

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

Planned Parenthood Great Northwest, )  
Hawai'i, Alaska, Indiana, Kentucky, )  
 )  
Plaintiff, )  
v. )  
 )  
State of Alaska, et al., )  
 )  
Defendants. )  
\_\_\_\_\_ )

Case No. 3AN-19-11710CI

**ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY  
INJUNCTION**

Introduction

Plaintiff Planned Parenthood Great Northwest, Hawai'i, Alaska, Indiana, Kentucky (Planned Parenthood) filed this lawsuit challenging AS 18.16.010, which prohibits anyone other than a licensed physician from providing abortions, and an Alaska Board of Nursing policy dictating that advanced practice clinicians cannot perform aspiration procedures to treat miscarriage.

Planned Parenthood now seeks a limited preliminary injunction that would permit advanced practice clinicians to provide medication abortion. This court GRANTS the Motion for Preliminary Injunction, because Planned Parenthood has shown that it is likely to succeed on the merits of its claim that prohibiting advanced practice clinicians from providing medication abortion violates patients' right to privacy under the Alaska Constitution by significantly restricting the availability of

abortions in this state without sufficient justification. The law also likely violates patients' right to equal protection, since it prevents patients seeking abortions from receiving care from advanced practice clinicians that patients experiencing miscarriage may receive from the same providers.

### Facts and Proceedings

Alaska Statute 18.16.010 provides that only licensed physicians may perform abortions in Alaska.<sup>1</sup> The statute defines abortion as “the use or prescription of an instrument, medicine, drug, or other substance or device to terminate the pregnancy of a woman known to be pregnant.”<sup>2</sup> Alaska Statute 18.16.010 thus applies to medication abortion—the use of the drugs mifepristone and misoprostol to end a pregnancy within the first eleven weeks.<sup>3</sup>

As a result of the physician requirement established by AS 18.16.010, Planned Parenthood can only offer medication abortion approximately once per week at each of its four locations in the state.<sup>4</sup> Planned Parenthood cannot staff its Alaska clinics with full-time physicians due to the high cost of hiring and the difficulty of recruiting them.<sup>5</sup> Instead, Planned Parenthood hires per diem physicians to provide abortion care at its locations in Alaska.<sup>6</sup> Most of Planned Parenthood's Alaska advanced practice

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<sup>1</sup> AS 18.16.010(a)(1).

<sup>2</sup> AS 18.16.090(1).

<sup>3</sup> Pasternack Aff. ¶ 6; *see also* Nichols Aff. ¶¶ 18-20 (describing how mifepristone and misoprostol work in combination).

<sup>4</sup> Pasternack Aff. ¶ 35.

<sup>5</sup> Pasternack Aff. ¶¶ 33-34 (explaining that many physicians are reluctant to provide abortion care in communities outside Anchorage and Juneau, and many prefer to provide more complex care than the family planning provided at Planned Parenthood clinics).

<sup>6</sup> Pasternack Aff. ¶ 35.

clinicians, on the other hand, work full-time.<sup>7</sup> If advanced practice clinicians could provide medication abortion, Planned Parenthood could offer medication abortion five to six days per week in Anchorage, five days per week in Fairbanks, four days per week in Soldotna, and three days per week in Juneau.<sup>8</sup>

Because appointments for medication abortion are currently available only about once per week, patients seeking medication abortions at Planned Parenthood clinics in Alaska regularly experience delays in accessing care.<sup>9</sup> Patients' inflexible work schedules, limited access to transportation, and childcare needs make it difficult for them to get to a clinic on the specific days when physicians offer abortion care.<sup>10</sup> Patients who can only reach a clinic by boat or air also have difficulty reconciling their limited travel options with limited appointment availability.<sup>11</sup> In 2020, the average time between the date an appointment for an abortion was made and the date of the appointment ranged from 3.13 days (in Soldotna) to 8.73 days (in Juneau).<sup>12</sup> However, these average wait times do not take into account when a patient first contacts a clinic to inquire about appointment availability.<sup>13</sup> Planned Parenthood's patients have faced delays of up to several weeks in accessing medication abortion.<sup>14</sup>

Many patients are close to the gestational age limit for medication abortion when they seek an appointment, and delays in accessing care have rendered Planned

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<sup>7</sup> Pasternack Aff. ¶¶ 37, 45; *see also* Bender Aff. ¶ 3.

<sup>8</sup> Bender Aff. ¶ 44.

<sup>9</sup> Bender Aff. ¶ 38.

<sup>10</sup> Bender Aff. ¶¶ 32-33, 35-36.

<sup>11</sup> Pasternack Aff. ¶ 42.

<sup>12</sup> Attach. to Bowman Suppl. Aff., filed Sep. 24, 2021 (Pl.'s Resp. to Def.'s Interrog. No. 7).

