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| **REBECCA COHEN, M.D., M.P.H.**,<br>*Plaintiff,*<br><br>v.<br><br>**JARED POLIS**, in his official capacity as Governor of Colorado;<br>**COLORADO MEDICAL BOARD**; and<br>**STATE OF COLORADO**.<br>*Defendants.* | ☐ **COURT USE ONLY** ☐ |
| **MORRISON FOERSTER LLP**<br>Elisabeth Hutchinson (CO # 46569)<br>4200 Republic Plaza<br>370 Seventeenth St.<br>Denver, CO 80202<br>Phone: (720) 956-5678<br>Fax: (303) 592-1510<br>EHutchinson@mofo.com | Case Number: 2025CV032424<br><br>Courtroom: 414 |

**PLAINTIFF'S OPPOSITION TO DEFENDANTS' JOINT MOTION TO DISMISS UNDER RULES 12(B)(1) AND (5)**

## TABLE OF CONTENTS


TABLE OF AUTHORITIES ..... iv

INTRODUCTION ..... 1

FACTS ..... 4

I. Parental Notice Requirement ..... 4

II. Recent Enactment of a Constitutional Right to Abortion ..... 5

III. Plaintiff Dr. Cohen ..... 5

LEGAL STANDARDS ..... 6

ARGUMENT ..... 6

I. Dr. Cohen Has Standing ..... 6

A. Absence of a Redressability Requirement Under Colorado Law ..... 6

B. Section 13-22-103's Text ..... 7

C. Section 13-22-103's History ..... 8

D. Section 13-22-103's Irrelevance to Dr. Cohen's Standing ..... 9

II. Dr. Cohen Has Stated a Facially Plausible Right to Abortion Claim Under Section 32 ..... 9

A. Denial of Abortion Care ..... 9

B. Delays to Abortion Care ..... 10

C. Damage to Abortion Patients' Doctor-Patient Relationship ..... 12

D. Forcing Young People to Run a Gauntlet to Obtain an Abortion ..... 13

E. Discrimination Against Young People Who Choose an Abortion ..... 14

F. Lack of Countervailing Benefits for Young People or Their Families ..... 15

III. Dr. Cohen Has Stated a Facially Plausible Equal Protection Claim Under the Due Process Clause ..... 17

IV. Dr. Cohen Has Stated a Facially Plausible Equal Rights Amendment Claim ..... 20

V. Dr. Cohen Has Stated a Facially Plausible Claim for Facial Relief ..... 22

VI. Nothing in Amendment 79 Bars This Court from Holding that the Parental Notice Requirement is Unconstitutional ..... 23

CONCLUSION ..... 24

## TABLE OF AUTHORITIES

Page(s)

Cases

*Ainscough v. Owens*,
90 P.3d 851 (Colo. 2004) ..... 6

*Allegheny Reprod. Health Ctr. v. Pa. Dep't of Human Servs.*,
309 A.3d 808 (Pa. 2024) ..... 19

*American Acad. of Pediatrics v. Lungren*,
940 P.2d 797 (Cal. 1997) ..... 13, 17

*Ashcroft v. Iqbal*,
556 U.S. 662 (2009) ..... 6

*Austin v. Litvak*,
682 P.2d 41 (Colo. 1984) ..... 18

*Barker v. Wingo*,
407 U.S. 514 (1972) ..... 12

*Board of Cnty. Comm'rs v. Vail Assocs., Inc.*,
19 P.3d 1263 (Colo. 2001) ..... 24

*Citizens United v. Federal Election Comm'n*,
558 U.S. 310 (2010) ..... 23

*City of Aspen v. Kinder Morgan, Inc.*,
143 P.3d 1076 (Colo. App. 2006) ..... 6

*City of Greenwood Vill. v. Pet'rs for Proposed City of Centennial*,
3 P.3d 427 (Colo. 2000) ..... 6, 7

*Colorado Civil Rights Comm'n v. Travelers Ins. Co.*,
759 P.2d 1358 (Colo. 1988) ..... 19, 20, 21

*Dallman v. Ritter*,
225 P.3d 610 (2010) ..... 18, 21

*Dean v. People*,
366 P.3d 593 (Colo. 2016) ..... 14, 17

*Department of Transp. v. Assoc. of Am. Railroads*,
575 U.S. 43 (2015) ..... 23

*Dobbs v. Jackson Women's Health Org.*,
597 U.S. 215 (2022) ..... 10, 12

*Doe v. Maher*,
515 A.2d 134 (Conn. 1986) ..... 19, 21

*Evans v. Romer*,
882 P.2d 1335 (Colo. 1994) ..... 1, 15

*Frontiero v. Richardson*,
411 U.S. 677 (1973) ..... 20

*Harris v. McRae*,
448 U.S. 297 (1980) ..... 10

*Hodgson v. Minnesota*,
497 U.S. 417 (1990) ..... 10

*Lobato v. State*,
218 P.3d 358 (Colo. 2009) ..... 23

*Lujan v. Colo. State Bd. of Educ.*,
649 P.2d 1005 (Colo. 1982) ..... 5

*Lujan v. Defenders of Wildlife*,
504 U.S. 555 (1992) ..... 6

*Matter of Estate of Musso*,
932 P.2d 853 (1997) ..... 22

*Maurer v. Young Life*,
779 P.2d 1317 (Colo.1989) ..... 7

*Miss. Univ. for Women v. Hogan*,
458 U.S. 718 (1982) ..... 20

*New Mexico Right to Choose/NARAL v. Johnson*,
975 P.2d 841 (N.M. 1998) ..... 19

*O'Bryant v. Pub. Utilities Com'n of Colo.*,
778 P.2d 648 (Colo. 1989) ..... 6

*Ohio Democratic Party v. Husted*,
834 F.3d 620 (6th Cir. 2016) ..... 12

*People ex rel. S.P.B.*,
651 P.2d 1213 (Colo. 1982) ..... 18

*People v. Young*,
859 P.2d 814 (Colo. 1993) ..... 17

*Planned Parenthood League of Mass., Inc. v. Att'y Gen.*,
677 N.E.2d 101 (Mass. 1997) ..... 13

*Planned Parenthood of Mont. v. State*,
554 P.3d 153 (Mont. 2024) ..... 13, 14

*Planned Parenthood of Cent. N.J. v. Farmer*,
762 A.2d 620 (N.J. 2000) ..... 13, 17

*Planned Parenthood of Southeastern Pa. v. Casey*,
505 U.S. 833 (1992) ..... 12

*Planned Parenthood of the Great Nw. v. State*,
375 P.3d 1122 (Alaska 2016) ..... 13, 14, 16

*R. McG v. J.W.*,
615 P.2d 666 (Colo. 1980) ..... 20, 21

*Rocky Mountain Gun Owners v. Polis*,
121 F.4th 96 (10th Cir. 2024) ..... 12

*Rosenthal v. Dean Witter Reynolds, Inc.*,
908 P.2d 1095 (Colo. 1995) ..... 6

*Thomas v. Chicago Park Dist.*,
534 U.S. 316 (2002) ..... 11

*United States v. Va.*,
518 U.S. 515 (1996) ..... 20

*Warne v. Hall*,
373 P.3d 588 (Colo. 2016) ..... 6

*We the Patriots, Inc. v. Lujan Grisham*,
119 F.4th 1253 (10th Cir. 2024) ..... 8

