

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF THE <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. The Judicial Bypass System Will Unconstitutionally Impede Minors’ Ability To Obtain a Confidential Abortion.....	5
A. Pregnant Minors Will Struggle to Gain Access to the Judicial Bypass System.	5
B. Pregnant Minors Will Struggle to Get to Court and Participate in a Judicial Bypass Hearing	12
II. The Judicial Bypass System Will Adversely Affect Minors’ Health.	21
A. The Judicial Bypass Procedure Could Impair a Minor’s Physical Health.....	21
B. The Judicial Bypass Procedure Could Impair a Minor’s Emotional Wellbeing	24
C. Minors Unable to Obtain a Judicial Bypass Could Suffer Severe Health Consequences	25
CONCLUSION	28

TABLE OF AUTHORITIES

Cases

<i>ACOG v. Thornburgh</i> , 656 F. Supp. 879 (E.D. Pa. 1987).....	10
<i>Am. Acad. of Pediatrics v. Lungren</i> , 940 P.2d 797 (Cal. 1997).....	2, 23, 27
<i>Bellotti v. Baird</i> , 443 U.S. 622 (1979).....	13, 22
<i>Calista Corp v. Mann</i> , 564 P.2d 53 (Alaska 1977).....	7
<i>Hodgson v. Minnesota</i> , 497 U.S. 417 (1990).....	27
<i>Hodgson v. Minnesota</i> , 648 F. Supp. 756 (D. Minn. 1986), <i>aff'd</i> , 497 U.S. 417 (1990)	19, 25
<i>In re Doe</i> , 485 S.E.2d 354 (N.C. Ct. App. 1997).....	22
<i>In re Jane Doe I</i> , 566 N.E.2d 1181 (Ohio 1991).....	22
<i>In re T.W.</i> , 551 So. 2d 1186 (Fla. 1989)	22
<i>John v. Baker</i> , 982 P.2d 738 (Alaska 1999)	7, 13
<i>Planned Parenthood of Blue Ridge v. Camblos</i> , 155 F.3d 352 (4th Cir. 1998) ...	26
<i>Planned Parenthood of Central N.J. v. Farmer</i> , 762 A.2d 620 (N.J. 2000) .	13, 17, 22, 28
<i>Planned Parenthood of Southeastern Pa. v. Casey</i> , 505 U.S. 833 (1992)	19, 27
<i>Planned Parenthood, Sioux Falls Clinic v. Miller</i> , 63 F.3d 1452 (8th Cir. 1995)	26
<i>T.L.J. v. Webster</i> , 792 F.2d 734 (8th Cir. 1986)	22

Statutes

Alaska Stat. § 18.16.030(d).....	9
Alaska Stat. § 18.16.030(f)	20
Alaska Stat. § 18.16.030(k).....	17, 19
Alaska Stat. § 18.16.030(n).....	7
Alaska Stat. § 18.16.030(n)(4).....	16
Alaska Stat. § 44.50	10

Other Authorities

<i>A Clinician's Guide to Medical and Surgical Abortion</i> (Maureen Paul, et al. eds., 1999).....	23
Aida Torres, <i>Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services</i> , 12 Fam. Plan. Persp. 284 (1980).....	26
Alaska Advisory Comm. to the U.S. Comm'n on Civil Rights, <i>Racism's Frontier: The Untold Story of Discrimination and Division in Alaska</i> (2000), available at http://www.usccr.gov/pubs/sac/ak0402/ak02.pdf	24
Alaska Court System, <i>Report of the Alaska Supreme Court Advisory Committee on Fairness and Access</i> (1997)	passim
Alaska Native Language Center, <i>ANLC Mission and Goal</i> , at http://www.uaf.edu/anlc/mission.html (last modified Nov. 27, 2001).....	17
<i>Am. Acad. of Pediatrics, Confidentiality in Adolescent Health</i> , AAP News 746 (1993)	7

Am. Med. Ass'n, <i>Induced Termination of Pregnancy Before and After Roe v. Wade, Trends in the Mortality and Morbidity Rates of Women</i> , 268 JAMA 3238 (1992)	23
Council on Ethical and Judicial Affairs, Am. Med. Ass'n, <i>Mandatory Parental Consent to Abortion</i> , 269 JAMA 82 (1993).....	6, 25, 27
Diane M. Reddy et al., <i>Effect of Mandatory Parental Notification on Adolescent Girls' Use of Sexual Health Care Services</i> , 288 JAMA 710 (2002).....	7
Fairness and Access Implementation Comm., <i>Interim Report on the Fairness and Access Implementation Committee</i> (2000)	7
Laurence L. Tribe, <i>Abortion and the Clash of Absolutes</i> (1990).....	27
Margaret C. Crosby & Abigail English, <i>Mandatory Parental Involvement/Judicial Bypass Laws: Do They Promote Adolescents' Health?</i> , 12 J. Adolescent Health 143 (1991).....	24, 27, 28
Patricia Donovan, <i>Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions</i> , 15 Fam. Plan. Persp. 259 (1983).....	15, 24
Phillip G. Stubblefield, <i>First and Second Trimester Abortion</i> , in <i>Gynecological, Obstetric, and Related Surgery</i> 1033 (David H. Nichols & Daniel L. Clarke-Pearson eds., 2d ed. 2000)	23
Phyllis Morrow, <i>Legal Interpreting in Alaska</i> , 10 Alaska Justice Forum 24 (1994)	18
Planned Parenthood of Alaska, <i>Our Clinics</i> , at http://www.plannedparenthoodalaska.org/clinics.asp (last visited October 13, 2004).....	12
Stanley Henshaw & Kathryn Kost, <i>Parental Involvement in Minors' Abortion Decisions</i> , 24 Fam. Plan. Persp. 196 (1992)	27
Stanley Henshaw & Lawrence Finer, <i>The Accessibility of Abortion Services in the United States</i> , 35 Persps. Sexual & Repro. Health 16 (2003).....	24
Statement by the Comm. on Adolescence of the Am. Acad. of Pediatrics, <i>The Adolescent's Right to Confidential Care When Considering Abortion</i> , 97 Pediatrics 746 (1996).....	22, 24
U.S. Census Bureau, <i>Alaska QuickFacts</i> , http://quickfacts.census.gov/qfd/states/02000.html (last revised July 9, 2004)	13
U.S. Census Bureau, <i>Alaska QuickFacts</i> , http://quickfacts.census.gov/qfd/states/02000/html (last revised July 9, 2004)	14
U.S. Census Bureau, <i>Wyoming QuickFacts</i> , http://quickfacts.census.gov/qfd/states/56000.html (last revised July 9, 2004)	14
Rules	
Alaska R. Admin. § 18(a)	12
Alaska Rule 6(b)(2).....	17

