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, and KENTUCKY, a Washington corporation, Appellee. Trial Court Case No.: 3AN-19-11710 CI	)	Supreme Court No.: S-19277

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

REPLY BRIEF OF APPELLANTS STATE OF ALASKA, ET AL.

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INTRODUCTION

A law is not automatically subject to strict scrutiny simply because it touches on abortion. On Planned Parenthood's theory, any law that marginally increases Planned Parenthood's costs or decreases its administrative flexibility would get strict scrutiny because it could affect how Planned Parenthood provides abortions. But strict scrutiny applies only when a law tends to deter women from exercising their fundamental right to choose whether to have children. The physician-only law has never prevented Planned Parenthood from meeting the demand for abortion in Alaska. Even though the law had been in effect for a half century, Planned Parenthood did not show that it had deterred women from exercising their right to choose. The physician-only law is therefore not subject to strict scrutiny, and it passes constitutional muster.

ARGUMENT

I. The physician-only law does not violate the constitutional right to privacy.

Both the extent of the burden and the number of people burdened by the physician-only law are relevant to determining its constitutionality as applied to APCs. Strict scrutiny under the constitutional privacy clause applies only if the law significantly impairs the fundamental right to abortion, which the physician-only law does not.[1] And even if the law occasionally prevents a woman from obtaining an abortion (which the evidence does not show), the trial court still should not have broadly enjoined the physician-only law as unconstitutional because the law has a plainly legitimate sweep.[2]

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1 *See infra* Argument Section I.A.

2 *See infra* Argument Section I.B.

A. Strict scrutiny is inappropriate because the physician-only law does not prevent women from accessing abortion.

The extent of the law's burden on privacy rights is relevant to the level of scrutiny because only *significant* burdens on fundamental rights trigger strict scrutiny, and there is no significant burden here.[3] [At. Br. 23-25] In the context of abortion, a significant burden is one that tends to prevent a woman from choosing to get an abortion. [At. Br. 36-38] The State agrees with Planned Parenthood that a law need not *forbid* abortion for it to "deter" a woman from choosing to have an abortion. [Ae. Br. 27[4]] But for the deterrence to be significant, the law—whether it is the reduction of a public benefit paying for the procedure or the requirement that a doctor perform the procedure—must have the real practical effect of obstructing the right to choose.[5] For example, if a law required women to stay in a hospital for a week after getting an abortion, which prevented women from getting abortions without losing a week of income and childcare and which was shown to deter many women from seeking abortions, that law would likely be subject to strict scrutiny.

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[3] *See Ranney v. Whitewater Eng'ring*, 122 P.3d 214, 222 (Alaska 2005).

[4] Citing *State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.* (*Planned Parenthood 2001*), 28 P.3d 904, 910 (Alaska 2001).

[5] *See id.* at 911 (finding that the regulation, which "eliminat[ed] public assistance for medically necessary abortions [and] would cause about thirty-five percent of women who would otherwise have obtained abortions to instead carry their pregnancies to term," indisputably "deter[red] women from obtaining abortions").

Contrary to Planned Parenthood's assertion, *Valley Hospital*[6] and *Planned Parenthood III*[7] applied strict scrutiny because the state actions challenged there actually prevented women from exercising their fundamental right to choose to have an abortion—not just because the laws made abortion less convenient. [Ae. Br. 27-28]

In *Valley Hospital*, it was undisputed that the challenged policy, if it went into effect, would *prevent* almost all abortions in Alaska after 12 weeks gestation, as well as medically complex abortions before 12 weeks gestation.[8] This is because Valley Hospital was "the only hospital in the state of Alaska offering abortion services to women in their second trimester," and state law required second trimester abortions to be performed in a surgical facility.[9] "Thus, if the Hospital's abortion ban were permitted to resume effect, women who [sought] an abortion in their second trimester of pregnancy, or who need[ed] a hospital-based service for medical reasons during their first trimester, [would] be unable to obtain an abortion in Alaska, unless their life [wa]s threatened by continuing the pregnancy."[10] The Court in *Valley Hospital* had no reason to adjudicate whether a

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6 *Valley Hosp. Ass'n v. Mat–Su Coalition for Choice*, 948 P.2d 963 (Alaska 1997).

7 *Planned Parenthood of the Great Nw. v. State (Planned Parenthood III)*, 375 P.3d 1122 (Alaska 2016).