*Woodsmall v. Regional Transp. Dist.*,
800 P.2d 63 (Colo. 1996) ..... 7

*Zaner v. City of Brighton*,
917 P.2d 280 (Colo. 1996) ..... 23

**STATUTES**

COLO. CONST. art. II, § 11 ..... 24

COLO. CONST. art. II, § 29 ..... 20

COLO. CONST. art. II, § 32 ..... 5, 11, 24

COLO. CONST. art. V, § 1(4)(b) ..... 5

COLO CONST. art. V, § 50 (2024) ..... 5

COLO. REV. STAT. § 13-22-103. ..... *passim*

**REGULATIONS**

45 C.F.R. § 164.502(g)(5) ..... 12

**OTHER AUTHORITIES**

Heidi Moseson et al., Development of an Affirming and Customizable Electronic Survey of Sexual and Reproductive Health Experiences for Transgender and Gender Nonbinary People, 15(5) PLOS ONE: e0232154 (2020), https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0232154&type=printable ..... 1

Juno Obedin-Maliver & Harvey J. Makadon, *Transgender Men and Pregnancy*, 9 OBSTETRIC MED. 4 (2016) ..... 1

Ann Scales, *Student Gladiators and Sexual Assault: A New Analysis of Liability for Injuries Inflicted by College Athletes*, 15 Mich. J. Gender & L. 205 (2009) ..... 22

Colo. Sec. of State, *Colorado Election Results: Amendment 79 (Constitutional)*, https://results.enr.clarityelections.com/CO/122598/web.345435/#/summary ..... 5

## INTRODUCTION

This Court should deny the State's motion to dismiss pursuant to Colorado Rules of Civil Procedure 12(b)(1) and 12(b)(5) for two overarching reasons.[1]

One, the State's sole objection to this Court's subject-matter jurisdiction rests on the fallacies that a) Colorado Revised Statute[2] 13-22-103 requires most young people[3] to secure parental consent before they can obtain any medical care, and that b) Section 13-22-103 determines whether Dr. Cohen's claims are redressable. *See* § 13-22-103 (authorizing certain young people to consent to their medical care).

Two, Plaintiff Dr. Cohen has provided detailed allegations of the ways in which the Parental Notice Requirement, §§ 13-22-701–708, denies, impedes, and discriminates against young people's ability to have an abortion in violation of their rights to abortion and equal treatment under the Colorado Constitution. The State bears the burden of demonstrating that the Requirement is the least restrictive means of advancing a compelling governmental interest. *Evans v. Romer*, 882 P.2d 1335, 1341 (Colo. 1994), *aff'd*, 517 U.S. 620 (1996). Even so, Dr. Cohen has offered comprehensive allegations of the ways in which it fails to help ensure that young people will confide in a parent—much less receive guidance or support from them. Conversely, the State's contention that the Parental

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[1] "The State" refers to all the Defendants in this case.

[2] All statutory references are to the 2025 Colorado Revised Statutes unless the brief states otherwise.

[3] "Young people" or "young women" is shorthand for the unemancipated minors under the age of eighteen governed by the Parental Notice Requirement. "Young men" is shorthand for their male partners who are also unemancipated minors under the age of eighteen, but not subject to the Parental Notice Requirement. Although most people with the capacity to become pregnant are biological females, some transgender males and nonbinary people also have the capacity to become pregnant. *See, e.g.*, Heidi Moseson et al., *Development of an Affirming and Customizable Electronic Survey of Sexual and Reproductive Health Experiences for Transgender and Gender Nonbinary People*, 15(5) PLOS ONE: e0232154, at 2-3 (2020), https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0232154&type=printable; Juno Obedin-Maliver & Harvey J. Makadon, *Transgender Men and Pregnancy*, 9 OBSTETRIC MED. 4, 4–6 (2016).

Notice Requirement's harms are justified is limited to a vague invocation of "parental rights." (Defendants' Joint Motion to Dismiss Under Rules 12(b)(1) & 12(b)(5) ("MTD") at 4.)

Dr. Cohen's claims are redressable. The State's unprecedented reading of Section 13-22-103 belies the statute's text and history. The operative version of Section 13-22-103 was enacted in 2000, three years before the Parental Notice Requirement. *See* Ch. 272, sec. 1, § 13-22-103, 2000 Colo. Sess. Laws 1244 (codified at COLO. REV. STAT. § 13-22-103); (*see also* MTD at 3 n.2.) That is, the State's reading of Section 13-22-103 makes the enactment of the highly contested Parental Notice Requirement in 2003 unnecessary. At any rate, the redressability of Dr. Cohen's claims does not hinge on Section 13-22-103's meaning because Colorado enables young people to consent to childbirth-related care, but not abortion care, in violation of young people's rights to abortion and equal protection under the Colorado Constitution. (*See* Compl. ¶¶ 65-66, 72, 93.)

Additionally, the fact that "the State has not relinquished the ability to regulate abortion in a reasonable and non-obstructive manner" is immaterial because the Parental Notice Requirement obstructs young people from obtaining an abortion and is unreasonable. (MTD at 1.)

The Parental Notice Requirement denies some young people an abortion outright. That includes young people who are not fortunate enough to be able to confide in a parent and overcome the challenges of pleading for an abortion before a judge. (Compl. ¶¶ 106-109, 113-123.)

The Parental Notice Requirement also meaningfully delays young people's abortions. (*Id.* ¶¶ 81, 117-118 (identifying delays inflicted not only by the waiting period set forth in the Requirement, but also by having to secure an attorney, prepare a legal petition, and find transportation to a courthouse to testify before a judge).) These delays can deprive young people of the option of a medication abortion and subject them to increased medical risks, expenses, and psychological distress. (*Id.* ¶ 42.)

The State mostly ignores that the Parental Notice Requirement compromises the doctor-patient relationship of young people seeking an abortion, (*id.* ¶¶ 124-126); that the judicial bypass process

coerces young people to divulge intimate information to strangers to obtain an abortion, (*id.* ¶¶ 121-123); and that Colorado enables "a pregnant minor" to "authorize prenatal, delivery, and post-delivery medical care for herself related to the intended live birth of a child," § 13-22-103.5. The State also lacks an effective response to Dr. Cohen's allegations that the Parental Notice Requirement burdens and punishes young women, but not their partners who are young men, for making a particular decision about a pregnancy. (Compl. ¶¶ 94-98.)

The Parental Notice Requirement offers no countervailing benefits to young people or their families. Thankfully, most young people fully research and carefully consider their options before making a decision about their pregnancy. (*Id.* ¶ 103.) And most young people confide in a parent about their decision regardless of parental involvement requirements. (*Id.*) Legally requiring a young person to involve a parent in her decision to have an abortion does not transform a dysfunctional family where such communication is impracticable into a functional family where such communication is possible. (*Id.* ¶¶ 106-111.) The State's assertion in its Introduction that the Parental Notice Requirement does not apply where "the minor alleges abuse or neglect" omits something critical. (MTD at 2.) The abortion provider must report that parental abuse or neglect to the State. § 13-22-705(1)(c). Such reporting may precipitate a family crisis, including placement of the young person in foster care. What is more, young people with abusive, absent, or overwhelmed parents who undertake the judicial bypass process receive no information, guidance, or screening relevant to the decision of whether to continue a pregnancy—and certainly not beyond that provided by their clinicians. (Compl. ¶¶ 37-41, 88.) Additionally, the State has no legitimate reason to treat young people who choose to have an abortion differently from young people who choose to carry to term. (*Id.* ¶¶ 65-66, 72, 93.) Likewise, the Parental Notice Requirement's discrimination between young women and their partners who are young men is rooted in impermissible stereotypes about women's role in society and their capacity to make important decisions. (*Id.* ¶¶ 94-98.)

