before they [could] exercise their uniquely personal reproductive freedoms," which "no doubt place[d] a burden on minors' fundamental right to privacy."[34] The Court did not conduct a threshold analysis of how frequently the law would deny or delay minors' ability to obtain an abortion.[35] The State's theory of strict scrutiny review cannot be squared with *Valley Hospital* or *Planned Parenthood III*.

The State cites *Planned Parenthood of Southeastern Pennsylvania v. Casey* for the proposition that "not every law which makes a right more difficult to exercise is *ipso facto*, an infringement of that right." [At. Br. 23–24 n.55][36] The State's reference is inapposite but telling. *Casey* once laid out the operative standard for the federal due process right to

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[33] *Valley Hosp.*, 948 P.2d at 968 n.8.

[34] *Planned Parenthood III*, 171 P.3d at 582.

[35] The Court did appropriately consider the burdens imposed by the law, including by the judicial bypass procedure, in its inquiry into whether the law was narrowly tailored to further the State's compelling interest. *Planned Parenthood III*, 171 P.3d at 584. However, as discussed *infra* at 37–40, the State failed to argue below that it had *any* interest supporting the APC Ban.

[36] Citing 505 U.S. at 873.

abortion, but that standard was "undue burden," not strict scrutiny.[37] This Court has long rejected *Casey* as the standard for analyzing abortion rights under the Alaska Constitution.[38]

Finding no support in this Court's reproductive freedom cases, the State looks to non-abortion cases, citing, for example, *Doe v. Department of Public Safety*[39] and *Ranney v. Whitewater Engineering*. [At. Br. 23, 24, 28, 32, 38, 39][40] These cases do not support the State's contention that strict scrutiny is inappropriate in this case. The Court in *Doe* analyzed the invasion of privacy resulting from having one's name on the Sex Offender Registry. There, the Court stated that strict scrutiny would only apply when there exists "both a legitimate expectation of privacy and a claim of a substantial infringement."[41] The Court found both requirements were met in that case. As to the requirement of proving "substantial infringement," the Court focused not on the number of people affected but on the consequences to those whose privacy was infringed. It concluded that the "requirement that privacy claims involve substantial rather than minimal impacts" was satisfied because "the *consequences* of such dissemination are important."[42] Those consequences ranged

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[37] *Id*. at 874.

[38] *See Valley Hosp.*, 948 P.2d at 969 ("The scope of the fundamental right to an abortion that we conclude is encompassed within article I, section 22, is similar to that expressed in *Roe v. Wade*. We do not, however, adopt as Alaska constitutional law the narrower definition of that right promulgated in the plurality opinion in *Casey*."); *see also Planned Parenthood IV*, 375 P.3d at 1144–45.

[39] 444 P.3d 116 (Alaska 2019).

[40] 122 P.3d 214 (Alaska 2005).

[41] *Doe*, 444 P.3d at 126–27.

[42] *Id.* at 130 n.106.

from "public scorn and ostracism to harassment, to difficulty in finding and maintaining employment, to threats of violence and actual violence."[43] Similarly, in this case, the consequences of infringement are important: compromised patient privacy, reduction in the number of abortion providers, less appointment availability, and greater potential for unnecessary delay are surely "important" to Alaskans seeking to access reproductive health care.

Nor does *Ranney* counsel against the application of strict scrutiny here. That case involved a challenge to a workers' compensation law that provided a death benefit to a married individual whose spouse died on the job, but provided no such benefit to an unmarried partner. The plaintiff argued that this infringed on her right to privacy "because she [could not] exercise that right in respect to her intimate relationships without losing her right as a dependent to death benefits."[44] In deciding that this infringement was insufficient to trigger strict scrutiny, the Court emphasized that, while "the state's decision to provide benefits to married people unquestionably benefits couples who choose to marry," this "does not in itself equate to imposing a significant burden on those who freely choose not to."[45] The Court found that the plaintiff "failed to explain how her relational rights [had] been burdened" *at all*.[46] In other words, the plaintiff did not establish a basis for strict scrutiny because she did not show that the law had "important consequences" adversely

[43] *Id.* at 130.

[44] *Id.* at 221.

[45] *Id.* at 222.

[46] *Id*.

affecting her right to choose not to get married. In contrast, the APC Ban explicitly burdens access to abortion care by preventing abortion patients from receiving abortion care from a large class of health providers.

