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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

PLANNED PARENTHOOD OF THE GREAT NORTHWEST AND THE HAWAIIAN ISLANDS, Plaintiff, v. STATE OF ALASKA, Defendant.	)	Case No. 3AN-16-10362 CI

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Antiquated and unconstitutional statutes and regulations prohibit most women from obtaining outpatient abortion services in Alaska after the first trimester. As a result, the vast majority of women seeking a second-trimester abortion must travel out of state to obtain health care that could be safely provided at Planned Parenthood health centers in Alaska, were it not for the restrictions challenged in this lawsuit. The restrictions do nothing to advance the health or safety of women seeking abortions. Instead, they undermine the health of women seeking abortion by delaying the procedure, and in some instances preventing women from obtaining abortions altogether. Planned Parenthood of the Great Northwest and the Hawaiian Islands ("Planned Parenthood") seeks to provide second-trimester services to its Alaska patients in Alaska and to end this ongoing unconstitutional interference with women's fundamental reproductive rights.

This lawsuit challenges four specific restrictions (collectively, "the Restrictions") that unreasonably limit the ability of Planned Parenthood to provide second-trimester abortions at its clinics in Alaska. The Restrictions require that the Department of Health and Social Services approve facilities providing second-trimester abortions and impose three unnecessary requirements requiring consultation with a second physician, and that blood products and an operating room equipped for major surgery be "immediately available."

Planned Parenthood meets each of the requirements for a preliminary injunction. First, enforcement of the challenged restrictions irreparably harms Planned Parenthood's patients by delaying care, forcing out of state travel, and infringing on the fundamental right to make reproductive decisions. Second, Planned Parenthood has raised substantial questions going to the merits of its claims that the restrictions violate the privacy and equal protection rights of its patients under the Alaska Constitution. Indeed, Planned Parenthood has established a likelihood of success on these claims. Not only do the Restrictions fail to meet the rigorous standard required under the Alaska Constitution, which protects women's reproductive rights more vigorously than the federal constitution, each of the challenged restrictions is unconstitutional under decades-old decisions from the United States Supreme Court. Finally, the State's interests will be adequately protected if a preliminary injunction is issued because permitting Planned Parenthood to provide outpatient abortion services in Alaska will advance the health of women, save the State of Alaska money, and protect Alaskan women's constitutional rights.

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STATEMENT OF THE CASE

I. Second-Trimester Abortion Is A Safe Procedure That Can Be Performed In An Outpatient Setting

As experienced physicians Sara Pentlicky, M.D., and Tanya Pasternak, M.D., explain, abortion in the United States is a very safe procedure.[1] The United States Supreme Court recently recognized that abortion is "safer in terms of minor and serious complications[] than many common medical procedures" that typically are performed in outpatient settings, including colonoscopies and liposuction.[2] The standard of care in this country is for second-trimester abortions to be performed in outpatient facilities, just as are similar medical procedures, such as the surgical completion of miscarriage.[3]

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1 Affidavit of Sara Pentlicky ¶ 7 (attached as Exhibit 1 to Plaintiff's Memo. for Preliminary Injunction); Affidavit of Tanya Pasternack ¶ 6 (attached as Exhibit 2 to Plaintiff's Memo. for Preliminary Injunction). Dr. Pasternack is a board-certified obstetrician/gynecologist, and the Alaska Medical Director for Planned Parenthood. Dr. Pentlicky is a board-certified obstetrician/gynecologist in Seattle, and she provides the majority of abortions at Planned Parenthood to Alaskan women who are forced to obtain second-trimester abortions in Seattle because of the Restrictions.

2 *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2302 (2016); *see also id.* at 2315 (noting that colonoscopy, which typically takes place in an outpatient setting, has a mortality rate 10 times higher than an abortion and that the mortality rate for liposuction, another outpatient procedure, is 28 times higher than the mortality rate for abortion). *See also* Pentlicky Aff. ¶ 19.

