IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

PLANNED PARENTHOOD OF THE GREAT NORTHWEST, *et al.*,	)	
Plaintiffs,	)	
v.	)	
STATE OF ALASKA,	)	
Defendant.	)	
	)	Case No. 3AN-10-12279 CI

I. INTRODUCTION

In 2007, the Supreme Court of Alaska invalidated a parental consent abortion law. But the Court also approved the concept of parental notification as a less restrictive alternative. In November 2010, Alaska's electorate, by initiative, adopted a parental notification law (PNL) that included penalties for noncompliance, a medical-emergency defense, and a judicial override. Plaintiff Planned Parenthood of the Great Northwest (Planned Parenthood) seeks a preliminary injunction enjoining this law on state constitutional grounds. Must Planned Parenthood merely raise substantial legal issues, or instead demonstrate probable success on the merits? In addition, should any injunction be limited to the apparently flawed features of the initiative, while core features go into force on the effective date, December 14, 2010?

II. FACTS AND PROCEEDINGS

Some states require parental consent when a minor seeks to have an abortion. The United States Supreme Court has upheld such laws so long as they provide for alternative judicial consent, referred to as a "judicial-bypass" mechanism. But in *State of Alaska v. Planned Parenthood of Alaska* (Planned Parenthood II),[1] the Supreme Court of Alaska held that Alaska's parental consent legislation violated the right to privacy clause of Alaska's Constitution. The court reasoned that the parental notification statutes of multiple other states provided an apt model for less intrusive and, therefore, constitutionally permissible regulation of minors seeking abortions.

In November 2010, voters passed an initiative modeled closely on the enjoined Parental Consent Act. The initiative revalidated the Parental Consent Act by eliminating the discredited parental veto, and disjunctively adding "parental notification" wherever "parental consent" appeared in the Act.[2] The new initiative additionally provides a protocol for notifying a parent or custodian in person, telephonically, or by registered mail. A knowing failure to strictly comply with the notification protocol constitutes a Class C felony, punishable maximally by five years in prison. Furthermore, the minor and her parents may sue the physician for any violation. But notice is unnecessary in

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[1] 171 P.3d 577, 584-85 (Alaska 2007) [hereinafter *Planned Parenthood II*].

[2] The parties dispute whether sections of the Parental Consent Act not set forth in the text of the initiative are nonetheless "revived." This court assumes this to be the case, without prejudice to any contrary argument.

the event of a particularized medical emergency, or if the minor documents parental abuse via enumerated sources of proof.

Upon the filing of a complaint in the superior court, a judge must hold a hearing to determine if notice may be excused because the minor is sufficiently mature or the victim of abuse. Either ground must be proven by clear and convincing evidence. A court must also appoint counsel for the minor.

Planned Parenthood is, *inter alia*, a provider of abortion services to women including minors. On November 19, 2010, Planned Parenthood and physicians Jan Whitefield and Susan Lemagie filed a post-election Complaint for Declaratory and Injunctive Relief against the State of Alaska (the "State"). On December 10, 2010, this court held oral argument on Planned Parenthood's Motion for Preliminary Injunction. Three sponsors of the initiative moved to intervene,[3] and appeared with counsel, Kevin Clarkson. This court offered to delay the hearing to accommodate their participation. But prior to their formal entry, the sponsors waived the court's outstanding offer to recuse, and urged that the hearing go forward. Because Planned Parenthood signaled its intent to oppose intervention, the court accorded the sponsors *amicus curiae* status, and permitted Mr. Clarkson to argue at the hearing.

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[3] These sponsors are: Loren Leman, Kim Hummer-Minnery, and Mia Costello.