STATEMENT OF INTEREST OF THE *AMICI CURIAE*

Pursuant to Alaska R. App. P. 212, *Amici Curiae* National Association of Social Workers Alaska Chapter, the Alaska Women's Lobby, National Center for Youth Law, Juvenile Law Center, and Jane's Due Process submit this Brief in Support of Plaintiffs-Appellees. *Amici Curiae* provide social services, legal assistance, or public policy advocacy on behalf of young women. Some of the *Amici* have extensive experience helping young women who need reproductive health services. Drawing on their collective experience advocating for minors, *Amici* submit this Brief to assist the Court by delineating how the judicial bypass option created by Alaska Stat. § 18.16.030 will obstruct young women's fundamental right to choose abortion.

The National Association of Social Workers (NASW) Alaska Chapter is an organization for professional social workers with over 450 members in Alaska. The mission of the NASW Alaska Chapter is to advance the profession of social work, address the professional needs of a diverse membership, and facilitate change that enhances quality of life and promotes social justice. Social workers are leaders in efforts that enhance human well-being. They work to empower those who are frequently unheard. They open doors of access and opportunity for everyone, particularly those in greatest need. Whether they work in direct practice, administration, education and research, or policy development, professional social workers are trained to improve the quality of life of the people they serve. Among NASW Alaska Chapter's members are social workers who help young people in troubled and abusive families.

The Alaska Women's Lobby (AWL) is committed to defending and advancing the rights of women and children. By lobbying on behalf of Alaska women, children and families, the AWL seeks to improve access to quality health care, equal insurance coverage for contraceptives, access to and information about abortion, and quality education. One of the AWL's chief objectives is to ensure that women and girls maintain their right to safe and legal abortion.

The Alaska Pro-Choice Alliance (APCA) is a permanent statewide coalition of 20 partner groups that was incorporated as a non-profit organization in 1998. Through education, advocacy, networking, and community organizing, APCA seeks to advance women's reproductive rights and promote women's access to comprehensive sexual and reproductive health services. APCA believes all women, regardless of age, ability, spirituality, culture, income, or location, should have access to safe and legal abortion care.

Founded in 1970, the National Center for Youth Law (NCYL) uses the law to improve the lives of poor children. NCYL promotes laws and policies on behalf of low-income children and serves as co-counsel in litigation of broad impact. NCYL also supports the advocacy of others by conducting trainings, providing technical assistance, and publishing analyses and other resources for legal services and pro bono attorneys, and other child advocates. One of NCYL's particular concerns is access to critical health care for adolescents. Beginning in 1987 and continuing for ten years, NCYL was counsel in *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797 (Cal. 1997). In that landmark case,

the California Supreme Court held that California's parental consent law violated the California State Constitution.

The Juvenile Law Center (JLC) was founded in 1975 as a non-profit legal organization. JLC works on behalf of children who have come within the purview of public agencies—for example, abused or neglected children placed in foster homes, delinquent youth sent to residential treatment facilities or adult prisons, or children in placement with specialized services needs. Although JLC primarily serves the children of Pennsylvania, it regularly lends its expertise to national child advocacy efforts. Throughout its existence, JLC has supported minors' right to obtain reproductive health care without parental involvement.

Jane's Due Process, Inc. (JDP) is a non-profit organization incorporated in 2001 to create a statewide response in Texas to minors seeking abortion services under the Texas parental notification law. At the end of their third year of service, Jane's Due Process has received approximately 4,700 hotline calls from callers in 127 Texas counties and has screened 1,274 minors for services. The JDP website receives an average of 12,000 visits per month. Along with a 24-hour toll-free hotline and pro bono lawyer referral program, JDP offers help with transportation to medical and legal appointments, childcare, and overnight accommodations, as well as financial assistance for pre-court sonograms and, when necessary, subsidies to cover the increased cost of an abortion procedure delayed by the legal system. Without the extensive assistance provided by Jane's Due Process, many young women in Texas would be unable to obtain abortions.

SUMMARY OF ARGUMENT

Alaska’s Parental Consent Act (“the Act”) threatens pregnant minors in Alaska who cannot obtain or who cannot risk seeking parental consent for abortion care. Rather than providing minors with an easily accessible, expeditious, and confidential substitute for parental consent, the judicial bypass procedure provided for in the Act will impose enormous burdens on minors in already difficult circumstances while providing no corresponding benefit to the State of Alaska. As the Superior Court concluded, “[t]he judicial bypass system will . . . delay the abortion, . . . increase the probability that the minor may not be able to receive a safe and legal abortion,” Op. at 34, ¶ 82,¹ make it difficult in some cases for a minor to “keep her choice private,” *id.* ¶ 83, and in some cases be detrimental to the physical health of the minor, *id.* at 35, ¶ 84. The court responded to the overwhelming trial testimony supporting these conclusions by holding that the judicial bypass procedure infringes upon a minor’s right to privacy under the Alaska Constitution and discriminates against pregnant minors seeking abortions without furthering any of the government’s purported interests. *See* Op. at 32-33, ¶ 77. This decision should be affirmed.

Amici submit this Brief to illuminate the ways in which the judicial bypass option’s onerous procedural requirements, combined with the obstacles created by Alaska’s unique geographic, linguistic, and cultural features, will unconstitutionally interfere with a minor’s access to abortion. In fact, the very process of obtaining a

¹ Throughout this Brief, the opinion of the Superior Court is cited as “Op.” followed by the page number and paragraph number cited.

judicial bypass is likely to harm the health and emotional well-being of Alaskan youth. For these reasons, the judicial bypass procedure will wholly fail to mitigate the Act's intrusion into the lives of minors unable to obtain parental consent.