8 Brief of Appellees in *Valley Hosp.*, 948 P.2d 963, 1996 WL 34392672 at *10-11.

9 Brief of Amici in Support of Appellees in *Valley Hosp.*, 948 P.2d 963, 1996 WL 34392670, at *7.

10 Brief of Appellees in *Valley Hosp.*, 1996 WL 34392672, at *10-11; *see also* Brief of Amici in *Valley Hosp.*, 1996 WL 34392670, at *7 ("Valley Hospital's decision to disallow abortion services, other than under extremely limited circumstances, effectively precludes Alaska women from receiving a second trimester abortion in their home state.").

lower level of scrutiny applied because eliminating abortion access at Valley Hospital meant eliminating all abortion access in Alaska after the first 12 weeks of gestation and eliminating statewide abortion access to medically complicated abortions within the first 12 weeks.[11] While it is true that the Court observed—in a footnote—that "other privacy interests," like the interest in keeping a pregnancy or an abortion private, were "also implicated" by the hospital's abortion ban, neither the case nor the level of scrutiny turned on those ancillary interests.[12] [Ae. Br. 27-28]

And in *Planned Parenthood III*, this Court likened Alaska's parental notification law to a similar law in a different state, the latter of which created "impediments *preventing* minors from exercising their constitutional rights."[13] The concurrence in *Planned Parenthood III* further elaborated on ways the Alaska law would unduly "*deny* a judicial bypass" of parental notification to some minors, and thus *deny* their access to abortion.[14] Regardless, in that case the State conceded that strict scrutiny applied, so this Court had no reason to address whether a lower level of scrutiny might have been warranted.[15]

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11 The appellees provided evidence that women who had to travel 1,500 miles to Seattle to get an abortion (the next closest facility) were less likely to get an abortion. Brief of Appellees in *Valley Hosp.*, 1996 WL 34392672, at *12.

12 *Valley Hosp.*, 948 P.2d at 968 n.8.

13 375 P.3d at 1143 (emphasis added).

14 *Id.* at 1149 (emphasis added).

15 Brief of Appellee, State of Alaska, in *Planned Parenthood III,* 375 P.3d 1122, 2013 WL 4717804, *6-7.

Although *Planned Parenthood v. Casey*[16] applied a different balancing analysis—the "undue burden" test under former federal law rather than strict scrutiny—*Casey* appropriately recognized the difference between just touching a fundamental right and *burdening* it. [Ae. Br. 28-29] *Casey* analogized what it means to burden the fundamental right to choose whether to have children to what it means to burden other fundamental rights, like the right of association and ballot access.[17] In those other fundamental rights contexts, both the United States Supreme Court and this Court consider "the character and magnitude of the asserted injury" to the fundamental constitutional right.[18] Strict scrutiny does not apply simply because a law affects a fundamental right—the magnitude of the burden must be significant enough to inhibit exercise of that right. [At. Br. 23-25]

Here, Planned Parenthood did not show that the physician-only law—which has been in effect for decades—has inhibited women in Alaska from exercising their right to choose an abortion. [At. Br. 25-32]

Planned Parenthood's own staffing and administrative choices, even if they lead to burdens on patients, can't render *the challenged law* a significant burden. Planned Parenthood chooses not to employ many physicians, but there is no shortage of

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16 505 U.S. 833 (1992), *overruled by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

17 505 U.S. at 873-74 ("[N]ot every ballot limitations amounts to an infringement of the right to vote.").

18 *See, e.g.*, *Anderson v. Celebrezze*, 460 U.S. 780, 789-92 (1983) (finding a substantial impact on the right to association when some voters were unable to vote for their chosen independent candidate); *Kohlhaas v. State*, 518 P.3d 1095, 1104, 1111, 1113 n.124 (Alaska 2022) (concluding that noting on the ballot a party's affiliation with a political party was a "scant burden on a party's associational rights").

physicians in Alaska willing to provide abortions. [At. Br. 12-14] While it is true that Planned Parenthood is a non-profit organization [Ae. Br. 33], that does not mean it cannot afford to offer doctor appointments more frequently—Providence, for example, is also a non-profit organization and it employs doctors every day. Nor does non-profit status and the clinics' overall finances mean that abortion services themselves are not profitable. Rather, as Dr. Pasternack testified, using APCs for abortions allows Planned Parenthood to save money and redirect any profit from the money saved to other clinics in other states. [Tr. 111, 112, 413] Hiring fewer doctors may be administratively and financially advantageous for the organization, but Planned Parenthood did not show that it *could not* hire more doctors. [Ae. Br. 33] Indeed, Planned Parenthood in Alaska has repeatedly turned down doctor applicants, including at least one doctor who offered to work on a volunteer basis. [At. Br. 13-14]

And it cannot be the case that any law that makes Planned Parenthood's operations more expensive or less convenient for its patients is subject to strict scrutiny. If that were the case, then any law—even building codes as applied to Planned Parenthood's buildings—would be subject to strict scrutiny.