III. APPLICABLE LAW

The superior court has discretion to grant a preliminary injunction. The court must compare the hardships of retaining or altering the status quo. Here, these competing interests include: (1) the relative harms suffered by plaintiff doctors and their patients from initiative provisions later held to be unconstitutional; compared with (2) the injury that the State of Alaska and affected minors would suffer from a delay in implementing provisions later found to be constitutional. If Plaintiffs but not Defendants would suffer irreparable harm, Plaintiffs need only raise substantial legal issues to obtain a preliminary injunction.[4] But if the doctors and their patients would suffer no irreparable harm when compared to a material harm to the State and other affected minors, Plaintiffs must demonstrate a probability of success on the merits to obtain an injunction.[5]

Article 1, section 1 of Alaska's Constitution provides "that all persons are equal and entitled to equal rights, opportunities, and protection under the law." Alaskan minors may give consent for diagnosis, prevention, or treatment of pregnancy.[6] Planned Parenthood claims the State violates the Equal Protection Clause when it requires pregnant minors to obtain parental advice while

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[4] See *State of Alaska v. United Cook Inlet Drift Ass'n*, 815 P.2d 378, 378-79 (Alaska 1991) (citing *A.J. Indus., Inc. v. Alaska Pub. Serv. Comm'n*, 470 P.2d 537, 540 (Alaska 1970).
[5] *See N. Kenai Peninsula Road Maint. Serv. Area v. Kenai Peninsula Borough*, 850 P.2d 636, 639 (Alaska 1993) (internal citations omitted).
[6] AS 25.20.025(a)(4).

choosing to terminate their pregnancy, but not when they otherwise make medical decisions independently from their parents. In resolving such issues, Alaska courts employ a three-step sliding scale test:

> Under this test, we initially establish the nature of the right allegedly infringed by state action, increasing the state's burden to justify the action as the right it affects grows more fundamental: at the low end of the sliding scale the state needs only to show that it has a legitimate purpose; but at the high end—when its action directly infringes a fundamental right—the state must prove a compelling governmental interest. We next examine the importance of the state purpose served by the challenged action in order to determine whether it meets the requisite standard. We last consider the particular means that the state selects to further its purpose; a showing of substantial relationship between means and ends will suffice at the low end of the scale, but at the high end the state must demonstrate that no less restrictive alternative exists to accomplish its purpose.[7]

In *State of Alaska v. Planned Parenthood of Alaska* (Planned Parenthood I), which involved parental consent, the Court stated that the third prong of the equal-protection test turned on "whether the state had compelling reasons to require parental consent or judicial authorization for one group of minors but not the other."[8] In remanding the case for an evidentiary hearing on the equal protection issue, the Court provided guidance to the trial court:

> Other courts have identified plausible, facially legitimate grounds for treating pregnant minors who carry their children to birth differently from those who chose abortion.

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[7] *State of Alaska v. Planned Parenthood of Alaska*, 35 P.3d 30, 44 (Alaska 2001) [hereinafter *Planned Parenthood I*].
[8] *Id.*

> And at least some of the legislative findings made in support of Alaska's parental consent or judicial authorization act appear to relate more specifically to a minor's capacity to make the choice of abortion than they do to the minor's ability to make other types of medical decisions.[9]

In addition, Article I, section 22 of the Alaska Constitution provides, "[t]he right of the people to privacy is recognized and shall not be infringed." This right is sufficiently robust to include a woman's right to control her pregnancy:

> Included within the broad scope of the Alaska Constitution's privacy clause is the fundamental right to reproductive choice. As we have stated in the past, few things are more personal than a woman's control of her body, including the choice of whether and when to have children, and that choice is therefore necessarily protected by the right to privacy . . . [this] reasoning was and continues to be as applicable to minors as it is to adults.[10]

Any law that burdens reproductive choice is, therefore, subject to strict scrutiny to determine if it advances a compelling state interest by the least restrictive means.[11] But, at least in the abstract, a parental notification law passes such constitutional muster:

> [T]he State has an undeniably compelling interest in protecting the health of minors and in fostering family involvement in a minor's decisions regarding her pregnancy. And contrary to the argument of Planned Parenthood, we determine that the constitution permits a statutory scheme which ensures that parents are notified so that they can be

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[9] *Id.* at 45.
[10] *Planned Parenthood II,* 171 P.3d at 581-82 (internal quotations and footnotes omitted).
[11] *Id.* at 582.