The State argues that the "financial, emotional, psychological, and physical costs" imposed by the APC Ban are mere "[c]ollateral consequences that do not tend to deter exercise of" the right to abortion. [At. Br. 34] But the superior court found that the psychological harms resulting from the Ban, for example, are tied to patient confidentiality. [*See, e.g.*, Exc. 128] And it cannot be that an Alaskan must risk their physical health before they are entitled to the protection of a fundamental right. [*See, e.g.*, *id.* (discussing health risks patients experience as a result of delay)] In other words, these are not just collateral consequences or "economist interests"—they are the real impacts of the Ban.

2. Even If the State Is Correct, Strict Scrutiny Still Applies.

Planned Parenthood showed at trial that, under the APC Ban, *all* patients seeking first-trimester abortions face more limited appointment availability than they would have absent the Ban. [Tr. 40, 94, 488–89, 500] Thus, the State's argument that the APC Ban does not burden *enough* Alaskans seeking abortions is simply factually untrue. Still, this does not mean that Planned Parenthood is bringing a facial challenge to the APC Ban, contrary to the State's suggestion (made for the first time in its appellate briefing before this Court). In a facial challenge, the plaintiff is trying to invalidate the law in toto—that is not and has never been Planned Parenthood's goal in this litigation. Instead, Planned Parenthood has sought to enjoin the APC Ban only as to qualified APCs for whom medication or aspiration abortion is within their scope of practice.

The Ban had an outsized impact on at least four groups of Alaskans: patients living in rural areas, patients experiencing intimate partner violence, patients seeking care outside of Anchorage, and patients who learn they are pregnant at non-abortion appointments and know that they want an abortion. *Supra* 17–19. That some patients are able to overcome these obstacles and obtain a timely abortion does not mean the law passes constitutional muster. Neither does the fact that circumstances other than the APC Ban also make it difficult for some patients to obtain abortions. [At. Br. 21] The existence of other factors does not make it constitutional for the State to place an additional, medically unnecessary barrier on accessing abortion. It is precisely because the decision of whether and when to have a child is such a critical decision for individuals that people who need an abortion will go to great lengths to get one—rearranging work schedules, losing income, finding transportation, and risking their privacy.[47]

For similar reasons, it is of no moment that Planned Parenthood sometimes is able to go to great lengths to meet patient needs, or that sometimes Planned Parenthood makes business decisions to staff its centers with APCs rather than physicians. [Exc. 124–25; At. Br. 29] The superior court found that "Planned Parenthood overcomes the barrier presented by [the APC Ban] through its staffing and scheduling decisions, successfully so in the vast

[47] Nor does the State's proposed hypothetical that it could limit the gestational age limit for medication abortion [At. Br. 30 n.66] prove its point. Indeed, the opposite: there is absolutely no compelling state interest in restricting the use of mifepristone to ten weeks LMP. This hypothetical proves too much: Alaska's robust constitutional protections for reproductive autonomy are intended to protect against such overreaches by the State, not to be manipulated to permit laws and policies that are more restrictive than those in nearly every other state where providing abortion is lawful.

majority of cases," [Exc. 124] but that does not mean that these barriers do not exist or that they are not "substantial" and "significant." The State also contends that Planned Parenthood could avoid the effect of the APC Ban by hiring more physicians to increase abortion availability. [At. Br. 12–14] Using APCs allows Planned Parenthood to provide high quality services while keeping its costs down and reflects how almost all health care services in the state other than abortion are provided. [Exc. 124] Planned Parenthood clinics are non-profit safety net providers operating low-volume clinics in a difficult environment, and its Alaska clinics operate at a loss. [Tr. 111, 112, 413][48] Furthermore, as the superior court recognized, Planned Parenthood has difficulty hiring and scheduling per diem physicians because those providers have other professional practices with highly variable schedules. [Exc. 124–25; Tr. 57–59] Because of the stigma, harassment, and threats, most women's health care providers do not provide abortions, especially outside of Anchorage. [Exc. 118, 124–25; Tr. 294, 295] Planned Parenthood has faced particular challenges staffing the Fairbanks health center; it prefers to hire local physicians due to lower costs and to avoid travel and weather delays. [Exc. 125]

As other courts have noted, "it [is not] appropriate for an opposing party or a court to dictate the best use of resources for a business, provided its choices are within the range of reasonableness—but particularly in the case of a non-profit agency with limited funding seeking to provide the most efficient health care services to a mostly poor population."[49]

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[48] The closure of the Juneau health center is further evidence of the difficulties Planned Parenthood faces providing health care in Alaska.