Planned Parenthood argues that consideration of its administrative and financial decisions is inappropriate, but this case is nothing like the cases it cites in support of that position. [Ae. Br. 33-34] In one of those cases,[19] Planned Parenthood was "unable" to

[19] *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 896 F.3d 809 (7th Cir. 2018), *vacated and remanded on other grounds sub nom Box v. Planned Parenthood of Ind. & Ky., Inc.*, 141 S. Ct. 184 (2020) (Mem.).

buy more ultrasounds and adequately staff them to mitigate the effect of the state's new ultrasound law.[20] [Ae. Br. 33] The evidence here, by contrast, shows that Planned Parenthood was able to hire more doctors but chose not to. [At. Br. 13-14] In another cited case,[21] the challenged law would force the closure of a clinic, which would then "significantly reduce the number of Arizona women who receive abortions."[22] [Ae. Br. 34] Here, the physician-only law did not force any clinics to close.[23] And it did not shrink abortion availability below the demand for abortions in Alaska. Rather, Planned Parenthood already had sufficient doctor capacity before the injunction to meet the demand for abortions in Alaska [Exc. 122; At. Br. 14, 18]

Nor is the physician-only law "necessarily linked to being able to make and effectuate decisions about whether to seek abortion care," as Planned Parenthood argues. [Ae. Br. 34] For that proposition, Planned Parenthood cites an unpublished Michigan state case in which a judge struck down a physician-only law because, in that case—

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[20] *Id.* at 823. Notably, in that case, Planned Parenthood submitted evidence "about nine women who could not obtain an abortion due to the burdens imposed by the new ultrasound law," and detailed exactly how the law burdened those specific nine women. *Id.* at 821.

[21] *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905 (9th Cir. 2014), *abrogated by Dobbs*, 597 U.S. 215 (2022).

[22] *Humble*, 753 F.3d at 916. Comparing the evidence presented in *Humble* to the evidence in this case further illuminates the deficient evidence in this case. In *Humble*, Planned Parenthood proved that the additional costs from the law would be significant and "sometimes prohibitive." *Id.* at 916.

[23] To the extent Planned Parenthood suggests that the low demand for abortions combined with the (enjoined) physician-only law is what caused the Juneau clinic to close [Ae. Br. 33 n.48], such implication is not supported by the record in this case.

unlike here—requiring physicians to provide abortions "would exacerbate[] existing provider shortages, leading to large swathes of Michigan without access to nearby abortion care."[24] Here, by contrast, the medical director for Planned Parenthood in Alaska repeatedly testified that Planned Parenthood had sufficient doctor capacity to meet the demand for abortion statewide. [At. Br. 18 (citing Tr. 387-89, 110, 125)] And while it is true that large portions of rural Alaska lack nearby abortion care, that is not a result of the physician-only law. Planned Parenthood is the only abortion provider in the State and has disavowed any intention of opening rural clinics, regardless of whether the physician-only law is struck down. [Tr. 408-09]

Even setting aside Planned Parenthood's decision to limit how often it offers physician appointments for abortion, Planned Parenthood's evidence did not prove that the physician-only law caused patients to be "denied entirely the ability to obtain time-sensitive abortion care in Alaska." [Ae. Br. 16-19] Dr. Pasternack testified that when someone needed an abortion, Planned Parenthood made it happen.[25] [At. Br. 27] Most of Planned Parenthood's testimony was nonspecific and concerned "ifs": *if* someone came to Planned Parenthood past the gestational age of 17 weeks and six days, she would have to travel out of state [Tr. 46-47]; *if* someone in Fairbanks couldn't get to an aspiration

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

[25] Although she testified that Planned Parenthood "sometimes" accommodated urgent abortions, she could not provide an example of a situation in which Planned Parenthood was unable to accommodate an urgent abortion need. [At. Br. 27 (citing Tr. 113-15)]

appointment in Fairbanks, they would have to travel to Anchorage to get an abortion (or not get one at all) [Tr. 91, 303]; *if* someone couldn't get child care or job coverage on the two days each week that Planned Parenthood offers physician-staffed abortion, they may be forced to continue their pregnancy [Tr. 300-01]. Given that the physician-only law has been around for a half century, testimony about such hypothetical burdens is insufficient. If these problems were real, surely Planned Parenthood could have produced at least one example of a specific woman who was thwarted from accessing abortion care because of the law.