## FACTS

### I. Parental Notice Requirement

The Parental Notice Requirement prohibits a clinician from providing an abortion to an unemancipated minor[4] until at least 48 hours after the clinician has delivered written notice of the abortion to the minor's parent.[5] § 13-22-704(1)(a),(c). The Parent Notice Requirement limits the relatives who may be notified in place of a parent to a "grandparent, adult aunt, or adult uncle" with whom the young person lives if she does not live with a parent. § 13-22-703(6). Abortion providers may achieve parental notice by postpaid certified mail or in-person delivery. § 13-22-704(1). If they notify a parent by postpaid certified mail, however, the 48-hour waiting period begins at 12:00 P.M. "on the next day on which regular mail delivery takes place." § 13-22- 704(e)(I). Consequently, a young person must wait at least 72 hours after parental notice has been mailed to obtain an abortion.

Young people who cannot satisfy the Parental Notice Requirement cannot obtain an abortion in Colorado unless they secure a bypass order from a court. § 13-22-707(1)(a). This requires a court to 1) find by a preponderance of evidence that parental notice is not in the young person's "best interest," or 2) find by clear and convincing evidence that the young person is "sufficiently mature to decide whether to have an abortion." *Id.* Young people are not entitled to a lawyer for a judicial bypass proceeding. But if a young person is unrepresented, the court has the discretion to appoint a lawyer or guardian ad litem. § 13-22-707(1)(b).

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[4] Under Colorado law, a minor can become emancipated only upon marriage, entering active military service, or by court order. *See* § 14-10-115(13).

[5] The Parental Notice Requirement exempts a young person in case of "medical emergency," but defines "medical emergency" narrowly as "a condition that, on the basis of the physician's good-faith clinical judgment, so complicates the medical condition of a pregnant minor as to necessitate a medical procedure necessary to prevent the pregnant minor's death or for which a delay will create a serious risk of substantial and irreversible impairment of a major bodily function." § 13-22-703(5).

## II. Recent Enactment of a Constitutional Right to Abortion

On November 5, 2024, Coloradans voted by a margin of 62% to enact Amendment 79 and protect abortion as a fundamental right in the Colorado Constitution.[6] Amendment 79 prohibited the State from "deny[ing], imped[ing], or discriminat[ing]" against the exercise of the right to abortion. *See* COLO. CONST. art. II, § 32. Amendment 79 also repealed a constitutional provision that prohibited the State from using public funds to pay for an abortion. *See* Colo Const. art. V, § 50 (2024). By making the right to abortion explicit in the Colorado Constitution, Amendment 79 affirmed a preexisting right to abortion under Colorado's Due Process Clause. *See, e.g.*, *Lujan v. Colo. State Bd. of Educ.*, 649 P.2d 1005, 1015 n.7 (Colo. 1982); *see also* § 25-6-403(2).

## III. Plaintiff Dr. Cohen

Plaintiff Rebecca Cohen, M.D., M.P.H., is Board-certified in Obstetrics and Gynecology ("OB/GYN") and Complex Family Planning. (Compl. ¶ 23.) She is licensed by the Colorado Medical Board. *Id.* Dr. Cohen provides abortion care to patients, including young people, from throughout Colorado and the country at a family planning and OB/GYN clinic in Denver. (*Id.*) Like other abortion providers, Dr. Cohen encourages her patients who are minors to consult a trusted adult about their decision if they have not done so already. (*Id.* ¶ 41 & n.29.) She has legal, professional, and ethical obligations to obtain informed consent from all her patients. (*Id.* ¶ 37 & n.25.) The Parental Notice Requirement threatens Dr. Cohen with civil penalties and professional discipline for providing constitutionally protected medical care. (*Id.* ¶ 17); §§ 13-22-706(1), 12-240-106(1)(b), 12-240-120(1)(b)-(c), 12-240-121(1)(j), 12-240-125(5)(c)(III). Dr. Cohen seeks injunctive and declaratory relief from the Parental Notice Requirement on behalf of herself and her patients. (Compl. at 29.)

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[6] *See* Colo. Sec. of State, *Colorado Election Results: Amendment 79 (Constitutional)*, https://results.enr.clarityelections.com/CO/122598/web.345435/#/summary; *see also* COLO. CONST. art. V, § 1(4)(b).

## LEGAL STANDARDS

When evaluating a motion to dismiss for lack of standing under Rule 12(b)(1), courts "examin[e] the substance of the claim based on the facts alleged and the relief requested." *City of Aspen v. Kinder Morgan, Inc.*, 143 P.3d 1076, 1078 (Colo. App. 2006). In Colorado, "parties to lawsuits benefit from a relatively broad definition of standing," which this Court must apply when evaluating a motion to dismiss under Rule 12(b)(1). *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004).

Colorado courts view Rule 12(b)(5) motions to dismiss with "disfavor." *Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095, 1099 (Colo. 1995). This Court must deny a Rule 12(b)(5) motion unless the allegations in the complaint, "accepted as true," fail to "state a claim for relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation modified); *see Warne v. Hall*, 373 P.3d 588, 590 (Colo. 2016) (adopting federal standards for a 12(b)(5) motion).

## ARGUMENT

### I. Dr. Cohen Has Standing

#### A. Absence of a Redressability Requirement Under Colorado Law

The State's only objection to Dr. Cohen's standing is that the relief she has requested would not redress her injuries. Unlike federal standing doctrine, however, Colorado standing doctrine has no express requirement that a favorable decision will likely redress the plaintiff's injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (identifying redressability as one of three elements of standing). In Colorado, "[r]esolution of the standing issue involves two considerations: (1) whether the party seeking judicial relief has alleged an actual injury from the challenged action; and (2) whether the injury is to a legally protected or cognizable interest." *O'Bryant v. Pub. Utils. Comm'n of Colo.*, 778 P.2d 648, 652 (Colo. 1989); *see City of Greenwood Vill. v. Pet'rs for Proposed City of Centennial*, 3 P.3d 427, 437 (Colo. 2000) (identifying the first element as the "constitutional prong" and the second element as the "prudential prong"). The State overlooks that Colorado courts "frequently consult federal cases for

persuasive authority," *City of Greenwood Vill.*, 3 P.3d at 436 n.7, only when "construing standing principles generally applicable under both the federal and Colorado law of standing," *Maurer v. Young Life*, 779 P.2d 1317, 1324 n.10 (Colo. 1989). Because redressability is not generally applicable under both the federal and Colorado law of standing, the State's reliance on federal redressability cases is misplaced. *See id.* (citing "the constitutional injury requirement" as an issue "of general applicability").