ARGUMENT

I. THE JUDICIAL BYPASS SYSTEM WILL UNCONSTITUTIONALLY IMPEDE MINORS' ABILITY TO OBTAIN A CONFIDENTIAL ABORTION.

Pregnant minors in Alaska seeking a judicial bypass under the Act will need to overcome a battery of procedural hurdles, many of which will inevitably threaten their confidentiality. Each step of the bypass process will be complicated for minors from Native backgrounds given unique cultural characteristics and linguistic diversity. Those from remote regions far from superior courts will also have to contend with Alaska's unforgiving geography in order to travel to court. The Act, by penalizing these pregnant minors under the age of 17 who are faced with an unwanted pregnancy and want an abortion but cannot confide in their parents or negotiate the judicial bypass system violates the rights of young women to privacy and equal protection as guaranteed by the Alaska Constitution.

A. Pregnant Minors Will Struggle to Gain Access to the Judicial Bypass System.

A pregnant minor in Alaska who wants an abortion and who cannot involve a parent will encounter a series of formidable obstacles before even appearing before a judge. Any one of these obstacles could prevent her from obtaining a judicial bypass and from obtaining an abortion.

For many teens, the very prospect of going to court is a daunting task. According to the Advisory Committee on Fairness and Access² that was formed by the Alaska Supreme Court, minors in Alaska do not understand the justice system and therefore find it challenging to use court services. *See Alaska Court System, Report of the Alaska Supreme Court Advisory Committee on Fairness and Access* 49 (1997) [hereinafter *Report on Fairness and Access*]. Additionally, Alaskans tend to view the court system as a “remote, intimidating, and unfathomable institution,” *id.*, a perception that could render a court the last place to which a minor would turn for help. As Judge Christopher Cooke, a former superior court judge in Bethel, testified, because of this perception, few minors would opt to appear before a judge. Tr. 1250-54. Likewise, Deborah Reichard, who has served as a guardian ad litem in Bethel, testified that minors commonly decide not to turn to the court system for assistance because they are wary of what it represents. Tr. 926. For a pregnant minor, the prospect of turning to court, where she has to discuss the most intimate aspects of her life—sex, pregnancy, and her thoughts and feelings about having a child—is particularly daunting.

For minors willing to attempt to obtain a judicial bypass, merely taking the initial steps will present burdensome obstacles, many of which will threaten their confidentiality. As the American Medical Association has maintained, minors are

² The Advisory Committee on Fairness and Access consists of members appointed by the Alaska Supreme Court to identify long-standing concerns about barriers to court access, racial and ethnic bias, the need for language interpretation, and the lack of cultural diversity in the Alaska Court System. *See Report on Fairness and Access, supra*, at vii. The 118-page *Report on Fairness and Access* consists of the Committee’s conclusions and recommendations.

entitled to the same degree of confidentiality that adult patients have in general health care issues. *See* Council on Ethical and Judicial Affairs, Am. Med. Ass'n, *Mandatory Parental Consent to Abortion*, 269 JAMA 82 (1993). Yet, young women's confidentiality will be compromised at every stage of the judicial bypass process. Loss of confidentiality is a problem that both providers and young people themselves have identified as "a significant access barrier to health care." Am. Acad. of Pediatrics, *Confidentiality in Adolescent Health*, AAP News 746, 750 (1993); *see also* Diane M. Reddy et al., *Effect of Mandatory Parental Notification on Adolescent Girls' Use of Sexual Health Care Services*, 288 JAMA 710 (2002) (study finding that more than half of the minors surveyed would stop using "sexual health care services, delay testing or treatment for HIV and other STDs, or discontinue use of specific sexual health care services if their parents were informed that they were seeking prescribed contraceptives").

Pursuant to Alaska Stat. § 18.16.030(n), a minor seeking a judicial bypass will first have to contact a superior court and request a Judicial Bypass Packet. The minor will likely not know how to go through this step without the assistance of a reproductive health care provider or someone else familiar with the system. Even the seemingly simple task of requesting the petition will pose obstacles for a minor who cannot involve a parent in her abortion decision. Some minors will have difficulty accessing a telephone

where they can make a confidential call.³ As several witnesses testified, minors in certain regions will have difficulty even locating a telephone. Many will have trouble keeping the call confidential. The minor may have to wait until her parents are out of the home and those who can assist her with the bypass are available. *See* Tr. 1198-99 (testimony of Ms. Patkotak, a guardian ad litem in Barrow); Tr. 925-26 (testimony of Ms. Reichard). And she will face particular obstacles if the call is long distance, as the call will appear on a bill, arousing her parents' suspicion.

The Alaska Court System's consistent and well-documented failure to replace rural courts' outdated phone systems complicates telephone communication even further. *See Report on Fairness and Access, supra*, at 14-15; *see* Fairness and Access Implementation Committee, *Interim Report on the Fairness and Access Implementation Committee* 11 (2000). Assuming the minor manages to get through to the court, she will likely have difficulty even receiving the judicial bypass packet confidentially, as the envelope from a superior court will likely arouse her parents' suspicion.

Even if they are able to receive the judicial bypass packet, many minors will not be able to read or understand the contained forms. Language barriers have long served as serious obstacles to Alaskans' ability to access court services. *See John v. Baker*, 982 P.2d 738, 760 (Alaska 1999) (finding that language barriers create a "judicial system that remains foreign and inaccessible to many Alaska Natives"); *Calista Corp v. Mann*, 564 P.2d 53, 61 (Alaska 1977). To address the problem, the Alaska Supreme Court Advisory

³ For example, many houses in villages outside of Bethel do not have phones, while others may have only one phone, rendering confidential conversations difficult to maintain. *See* Tr. 925-26, 928 (testimony of Ms. Reichard).

Committee on Fairness and Access advised the Alaska Court System to use only “clear, simple language in its forms and other publications.” *Report on Fairness and Access*, *supra*, at 25. The Committee further recommended that publications issued by the Alaska Court System be translated into one or two of the most prominent languages in each venue district. *Id.* Neither the P-501 “Instructions For Requesting Judicial Permission To Bypass Parental Consent” form [hereinafter “instructions”] nor the P-505 “Petition To Bypass Parental Consent” form [hereinafter “petition”] complies with either of these critical recommendations. *See* TE 2005. The form is published only in English, leaving minors who struggle with English unable to read the instructions or complete.⁴ *See* TE 2005. They will thus need to find an English speaker who can help them, which means they must tell another person about their planned abortion—yet another threat to their confidentiality. Minors with a rudimentary understanding of the English language may still be confounded by the forms’ complex language. For example, the instructions contain terms such as “Petitioner” and “Emancipation” that many minors will have difficulty understanding. *See* Tr. 932 (testimony of Ms. Reichard). Moreover, Ms. Reichard testified that, in her experience as a guardian ad litem in the Alaska Court System, minors often fail to fully comprehend complicated legal forms even if they are accompanied by instructions. *See* Tr. 933.