And even assuming that the right to abortion includes the right to choose medication rather than aspiration as the procedure, Planned Parenthood did not provide sufficient evidence to show that patients were "pushed beyond the gestational limit for medication abortion" *because of the physician-only law*. [Ae. Br. 16] Dr. Pasternack testified that she knew of patients arriving at Planned Parenthood who were past the gestational cutoff for medication abortion both before and after the preliminary injunction. [Tr. 94] Because Planned Parenthood changed the gestational cutoff for medication abortions from 10 weeks to 11 weeks in 2020 (the year before the superior court preliminarily allowed APCs to provide medication abortions), it follows that Planned Parenthood's former policy caused more patients to miss the cutoff before the preliminary injunction than after the injunction. [Tr. 143-44; *see also* Tr. 43]

Nor does Ms. Bender's testimony support a finding that the physician-only law pushed patients past the gestational cutoffs for abortion. [Ae. Br. 16-19] Ms. Bender believed that the physician-only law caused patients to miss the gestational cutoff for

medication abortion or for any abortion in Alaska because some undefined number of patients needed a successive appointment when (a) they came to an appointment, (b) they discovered they were pregnant at the appointment, (c) they decided immediately that they wanted an abortion that same day, and (d) a doctor was unavailable that day. [Tr. 483] The superior court credited Ms. Bender's testimony that it was "not infrequent" that this happened. [Exc. 123] Critically, the superior court refused to credit Ms. Bender's testimony that *any* particular number of women who needed a successive appointment returned too late to get abortions. [Exc. 124] The trial court discredited as "highly speculative" Ms. Bender's estimation of how many patients missed the gestational cutoff for medication abortion or abortion in Alaska because Ms. Bender's trial testimony and deposition testimony were wildly different. [Exc. 124]

And Planned Parenthood presented no admissible evidence that any patients who missed the gestational cutoffs for abortion did so *because of the physician-only law*. Ms. Bender's testimony relaying hearsay from patients about why a patient did not come to a clinic sooner was not admissible under the medical treatment exception to hearsay because, as the trial court found, those reasons are "not relevant to the care [patients] need." [Exc. 123; At. Br. 33-34; Ae. Br. 25-26] The gestational age of a patient's pregnancy is relevant to treatment, but why a patient arrived at 12 weeks instead of 11 weeks is irrelevant to treatment and therefore does not fall under the medical treatment exception to hearsay.[26] [Ae. Br. 25-26] It was therefore error for the trial court to rely on

[26] Alaska R. Evidence 803(4). For the same reasons, the residual exception to hearsay, which Planned Parenthood points to on appeal, does not apply. [Ae. Br. 26

the hearsay relaying *why* a patient might delay treatment. [At. Br. 33; Exc. 123-24] While Ms. Bender also testified that she provided medication abortion at earlier stages of pregnancy after the injunction, this does not indicate that women could not get abortions or their preferred type of abortions before the injunction. [Tr. 500] Plus, Ms. Bender's impressionistic testimony is in tension with the data showing that, after the injunction, average appointment times were later (rather than sooner), because women could choose later dates that better fit their schedules. [At. Br. 25-26]

Planned Parenthood argues that having fewer abortion appointments available causes ancillary burdens to some patients—financial, emotional, psychological, and physical—due to their difficult life circumstances. [Ae. Br. 31-32] But these collateral consequences are not the same as deterring the fundamental right to choose.