[49] *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 896 F.3d 809, 823 (7th Cir. 2018), *vacated and remanded on other grounds sub nom Box v.*

Perhaps most importantly, it is not the case that the APC Ban "*merely* requires a physician to administer an abortion." [At. Br. 29 (emphasis added)] A Michigan court aptly recognized in striking down that state's APC ban as unconstitutional that, "[h]aving access to a provider is *necessarily linked* to being able to make and effectuate decisions about whether to seek abortion care.."[50] By contrast, that court observed: "increas[ing the] number of healthcare professionals . . . increase[s] access to abortion care for individual patients."[51]

The State also claims that the data indicate that the APC Ban does not delay Alaskans seeking abortion because wait times (the length of time between the date a patient made an appointment and the date they received an abortion) went up following the Preliminary Injunction. [At. Br. 18 (citing Exc. 17–30 (the "Wait Time Data"))] But the superior court correctly found that the Wait Time Data in this case are not "reliable statistical evidence . . . that would permit" the court to draw any conclusion about the impact of the APC Ban. [Exc. 129; Tr. 335] Among other issues, patients often do not accept the first available appointment because they need to make arrangements for travel or to take time off work or for child care; the data do not reflect when patients first contact

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Planned Parenthood of Ind. & Ky., Inc., 141 S. Ct. 184 (2020); *see also Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 916 (9th Cir. 2014), *abrogated on other grounds by Dobbs*, 597 U.S. 215 (considering testimony that, because the challenged restriction on medication abortion would reduce patient volume, plaintiffs "may have to close" their Flagstaff clinic if it takes effect, along with evidence of predicted effects of such a closure).

[50] *Northland Fam. Plan. Ctr. v. Nessel*, No. 24-000011-MM, slip op. at 61 (Mich. Ct. Cl. May 13, 2025) (unpublished) (emphasis added).

[51] *Id.*

Planned Parenthood to inquire about appointment times. [Tr. 335; R. 2987–88] The Wait Time Data also do not capture whether the patient was forced to reschedule the abortion because of some event or complication in their life; if a patient reschedules, the data include that delay as well. [Exc. 127, 129; R. 2987–88] Furthermore, the data do not distinguish between medication and procedural abortions, despite that the Preliminary Injunction applied only to medication abortion. [Exc. 20–26; R. 2987–88] Lastly, the Wait Time Data do not account for confounding factors, such as staffing challenges. [Exc. 129; Tr. 331]

Because Planned Parenthood has shown that the APC Ban is a barrier to pregnant Alaskans' seeking to exercise their right to abortion, and the barrier is substantial or significant for those who are impacted by it, the superior court did not err in applying strict scrutiny in this case.

B. The APC Ban Fails Strict Scrutiny.

"Under strict scrutiny, when a law substantially burdens a fundamental right, *the State* must articulate a *compelling* state interest that justifies infringing the right and must demonstrate that no less restrictive means of advancing the state interest exists."[52] Nowhere in its briefing does the State suggest that the APC Ban would survive strict scrutiny review

[52] *Doe,* 444 P.3d at 125–26 (emphasis added). This longstanding standard does not require the Court to "second-guess[] regulatory line-drawing." [At. Br. 30]; it requires the State to make a showing that laws that infringe on fundamental rights are justified.

in a privacy analysis. Because the State has failed to meet its burden, deciding that Planned Parenthood's challenge warrants strict scrutiny should end the Court's analysis.[53]

In other states with a fundamental right to abortion, courts have applied strict scrutiny to APC bans like the one at issue here and struck them down. In 1999, the Montana Supreme Court struck down that state's physician-only law as violating the right to privacy under the Montana Constitution.[54] The court observed that Montana's Constitution offers "stringent" privacy protections, exceeding those of the U.S. Constitution,[55] just as Alaska's does. Thus, strict scrutiny applied.[56] Applying this standard, the court wrote that,

> except in the face of a medically-acknowledged, *bona fide* health risk, clearly and convincingly demonstrated, the legislature has no interest, much less a compelling one, to justify its interference with an individual's fundamental privacy right to obtain a particular lawful medical procedure from a health care provider that has been determined by the medical community to be competent to provide that service and who has been licensed to do so.[57]

[53] *See, e.g.*, *Planned Parenthood II*, 35 P.3d at 44 n.92 (noting that "the lack of a compelling state interest would have doomed the [abortion restriction] under either the privacy or equal protection analyses").

[54] *Armstrong v. State*, 989 P.2d 364, 384 (Mont. 1999).

[55] *Id.* at 373–74.