⁴ A court-appointed attorney could assist minors in filling out the bypass petition. *See* Alaska Stat. § 18.16.030(d) (requiring appointment of attorney if pregnant minor has not retained her own). However, § 18.16.030(d) requires the appointment of an attorney only after the form has been submitted to the court. As a result, minors unable to retain a private attorney would be left to decipher, complete, and submit the forms without the assistance of counsel.

The notarization requirement poses yet another formidable, if not insurmountable, obstacle. The petition must be notarized before it is submitted to court. *See* TE 2005. To satisfy the requirement, a minor must either find a notary or deliver the petition personally to a superior court where she can have her petition notarized by a court clerk. *See id.* Many young women will be unable to avail themselves of either option. Minors who do not deliver the petition to court personally will have to find a notary for their petition. Yet, many communities do not have a notary. *See* Tr. 931 (testimony of Ms. Reichard). In the limited number of communities that do have a notary, the minor will have to find that person and develop a plan for meeting with him or her without betraying her secret. With every added call and every added trip, the minor risks her confidentiality and may well have to delay her abortion further, as she awaits a safe time to call and travel.

Even assuming the minor can safely get to the notary, her confidentiality may well be compromised. At minimum, she will have to disclose her plan to petition the court for a bypass to yet another person. Moreover, approaching the notary will force the minor to disclose her identity because the petition requires the minor to include her full name. In many communities, the notary may be someone who knows the minor or her family. In such circumstances, the minor will have nowhere to turn.⁵ *See* Tr. 1209 (testimony of

⁵ While Alaska's statute governing notaries public, Alaska Stat. § 44.50, does not expressly require notaries to produce their records upon request, the statute fails to prohibit notaries from disclosing their records. At least one federal court was so troubled by a judicial bypass notarization requirement exposing minors' identities through publicly available notary logs that the court enjoined the entire parental consent statute. *See ACOG v. Thornburgh*, 656 F. Supp. 879, 889 (E.D. Pa. 1987).

Ms. Patkotak). Asking a postmaster to notarize a bypass petition, pursuant to the petition, could threaten a minor's confidentiality as well, especially in small communities where a single postmaster distributes the mail for the entire community. *See* Tr. 931-32 (testimony of Ms. Reichard). The petition's certification exception would not apply to those minors who simply cannot risk revealing their plight to an available notary. *See* TE 2005. Moreover, as observed by Ms. Patkotak, the instructions on how to certify that a notary is not available could confuse minors. *See* Tr. 1209-10.

Minors who opt to let the court clerk notarize their petition face other difficulties. They must travel to court, which entails insurmountable obstacles for many teens. *See* discussion, *infra*, Part I-B. Even if a minor is able to travel to court without arousing the suspicion of her parents, it may be impossible for her to satisfy the requirements necessary for notarization. The instructions explicitly require minors to provide the court clerk with photo identification, a requirement to which there is no exception. *See id.* Many minors have no photo identification and no easy way to acquire one. In the tiny city of Barrow, for example, where driver's licenses are the only commonly used form of photo identification, a minor might have to travel to Fairbanks to obtain a photo driver's license because municipal funding cutbacks prevent the city from issuing its own. *See* Tr. 1208-09 (testimony of Ms. Patkotak). For minors who are under Alaska's legal driving age of 16, obtaining photo identification in most Alaskan villages would prove even more challenging. *Id.* at 1209.

B. Pregnant Minors Will Struggle to Get to Court and Participate in a Judicial Bypass Hearing.

Assuming a minor can successfully obtain, complete, notarize, and file a bypass petition, getting to court and participating in the hearing will present other obstacles, particularly for abuse victims.

First, the minor will face the horrendous challenge of attending a court hearing while maintaining her confidentiality. A minor enrolled in school will likely have to miss school in order to attend a hearing. No court in Alaska is open in the evenings or on weekends for routine, non-criminal hearings, times when a minor could more easily attend a hearing without arousing her school's suspicion.⁶ *See* Alaska R. Admin. § 18(a) (stating that courts are only open on weekdays until 4:30). Even if her school day ended before 4:30 and a court were willing to schedule a hearing late in the day, a minor would have difficulty traveling to court before 4:30. Moreover, because she would likely be expected to return home after school or attend an after-school activity, disappearing after school could create suspicion and lead to disclosure.

⁶ Contrary to the Alaska State Legislature's assertion that a pregnant minor would not be significantly burdened by having to appear at a hearing because she would already have to travel to an abortion provider, *see* Amicus Curiae Brief of the Alaska State Legislature 36, a minor would likely have an easier time leaving school to obtain an abortion than appear at a hearing because several abortion providers in Alaska, including the Plaintiff Planned Parenthood of Alaska, provide services several days a week after school hours. *See* Planned Parenthood of Alaska, *Our Clinics*, at <http://www.plannedparenthoodalaska.org/clinics.asp> (last visited October 13, 2004). In addition, a minor may be able to get away once, but not twice or possibly three times to file her petition and later attend a hearing. Every added step increases the likelihood that the minor's confidentiality will be breached.

What is more, some school districts routinely alert parents to a student's absence from school. *See Planned Parenthood of Central N.J. v. Farmer*, 762 A.2d 620, 636 (N.J. 2000) (“[A minor] may well have to be absent from school and risk her parents finding out that she has been truant in order to attend a judicial proceeding.”). As Todd Arndt, the supervisor of high school education for the Anchorage Public District, testified, there is no way for a minor in Anchorage to be excused from school without a parent's involvement or notification. *See* Tr. 2675. Although it is unconstitutional for a public school to breach the confidentiality of a student seeking an abortion, *see Bellotti v. Baird*, 443 U.S. 622 (1979), a minor pursuing a confidential bypass is unlikely to be in a position to assert her rights against the school. As a result, a minor who is aware of a parental notification policy for student absences would be inclined to try to avoid the judicial bypass procedure entirely, while a minor who is not aware that the school will notify her parents could have her confidentiality compromised if she leaves school to attend a court hearing.