<sup>13</sup> *Id.*

<sup>14</sup> Bender Aff. ¶ 38.

Parenthood patients ineligible for a medication abortion.<sup>15</sup> Patients must then undergo aspiration abortion, which is available on an even more limited basis than medication abortion: once a week at Planned Parenthood’s Anchorage clinic, once a month in Fairbanks and Juneau, and not at all in Soldotna.<sup>16</sup> Moreover, some patients have a medical indication for avoiding aspiration.<sup>17</sup> Due to the difficulty of accessing abortion care in Alaska, some patients have been unable to end their pregnancies.<sup>18</sup>

Under Alaska law, advanced practice clinicians (“APCs”)—a category that, for purposes of this order, encompasses advanced practice registered nurses and physician assistants—may diagnose and treat patients to a limited extent.<sup>19</sup> APCs at Planned Parenthood’s Alaska locations routinely provide healthcare that involves counseling patients, screening for risk factors, and monitoring for complications.<sup>20</sup> Though APCs cannot prescribe mifepristone and misoprostol for medication abortion under AS 18.16.010, they can and do prescribe these drugs to treat miscarriages and incomplete abortions.<sup>21</sup> Moreover, when patients seek medication abortion at Planned Parenthood clinics in Alaska, APCs counsel them, screen them for contraindications, and treat them

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<sup>15</sup> Pasternack Aff. ¶ 40; *see also* Bender Aff. ¶ 39.

<sup>16</sup> Bender Aff. ¶ 40.

<sup>17</sup> Pasternack Aff. ¶ 40.

<sup>18</sup> Bender Aff. ¶ 42.

<sup>19</sup> *See* AS 08.68.850(1) (defining an “advanced practice registered nurse” as a registered nurse “certified to perform acts of medical diagnosis and the prescription and dispensing of medical, therapeutic, or corrective measures under regulations adopted by” the Board of Nursing); AS 08.64.170(a)(1) (providing that “a physician assistant may examine, diagnose, or treat persons under the supervision, control, and responsibility of” a physician).

<sup>20</sup> Bender Aff. ¶ 9; *see also* Pasternack Aff. ¶ 20 (“Alaska Planned Parenthood APCs provide a broad range of health care services, have extremely broad prescriptive authority, and regularly prescribe medications that are comparable to or higher risk than medication abortion...”).

<sup>21</sup> Bender Aff. ¶ 7; *see also* Nichols Aff. ¶ 21 (“Mifepristone and misoprostol are also used as a treatment option for patients who have retained tissue following a miscarriage; this treatment is not significantly different than the treatment of medication abortion.”).

for complications when they occur.<sup>22</sup>

Medication abortion has a low risk of complications.<sup>23</sup> A 2013 study showed that, out of 233,805 medication abortions performed at Planned Parenthood clinics in the United States, 0.16 percent of patients experienced a “clinically significant” complication and only 0.06 percent of patients experienced complications that resulted in hospital admission.<sup>24</sup> Another study found that complications requiring hospital admission, surgery, or blood transfusion occur in just 0.31 percent of medication abortion cases.<sup>25</sup> Mifepristone and misoprostol are safer than commonly used medications such as penicillin, Tylenol, and Viagra.<sup>26</sup> Medication abortion has lower complication rates than does carrying a pregnancy to term.<sup>27</sup>

Planned Parenthood filed this lawsuit in December 2019, challenging AS 18.16.010 and an Alaska Board of Nursing policy which dictates that APCs cannot perform aspiration procedures to treat miscarriage.<sup>28</sup> Planned Parenthood now seeks a limited preliminary injunction that would permit APCs in Alaska to provide medication abortion. It argues that the prohibition on APCs providing medication abortion lacks medical justification, because Planned Parenthood’s APCs in Alaska provide care greater in risk and complexity than medication abortion and they already prescribe the

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<sup>22</sup> Bender Aff. ¶¶ 12-14.

<sup>23</sup> See Nichols Aff. ¶¶ 27-30.

<sup>24</sup> Nichols Aff. ¶ 30.

<sup>25</sup> Nichols Aff. ¶ 30.

<sup>26</sup> Nichols Aff. ¶ 31.

<sup>27</sup> Nichols Aff. ¶ 33; *see also* Bowman Aff. Ex. B, at 8 (Def.’s Resp. to Pl.’s Req. for Admis. No. 5) (admitting that “medication and aspiration abortion have lower complication rates than those associated with carrying a pregnancy to term and delivering a child”).

<sup>28</sup> Planned Parenthood’s Compl. ¶¶ 1, 8.

same medication to treat miscarriages. Planned Parenthood argues that, consequently, the prohibition cannot survive strict scrutiny.