Moreover, trying life circumstances will often make vindicating fundamental rights harder for some people no matter what right is at issue. For example, courts, which are open only during normal business hours, are less accessible for low-income people with inflexible jobs and childcare responsibilities. And they are not located in every village, making it harder for many rural Alaskans to come to court. But the right to access courts is not infringed just because socioeconomic inequities make it harder for some

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(citing Alaska R. Evidence 803(23)] In fact, the Court of Appeals case Planned Parenthood cites recognizes that not everything a patient says to her doctor is excepted from hearsay. [Ae. Br. 26 (citing *Sluka v. State*, 717 P.2d 394, 399 (Alaska App. 1986))] Rather, the trustworthiness of medical statements made to a doctor stems from a patient's desire to secure medical *treatment*. If the statements are irrelevant to treatment, such as the case here, they do not bear any hallmarks of reliability.

people to exercise their rights. Rather, constitutional due process is infringed only by a "direct" and "insurmountable barrier" to the courthouse doors.[27] Likewise, this Court's abortion jurisprudence makes clear that a law infringes on the right to choose only if the law tends to prevent at least some women from getting abortions. [At. Br. 36-38] This law does not.

B. Because the number of people significantly burdened by the physician-only law is either zero or very low, the law is not broadly unconstitutional.

Planned Parenthood raises an "as-applied" challenge to the physician-only law in the sense that it seeks to block application of the law in a subset of situations: those involving APCs otherwise capable of performing medication and aspiration abortions in the first trimester. [Ae. Br. 31] But this is not a typical "as-applied" challenge because it does not limit its scope to a particular person (or subset of people) who are particularly burdened by the physician-only law while leaving the law undisturbed for those it does not burden. Instead, Planned Parenthood challenges the law broadly, as applied to all women seeking abortions whether or not the law presents any difficulty for them. [Ae. Br. 31] Planned Parenthood contends that the physician-only law has, at some point, been one of many contributing factors that led to some unidentified number of women not getting an abortion or the type of abortion she preferred. [Ae. Br. 24-26] In other words, Planned Parenthood's constitutional theory focuses on burdens to a small set of women, while its remedy encompasses vastly more women than those burdened.

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[27] *Varilek v. City of Houston*, 104 P.3d 849, 854 (Alaska 2004).

The framework for facial challenges is thus instructive here. [At. Br. 30-32] When assessing the facial validity of a law, this Court looks at "the group for whom the law is a restriction, not the group for whom the law is irrelevant."[28] [Ae. Br. 26] But this still entails a focus on the group of people that the law actually harms. A statute is not facially unconstitutional if it might occasionally create constitutional problems in its application, as long as it "has a plainly legitimate sweep."[29] Rather, a statute may be facially unconstitutional when it is "likely to prevent *a significant number* of women from obtaining an abortion."[30] The Court does not broadly invalidate a wide sweep of unproblematic applications of a law to people who are not burdened just because the law might cause occasional constitutional problems for a small set of people. Put differently, the number of patients affected by the physician-only law is relevant to the scope of the relief. Even if an occasional patient were prevented from getting an abortion, the physician-only law is not unconstitutional as applied to all women who are not significantly affected by the law because the law has a plainly legitimate sweep.

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

[29] *Planned Parenthood III*, 375 P.3d at 1133 & n.48 (citing *Casey*, 505 U.S. at 893-94).

[30] *Casey*, 505 U.S. at 893 (emphasis added), *cited with approval in Planned Parenthood I*, 35 P.3d at 35 and *Planned Parenthood III*, 375 P.3d at 1133 n.48.

C. Because the physician-only law minimally impacts a fundamental privacy right, it does not violate the right to privacy.

"For the right to privacy to apply, there must be . . . a claim of substantial infringement, as distinguished from a minimal one."[31] The privacy clause analysis ends here because—as explained above and in the State's opening brief—the physician-only law does not substantially infringe a fundamental right. [At. Br. 38-39; *supra* Section I.A]

Planned Parenthood argues that if strict scrutiny does not apply, then—in the context of the privacy clause—the state must still show "a legitimate interest and a close and substantial relationship between its interest and its chosen means of advancing that interest," because this is the framework used for reviewing infringements of non-fundamental rights. [Ae. Br. 37] But this conflates the type of interest (fundamental versus nonfundamental) with the extent of the interference (significant versus minimal). The State acknowledges that the right to choose whether to have children is a fundamental privacy right. [At. Br. 1] The reason the privacy analysis ends here is because the physician-only law's effect on that fundamental privacy right is minimal. The State does not concede that an intermediate scrutiny standard applies under the privacy clause analysis when a law has a non-substantial effect on a fundamental privacy right. [Ae. Br. 37; At. Br. 39] But if it did, the State would meet that lower burden for the same reasons identified below in the equal protection analysis.