Traveling to court for a minor in Alaska may present a formidable impediment to many minors' ability to obtain a judicial bypass. Twenty-nine percent of Alaska's population does not have easy year-round access to a court, and at least 6% has no local justice system service other than a police department. *See Report on Fairness and Access, supra*, at 6; *see also John*, 982 P.2d at 760 (recognizing that the distance of many villages from courts “limits our state judicial system's ability to respond to the needs of many Alaska Natives”). Alaska's unique geography renders travel difficult for those who

live in remote areas.⁷ Alaska stands as the largest state in the U.S. with one of the smallest populations: while its population of fewer than 650,000 is smaller than Rhode Island's, its land mass of 570,374 square miles is more than twice the size of Texas. *See* U.S. Census Bureau, *Alaska QuickFacts*, <http://quickfacts.census.gov/qfd/states/02000/html> (last revised July 9, 2004).

Consequently, accessing one of fourteen superior courts could require hundreds of miles of travel.

Access for those minors who live outside of metropolitan areas will prove particularly difficult. In Alaska, the majority of the population lives in rural regions where far fewer superior courts are located. In fact, only 42% of the population lives in metropolitan areas, compared to 82% nationally.⁸ Minors from rural regions in other

⁷ The argument of Amicus Life Liberty Institute (LLI) asserting that Alaska's judicial bypass procedure should pass constitutional muster because certain states with enforceable judicial bypass laws are geographically large while others have small populations is fundamentally flawed. *See* Amicus Curiae Brief of LLI 23-28. Alaska is unique in having a small population spread over a vast terrain. The LLI brief incongruously compares Alaska's geography to Rhode Island, which stands as the nation's smallest state with only 1,214 square miles, and Texas, with a population that exceeds 22 million people. The comparison to Wyoming, which, as the brief correctly notes, has the lowest population and stands as the 10th largest state, is also a flawed comparison: while Wyoming's population of approximately 500,000 is comparable to Alaska's of approximately 650,000, its size of 97,100 square miles pales in comparison to Alaska's 571,951 square miles. *See* U.S. Census Bureau, *Wyoming QuickFacts*, <http://quickfacts.census.gov/qfd/states/56000.html> (last revised July 9, 2004); U.S. Census Bureau, *Alaska QuickFacts*, <http://quickfacts.census.gov/qfd/states/02000.html> (last revised July 9, 2004). Furthermore, it is irrelevant that the judicial bypass laws in some other states are legally enforceable, *see* Amicus Curiae Brief of LLI, because the question before the Court is unique: whether the Alaska statute violates the Alaska Constitution.

⁸ *See* Henry J. Kaiser Family Foundation, *Alaska: Population Distribution by Metropolitan Status, state data 2001-2002*, <http://statehealthfacts.kff.org/cgi->

states with parental consent laws have had a more difficult time obtaining judicial bypasses than those from urban centers. *See* Patricia Donovan, *Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions*, 15 Fam. Plan. Persp. 259, 259-60 (1983) (finding that minors in Minnesota who “live in rural areas of this largely rural state apparently are not able to take advantage of the judicial bypass alternative”).

For those minors from the Bush who would need to travel substantial distances to get to court, ground transportation may not be available because much of the state is not connected to a functional road system. *See* Tr. 1713 (testimony of Ms. Patkotak). Air travel may be the only alternative. But the logistics of air travel will likely threaten the minor’s confidentiality and delay her procedure. The minor must gather funds for the flight, itself an overwhelming task. She must also arrange safe times to call those who would need to assist her with her travel and find a time to travel without arousing her parents’ suspicion. *See* Tr. 2571 (testimony of Ms. Sabino, an attorney who has worked extensively in judicial bypass system in Massachusetts). While a minor may be able to overcome logistical and other barriers one time in order to travel for an abortion, she is unlikely to be able to do it for purposes of attending the hearing as well.

Magistrates in Alaska, to whom superior court judges may delegate cases, do not satisfactorily alleviate the burdens involved in accessing judicial bypass hearings. Judge Cooke testified to the shortage of magistrates within the Bethel area by noting that less than ten percent of villages outside of Bethel have magistrates. Tr. 1253. As Susan

bin/healthfacts.cgi?action=profile&area=Alaska&category=Demographics+and+the+Economy&subcategory=Geography&topic=Metropolitan+Distribution (last visited Oct. 13, 2004).

Miller, a high-ranking officer in the Alaska Court System testified, magistrates tend to work only part time. Tr. 1402-03. Thus, even if a magistrate were located near a minor's village, the magistrate's limited availability could prevent a minor from exercising this option or delay her.

A telephonic hearing, as provided by the Act, *see* Alaska Stat. § 18.16.030(n)(4), is likewise not an adequate alternative. Again, this alternative requires a teen to find a phone that she can use for a significant amount of time without detection. *See supra* note 3. But even if the minor finds a telephone at which she can receive a confidential call, in some cases cultural and language barriers will severely complicate the hearing. Minors from Native Alaskan cultures communicate largely through traditional nonverbal gestures even if they speak English. Some Native cultures speak with their heads down and express their thoughts through facial expressions, such as squinting their eyes, nodding their heads and moving their eyebrows. Tr. 1214-15 (testimony of Ms. Patkotak); Tr. 1259 (testimony of Judge Cooke). In other contexts, judges have been known to stop telephonic hearings and reschedule in-person hearings when minors' communication over the telephone has proven incomprehensible. Tr. 1213-15 (testimony of Ms. Patkotak); Tr. 1255, 1257-59 (testimony of Judge Cooke). If a judge were to insist on scheduling an in-person hearing for a pregnant minor, the minor would lose her opportunity to obtain a judicial bypass if she were unable to travel to court quickly and confidentially for the hearing.