In any event, Dr. Cohen's claims are redressable under federal standing doctrine because a holding that the Parental Notice Requirement is unconstitutional would allow young people to consent to an abortion just as they consent to medical care to deliver a baby. The State's counterargument incorrectly assumes that Section 13-22-103 requires most young people to secure parental consent before they can obtain any medical care. This contradicts the statute's text and history in relation to the Parental Notice Requirement. Ultimately, however, the redressability of Dr. Cohen's claims does not depend on Section 13-22-103's meaning because Colorado enables young people to consent to childbirth-related care, but not abortion care, in violation of young people's rights to abortion and equal protection under the Colorado Constitution.

### B. Section 13-22-103's Text

"A court's primary task in statutory construction is to ascertain and give effect to the legislative purpose underlying a statutory enactment." *Woodsmall v. Regional Transp. Dist.*, 800 P.2d 63, 67 (Colo. 1996). "In ascertaining the legislative purpose, [courts] look first to the statutory language employed by the General Assembly and give words their commonly accepted and understood meaning." *Id.* "When the statutory language is clear and unambiguous . . . it reasonably may be presumed that the General Assembly meant what it clearly said." *Id.* Section 13-22-103's text clearly and unambiguously specifies that young people over the age of 15 who are 1) married or 2) living apart from their parents and managing their own finances can consent to their medical care. § 13-22-103(1)-(2). Construing

this language to require most young people to secure parental consent before they can obtain medical care turns the language on its head.[7]

If the General Assembly meant for the statute to constrain young people, it would have said so rather than the exact opposite. In *We the Patriots, Inc. v. Lujan Grisham*, for example, which the State erroneously relies on, the Court held that a plaintiff's challenge to a prohibition on possessing firearms on playgrounds was not redressable because at least one other law also prohibited possessing firearms on playgrounds. 119 F.4th 1253, 1259 (10th Cir. 2024). Unlike here, the text of that law indisputably involved the same sort of prohibition that the plaintiff was challenging. *Id.* ("[A] County ordinance plainly prohibits possession of firearms in 'recreation facilities'. . . . Playgrounds are included in the definition of 'recreational facilities.'") (citations omitted).

### C. Section 13-22-103's History

Section 13-22-103's history reinforces that it does not require most young people to secure parental consent before they can obtain medical care. As the State concedes, the General Assembly enacted the Parental Notice Requirement in 2003. (MTD at 3 n.2.) The 2003 version of Section 13-22-103 was virtually identical to the current version. *See* Ch. 318, sec. 1, § 13-22-103, 2003 Colo. Sess. Laws 1975. If, as the State insists, Section 13-22-103 required most young people to secure parental consent before they could obtain medical care, it was unnecessary for the General Assembly to enact the highly controversial Parental Notice Requirement. At times, the State frames the Parental Notice Requirement as an "exception" to Section 13-22-103. (*See, e.g.*, MTD at 2.) This again dismisses both the Parental Notice Requirement's documented injuries to young people, (*see* Compl. ¶¶ 93-127), and

[7] If anything, Section 13-22-103 appears to respond to a concern that healthcare providers will, on their own, require parental consent from all young people for any medical care irrespective of age and circumstance. It is not a source of that conduct.

Section 13-22-103's text, which cites three exceptions, none of which are the Parent Notice Requirement. § 13-22-103(1).

### D. Section 13-22-103's Irrelevance to Dr. Cohen's Standing

Importantly, Dr. Cohen's claims are redressable even if this Court were to hold that Section 13-22-103 requires most young people to secure parental consent before they can obtain any medical care. As detailed below, both the right to abortion and right to equal protection entitle young people who choose to have an abortion to the same treatment as young people who choose to carry to term. *Infra* at 14-15, 17. And Colorado enables "a pregnant minor" to "authorize prenatal, delivery, and post-delivery medical care for herself" so long as it is related to the "intended live birth of a child." § 13-22-103.5. Thus, both the right to abortion and right to equal protection entitle young people who choose to end a pregnancy to the ability to authorize medical care related to their abortion. *Infra* at 14-15, 17. A declaratory judgment to that effect and injunction against the Parental Notice Requirement would therefore redress their discrimination injuries.

## II. Dr. Cohen Has Stated a Facially Plausible Right to Abortion Claim Under Section 32

In characterizing this lawsuit as a mere "disagreement" with the Parental Notice Requirement, the State ignores that Dr. Cohen brought it primarily to vindicate young people's fundamental rights, including their right to abortion. (MTD at 12.)

### A. Denial of Abortion Care

The Parental Notice Requirement denies some young people an abortion outright. That includes young people who are not fortunate enough to be able to confide in a parent and overcome the challenges of pleading for an abortion before a judge. (*See* Compl. ¶ 111 ("Requiring parental notice for an abortion allows a parent to force a young person to remain pregnant without requiring the parent to offer the young person any information, support, or care."); *id.* ¶ 114 ("Some young

people find the judicial bypass process so daunting—in particular, obtaining an attorney, preparing a detailed petition, and testifying at a hearing—that they do not even try to undertake it."); *id.* ¶ 115 ("In the Parental Notice Requirement Study, one adolescent, 'fearing judicial bypass would take months, turned to self-managed options, taking large doses of Vitamin C and considering large doses of ibuprofen . . . .'") (citation omitted); *id.* ¶ 116 ("The daunting nature of the judicial bypass process forces some young people to remain pregnant, give birth, and become a parent. Others are forced to travel outside Colorado for abortion care.").) The State simply neglects these allegations.

**B. Delays to Abortion Care**

Likewise, Dr. Cohen did not take the consequential step of challenging a state law because it is preventing some of her patients from obtaining "immediate abortion[s]." (MTD at 14 (emphasis omitted).) The State discounts the significance of the delays inflicted by the Parental Notice Requirement in two ways. First, the 48-hour waiting period set forth in the Requirement is in fact a 72-hour delay because it is unreasonable to expect overstretched clinicians to provide parental notice in person rather than via mail. (Compl. ¶ 104); *see* § 13-22-704(e)(I) ("Delivery shall be conclusively presumed to occur, and the 48-hour time period . . . shall commence to run at 12:00 o'clock noon on the next day on which regular mail delivery takes place."). This is especially true after the influx of out-of-state patients following *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022).[8] (*See* Compl. ¶¶ 11, 54.)

[8] Even if the Parental Notice Requirement only set forth a 48-hour delay, the State's reliance on *Hodgson v. Minnesota*, 497 U.S. 417, 448-49 (1990)—which *Dobbs* abrogated—is misplaced. The impetus behind Amendment 79 was to enact *Coloradans'* will and expressly protect abortion as a fundamental right under the *Colorado* Constitution. The then-federal right to abortion was implied, notoriously unclear, and allowed states to deny health insurance coverage for abortion. *See, e.g.*, *Harris v. McRae*, 448 U.S. 297, 316 (1980), *abrogated by Dobbs*, 597 U.S. 215 (2022) ("[I]t simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices."). On the contrary, the explicit right to abortion under the Colorado Constitution expressly forbids Colorado from impeding or discriminating against

More importantly, the Parental Notice Requirement seriously delays young people's abortions beyond the 72-hour waiting period. For example, the judicial bypass process adds weeks to that delay by requiring young people to obtain an attorney, file a petition, participate in a judicial hearing, and potentially appeal a denial. (*Id.* ¶ 117; *id.* ¶ 118 ("Of the four adolescents in the Parental Notice Requirement Study who sought a judicial bypass, three suffered a 2–3-week delay and one suffered an 8–9-day delay.").)[9] And both the 72-hour delay and the delays imposed by the judicial bypass process compound delays caused by long travel distances, wait times for abortion appointments, and young people's tendency to discover they are pregnant later than adults. (*See id.* ¶¶ 42, 53-54, 104, 117-118.) The combination of these delays makes the impact of the delays inflicted by the Parental Notice Requirement more profound.