> engaged in their daughters' important decisions in these matters.[12]

If Planned Parenthood demonstrates probable success that a particular provision is unconstitutional, the court has discretion to enjoin that provision, while permitting other aspects of the initiative to take effect. A recent holding by the Supreme Court of Alaska regarding the parental notice initiative affords guidance by analogy:

> In the severance context we have noted . . . [a] reviewing court should sever an impermissible portion of the proposed bill when the following conditions are met: (1) standing alone, the remainder of the proposed bill can be given legal effect; (2) deleting the impermissible portion would not substantially change the spirit of the measure; and (3) it is evident from the content of the measure and the circumstances surrounding its proposal that the sponsors and subscribers would prefer the measure to stand as altered, rather than to be invalidated in its entirety. We have cautioned that [w]e exercise our power to sever an impermissible section of an initiative "circumspectly."[13]

IV. DISCUSSION

a). Planned Parenthood's Burden for Preliminary Injunctive Relief.

Planned Parenthood argues that the plaintiff doctors, young women in case-specific circumstances and, to some degree, all minors seeking abortions, will be harmed if the initiative takes effect. The State and the sponsors assert the converse. But Planned Parenthood's "worst case scenario" arguments must be tempered by the insight that Alaska law tolerates some probability of

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[12] *Id.* at 578.
[13] *Planned Parenthood of Alaska v. Campbell*, 232 P.3d 725, 733 (Alaska 2010).

incidental injury to individuals as a result of legislation: "[w]e uphold a statute against a facial constitution challenge if 'despite any occasional problems it might create in its application to specific cases, [the statute] has a plainly legitimate sweep.'"[14]

Here, the State has an undeniable interest in enhancing the potential for positive familial consultation between pregnant minors and their parents. And this case arises with the unusual posture that the constitutional validity of parental notification has already been implicitly approved. Given that the core principle of parental notification has been positively recognized by our Supreme Court, the voters of this state undoubtedly have a profound interest that the parental notification initiative take effect immediately. Indeed, unnecessary postponement of that interest would detract from the vitality of the initiative process. To the extent that Planned Parenthood seeks a contrary outcome, it should appropriately bear the burden of demonstrating a clear probability of success on the merits.

b). Equal Protection.

Though the Supreme Court of Alaska has never directly ruled on the principle of parental notification as it relates to the Equal Protection Clause of Alaska's Constitution, that precise issue was briefed in Planned Parenthood I. The Court discussed and remanded the case for further proceedings. The

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[14] *Planned Parenthood II,* 171 P.3d at 581 (internal quotations and footnotes omitted).

superior court, through Judge Tan, held the required hearing and reaffirmed his prior decision that the parental consent law violated equal protection. The issue was then briefed a second time to the Court in light of the superior court's additional findings. Planned Parenthood II then decided the case on right to privacy rather than equal protection grounds. But in so doing, the Court unequivocally ratified the concept of parental notification. Indeed, it did so with an understanding of Planned Parenthood's equal protection objections to parental consent, which apply with equal force to parental notification. Accordingly, Planned Parenthood falls short of showing probable success on that issue in light of the Court's prior implicit rejection of similar, if not identical, argument and reasoning.

c). Right to Privacy.

Planned Parenthood II approved parental notification, at least in the abstract, incident to its rejection of the Parental Consent Act (the "Act"). But the Court did not reach the propriety of the particular notice protocol in the Parental Consent Act. Subsequently, the sponsors of the initiative chose to revalidate the statutory protocol of the enjoined Act, largely but not precisely mirroring its provisions. But the Supreme Court is not on record as to the constitutional validity of any <u>particular</u> protocol for parental notification.

Planned Parenthood points out that the notification protocol may only burden a young woman's right to reproductive choice in the least restrictive

fashion that still effectuates the statute's purpose. The sponsors argue that this tailoring of a "close fit" between ends and means only applies to the issue of whether a parental notification statute is, in the abstract, an acceptable, least-restrictive means. Once that question has been answered in the affirmative, the minimally stringent "any rational basis" standard should govern whether a particular implementation protocol satisfies constitutional scrutiny.

But the sponsor's argument does not square with the Supreme Court's discussion of the role of the superior court on remand in Planned Parenthood I. The Court instructed Judge Tan to hold an evidentiary hearing to investigate all issues related to the burden imposed by the parental consent statute:

> Given the fundamentality of the right to privacy and the nature of the statutory classification at issue, we certainly recognize that that evidence presented in support of the challenged act is "deserving of the most exacting scrutiny." [E]ven if the state's interests were actually compelling, evidence concerning experiences with consent provisions in other jurisdictions, including information about the difficulties faced by minor—particularly minors in rural areas in gaining access to courts and the judicial bypass procedure, might convince the court that Alaska's act will not actually accomplish these purposes or will not do so using the least restrictive means. Alternatively, close scrutiny of the evidence might lead the court to conclude that the state's differential treatment of minors reflects nothing more than a discriminatory intent—an attempt to chip away at the private choice shielded by *Roe v. Wade*.[15]

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[15] *Planned Parenthood I,* 35 P.3d at 45 (internal footnotes omitted but emphasis added).