Even a minor who is able to travel to court will face numerous challenges once she arrives. While the Act requires that all proceedings be "conducted in a manner that will

preserve the anonymity of the complainant,” Alaska Stat. § 18.16.030(k), it cannot protect her anonymity before or after the hearing. Merely appearing at court could jeopardize her confidentiality. The minor may well run into court personnel or others who know her and can report a sighting to her parents. *See Farmer*, 762 A.2d at 636 (finding that a minor could be recognized by members of the community who know her while she is at the courthouse to attend the hearing); *see also* Tr. 2572 (testimony of Ms. Sabino); Tr. 973-74 (testimony of Judge Martin, a district court judge in Minnesota). She then risks suffering the very harm she was going to court to avoid—be it that her parents will kick her out of the house, that she is prevented from getting an abortion, or that she adds to her family’s stress.

Appearing before a judge would also present its own set of difficulties, especially for minors from the Bush or others who lack a strong grasp of the English language. Minors who speak English as a second language and lack the ability to communicate fluently with English speakers will bear the burden of finding and paying for an interpreter. Despite interpreters’ instrumental role in conducting fair legal proceedings for those not comfortable with English, the Alaska Court System does not require the courts to pay for interpreters in most cases. *See* Alaska Rule 6(b)(2) (payment must be made “in civil and criminal cases, by the party who requires translation or interpretation to understand the proceedings”). Moreover, while approximately twenty Native languages are spoken in Alaska according to the Alaska Native Language Center at the University of Alaska, *see* Alaska Native Language Center, *ANLC Mission and Goal*, at <http://www.uaf.edu/anlc/mission.html> (last modified Nov. 27, 2001), the court system

currently has no system for certifying interpreters, nor does it have a system for evaluating the proficiency of those who serve as court interpreters. *See Report on Fairness and Access, supra*, at 19-20.

Even for minors who are fluent in English, an understanding of the language does not ensure that a nonlawyer will understand technical legal proceedings. Courtroom speech is “unusually varied and constrained by procedural rules that are largely unknown to laypersons.” Phyllis Morrow, *Legal Interpreting in Alaska*, 10 Alaska Justice Forum 24 (1994) [hereinafter Morrow, *Legal Interpreting in Alaska*] available at http://justice.uaa.alaska.edu/forum/f104wi94/a_interp.html (last modified Nov. 7, 2001). In fact, a study of laypersons in Bethel revealed that 85% of those who spoke English believed that they would have a stronger comprehension of legal proceedings conducted bilingually. *Id.*

Other systemic problems caused by cultural differences also render the court experience confusing and impenetrable for many Alaskan Natives. The Advisory Committee on Fairness and Access has recommended that the Alaska Court System respond to Alaskan Natives’ profound cultural differences by employing cultural navigators who possess both an understanding of the legal system and of minority languages and cultures. *See Report on Fairness and Access, supra*, at 33. The Committee recommended that navigators be assigned to individuals who need assistance filling out forms, following court procedures, communicating with court staff, and finding their way through the system in other ways. These navigators have been described as “essential to ensur[ing] equal access to justice.” Morrow, *Legal Interpreting*

in Alaska, supra. Unfortunately, to date, only in Bethel has a Yupik-speaking cultural navigator been employed. *See Report on Fairness and Access, supra*, at 13-14; Tr. 927 (testimony of Ms. Reichard). Without more widespread use of cultural navigators, Native Alaskan minors will struggle to communicate effectively with judges and court personnel, none of whom are required to receive cross-cultural training. *Report on Fairness and Access, supra*, at 58.

Minors who are victims of abuse will also have a particularly difficult time availing themselves of the bypass procedure. As other courts have found, abuse victims are often reticent to discuss their histories of abuse with strangers, rendering judicial bypass procedures unusable for many of the victims they are superficially designed to protect.⁹ *See Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 889 (1992) (“Secrecy typically shrouds abusive families. Family members are instructed not to tell anyone, especially police or doctors, about the abuse”); *Hodgson v. Minnesota*, 648 F. Supp. 756, 764 (D. Minn. 1986) (“Minors who are victims of sexual or physical abuse often are reluctant to reveal the existence of the abuse to those outside the home.”), *aff’d*, 497 U.S. 417 (1990). As Judge Cooke testified, “many cases [involving victims of abuse] get dismissed because . . . it is so difficult to get the information [about the abuse] out.” Tr. 1256. It may be especially difficult for an abused minor to discuss her situation in the sort of detail necessary to satisfy the high “clear and convincing

⁹ In its trial brief, the State argued that the judicial bypass procedure will actually benefit abused minors by increasing the reporting of sexual assault. *See* Brief of Appellant at 22, 55. However, if a judge were to report a case of suspected abuse, the abused minor’s anonymity would be compromised, in direct conflict with the Act. *See* Alaska Stat. § 18.16.030(k).

evidence” standard required by the Act. *See* Alaska Stat. § 18.16.030(f) (providing that a minor may consent to her own abortion if a court finds there to be “clear and convincing evidence of physical abuse, sexual abuse, or a pattern of emotional abuse” by a parent or guardian). Those from Native cultures who are abused will face particular difficulties. For these minors who may already exhibit shyness in court and struggle to communicate with authority figures, the shame and fear instilled by abuse would make it even harder for them to communicate effectively with a judge. *See* Tr. 933-35, 944-45 (testimony of Reichard); *id.* 1184-85 (testimony of Paktotak); *id.* 98-100 (testimony of Dr. Elkind). If a bypass petition were to be denied for this reason, a minor could be denied her right to terminate her pregnancy.

The burdens of the bypass will not be relieved, even if minors are represented by counsel or have the assistance of an advocate from the very beginning of the process. Minors will face difficulties connecting with the advocate: many will face problems even finding a phone from which to call; many will not be able to receive a call back without risking their confidentiality; they will struggle to find time to meet or speak at length with the advocate to prepare for the hearing; and the difficulties involved with getting their petition notarized—a task that must be completed before they are assigned an attorney—and getting to court will be every bit as great as if they were proceeding alone.

Indeed, unless the bypass judge rules immediately from the bench, even learning of the court’s decision will be difficult for the minor, whether she is represented or not. She cannot have the order sent to her home without compromising the very privacy she has so zealously guarded; in many cases, she will not be able to receive calls at home;

and, all too often, she will not have the freedom even to place a phone call to a court or to her lawyer.