[56] *Id.* at 375.

[57] *Id.* at 380.

The Montana Supreme Court has reaffirmed its ruling in *Armstrong*.[58] The State's citation to the U.S. Supreme Court's grant of certiorari in *Mazurek v. Armstrong*, [At. Br. 9][59] suggesting that Montana's APC ban would pass muster under the undue burden standard, says nothing about how such a restriction fares under strict scrutiny. Minnesota, Michigan, and Ohio courts have also enjoined APC bans after applying strict scrutiny.[60]

C. The APC Ban Does Not Pass Any Level of Scrutiny.

Even if the Court declines to apply strict scrutiny to Planned Parenthood's privacy challenge, the APC Ban should be struck down. The State maintains that a privacy clause analysis is improper because there has been "no substantial infringement on the fundamental privacy right," [At. Br. 38–39] but, in the privacy context, even when "governmental action interferes with an individual's freedom in an area that is not characterized as fundamental . . . the state must show a legitimate interest and a close and substantial relationship between its interest and its chosen means of advancing that interest."[61] At minimum, the State appears to agree that this level of scrutiny would apply [*see* At. Br. 39–40]; the APC Ban cannot meet it. Below, the State asserted only that, while

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[58] *Weems v. State*, 440 P.3d 4, 10 (Mont. 2019) ("Our cases make clear that Montana's constitutional right to privacy is implicated when a statute infringes on a person's ability to obtain a lawful medical procedure."); *Weems v. State*, 529 P.3d 798, 801 (Mont. 2023); *Planned Parenthood of Mont. v. State*, 557 P.3d 440 (Mont. 2024) (striking down physician-only Medicaid restriction).

[59] 520 U.S. 968 (1997).

[60] *Northland Fam. Plan. Ctr. v. Nessel*, No. 24-000011-MM, 2024 WL 5468617, at *21–22 (Mich. Ct. Cl. June 25, 2024) (unpublished); *Doe v. State*, No. 62-CV-19-3868, 2022 WL 2662998, at *25 (Minn. Dist. Ct. July 11, 2022) (unpublished); *Planned Parenthood Sw. Ohio Region*, 2024 WL 4183293, at *7.

[61] *Sampson v. State*, 31 P.3d 88, 91 (Alaska 2001).

the APC Ban "was 'rooted in concerns over maternal health and safety'" when it was passed, "[i]f those concerns are no longer present that is a problem for the legislature not the courts." [R. 2378–79] On appeal, the State attempts to raise a host of "compelling" interests for which it offered absolutely no evidence at trial [At. Br. 41–46] The Court should not consider these newly-asserted interests, but even if it does, they are not "legitimate interest[s]" with "a close and substantial relationship" to the APC Ban.[62]

1. The State Has Improperly Raised New Interests on Appeal.

An argument not raised by an appellant below may only be considered on appeal "if the issue is (1) not dependent on any new or controverted facts; (2) closely related to the appellant's trial court arguments; and (3) could have been gleaned from the pleadings."[63] "This rule is based on the belief that permitting a party to claim error regarding a claim not raised and litigated below is both unfair to the trial court and unjust to the opposing litigant."[64] The State's newly-asserted interests satisfy none of the required criteria.[65] The State has waived these arguments, and this Court should not consider them.

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[62] *Id.*

[63] *Norman S. v. Dep't of Health & Soc. Servs., Off. of Child.'s Servs.*, 459 P.3d 464, 466 n.3 (Alaska 2020) (quoting *Radebaugh v. State, Dep't of Health & Soc. Servs., Div. of Senior & Disabilities Servs.*, 397 P.3d 285, 292 (Alaska 2017)).

[64] *Harvey v. Cook*, 172 P.3d 794, 802 (Alaska 2007) (citations omitted); *Boardman v. Inslee*, 978 F.3d 1092, 1118 n.16 (9th Cir. 2020) ("The [trial] court is not merely a way station through which parties pass by arguing one issue while holding back . . . others for appeal.") (quoting *Crawford v. Lungren*, 96 F.3d 380, 389 n.6 (9th Cir. 1996)).