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[31] *Doe v. Dep't of Pub. Safety*, 444 P.3d 116, 126-27 (Alaska 2019); *see also Ranney Eng'ring*, 122 P.3d at 222.

II. The physician-only law does not violate equal protection because treating abortion as a unique life-ending procedure bears a substantial relationship to compelling and legitimate state interests.

Turning to equal protection, the Court should not disregard the State's interests, which are apparent from the statute's text, the legislative history, and undisputed facts. [Ae. Br. 38-40] If the Court believes that the record is underdeveloped as to the State's interests, the appropriate next step would be to remand to develop the record, not to strike down a democratically enacted law on an underdeveloped record. Indeed, that is what the Ninth Circuit did in a case that Planned Parenthood cites for the proposition that justifications for a law should be developed in the trial court. [Ae. Br. 38 n.65[32]]

As for the level of judicial review, strict scrutiny does not apply for the same reasons articulated in the State's privacy clause analysis. [At. Br. 40] Planned Parenthood seems to argue that the analysis is different for determining whether infringement of a fundamental right is significant under the privacy clause versus the equal protection clause. [Ae. Br. 46-47] Not so. In both contexts, courts look at the objective, real-world effects to determine if the effect is significant. [Ae. Br. 47; At. Br. 37-38]

And as for those real-world effects, the physician-only law was in full force for half a century and Planned Parenthood failed to produce evidence that it ever actually deterred women from receiving abortions. If the physician-only law had been enjoined before being implemented, perhaps the Court would have to rely on hypotheses about

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[32] Citing *Harrison v. Kernan*, 971 F.3d 1069, 1080-81 (9th Cir. 2020) (after determining that a higher level of scrutiny applied, declining to resolve on the current record and remanding to the district court for development of justifications for the law).

how the law would affect patients.[33] [Ae. Br. 46-47] But given the long history of the physician-only law, and Planned Parenthood's failure to show that the law has ever prevented any patients from receiving abortions, Planned Parenthood did not meet its evidentiary burden. Strict scrutiny does not apply.

Alaska Pacific Assurance Co. v. Brown,[34] in which the Court reviewed a direct and severe monetary penalty on people who invoked their constitutional right to travel, does not support applying strict scrutiny here. [Ae. Br. 47-48] There, the Court considered whether a law violated equal protection because it provided significantly lower retirement benefits to Alaskans who moved out of state compared to those who stayed in state.[35] Planned Parenthood argues that this Court should follow *Alaska Pacific* by focusing not on how the law prevents patients from exercising their right to choose, but on how the law might penalize patients for exercising their right to choose. [Ae. Br. 48] But in the right-to-travel cases, this Court applies strict scrutiny only when the penalty is very "severe."[36] And in the abortion cases that reference *Alaska Pacific*, this Court has recognized that the burden on reproductive choice is significant or "severe" when the law

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33 *See, e.g.*, *Valley Hospital*, 948 P.2d at 965-66, 971 (applying strict scrutiny based on assumptions of how the preliminarily enjoined policy would interfere with the right to choose if allowed to go into effect).

34 687 P.2d 264 (Alaska 1984).

35 *Id.* at 268, 271.

36 *See, e.g.*, *id.* at 275.

in question has the practical effect of preventing some women from choosing abortions.[37] The same cannot be said for the physician-only law.

Because the physician-only law does not "effectively deter[] the exercise of the fundamental constitutional right to reproductive choice," the State needs only a legitimate reason to allow doctors to perform abortions while disallowing APCs to perform them.[38] And that reason need not be the least restrictive alternative, but must simply bear a "substantial relationship" to the objectives of the law.[39]

Safety justifications support limiting who can provide abortions, generally. [At. Br. 4-5, 41-42] Planned Parenthood seems to agree. [Ae. Br. 40] It does not argue that there is no safety rationale in limiting who can provide abortions. [Ae. Br. 40] It argues only that there is no safety rationale in drawing the line between physicians and APCs who could otherwise safely perform medication and aspiration abortions during the

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37 *See, e.g.*, *Planned Parenthood 2001*, 28 P.3d at 909-11 (applying the *Alaska Pacific* framework of heightened scrutiny because "eliminating public assistance for medically necessary abortions would cause about thirty-five percent of women who would otherwise have obtained abortions to instead carry their pregnancies to term); *State v. Planned Parenthood of the Great Nw. (Planned Parenthood 2019)*, 436 P.3d 984, 1000-01 & n.101 (Alaska 2019) (citing *Alaska Pacific* and recognizing the State's different treatment of women on Medicaid who choose abortions versus who choose to continue their pregnancy "has a material impact on the exercise of their fundamental right of reproductive choice" because eliminating using Medicaid funds for abortion "inevitably required the other [choice]" (i.e., continuing one's pregnancy).