II. THE JUDICIAL BYPASS SYSTEM WILL ADVERSELY AFFECT MINORS' HEALTH.

A. The Judicial Bypass Procedure Could Impair a Minor's Physical Health.

As the Superior Court held, “the judicial bypass procedure may be detrimental to the physical health of the minor.” Op. at 35, ¶ 84. The most severe consequences to minors' health may result from the delays that minors seeking judicial bypasses will inevitably experience. *Id.*; *see also* Tr. 109 (testimony of Dr. Lemagie, an OB/GYN in Alaska) (“delay[s] actually delay the [abortion] care, putting the pregnancy in a more risky state”); Tr. 282-83, 290-91 (testimony of Dr. Henshaw, a statistician for the Alan Guttmacher Institute); Tr. 748 (testimony of Dr. Stotland, a psychiatrist from Illinois); Tr. 1084 (testimony of Dr. Whitefield, an OB/GYN in Alaska).

The judicial bypass procedure will inevitably delay the abortion. In Massachusetts, for example, where the judicial bypass process has been functioning for decades, the system has been found to delay minors anywhere from one to two weeks from the time they contact an abortion provider to the time they receive the abortion. *See* Tr. 2551-52, 2565-69 (testimony of Ms. Sabino). Delays in Alaska will likely be even longer for many minors. While the P-501 bypass petition stipulates that a hearing must be scheduled within forty-eight hours of filing, *see* TE 2005, the process will take much longer, as the minor struggles to figure out how to initiate the process, to find a notary, to coordinate travel arrangements, or to schedule a confidential telephonic hearing. Indeed,

the unique burdens of Alaska's geography make any bypass in Alaska incomparably burdensome. Additionally, the issuance of a bypass order could be delayed for several additional days at least if a judge wrongly denied a petition and the minor had to wait for an appellate court to reverse, a problem that has occurred in other jurisdictions with bypass systems.¹⁰

As the American Association for Pediatrics has reported, minors whose abortion procedures are delayed experience increased risks to their physical health. *See* Statement by the Comm. on Adolescence of the Am. Acad. of Pediatrics, *The Adolescent's Right to Confidential Care When Considering Abortion*, 97 *Pediatrics* 746, 750 (1996); *see also Bellotti*, 443 U.S. at 642 (a pregnant minor "cannot preserve for long the possibility of abortion, which effectively expires in a matter of weeks from the onset of pregnancy"); *Farmer*, 762 A.2d at 636. The potential for complications increases about 20% for each additional week past eight weeks. *See* Tr. 291 (testimony of Dr. Henshaw). The American Medical Association concluded that parental consent laws "increase the gestational age at which the induced termination occurs, thereby also increasing the risk

¹⁰ *See, e.g., In re T.W.*, 551 So. 2d 1186, 1188-90 (Fla. 1989) (reversal of a trial court ruling in which a judge appointed a guardian ad litem to the fetus and denied the minor's request for a judicial bypass despite her clear demonstration of maturity); *In re Jane Doe I*, 566 N.E.2d 1181 (Ohio 1991) (reversal of a trial court ruling in which a judge denied a judicial bypass to a 17-year-old minor who performed well in school, held a part-time job, and testified to having been abused by her father); *T.L.J. v. Webster*, 792 F.2d 734, 738-39 n.4 (8th Cir. 1986) (appeal of a ruling in which a judge, while denying a minor's request for a judicial bypass, stated that "I hold in my hands the power to kill an unborn child."); *In re Doe*, 485 S.E.2d 354, 355-56 (N.C. Ct. App. 1997) (reversal of a trial court ruling in which a judge held that the minor was not "well-informed enough" to decide whether to have an abortion despite the judge's findings that she was mature, had provided informed consent, and was aware of the risks involved).

associated with the procedure.” Am. Med. Ass’n, *Induced Termination of Pregnancy Before and After Roe v. Wade, Trends in the Mortality and Morbidity Rates of Women*, 268 JAMA 3238 (1992); *see also Lungren*, 940 P.2d at 829 (finding that a “judicial procedure inevitably will delay the minor’s access to a medically safe abortion, thereby increasing the medical risks posed by the abortion procedure”).

In addition, regardless of how short in duration, delays will inevitably push some minors into the second trimester when the procedure becomes medically riskier. As has been found in other states, delays are more likely to push a minor’s pregnancy into the second trimester than an adult woman’s because teenagers tend to take longer to recognize the physical signs of pregnancy and decide whether to carry to term. *See* Tr. 2571 (testimony of Ms. Sabino). If a minor is pushed into the second trimester, the procedure will not only be riskier, but more difficult to obtain. *See A Clinician’s Guide to Medical and Surgical Abortion* 107, 108 (Maureen Paul, et al. eds., 1999). Finding an abortion provider who performs second-trimester abortions would be particularly difficult for a minor in Alaska. In fact, Dr. Lemagie is the only physician in the state who performs second-trimester procedures in cases other than fetal anomalies or when the procedure would be medically necessary. *See* TR 43, 161 (testimony of Dr. Lemagie). A second-trimester abortion is typically a two-day procedure, making it even more difficult for a minor to obtain the care without arousing her parents’ suspicion. *See id.* at 123; Phillip G. Stubblefield, *First and Second Trimester Abortion*, in *Gynecological, Obstetric, and Related Surgery* 1033, 1042-45 (David H. Nichols & Daniel L. Clarke-Pearson eds., 2d ed. 2000).

In addition to facing increased health risks, a minor who needs a second-trimester abortion will have difficulty finding a provider who will perform the procedure, as only 13% of providers offer services at 24 weeks. *See Stanley Henshaw & Lawrence Finer, The Accessibility of Abortion Services in the United States*, 35 *Persps. Sexual & Repro. Health* 16 (2003). Pregnant minors in this predicament would have to travel to a neighboring jurisdiction, an impossibility for some teens. As a result, a pregnant minor in this plight will most likely be forced to carry the pregnancy to term.

Aside from the medical risks and access problems, delays will invariably increase the cost of abortion. *See Margaret C. Crosby & Abigail English, Mandatory Parental Involvement/Judicial Bypass Laws: Do They Promote Adolescents' Health?*, 12 *J. Adolescent Health* 143, 145 (1991). The problem of increased cost may prove particularly acute for Native Alaskans who generally do not enjoy the economic security that the state of Alaska as a whole does. *See Alaska Advisory Comm. to the U.S. Comm'n on Civil Rights, Racism's Frontier: The Untold Story of Discrimination and Division in Alaska* 41 (2000), available at <http://www.usccr.gov/pubs/sac/ak0402/ak02.pdf>.