This passage indicates that not only the fact of notice, but also the manner of notice must accommodate core privacy rights as reasonably feasible. A court must scrutinize whether distinct features of the notification protocol, taken as a whole or individually, are unduly burdensome. As such, this court concludes that the implementing details—but not the core goal of reasonable notification and an opportunity to consult—will likely fail to meet the least-restrictive means test. In other words, Planned Parenthood will likely succeed on the merits.

In general, the initiative adopts an unduly controlling and punitive approach to this public health matter. It takes physicians out of their normal role, converting them to facilitators of the initiative's goal in a manner requiring discretion without clear guidance as to the standard of proof. The initiative subjects doctors and their personnel to daunting civil and criminal liability disproportionate to the measure's public health implications. It threatens to drive practitioners and new physicians out of public-health services, and unreasonably limits the discretion of judges in the judicial override process. Because superior and less intrusive means of notice, verification, and assurance of compliance are readily available, aspects of the protocol are unlikely to be upheld.

To illustrate, the notification requirements are arduous and bureaucratic. If a parent accompanies a minor to the clinic, the parent must

show not only formal identification, but also confirmatory documents. If this means a birth certificate or the equivalent, a parent from another town might not have such documentation readily available. Even though the parent-child relationship may be open and obvious to clinic staff, there is no provision for the staff to simply question the parent at the clinic to obtain circumstantial oral verification, as would be sufficient under the statute if the clinic had simply telephoned that same parent at a listed telephone number. Indeed, written documentation is a non-waivable incident of the initiative's in-person notice protocol, and such is not the least restrictive means for rural Alaskans.

Notwithstanding, no documents need be produced for telephonic verification, even though such contact is inherently a less reliable than in-person verification. But if the initial contact is telephonic, the initiator must attempt to verify the parent's identity through published phone directories. Needless to say, medical clinics are generally not required to maintain a bank of phone books for all Alaskan communities. Furthermore, it is not clear from the law whether cell-phone contact is acceptable; there is no current cell phone directory.

In the event there is no referral physician, the actual notification and documentation must be given by the physician <u>actually</u> performing the abortion. For example, if the initiator communicates with the parent on the telephone, the physician must take over the call to explain the unexpected

contact and verify parental status. In short, it is overly burdensome to require a physician to accomplish this ministerial task rather than care for his or her patients. This is not likely an acceptable "least-restrictive means."

Only after in-person and telephonic efforts have failed may "constructive notice" via certified mail commence. Yet there is no apparent reason to forbid constructive notice from being sent at the earliest possible moment, even while telephonic efforts are underway, to become effective once actual notice attempts fail. Since constructive notice is deemed effective two days post-mailing, and an additional two-day waiting period applies, delay in mailing may further lengthen this notification process.

In aid of preventing fraud and avoiding merely *pro forma* notification attempts by an abortion clinic, the initiative has created a restrictive scheme that is not well suited to its mission. But failure to follow these complicated procedures can result in exposure to felony prosecution with up to five years imprisonment. The level of sanction imposed for a knowing failure to precisely follow these notice requirements is an unsustainable imposition on the privacy rights of young women, who will be deprived of otherwise willing abortion providers, if such provisions drive providers from service or make them overly cautious.

The initiative also exposes the physician to unlimited liability if he or she performs an abortion without strict compliance with the notice provision. But

since a staff member will surely be responsible for portions of the notice protocol, a physician may find herself civilly liable because staff failed in some detail of strict compliance. If the physician errs in identifying the true parent, the minor, her parents, and any custodian or guardian may all sue. Furthermore, at oral argument, counsel for the sponsors indicated that this is a strict liability statute requiring only a technical violation of the notice requirements. The sponsors also contemplate that recoverable damages may include a loss of consortium type claim. But such a claim would violate conventional tort principles and expose physicians to untenable litigation expenses and damages. Such cannot be said to be the least restrictive means.