[65] *See Harrison v. Kernan*, 971 F.3d 1069, 1080–81 (9th Cir. 2020) (holding that a new justification for a law raised for the first time on appeal "should properly be developed in district court and then factored into the intermediate scrutiny analysis"); *Armstrong v. Davis*, 275 F.3d 849, 874 (9th Cir. 2001) ("Considerations advanced to support a restrictive policy must be sufficiently articulated to permit meaningful review . . . . Thus, at a

First, the State's belatedly asserted interests improperly depend on new and potentially controverted facts that are not in the superior court record.[66] For example, despite asserting that the APC Ban furthers the "integrity of the medical profession," the State cites no evidence in the record regarding the training of physicians as compared to APCs. To the contrary, at trial, the State did not try to rebut Planned Parenthood's extensive evidence that APCs are as qualified as physicians to provide abortions. Rather than evidence, the State cites a Harvard Business Review article and makes an unsubstantiated claim that society has higher expectations for physicians. [At. Br. 44]

Second, the State's newly-raised interests are not closely related to its superior court arguments.[67] The State's brief does not expand on an existing argument—it attempts to supply an argument where it made none before. For example, the State asserts that having two agencies regulate abortion providers would impose an administrative burden. But, even putting aside why this is any more true for abortion than for any other of the many

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minimum, the reasons must be urged in the district court." (cleaned up)), *abrogated on other grounds by Mattioda v. Nelson*, 98 F.4th 1164 (9th Cir. 2024).

[66] *State, Dep't of Revenue v. Gazaway*, 793 P.2d 1025, 1027 (Alaska 1990) (holding an argument depended on new or controverted facts where it relied on assertions not supported by the record).

[67] An appellant may "expand or refine details of an argument otherwise preserved on appeal," *Zeman v. Lufthansa German Airlines*, 699 P.2d 1274, 1280 (Alaska 1985), but a novel justification for a general claim made in the superior court is not "closely related" to the original claim. *Ace Delivery & Moving, Inc. v. State*, 350 P.3d 776, 781–82 (Alaska 2015).

categories of healthcare provided by both APCs and physicians, this argument relies on "entirely different realms of facts"[68] than those before the superior court.

Third, the State's interests could not have been gleaned from the pleadings below. For example, the State never "even allude[d]"[69] to its interest in fetal life before the superior court.

2. None of the State's Interests Justify the APC Ban.

Even if the Court were to consider the State's improperly raised new justifications, they fail to meet even the lowest level of review.

Safety: The State maintains that its "interest in protecting the safety of pregnant women" justifies the APC Ban. [At. Br. 41] It argues that the law promotes safety by authorizing doctors to provide abortions, which is safer than pre-*Roe* "underground" abortions. [*Id.*] However, it presented no argument or evidence at trial to suggest that these abortions are comparable to those provided by APCs. The superior court found, based on Planned Parenthood's unrebutted evidence, that abortion is safe, that APCs safely provide care comparable to abortion, and that APCs can provide abortions just as safely as physicians. *Supra* at 9–13.[70] There is no medical reason why APCs at Planned Parenthood should not provide medication or aspiration abortion. [Tr. 63, 457, 462]

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[68] *Kaiser v. Umialik Ins.*, 108 P.3d 876, 881 (Alaska 2005).

[69] *State v. Nw. Constr., Inc.*, 741 P.2d 235, 239 (Alaska 1987); *see also Sea Lion Corp. v. Air Logistics of Alaska, Inc.*, 787 P.2d 109, 115 (Alaska 1990) (refusing to "glean new theories on appeal from nothing more than a general denial").

[70] *Weems* (2023), 529 P.3d at 801 ("[A]bortion care is identical to the care [APCs] already lawfully provide in [the state]; . . . abortion care is exceedingly safe; and . . . abortion care can safely be provided by [APCs]. Accordingly, there is no medically acknowledged, bona

For the very same reasons, Alaska's APC Ban is also *not* closely and substantially related to the State's asserted interest in safety. Indeed, the medical consensus is that expanding access to abortion increases patient safety, by making it more likely that people can obtain that care earlier in pregnancy, when it is safer, and so they are not forced to carry to term. *Supra* 8, 12.

Autonomy: The State next argues that its "compelling interest in protecting women's constitutional right to choose whether and when to have children" justifies the APC Ban. [At. Br. 42] The State appears to contend that the Legislature was promoting autonomy at the time it enacted the physician-only law because it legalized abortion. This may have been true in 1972, but the effect of the law today is not to promote autonomy but instead to limit it. Thus, the APC Ban lacks even a "close and substantial" relation to the alleged goal of autonomy.