B. The Judicial Bypass Procedure Could Impair a Minor's Emotional Wellbeing.

Obtaining a judicial bypass has been described as an “emotionally difficult and sometimes traumatic experience.” Donovan, *supra*, at 260.; *see also* Statement by the Comm. on Adolescence of the Am. Acad. of Pediatrics, *supra*, at 750 (stating that the judicial bypass process “is detrimental to emotional well-being, because adolescents

perceive the court proceedings as extremely burdensome, humiliating, and stressful”). Some minors have found the judicial bypass proceeding to be more difficult than obtaining the abortion itself. *See Hodgson*, 648 F. Supp. at 763-64. Minors’ fear and stress can result from “facing an authority figure who holds in his hands the power to veto their decision to proceed without notifying one or both parents.” *Id.* at 764.

Characteristics unique to Alaskan Native cultures could render the judicial bypass system even more distressing for some minors in Alaska than for those in other states. Ms. Reichard testified that she has found, in her experience with Alaskan minors, that many are frightened when appearing in front of a judge,¹¹ even after someone has thoroughly explained what the proceedings will entail. *See* Tr. 924-26. Judge Cooke echoed this view by noting that bypass hearings for Native Alaskan minors would be “intimidating” and “traumatic.” Tr. 1276. If the anxiety caused by the judicial bypass process is severe enough and endures until the time the minor obtains an abortion, the stress can render the abortion procedure itself more difficult, even contributing to a risk of medical complications during the procedure. *See Hodgson*, 648 F. Supp. at 764.

C. Minors Unable to Obtain a Judicial Bypass Could Suffer Severe Health Consequences.

Minors seeking an abortion who are unable to use the judicial bypass procedure or circumvent the parental consent requirement could resort to desperate measures with

¹¹ The State argues unpersuasively that judges would serve to improve minors’ emotional wellbeing by protecting them from their own immaturity; however, minors receive successful counseling only from those with whom they feel comfortable discussing their pregnancies. *See* Council on Ethical and Judicial Affairs of the Am. Med. Ass’n, *supra*.

potentially tragic results, as has happened in other states with parental consent laws. Minors who are unable to obtain a judicial bypass may be forced to carry their unwanted or medically risky pregnancies to term. *See* Aida Torres, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 Fam. Plan. Persp. 284, 289, 291 (1980). The court in *Lungren* noted that an unwanted full-term pregnancy and birth can cause “increased physical, emotional, and psychological risks.” 940 P.2d at 827; *see also* Tr. 744 (testimony of Dr. Stotland).

Some desperate minors may reluctantly inform their parents of their pregnancy, a measure that could result in disastrous consequences. A minor caught in this predicament could be forced by her parents to carry an unwanted or risky pregnancy to term. *See* Tr. 296 (testimony of Dr. Henshaw); *see also Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1462 (8th Cir. 1995) (recounting evidence of father opposed to abortion who, upon learning his daughter was at a clinic, assaulted clinic staff and forced the minor to leave). The news could also cause enormous stress or lead to physical violence at the hands of parents who are abusive, who are addicted to drugs or alcohol, or who suffer from severe mental disabilities. *See* Tr. 750-51 (testimony of Dr. Stotland); *see also Planned Parenthood of Blue Ridge v. Camblos*, 155 F.3d 352, 390 n.3 (4th Cir. 1998) (Michael, J., concurring) (recounting case of a father who killed his daughter, with whom he had had an incestuous relationship, upon learning of her intended abortion). The prospect of triggering a violent response is an especially dangerous possibility in light of the trial testimony suggesting that teenagers who get pregnant are more likely to have been abused or neglected than the general population. *See* Tr. 726-27 (testimony of

Dr. Stotland); *Casey*, 505 U.S. at 889 (“Mere notification of pregnancy is frequently a flashpoint for battering and violence within a family.”); Crosby & English, *supra*, at 146; *Hodgson v. Minnesota*, 497 U.S. 417, 450-54 (1990) (finding that informing parents about a pregnancy can endanger young women who live in homes where physical, psychological, and sexual abuse is present). One study of 1500 minors seeking abortions found that 3% of minors reported at least one of the following results of parental knowledge of their pregnancy: “harm to parents’ health, physical violence in the home, [or] being forced to leave home and being beaten.” See Stanley Henshaw & Kathryn Kost, *Parental Involvement in Minors’ Abortion Decisions*, 24 Fam. Plan. Persp. 196, 204 (1992). The Act fails to guard against any of the numerous desperate situations in which a minor unable to obtain a judicial bypass could find herself.

Rather than tell a parent about an intent to abort a pregnancy, some minors may resort to a dangerous “back-alley” or self-induced abortion. See *Lungren*, 940 P.2d at 829; *Farmer*, 762 A.2d at 636; Crosby & English, *supra*, at 146. This scenario is far from speculative. The American Medical Association has concluded that the desire to maintain secrecy about abortion has been one of the leading reasons for illegal abortion deaths since 1973. See Council on Ethical and Judicial Affairs, Am. Med. Ass’n, *supra*, at 83. The fate of Becky Bell, an Indiana teenager who had an illegal abortion that resulted in her death, illustrates the drastic measures to which some young women may resort when they believe that no other option is available. See Laurence L. Tribe, *Abortion and the Clash of Absolutes* 134-65 (1990). The Alaska Constitution does not permit such a tragedy to be visited on Alaskan youth.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully urge this Court to affirm the decision of the Superior Court.

Respectfully submitted,

DATED: October __, 2004

Janell Hafner
Alaska Bar No. 0306035
Cooperating Attorney for the
Alaska Civil Liberties Union
Reges & Boone, LLC
9095 Glacier Highway, Suite 103
Juneau, AK 99801
(907) 790-2777

Stacey I. Young*
Women's Law Project
Western Pennsylvania Office
345 Fourth Avenue, Suite 904
Pittsburgh, PA 15222
412-227-0301

*Motion for *Pro Hac Vice* admission pending.