The State's position that governments commonly delay people from exercising their rights wrongly conflates all rights and right-bearers. (*See* MTD at 14-15.) Requiring "a permit in order to 'conduct a public assembly . . . involving more than fifty individuals'" is scarcely the same as requiring a young person to remain pregnant against her will—particularly if the disclosure of her pregnancy would precipitate a family crisis. *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 318 (2002) (citation omitted); (*see* Compl. ¶ 42 ("Although abortion is extremely safe throughout pregnancy, its complexity, duration, medical risks, and costs increase with gestational age. Further, each day that someone

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abortion access, "including prohibiting health insurance coverage for abortion." COLO. CONST. art. II, § 32. Endorsing the Parental Notice Requirement based on a defunct, weaker federal right would undermine the democratic achievement that is Amendment 79. Notably, in 2022, a Minnesota court held that the parental notice requirement at issue in *Hodgson* violated the Minnesota Constitution's right to abortion. *Doe v. State*, No. 62-CV-19-3868, 2022 WL 2662998, at *10 (Minn. Dist. Ct. Jul. 11, 2022) ("The Two-Parent Notification Law causes delays which make some adolescents unable to obtain medication abortion anywhere in Minnesota, and pushes others later into their pregnancy . . . .").

[9] The fact that "those periods reflect the time between first placing a call to a legal support hotline and the date the individual obtained an abortion" is consistent with the delays being caused by securing an attorney, preparing a legal petition, and finding transportation to a courthouse to testify before a judge. MTD at 18.

remains pregnant against her will can be agonizing, particularly if the pregnancy resulted from abuse.").)

Additionally, *Planned Parenthood of Southeastern Pennsylvania v. Casey* is both no longer good law and immaterial to the Colorado Constitution's demands. 505 U.S. 833, 885 (1992), *abrogated by Dobbs*, 597 U.S. 215 (2022); *see supra* at 10-11 n.8. The State underscores that a Pennsylvania waiting period for abortion complied with the U.S. Constitution because it "[i]n theory, at least" was "a reasonable measure to implement the State's interest in protecting" potential life, which was permitted by the framework for assessing violations of the then-federal abortion right. *Casey*, 505 U.S. at 885. Here, however, Dr. Cohen has supplied numerous allegations that the Parental Consent Requirement does not provide any benefits to young people or their families, which the State at least gestures to as compelling governmental interests.[10] *See infra* at 15-17.

### C. Damage to Abortion Patients' Doctor-Patient Relationship

The Parental Notice Requirement undermines the doctor-patient relationship of young people who seek an abortion rather than continue a pregnancy. Specifically, it requires doctors to disclose otherwise legally and ethically protected medical information to parents, which can reduce patients' trust in doctors, stymie patients and doctors from exchanging critical information, and endanger the safety of patients living with family violence. (Compl. ¶¶ 124-126); *see* 45 C.F.R. § 164.502(g)(5) (protecting young people from parental notice when it may endanger them and expressly preempting

[10] The State's remaining examples are especially inapposite. In *Rocky Mountain Gun Owners v. Polis*, for instance, the court held that an age requirement for buying a commercial firearm did not implicate the Second Amendment at all given the unique history of that right. 121 F.4th 96, 120, 127-128 (10th Cir. 2024). In *Ohio Democratic Party v. Husted*, there were numerous options for early voting: "the State's use of 'no-excuse' absentee ballots provide[d] any interested resident the chance to cast a ballot more than four weeks before Election Day by mail . . . ." 834 F.3d 620, 630 (6th Cir. 2016). The analogue here would be a de minimis delay to young people's abortions, not the substantial delays identified by Dr. Cohen. And *Barker v. Wingo*, involved no categorical delay. 407 U.S. 514 (1972). Rather, it held that a defendant's right to a speedy trial could only be determined by "a balancing test, in which the conduct of both the prosecution and the defendant are weighed," that is, "on an ad hoc basis." *Id.* at 530.

contrary state laws). The State's position is that requiring parental notice as opposed to parental consent, which nonetheless enables a parent to coerce their child to carry to term, "supports minors' reproductive choices." (MTD at 18.) This is both untrue and unresponsive to the allegation that requiring parental notice of the decision to have an abortion damages the doctor-patient relationship of abortion patients.

### D. Forcing Young People to Run a Gauntlet to Obtain an Abortion

The judicial bypass process forces a young person to divulge intimate information to strangers to exercise her choice to have an abortion. (Compl. ¶¶ 121-123.) That includes judicial scrutiny about deeply personal matters, such as her sexual and reproductive history, gender identity and sexual orientation, family dynamics, and socioeconomic background. (*Id.* ¶ 122.) These invasions of privacy humiliate, shame, and stigmatize young people who seek an abortion without a parent's support, which can further isolate and psychologically distress them. (*Id.* ¶ 123.) Rather than engage with these detailed allegations, the State recites some of the judicial bypass requirement's text. (*See, e.g.*, MTD at 17 ("It allows courts to appoint counsel and guardian ad litem for these minors. . . .") (citation omitted).) Yet Dr. Cohen contests not the provisions designed to "make the judicial bypass process accessible to minors," *id.*, but the many ways in which having to publicly plead for the ability to have an abortion before a judge demeans a young person for her choice. (Compl. ¶¶ 121-123.)

Notably, the parental involvement requirements that courts have held unconstitutional had virtually the same judicial bypass provisions as Colorado's Parental Notice Requirement. *See, e.g.*, *Planned Parenthood of Mont. v. State*, 554 P.3d 153, 172-3 (Mont. 2024); *Planned Parenthood of the Great Nw. v. State*, 375 P.3d 1122, 1141-43 (Alaska 2016); *Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620, 642-3 (N.J. 2000); *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 829 (Cal. 1997); *Planned Parenthood League of Mass., Inc. v. Att'y Gen.,* 677 N.E.2d 101, 108 (Mass. 1997); *see also Doe*, 2022 WL 2662998 at *46-48.

### E. Discrimination Against Young People Who Choose an Abortion

The State's claim that the Parental Notice Requirement does not discriminate against young people's right to abortion falls flat for two reasons. One, Colorado does not broadly require young people to secure parental consent before they can obtain medical care. *Supra* at 7-9. Two, not only does Colorado not require parental or judicial involvement for any reproductive healthcare other than abortion, but it enables "a pregnant minor" to "authorize prenatal, delivery, and post-delivery medical care for herself related to the *intended live birth of a child*." § 13-22-103.5 (emphasis added). The State's preference for young people who continue a pregnancy and give birth over young people who have an abortion could not be clearer. *See Planned Parenthood of Mont.*, 554 P.3d at 166 (holding that a parental consent requirement "create[d] a class of pregnant minors who want to obtain an abortion and a class of pregnant minors who do not want an abortion," which "discriminate[d] against minors who cho[]se . . . an abortion because the [requirement] applie[d] only to them"); *Planned Parenthood of The Great Nw.*, 375 P.3d at 1136 ("It is clear that the [Parental] Notification Law treats the two classes of pregnant minors differently, burdening the fundamental privacy rights of those seeking termination but not the fundamental privacy rights of those seeking to carry to term.").