Respect for Fetal Life: Third, the State maintains that the APC Ban "protect[s], respect[s], and promot[es] 'the possibility of life.'" [At. Br. 42] In suggesting that the APC Ban furthers this interest, the State appears to concede that the APC Ban does, in fact, restrict access to abortion. *Id.* (acknowledging that this asserted interest "sometimes conflict[s]" with personal autonomy). Regardless, this interest is not compelling. In *Valley Hospital*, the Court rejected a hospital policy based on "a 'sincere moral belief' that elective abortion is wrong."[71] *Valley Hospital* also made clear that the Alaska Constitution is at

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fide health risk for the State to restrict the availability of abortion care by preventing [APCs] from performing abortions.").

[71] *Valley Hosp.*, 948 P.2d at 972.

least as protective of the right to abortion as the right articulated in *Roe v. Wade*.[72] Under the *Roe* framework, restricting access to abortion pre-viability was always unconstitutional because the State has no compelling interest in embryonic or fetal life at this point.[73] Further, even applying the analysis at the low end of the sliding scale, it is clear that the APC Ban is not closely and substantially related to the State's interest in fetal life because it authorizes physicians to provide abortions.

Integrity of Medical Profession: Fourth, the State argues that, because abortion is a "unique medical treatment," it furthers the integrity of the medical profession to limit the provision of abortions to physicians, "[g]iven society's higher cultural expectations of doctors." [At. Br. 43–44] But the State has offered no evidence about the cultural expectations of different types of health care providers or about how allowing APCs to perform abortions would undermine the integrity of the medical system. It is undisputed that APCs who provide abortion since the Preliminary Injunction are acting within their scope of practice. It does not follow that preventing APCs from providing care within their scope of practice furthers the integrity of the medical profession. Without any evidence, the State proposes doctor-assisted suicide as a "close[] medical analogue." [At. Br. 43] It is not. Alaska's Constitution does not protect a right to physician-assisted suicide,[74] but it

[72] *Id.* at 969 ("The scope of the fundamental right to an abortion that we conclude is encompassed within article I, section 22, is similar to that expressed in *Roe v. Wade.*").

[73] *Roe v. Wade*, 410 U.S. 113, 163 (1973) ("With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability.").

[74] *Sampson*, 31 P.3d at 98.

does protect the right to abortion. This alleged interest is thus not legitimate and does not justify the APC Ban.

Administration: Finally, the State claims that its interest in "having a single board . . . regulate the administration of abortions" supports the APC Ban. [At. Br. 44] If this were true, abortion would be the *only* type of health care for which the State apparently has this interest because it is the *only* type of health care it regulates in this way. [Tr. 215 (noting that the Ban is "very out of step" with how Alaska otherwise regulates clinicians)] There is much overlap between the services that APCs provide and the services that physicians provide, including delivering babies, inserting IUDs, performing cancer screenings, and managing miscarriages. *See supra* at 9–11. For all these services other than abortion, the State is not troubled by having the Board of Nursing regulate nurses and APCs while the Board of Medicine regulates doctors. The Board of Nursing is entirely capable of regulating APCs providing abortion in the same way it regulates APCs providing every other type of health care, including reproductive health care like miscarriage and pregnancy care. [Exc. 131–32] The Board of Nursing is well-positioned to declare that an APC without relevant training may not perform an abortion, just as the Medical Board can declare that an ear, nose, and throat doctor without relevant training may not perform an abortion. Furthermore, the Medical Board also regulates PAs. In short, the APC Ban has no fair and substantial relationship to the goal of administrative efficiency where both the Board of Nursing and the Medical Board already regulate performance of procedures medically comparable to abortion.

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This Court should therefore affirm the superior court's conclusion that the APC Ban unconstitutionally violates Alaskans' right to privacy, no matter what standard of scrutiny the Court applies.

II. The APC Ban Violates the Equal Protection Clause.

As the superior court properly found, the APC Ban "violates the constitutional right . . . to equal protection of patients seeking medication or aspiration abortion, and . . . the equal protection rights of APCs whose scope of practice includes medication or aspiration abortion." [Exc. 133] To determine whether it is permissible to treat two similarly situated classes differently, courts employ a three-step equal protection analysis, using a "sliding scale."[75] The first step is to "determine[] at the outset what weight should be afforded the constitutional interest impaired by the challenged enactment."[76] Second, courts examine the purpose served by a challenged statute. "Depending on the level of review determined, the state may be required to show only that its objectives were legitimate, at the low end of the continuum, or, at the high end of the scale, that the legislation was motivated by a compelling state interest."[77] Finally, courts evaluate the relationship between the state's interest and the means used to further this purpose, applying a sliding scale analysis. The question is whether "[u]nder the applicable scrutiny level, . . . the stated rationales for the [law at issue] justify discriminating between" the similarly situated classes.[78] "At the low

[75] *Planned Parenthood IV*, 375 P.3d at 1137; *State v. Erickson*, 574 P.2d 1, 11–12 (Alaska 1978).