With respect to the judicial bypass provision, the court is troubled by the requirement of proof by clear and convincing evidence. That standard applies to relatively few aspects of civil law, often where the state seeks to impinge on a citizen's fundamental right. But the initiative inverts this expectation by requiring the minor, on whom the State seeks to impinge, to prove either: (1) maturity and autonomy; or (2) physical, sexual, or emotional abuse, by this elevated standard. In domestic-relations law, mere probability of abuse is sufficient to deprive a parent of meaningful contact with a child. It may be quite difficult for a young woman to provide clear and convincing evidence of abuse based on her testimony alone. It is unclear why a judge, convinced that

a parent probably sexually abused a young woman, must nevertheless order notification.

This court believes that such infirmities of the initiative, individually or collectively, sufficiently burden a minor's right to reproductive freedom such that the notification and bypass protocols are not the least restrictive means to attain the State's permissible goals. More appropriate regulations could be drafted by the Department of Health and Social Services (DHSS), such that medical staff persons at a clinic would know precisely what is expected in varied situations. Furthermore, identifying parental addresses, phone numbers, and cogent confirmatory questions might be best accomplished with reference to the Alaska Permanent Fund Dividend database, which the State already enlists for jury-duty notification purposes.

In addition, locating rural parents should not proceed with an over-reliance on a dedicated land lines, but rather by all reasonable means, including perhaps village health aids. Moreover, all efforts at notice might be logged, with questionnaires retained, so that DHSS could periodically audit notification compliance. If compliance problems were identified, DHSS could require staff retraining. Ultimately, if acceptable compliance were not obtained, DHSS could commence licensure proceedings or lodge civil fines against the clinic.

This model is not offered as a definitive recipe, but only to suggest the availability of alternative notification protocols that do not effectively restrict a minor's rights, by driving medical providers from abortion services. Because the initiative fails to accomplish these goals, the court finds to a clear probability that the Supreme Court of Alaska would hold that the initiative impermissibly burdens the right of young women to reproductive choice and access to abortion providers. It is, therefore, not the least restrictive means for advancing the State's permissible goals, and Planned Parenthood is entitled to some form of preliminary injunctive relief.

d). Severance.

The constitutionally suspect provisions of the PNL can be severed from the bill, leaving a stand-alone measure that provides the essential elements of the initiative. Deleting these suspect measures pending further litigation will not substantially change the spirit of the measure, and will affirm its laudable goals in the vast majority of instances. To the extent the surviving portions of the PNL would benefit from additional definitions of: (1) notification; (2) compliance auditing; and (3) penalties for violations consistent with the ultimate resolution of these issues, the Alaska State Legislature may, of course, backfill with amendments. But the law, as redacted, is not devoid of sanctions for non-compliance because Planned Parenthood, other providers, and all

doctors are subject to licensure proceedings and sanctions for violations of state statute.

The court infers that the sponsors prefer timely enactment of the core functions of the initiative, as opposed to a preliminary injunction of the entire law. Indeed, the alternative of enjoining the entire statute would be inappropriate in light of the clearly stated desire of the electorate for a parental notification law, and the affirmation by our Supreme Court that such a law passes muster under the privacy clause of Alaska's Constitution. There is no just reason to delay Alaska's citizenry from obtaining the benefits that flow from encouraging young women, under the great stress of an unplanned pregnancy and secretively considering abortion, to confer with their parents, most of whom will likely rise to the occasion.

V. ORDER

The court grants in part, and denies in part, Planned Parenthood's Motion for Preliminary Injunction. This court appends a copy of the text of the PNL. The interlineated portions constitute the enjoined provisions. The court has also added the bolded and underlined terms. The court will hold an additional status conference to schedule further proceedings on December 21, 2010 at 2:30 PM.

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ENTERED at Anchorage, Alaska this 13th day of December, 2010.

John Suddock
Superior Court Judge

I certify that on 12-13-10
a copy of the above was mailed to each of the following at their addresses of record:
Jeffrey Feldman
Mary Lundquist
Stacie Kraly
Dario Borghesan
Kevin Clarkson

Mary Brault - Judicial Assistant