Tellingly, the State is silent about this disparity. As with equal protection claims, discrimination claims under the right to abortion warrant scrutiny of whether the State is treating similarly situated, rather than dissimilar, groups dissimilarly. *See Dean v. People*, 366 P.3d 593, 596 (Colo. 2016); *infra* at 18. The State, however, exclusively cites age requirements for conduct that, unlike carrying to term and giving birth, is not similarly situated to having an abortion. (*See* MTD at 19.) For instance, the State claims that it applies "juvenile justice laws" to young people who are convicted of a crime partly because of their "increased susceptibility to outside pressure, immature behavior, and impulsiveness." (*Id.* (citation omitted).) Assuming this is true, this sort of decision-making fundamentally differs from

decision-making about medical care and parenthood. Yet the State disregards Dr. Cohen's allegations that:

> As with adults, the vast majority of young people seeking an abortion are able to provide informed consent because they are capable of sharing their medical histories; understanding what pregnancy, abortion, and childbirth involve; weighing the risks and benefits for them of having an abortion instead of remaining pregnant and giving birth; asking appropriate questions; and following instructions for after care.

(Compl. ¶ 41.) At this stage in the case, this Court must accept these allegations as true. *Supra* at 6.

### F. Lack of Countervailing Benefits for Young People or Their Families

Because the Parental Notice Requirement infringes on fundamental rights, the State bears the burden of demonstrating that it satisfies strict scrutiny. *Evans*, 882 P.2d at 1341. Thus far, its response has been limited to a vague invocation of "parental rights." (MTD at 4.) At the same time, the abortion restrictions that the State points to in support of the Parental Notice Requirement actually advance compelling governmental interests.[11] For example, requiring abortion providers "to be licensed and to act within their scope of practice," "follow generally accepted standards," and "establish a provider-patient relationship prior to providing patient care" indisputably furthers patient safety. (*Id.* at 12.)

On the other hand, Dr. Cohen has detailed how the Parental Notice Requirement provides no benefits to either young people or their families. As with adults, the vast majority of young people seeking an abortion are able to provide informed consent to medical care. (Compl. ¶ 41.) Counterintuitively, the Parental Notice Requirement does not materially increase the likelihood that a young person will confide in a parent about her pregnancy. (*Id.* ¶¶ 103, 106-110.) Rather, *most young people confide in a parent independently of such laws*. (*Id.* ¶ 103.) The small proportion of young people who do not confide in a parent about a pregnancy have the misfortune of having absent, abusive, or

[11] Assuming that these actions constitute State action, this is also true of "scheduling appointments a few days out to accommodate staffing and an influx of patients from other states post-*Dobbs*," "obtaining informed consent," and "encourage[ing] patients who are minors to consult a trusted adult about their decision if they have not done so already." (MTD at 16 (citations omitted).)

overwhelmed families. (*Id.* ¶¶ 106-109, 113.) For the even smaller proportion of young people who the Parental Notice Requirement coerces to notify a parent, it cannot improve toxic family dynamics. (*Id.* ¶¶ 110-111.) The Requirement therefore endangers these young people's safety and well-being, including the real possibility that a parent will force them to carry to term. (*Id.* ¶ 111.)

To make matters worse, the judicial bypass process fails to offer young people information, guidance, or support relevant to the decision of whether to continue a pregnancy. (*Id.* ¶ 88.) Judges are less equipped than abortion providers—who are extensively trained and obligated to obtain informed consent—to ensure that any particular young person is making a careful and informed decision about her pregnancy. (*Id.* ¶¶ 37, 133.) Accordingly, every major medical organization whose members provide adolescent or reproductive healthcare opposes parental involvement requirements such as Colorado's Parental Notice Requirement. (*Id.* ¶¶ 134-138 (cataloging official statements by the American College of Obstetricians and Gynecologists, American Medical Association, American Public Health Association, and American Academy of Pediatrics).)

Additionally, there is no legitimate reason to enable a "pregnant minor" to "authorize prenatal, delivery, and postdelivery medical care for herself related to the intended live birth of a child," but not an abortion, when the former involves potentially life altering consequences and health risks far exceeding or equivalent to the consequences and risks associated with abortion care. (*Id.* ¶¶ 65-66, 72, 93.) For instance, cesarean sections constitute major surgery, with risks of blood clots, infection, hemorrhage, and serious complications in future births. (*Id.* ¶ 66 & n.64.)

In *Planned Parenthood of The Great N.w.*, for example, the Supreme Court of Alaska held that requiring parental notice of an abortion at least 48 hours before it occurred, but allowing young people to consent to other pregnancy-related care, unconstitutionally discriminates against young people who choose to end a pregnancy. 375 P.3d at 1128, 1131. As the court explained, "vindicating the State's compelling interest in encouraging parental involvement in minors' pregnancy-related decisions does

not support the Notification Law's disparate treatment of the two classes of pregnant minors." *Id.* at 1139. "Parents do have an 'important "guiding role" to play in the upbringing of their children.' . . . But . . . this must be true for *all* pregnant minors' parents, not just those whose daughters are considering termination." *Id.* at 1139-40; *see also Planned Parenthood of Cent. N.J.*, 762 A.2d at 642 ("Nor does the State offer adequate justification for distinguishing between minors seeking an abortion and minors seeking medical and surgical care relating to their pregnancies. To the contrary, plaintiffs present compelling evidence that . . . there is no principled basis for imposing special burdens only on that class of minors seeking an abortion."); *Am. Acad. of Pediatrics*, 940 P.2d at 826 ("Defendants' contention that the restrictions imposed by [the parental notice requirement] upon a minor's constitutionally protected right of privacy are necessary to protect the physical and emotional health of a pregnant minor is undermined by the circumstance that California law authorizes a minor, without parental consent, to obtain medical care and make other important decisions in analogous contexts that pose at least equal or greater risks to the physical, emotional, and psychological health of a minor and her child as those posed by the decision to terminate pregnancy.").

## III. Dr. Cohen Has Stated a Facially Plausible Equal Protection Claim Under the Due Process Clause

The Parental Notice Requirement violates the equal protection right of young people who choose to have an abortion for the same reasons that the Requirement violates their right not to be discriminated against under Section 32 of the Constitution. *Supra* at 14-17.

The Parental Notice Requirement also violates young women's right to equal protection by requiring them to involve a parent or judge in their decision to end a pregnancy while placing no comparable burdens on their partners who are young men. (*See* Compl. ¶¶ 94-98.)

The Due Process Clause of the Colorado Constitution protects the right to equal protection of the laws. *Dean*, 366 P.3d at 596; *People v. Young*, 859 P.2d 814, 816 n.9 (Colo. 1993). When a law

draws a sex- or gender-based classification, the law is unconstitutional unless the State demonstrates that it "serves important governmental objectives and is substantially related to the achievement of those objectives." *Austin v. Litvak*, 682 P.2d 41, 49 (Colo. 1984).