38 *Planned Parenthood 2019*, 436 P.3d at 990, 1001.

39 *See id.* at 1001.

first trimester. [*See* Ae. Br. 40] This is a line drawing question for policymakers. Because strict scrutiny does not apply, the law need not be so narrowly tailored.[40]

And regarding tailoring, this is not such an easy line to draw. Planned Parenthood's witnesses testified that, as gestation progresses, above 14 weeks, only physicians can safely provide aspiration abortions. [Tr. 300] The evidence does not delineate precisely when the first trimester ends, but it appears to end around the end of week 12 or 13. One of Planned Parenthood's witnesses compared national data on first trimester abortions with Alaska-specific data on abortions within the first 12 weeks, suggesting the first trimester ends around the end of week 12. Other sources say that "[t]he first trimester . . . starts on the first day of your last period . . . and lasts until the end of the 13th week.").[41]

The line delineating the bounds of safe administration of abortion is further complicated by the method used to estimate gestational age. Whereas physicians must, per the Medical Board's regulations, estimate a patient's gestational age after examining the patient and reviewing test results, [42] APCs have no parallel regulatory requirement. Ms. Bender testified that Planned Parenthood providers estimate gestational age based on a patient's report of her last menstrual period. [Tr. 500] Planned Parenthood APCs thus

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40 *See id.* at 1001, 1004 (requiring only "substantial relationship" to the law's objectives).

41 *See, e.g.*, webmd.com, The First Trimester of Pregnancy: What to Expect, Baby Development, https://www.webmd.com/baby/first-trimester-of-pregnancy (Jan. 18, 2025) (article medically reviewed by practicing OBGYN doctor and former chief of OBGYN at a large hospital in Georgia).

42 12 AAC 40.080; 12 AAC 40.090.

rely on a patient's memory to decide whether she is eligible for an APC-provided medication or aspiration abortion. And while Ms. Bender testified that an APC "might" do an ultrasound and discover the patient was further along than she thought [Tr. 501], there is no regulatory requirement that APCs do so.[43] Accordingly, the line between when a physician rather than an APC may safely perform an abortion is not so clear.

The physician-only law also promotes respect for fetal life, integrity of the medical profession, and consistent administration of abortion. [At. Br. 42-44] To be clear, the State's asserted interest in respecting fetal life is not an interest in preventing abortions, as Planned Parenthood implies. [Ae. Br. 42] Instead, the State's interest is in ensuring that these procedures ending fetal life are performed ethically, professionally, and under a uniform standard. Although the medication and aspiration procedures for treating miscarriages are similar to the procedures for abortions [At. Br. 12], the context (and stakes) are completely different. After a miscarriage, there is no longer any fetal life to consider. Because of this unique context, the legislature intended that this life-ending procedure be regulated differently.[44]

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[43] In fact, Dr. Pasternack testified that Planned Parenthood was in the midst of revising its practice model, so that its APCs could provide medication abortions without examining patients in person. [Tr. 408-12]

[44] Similarly, in states that have allowed doctor-assisted suicide, that procedure is likewise regulated differently from other medical procedures. For example, Oregon's Death with Dignity Act allows terminally ill adults to end their lives through lethal medication prescribed by a physician, but strictly regulates who is eligible and how it may be accomplished. Death With Dignity Act, Or. Rev. Stat. § 127.800 *et seq*.

The legislature delegated to the Medical Board (and only the Medical Board) the responsibility to regulate the *sui generis* irreversible and life-ending procedure.[45] Planned Parenthood cannot argue away the indisputable reality that medical doctors go through more training than even highly-trained nurses and physician assistants. [Ae. Br. 39, 42-43] And the legislature has a legitimate interest in having this esteemed class of medical professionals with the most rigorous training perform this *sui generis* procedure.

That the law distinguishes between who can (and who cannot) perform abortions bears a substantial relationship to the State's compelling and legitimate state interests. It is therefore constitutional under the applicable level of equal protection scrutiny.

CONCLUSION

For these reasons, the Court should reverse the superior court's order and conclude that the physician-only law is constitutional.

[45] AS 08.64.105.