[76] *Planned Parenthood V*, 436 P.3d at 1001.

[77] *Id*.

[78] *Planned Parenthood IV*, 375 P.3d at 1136.

end of the sliding scale, this Court has held that a substantial relationship between means and ends is constitutionally adequate."[79] But, at the opposite end, "the fit between means and ends must be much closer."[80] At any level of review, the APC Ban fails an equal protection analysis.

A. The APC Ban Discriminates Against Pregnant Patients Seeking Abortion.

As the State does not appear to dispute, the comparison between pregnant people seeking abortions and pregnant women seeking other reproductive health care is the same here as in *Planned Parenthood IV*: "Until actually seeking pregnancy-related medical care the only difference between" these two groups "is the constitutionally protected choice each is making."[81] Once they opt to seek care, patients seeking abortion face a starkly different medical landscape: while all other pregnant patients have access to the full range of medical professionals skilled and willing to provide them pregnancy-related care, including APCs, pregnant patients who wish to obtain an abortion can do so only from a physician.

For example, as a Planned Parenthood APC testified, before the Preliminary Injunction, if one of her patients needed miscarriage treatment, she could treat the miscarriage herself during the very same appointment. [Tr. 452] If, however, the patient in the next room wanted an abortion, she could not treat that patient, despite the fact that the

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[79] *Planned Parenthood V*, 436 P.3d at 1001.

[80] *Id*.

[81] 375 P.3d at 1142.

treatment for miscarriage and abortion is medically identical. The patient seeking an abortion would have to return to the clinic on a day a physician was available. [Tr. 452–53] Pregnant patients who are not seeking an abortion, who therefore may obtain care from an APC, are also better able to schedule their appointments for prenatal care around their work schedules, their caregiving responsibilities, their ability to travel, and the weather.

The State maintains that this clear difference in treatment based on the exercise of a fundamental right does not warrant strict scrutiny because it does not "effectively deter[] the exercise of the fundamental constitution[al] right to reproductive choice." [At. Br. 40][82] But this misstates the law. This Court has made clear that strict scrutiny applies "where the government, by selectively denying a benefit to those who exercise a constitutional right, effectively deters the exercise of that right."[83] This Court has been equally clear that "deter" does not mean prevent. To the contrary, "[t]here is no requirement to demonstrate actual deterrence"; instead, "[t]he relevant criteria are the fact and the severity of the restriction."[84] This is because the deterrence requirement in an equal protection challenge is an objective one: it asks whether a "reasonable" person "would be deterred from

[82] Citing *Planned Parenthood V*, 436 P.3d at 990.

[83] *Planned Parenthood I*, 28 P.3d at 909.

[84] *Alaska Pac. Assurance Co. v. Brown*, 687 P.2d 264, 271 n.11 (Alaska 1984).

exercising" the right in question.[85] Courts look to the real-world effects of government action to determine the appropriate level of scrutiny.[86]

Planned Parenthood has met this objective test. As the superior court made clear, "[l]imiting the available days on which patients can make appointments can make it more difficult for patients to access care," disproportionately impacting "people who are low-income, have limited access to transportation, or have inflexible work or caregiving schedules." [Exc. 127] The APC Ban therefore "create[s] a deterrent . . . effect" for pregnant Alaskans who want an abortion.[87] And enjoining the APC Ban removes the artificial, state-imposed disadvantage placed on pregnant patients seeking abortion and puts them on more equal footing with their counterparts seeking other types of pregnancy-related care. It removes a deterrent to accessing abortion.

Alaska Pacific Assurance Co. v. Brown[88] is illustrative of how the Court approaches applying strict scrutiny in an equal protection analysis where fundamental rights are implicated. There, the Court considered a law providing different retirement benefits to Alaskans who moved out of state as compared to those who continued living in Alaska. It found that the law "impose[d] a substantial penalty upon the exercise . . . of the

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[85] *Id.* at 273; *see also Planned Parenthood I*, 28 P.3d at 909–10 ("The suspicion with which this court will view infringements upon [constitutional rights] depends upon . . . the objective degree to which the challenged legislation tends to deter [the exercise of those rights].").

[86] *Planned Parenthood I*, 28 P.3d at 909–10.

[87] *Planned Parenthood V*, 436 P.3d at 1003.