Contrary to the State's assertions, Dr. Cohen has identified a class that is similarly situated to the young women subject to the Parental Notice Requirement for the purposes of her gender discrimination claim: their partners who are young men. (*See* Compl. ¶¶ 94-98.) "[T]he 'similarly situated' inquiry turns not on whether two entities are superficially alike, but on whether the two are positioned similarly, thereby allowing one law to affect them differently." *Dallman v. Ritter*, 225 P.3d 610, 634 (2010) (holding that labor unions and corporations were similarly situated for the purposes of a law prohibiting campaign donations from labor unions, but not corporations). "[F]acial difference[s]" between the classes do not defeat an equal protection claim; to hold otherwise would "completely eviscerate[e]" the equal protection right. *Id.* Here, both young women and young men cause pregnancies, but only young women must notify a parent of the pregnancy regardless of their family dynamics or convince a judge they are mature enough to decide not to become a parent.[12] (*See* Compl. ¶ 98.)

*People ex rel. S.P.B.* does not disturb this conclusion. 651 P.2d 1213 (Colo. 1982); (*see* MTD at 20.) In that case, the Colorado Supreme Court held that a law requiring a father to pay child support even though he wanted his partner to have an abortion was supported by a "substantial and legitimate competing interest"—namely, "protecting [a woman's] fundamental right to make decisions relating to her pregnancy." *People ex rel. S.P.B.*, 651 P.2d at 1216. The Court did not hold that men are not similarly situated to their pregnant partners, but rather, that the gender-based classification drawn by the child support law survived intermediate scrutiny because it advanced a weighty state interest. *Id.*

[12] A young man's ability to effectuate his decision to not become a parent is limited by his partner's decision-making—not State coercion.

The State's reliance on *S.P.B.* is particularly inappropriate here because the child support law protected a woman's right to make a decision about her pregnancy while the Parental Notice Requirement selectively burdens a young woman's right to make a decision about her pregnancy. *Supra* at 9-16.

The State's contention that the Parental Notice Requirement does not draw a gender-based classification is equally unfounded. The Colorado Supreme Court has recognized that a law burdening pregnant women necessarily draws a gender-based classification. *Colo. Civil Rights Comm'n v. Travelers Ins. Co.*, 759 P.2d 1358, 1363 (Colo. 1988).[13] In fact, several other states have interpreted their constitutions to presumptively forbid abortion restrictions precisely because they discriminate based on gender. *See, e.g.*, *Allegheny Reprod. Health Ctr. v. Pa. Dep't of Human Servs.*, 309 A.3d 808, 950 (Pa. 2024) (Wecht, J., concurring) ("Any statute that singles out and targets the reproductive health choices of women . . . will trigger scrutiny under our ERA."); *N.M. Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 855 (N.M. 1998) ("We conclude that classifications based on the unique ability of women to become pregnant and bear children are not exempt from a searching judicial inquiry under the Equal Rights Amendment."); *Doe v. Maher*, 515 A.2d 134, 159 (Conn. 1986) ("Since only women become pregnant, discrimination against pregnancy by not funding abortion when it is medically necessary and when all other medical expenses are paid by the state for both men and women is sex oriented discrimination.").

Unlike the child support law at issue in *S.P.B.*, no governmental objective—let alone an important one—justifies the Parental Notice Requirement. *Supra* at 15-17.[14] In fact, the Parental

[13] The State's half-hearted attempt to distinguish *Travelers* is unavailing. (*See* MTD at 21.) Although *Travelers* did not involve young people, the Court expressly rejected the notion that a law that assigns burdens and benefits based on gender is insulated from constitutional scrutiny merely because it involves other factors, such as physical differences. 759 P.2d at 1363-64.

[14] The many ways in which the Parental Notice Requirement injures young women who choose to have an abortion nullifies any suggestion that the Requirement serves the State's interest in protecting the right to decide to end a pregnancy. *See* MTD at 21.

Notice Requirement is necessarily unjustified because it is "predicated on . . . overbroad generalization[s]" about the sexes. *R. McG v. J.W.*, 615 P.2d 666, 671 (Colo. 1980) (en banc) (holding that a statute that permitted mothers, but not fathers, to bring actions to determine paternity violated the right to equal protection). Specifically, the Parental Notice Requirement is "rooted in the social stereotype that the proper and central role of females is to bear and raise children . . . ." (Compl. ¶ 94.) And it rests on a paternalistic view that young women need help making the decision not to do so. (*Id.* ¶¶ 97-98.) By denying and impeding only the will of young women who choose to end a pregnancy, the Parental Notice Requirement "threaten[s] [them] with compulsory motherhood" and "devalues the[ir] decision-making capabilities," without threatening young men with compulsory fatherhood or questioning their ability to decide whether to become parents. (*Id.* ¶ 98.)

Courts have repeatedly held that laws rooted in gender-based stereotypes violate the right to equal protection. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 533 (1996) (explaining that "generalizations about 'the way women are'" cannot justify gender-based classifications); *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973) (denouncing laws that rely on "gross, stereotyped distinctions between the sexes"); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982) ("[I]f the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.").

## IV. Dr. Cohen Has Stated a Facially Plausible Equal Rights Amendment Claim

For largely the same reasons, this Court should deny the State's attempt to dismiss Dr. Cohen's Equal Rights Amendment ("ERA") claim. The ERA prohibits the State from "den[ying] or abridg[ing]" "equality of rights under the law . . . on account of sex." COLO. CONST. art. II, § 29. Under the ERA, legislative classifications based on sex or gender "receive the closest judicial scrutiny." *Travelers*, 759 P.2d at 1363; *see also R. McG*, 615 P.2d at 672. Thus, if the Court determines that Dr. Cohen has stated a facially plausible equal protection claim, which she has, it "necessarily follows"

that she has stated a facially plausible ERA claim. *R. McG*, 615 P.2d at 672. But even if this Court were to dismiss Dr. Cohen's equal protection claim, the State could not show that the Parental Notice Requirement withstands the ERA's stricter scrutiny. *See id.*

The State is flatly wrong that Dr. Cohen has not offered "specific allegations as to how the [Parental Notice Requirement] interacts with the [ERA]." (MTD at 22.) As explained above, she has provided detailed allegations about the ways in which the Requirement privileges young men over young women according to gender-based stereotypes. *Supra* at 18-20. The State's protestation that the Parental Notice Requirement draws an age-based rather than a gender-based classification misses the mark. Dr. Cohen does not challenge the Parental Notice Requirement's classification between pregnant adults and pregnant young people. For the purposes of her ERA claim, Dr. Cohen challenges the Requirement's classification between young women seeking abortions and their partners who are young men. In this way, gender, not age, is the feature that differentiates the two classes. *See Dallman*, 225 P.3d at 634.