In its opposition, the State argues that Planned Parenthood has not produced sufficient evidence that the statutory ban on APCs providing medication abortion actually impairs access to abortion and that Planned Parenthood has thus failed to assert a constitutional violation triggering strict scrutiny.

### Discussion

#### 1. *Standard for Granting Preliminary Injunction*

The standard a court applies to determine whether to grant a preliminary injunction “depends on the nature of the threatened injury.”<sup>29</sup> If “the plaintiff faces the danger of ‘irreparable harm’” and “the opposing party is adequately protected,” then the court applies the “balance of hardships” standard: the plaintiff need only raise “‘serious’ and substantial questions going to the merits of the case.”<sup>30</sup> On the other hand, when “the plaintiff’s threatened harm is less than irreparable” or “the opposing party cannot be adequately protected,” the plaintiff must make a “clear showing of probable success on the merits.”<sup>31</sup>

Because this court grants Planned Parenthood’s motion on the ground that Planned Parenthood has met the heightened standard of showing probable success on the merits, the court does not decide whether the threatened injury is irreparable or

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<sup>29</sup> *State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 978 (Alaska 2005).

<sup>30</sup> *State, Div. of Elections v. Arctic Village Council*, 495 P.3d 313, 320 (Alaska 2021) (quoting *Metcalfe*, 110 P.3d at 978).

<sup>31</sup> *Id.* at 11 (quoting *Metcalfe*, 110 P.3d at 978).

whether the State's interests can be adequately protected.<sup>32</sup>

2. *Planned Parenthood Has Shown that It Is Likely to Succeed on the Merits*

The Alaska Supreme Court has held that the right to privacy established by the Alaska Constitution encompasses “the fundamental right to reproductive choice.”<sup>33</sup> Courts apply strict scrutiny to statutes infringing on this fundamental right, whether they are challenged on the basis of the constitutional right to privacy<sup>34</sup> or on equal protection grounds.<sup>35</sup>

Planned Parenthood argues that the statutory ban on APCs providing medication abortion burdens both patients' rights to privacy and their rights to equal protection, since it substantially restricts the availability of medication abortion in Alaska and also discriminates between patients seeking abortions and patients experiencing miscarriage.

a. *Alaska Statute 18.16.010 Infringes on the Fundamental Right to Abortion, Triggering Strict Scrutiny*

A party challenging the constitutionality of a statute “bears the burden of demonstrating the constitutional violation,” and “[a] presumption of constitutionality applies.”<sup>36</sup> Once the challenging party has demonstrated that a statute “infring[es] on a

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<sup>32</sup> The State also contends that the purpose of injunctive relief is to maintain the status quo and that granting a limited preliminary injunction in this case would not serve that purpose, because AS 18.16.010 has been in force for decades. Def.'s Opp'n 3. But the length of time for which a statute has been in force is irrelevant to the injunctive relief inquiry. *See Arctic Village Council*, 495 P.3d at 321-26 (enjoining witness signature requirement for absentee ballots without regard to when the legislature established the requirement).

<sup>33</sup> *See State v. Planned Parenthood of Alaska*, 171 P.3d 577, 581 (Alaska 2007) [hereinafter *Planned Parenthood 2007*].

<sup>34</sup> *See id.* at 581-82 (applying strict scrutiny under a right-to-privacy analysis).

<sup>35</sup> *See State v. Planned Parenthood of the Great Nw.*, 436 P.3d 984, 1001-03 (Alaska 2019) (applying strict scrutiny under an equal-protection analysis) [hereinafter *Planned Parenthood 2019*].

<sup>36</sup> *Id.* at 1000 (quoting *Harrod v. State, Dep't of Revenue*, 255 P.3d 991, 1000-01 (Alaska 2011)).

constitutionally protected right,” the State “bears a high burden to justify” that law.<sup>37</sup>

Planned Parenthood has presented sufficient evidence that AS 18.16.010 burdens Alaskans’ fundamental right to access abortions by limiting the days each month that medication abortion appointments are available. The State argues that Planned Parenthood has not met its burden because it has not shown a quantifiable access issue caused by the statute; consequently, the State asserts, Planned Parenthood has not demonstrated any constitutional violation.<sup>38</sup> But the State cites no binding authority for the proposition that Planned Parenthood must quantify the access issues it has identified.

Planned Parenthood has produced evidence that patients seeking abortions at its Alaska locations regularly experience delays in accessing care due to the limited availability of medication abortion,<sup>39</sup> that these delays can last up to several weeks,<sup>40</sup> and that these delays have rendered patients ineligible for medication abortion and, in some cases, prevented patients from accessing abortion altogether.<sup>41</sup> The State contends that Planned Parenthood has shown only “isolated, hypothetical examples” of patients encountering obstacles to accessing abortion care.<sup>42</sup> This contention mischaracterizes the evidence: Planned Parenthood has produced an affidavit indicating that its providers regularly see patients delayed by limited appointment

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<sup>37</sup> *Id.*

<sup>38</sup> Def.’s Opp’n 17-20.