[88] 687 P.2d 264.

[fundamental] right to travel out of Alaska," thereby meriting strict scrutiny in an equal protection analysis.[89] In that case, the Court did not examine whether the law prevented any Alaskan from moving out of state; indeed, one of the plaintiffs was living in California.[90] Despite this, the Court applied an objective test and found simply that "[t]he *risk* of severe benefit reductions based upon variations in economic conditions which do not reflect the purchasing power of benefit dollars is a significant penalty in itself."[91] Like the plaintiffs in *Alaska Pacific Assurance*, Planned Parenthood has more than shown that the APC Ban deters exercise of a fundamental right—here, access to abortion.

Therefore, the highest form of scrutiny applies, and it is the State's burden to show that the Ban is narrowly tailored to serve a compelling interest.[92] The only way the State attempts to meet this burden is to put forth wholly new state interests, which the Court should not consider, *supra* at 38–40. But, even if the Court does consider these interests, none of these are sufficient to meet strict scrutiny review.[93] For the reasons discussed *supra* 40–43, none of the State's newly asserted interests are compelling, and none justify restricting providers for pregnant patients seeking abortions, while not imposing the same

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[89] *Id*. at 273.

[90] *Id.* at 268.

[91] *Id.* at 274.

[92] *Planned Parenthood IV*, 375 P.3d at 1138.

[93] *Id*. at 1146 (Fabe, J., concurring) ("When fundamental rights are at issue, our right-to-privacy analysis closely resembles our equal protection analysis. Both modes of analysis require identification of a compelling governmental interest, advanced by the least restrictive means. They differ in what aspect of a law is subjected to this strict review: its infringement of the fundamental right or its discriminatory treatment of the fundamental rights of two different groups.").

restrictions on pregnant people seeking other types of pregnancy-related care. Certainly, doing so is not the least restrictive means of achieving any of the State's purported interests.[94]

Indeed, even at the lowest end of the sliding scale, differential treatment of similarly situated people is permissible only if the distinction between the persons "rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation."[95] As also shown *supra* at 40–43, the APC Ban does not meet even this test.

B. The APC Ban Discriminates Against APCs.

The superior court also properly held that the APC Ban violates the equal protection rights of APCs for whom providing abortions is within their scope of practice, as compared to physicians who are trained to provide the same type of abortion care. [Exc. 133] The State has not argued that APCs and physicians are not similarly situated in this respect. The "right to engage in [an] economic endeavor" is "an important right that the government may impair only if its interest in taking the challenged action is important and the nexus between the action and the interest it serves is close."[96] The State asserts for the first time on appeal that Planned Parenthood failed to establish "that APCs' economic interests are at stake." [At. Br. 47] That is incorrect. The State did not refute at trial that APCs have an

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[94] *Cf. id*. at 1137 ("If the purpose can be accomplished by a less restrictive alternative, the classification will be invalidated." (citation omitted)).

[95] *Planned Parenthood I*, 28 P.3d at 911.

[96] *Laborers Loc. No. 942 v. Lampkin*, 956 P.2d 422, 430 (Alaska 1998) (quoting *State, Dep'ts of Transp. & Lab. v. Enserch Alaska Constr., Inc.*, 787 P.2d 624, 631 (Alaska 1989)).

interest in practicing their profession, which includes providing care within their scope of practice–like abortion.

The State also appears to suggest that the APC Ban's differential treatment of similarly situated APCs and physicians is subject to less exacting scrutiny than the superior court applied. [At. Br. 46] But even at the lowest end of the sliding scale, "a 'legitimate reason for the disparate treatment [must] exists' and the law creating the classification [must] 'bear[] a fair and substantial relationship to that reason.'"[97] Again, in the superior court, the State provided no reason for treating APCs and physicians differently with regard to abortion. And even if the State's governmental interests are presumed legitimate (which they should not be), there is no "nexus between the state interest and the [APC Ban],"[98] much less one that is close. *See supra* 40–43.

CONCLUSION

The Court should affirm the superior court's order restraining the State from enforcing the APC Ban as to qualified APCs for whom medication and aspiration abortion is within their scope of practice.

[97] *Squires v. Alaska Bd. of Architects, Eng'rs & Land Surveyors*, 205 P.3d 326, 341 (Alaska 2009).

[98] *Id.*; *see also State v. Schmidt*, 323 P.3d 647, 663 (Alaska 2014) (finding that even though the State's proffered interests were legitimate, "the classification . . . [was] not sufficiently related to those interests").