Importantly, the Colorado Supreme Court has rejected the State's contention that physical differences justify different treatment of women and men here. *See Travelers*, 759 P.2d at 1364. Just as *Travelers* held that a law excluding insurance coverage for pregnancy conditions discriminated against women even though men cannot become pregnant, the Parental Notice Requirement is "inherently discriminatory" because it burdens young women who seek particular care for a "physiological condition affecting only women." *Id.* (explaining that targeting pregnancy-related care for less favorable treatment "is essentially no different in effect than if the employer had provided female employees a lower wage on the basis of sex"); *see also Doe*, 515 A.2d at 160 (identifying "invidious discrimination . . . in the law's very indifference to the biological reality that sometimes requires

[women], but never requires their male counterparts, to resort to abortion procedures if they are to avoid pregnancy and childbearing" (quoting Laurence Tribe, Constitutional Choices (1985), p. 244)).[15]

The State's claim that the Parental Notice Requirement somehow benefits young women because it is "premised on the reality that only a pregnant person has the right to decide to terminate or carry a pregnancy to term" upends equal protection analysis, which aims to eradicate pernicious stereotypes. (MTD at 23.) Although a gender-based classification that protected the right to abortion could survive scrutiny under the ERA, the Parental Notice Requirement denies, impedes, and discriminates against the right to abortion. *Supra* at 9-15. What is more, the Requirement presumes that women's proper role is to bear and raise children, and that they need help recognizing that. Because that presumption "is a creature of a different 'era' in our society," it is unconstitutional. *Matter of Estate of Musso*, 932 P.2d 853, 855 (Colo. App. 1997) (invalidating under the ERA a law that presumed that a husband owns all household goods).

## V. Dr. Cohen Has Stated a Facially Plausible Claim for Facial Relief

The State misguidedly argues that Dr. Cohen has not provided sufficient allegations in support of facial relief without identifying a single circumstance in which the Parental Notice Requirement is constitutional. (MTD at 2-3.) By contrast, Dr. Cohen has alleged that even young people who would confide in a parent about their abortion regardless of the Parental Notice Requirement suffer an arbitrary, but meaningful 72-hour delay to their abortion care, *supra* at 10, and express discrimination for choosing to end rather than continue a pregnancy, *supra* at 14-17.

Further, even if this Court were to hold that Dr. Cohen's allegations raise a plausible claim for as-applied rather than facial relief, that holding would not justify dismissing her lawsuit. It would justify

[15] *See* Ann Scales, *Student Gladiators and Sexual Assault: A New Analysis of Liability for Injuries Inflicted by College Athletes*, 15 MICH. J. GENDER & L. 205, 268 (2009) (explaining that *Travelers* "refus[ed], in the pregnancy context, to rely on shallow federal equality theory").

maintaining the lawsuit as to as-applied relief. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010) (holding that "the distinction between facial and as-applied challenges . . . . goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint"). Because Dr. Cohen's allegations plausibly leave no circumstance in which the Parental Notice Requirement is constitutional, this Court should maintain her request for facial relief.

## VI. Nothing in Amendment 79 Bars This Court from Holding that the Parental Notice Requirement is Unconstitutional

The State spills a lot of ink refuting the argument that Amendment 79 repealed the Parental Notice Requirement, even as they acknowledge that Dr. Cohen does not make that argument. (MTD at 9-12.) But repeal is scarcely the only way to invalidate a statute. It is well-established that "legislation which directly or indirectly impairs, limits or destroys rights granted by . . . constitutional provisions is not permissible." *Zaner v. City of Brighton*, 917 P.2d 280, 286 (Colo. 1996). And Dr Cohen has provided comprehensive allegations of the ways in which the Parental Notice Requirement violates young people's rights to abortion and equal treatment under the Colorado Constitution. Thus, this Court should sustain Dr. Cohen's challenge in its entirety.

The State insinuates that Amendment 79 eliminated this Court's authority to hold that an existing abortion restriction is unconstitutional because Amendment 79 repealed a constitutional prohibition on using public funds to pay for an abortion. (*See* MTD at 9; *2024 State Ballot Information Booklet*, Colo. Gen Assembly, at 27 (Sept. 11, 2024) (ballot measure "Amendment 79: Constitutional Right to Abortion").) There are two major problems with this. One, judicial review is the courts' foundational power. *See Dep't of Transp. v. Ass'n. of Am. Railroads*, 575 U.S. 43, 76 (2015) ("The 'check' the judiciary provides to maintain our separation of powers is enforcement of the rule of law through judicial review."). In other words, it is up to the courts to determine "whether a particular action constitutes a constitutional violation." *Lobato v. State*, 218 P.3d 358, 369 (Colo. 2009) (citation omitted).

Two, leaving an existing abortion restriction intact in the face of evidence that it denies, impedes, or discriminates against Coloradans' abortion right would defy Amendment 79's text and purpose. COLO. CONST. art. II, § 32. A constitutional right that categorically shields existing laws from scrutiny and applies only to future enactments would be a limited right indeed.

Ultimately, courts must "afford the language of constitutions and statutes their ordinary and common meaning." *Bd. of Cnty. Comm'rs v. Vail Assocs., Inc.*, 19 P.3d 1263, 1273 (Colo. 2001). Accordingly, this Court need not consult Amendment 79's history. But even if it were to, nothing in that history supports the State's unusual position that the repeal of a particular abortion restriction immunized existing abortion restrictions from invalidation. The State emphasizes that the "Arguments Against Amendment 79" section of the Blue Book stated that Amendment 79 would prevent passage of future "parental notification laws." (MTD at 11.) But this says nothing about the current Parental Notice Requirement. If anything, it suggests that the Parental Notice Requirement violates Amendment 79. The State's reliance on the statement that Amendment 79's passage would have no fiscal impact is equally puzzling because invalidating the Parental Notice Requirement would impose no added costs on Colorado.[16] (*See id.* at 11.)

## CONCLUSION

Far from a "balanced compromise between minors' autonomy over reproductive choices and parental rights in Colorado," the Parental Notice Requirement tramples the former and fails to further the latter. MTD at 4. Accordingly, Plaintiff Dr. Cohen respectfully asks this Court to deny the State's motion to dismiss her lawsuit.

[16] The State's reference to a constitutional prohibition against retroactive legislation is inapposite. *See* COLO. CONST. art. II, § 11. This case involves an existing statute's unconstitutionality, not a new law imposing retroactive consequences.

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Respectfully submitted,

*/s/ Elisabeth Hutchinson*

**MORRISON FOERSTER LLP**
Elisabeth Hutchinson (CO #46569)
4200 Republic Plaza
370 Seventeenth St.
Denver, CO 80202
Phone: (720) 956-5678
Fax: (303)592-1510
EHutchinson@mofo.com

**LAWYERING PROJECT INC.**
Kyriaki Council (CO #51157)
1312 17th St., No. 1580
Denver, CO 80202
Phone: (646) 490-1225
Fax: (646) 480-8622
kcouncil@lawyeringproject.org

Rupali Sharma*
443 Western Ave., #1025
South Portland, ME 04106
Phone: (646) 490-1219
Fax: (646) 480-4622
rsharma@lawyeringproject.org

Allison Zimmer*
900 Camp St., 3rd Fl., #1197
New Orleans, LA 70130
Phone: (347) 515-6074
Fax: (646) 480-8622
azimmer@lawyeringproject.org

*Attorneys for Plaintiff*
**Admitted pro hac vice*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 6th day of November 2025, I served the foregoing OPPOSITION TO DEFENDANTS' JOINT MOTION TO DISMISS upon all counsel of record for the parties electronically via the Colorado Courts E-filing system.

*/s/ Elisabeth Hutchinson*
Elisabeth Hutchinson