<sup>39</sup> Bender Aff. ¶ 38.

<sup>40</sup> Bender Aff. ¶ 38.

<sup>41</sup> Pasternack Aff. ¶¶ 40, 42; *see also* Bender Aff. ¶ 39.

<sup>42</sup> Def.’s Opp’n 20.



availability and rendered ineligible for medication abortion because of these delays.<sup>43</sup>

When evaluating whether a law burdens the right to abortion and thereby triggers strict scrutiny, a court must “look to the real-world effects of government action.”<sup>44</sup> The State asserts that the prohibition on provision of medication abortion by APCs does not amount to a constitutional violation because it is not a “categorical bar to abortion care.”<sup>45</sup> However, the Alaska Supreme Court has held that “challenged legislation need not expressly forbid the exercise of” a fundamental right; strict scrutiny applies when a statute “effectively deters the exercise of that right.”<sup>46</sup> Here, the real-world consequences of AS 18.16.010 are that Alaskans face delays in accessing medication abortion due to the limited availability of appointments, and some patients have been delayed past the point of eligibility for medication abortion.<sup>47</sup> Although the ban on APCs providing medication abortion does not categorically prohibit patients from obtaining medication abortions, it has the effect of preventing patients from accessing such care by restricting its availability.

Planned Parenthood has also demonstrated that AS 18.16.010, as applied to the provision of medication abortion by APCs, results in different treatment for two groups of people: pregnant patients seeking abortions and pregnant patients not seeking abortions but experiencing miscarriage. The statute dictates a patient’s access

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<sup>43</sup> Bender Aff. ¶¶ 38-39.

<sup>44</sup> See *Planned Parenthood 2019*, 436 P.3d at 1001-02 (quoting *State, Dep’t of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 910 (Alaska 2001)) (determining whether to apply strict scrutiny to a challenge under equal protection).

<sup>45</sup> Def.’s Opp’n 9-10.

<sup>46</sup> See *Planned Parenthood 2019*, 436 P.3d at 1001.

<sup>47</sup> Bender Aff. ¶¶ 38-39.

to care based on their decision to obtain an abortion; it prevents patients seeking abortions from receiving care—a combination regimen of mifepristone and misoprostol—that APCs can and do provide to patients experiencing miscarriage.<sup>48</sup>

Because Planned Parenthood has shown that the restriction on APCs providing medication abortion infringes on the fundamental right to abortion, strict scrutiny applies.

*b. The State Has Not Asserted a Compelling Interest in Prohibiting APCs From Providing Medication Abortion*

Under both the right-to-privacy analysis and the equal-protection analysis, “[t]he State must show that the measures [at issue] serve a compelling state interest in order for [them] to withstand strict scrutiny.”<sup>49</sup> The State also “bears the burden of proving ‘that the means it has chosen to advance [its] goals are well-fitted to the ends.’”<sup>50</sup>

In its opposition to Planned Parenthood’s motion, the State does not identify what interest it has in prohibiting the provision of medication abortion by APCs. The State also has not asserted any justification for permitting APCs to treat patients experiencing miscarriage with mifepristone and misoprostol while prohibiting them from offering the same care to patients seeking abortion. Because the State has not asserted a compelling interest in this restriction—let alone shown that the restriction is

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<sup>48</sup> Bender Aff. ¶ 7; *see also* Nichols Aff. ¶ 21.

<sup>49</sup> *Planned Parenthood 2019*, 436 P.3d at 1003 (analyzing statute and regulation under equal protection); *see also Valley Hosp. Ass’n v. Mat-Su Coal. for Choice*, 948 P.2d 963, 969 (Alaska 1997) (providing that restrictions on abortion that have been challenged based on the constitutional right to privacy are valid “only when the constraints are justified by a compelling state interest, and no less restrictive means could advance that interest”).

<sup>50</sup> *Planned Parenthood 2019*, 436 P.3d at 1004 (quoting *State, Dep’t of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 909 (Alaska 2001)).

narrowly tailored to serve such an interest—the restriction likely cannot survive strict scrutiny.

Conclusion


For the foregoing reasons, this court GRANTS Planned Parenthood’s Motion for Preliminary Injunction.

DATED at Anchorage, Alaska, the 2<sup>nd</sup> day of November 2021.

  
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JOSIE GARTON  
Superior Court Judge

I certify that on 11/2/2021  
a copy of the above was mailed to  
each of the following at their  
addresses of record:

Shannon Bleicher  
Jill Bowman  
Veronica Keithley  
Susan Lambiase  
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