3 Pentlicky Aff. ¶ 19 ("Surgical abortion is analogous to, or safer than, a number of other outpatient procedures in terms of risks, invasiveness, instrumentation, and duration."); Pasternack Aff. ¶ 16; *see also Whole Woman's Health*, 136 S. Ct. at 2315 ("Medical treatment after an incomplete miscarriage often involves a procedure identical

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Prior to an abortion, the woman is examined, typically using ultrasound, to determine the length of the pregnancy. In the first trimester, through 13 weeks and six days (13.6 weeks), as measured from the first day of a woman's last menstrual period ("lmp"),[4] an in-clinic (surgical) abortion is typically performed using suction curettage. The provider dilates the woman's cervix and evacuates the contents of the uterus using a plastic tube attached to a suction device. The procedure usually takes less than 10 minutes. It does not involve an incision despite the name "surgical."[5]

In the early second trimester, the process for surgical abortion is the same as that used for first-trimester surgical abortions. As the pregnancy progresses further into the second trimester, more dilation is needed to complete the procedure, and instruments may be used, in addition to suction, to remove the products of conception. As with first-

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to that involved in a nonmedical abortion, but it often takes place outside a hospital or surgical center.").

[4] An alternative method of dating pregnancy is "gestation," which measures the pregnancy from the presumed time of conception. Pregnancies dated using gestation are expressed as a date two weeks earlier than those dated using lmp. Thus, 12 weeks gestation is the same as 14 weeks lmp. Pentlicky Aff. ¶ 6.

[5] Pentlicky Aff. ¶¶ 10, 11. An alternative method of first-trimester abortion, available through 70 days lmp, is medication abortion. To complete a medication abortion, the woman takes medication known as mifepristone at the clinic, followed 24 to 48 hours later by a drug known as misoprostol, which the woman takes at home. She passes the pregnancy in a process similar to menstruation. *Id.* at ¶ 12.

trimester abortions, second-trimester abortions are performed safely in outpatient facilities throughout the United States.[6]

II. Planned Parenthood's Abortion Services

In Alaska, Planned Parenthood performs first-trimester surgical abortions at its Anchorage, Juneau, and Fairbanks health centers. Each health center where abortions are performed has exam rooms, procedure rooms, a recovery room, a laboratory, and emergency equipment, and the staff is well-trained in abortion provision and emergency procedures (in the rare event they are necessary).[7] But for the Restrictions, Planned Parenthood could and would provide second-trimester abortions in its Alaska health centers.[8] Because all Planned Parenthood heath centers operate according to the same standards, any Alaska facility that performs second-trimester abortions would replicate, in all material respects, the protocols, staffing, and equipment of the Seattle health center where Alaskan women currently obtain second-trimester abortions.[9]

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6 *Id.* at ¶ 13.

7 Pasternack Aff. ¶ 2.

8 Affidavit of Rebecca L. Poedy ¶ 8. Rebecca Poedy is Chief Operating Officer of Planned Parenthood of the Great Northwest and the Hawaiian Islands, and has overall responsibility for clinical operations.

9 Pasternack Aff. ¶ 3; Pentlicky Aff. ¶ 4; Poedy Aff. ¶ 3.

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III. Statutory And Regulatory Restrictions On The Provision Of Second-Trimester Abortions

In 1970, the Alaska legislature enacted a statute, now codified at AS 18.16.10, that set forth the circumstances under which abortion may be legally performed in Alaska. AS 18.16.010(a)(2) (the "Facilities Statute") provides: "[a]n abortion may not be performed in this state unless . . . the abortion is performed in a hospital or other facility approved for the purpose by the Department of Health and Social Services . . . ."

In 1974 and 1976, the Department of Law, at the request of the Department of Health and Social Services ("DHSS"), issued memoranda explaining that, in light of decisions of the United States Supreme Court regarding constitutionally permissible burdens on women's right to abortion, DHSS could not enforce the Facilities Statute as to first-trimester abortions, but could enforce it as to second-trimester abortions.[10] In 1981, the Department of Law, again at the request of DHSS, issued an Attorney General's Opinion that reiterated that the Facilities Statute is invalid as applied to first-trimester abortions.[11] The Opinion further states that "your agency is nonetheless responsible for the approval of facilities in which abortions are to be performed beyond the first trimester

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[10] Attorney General Memorandum re: Regulation of Abortion Facilities (Oct. 7, 1974) (attached as Exhibit 4 to Plaintiff's Memo. for Preliminary Injunction); Attorney General Memorandum re: Constitutionality of AS 11.15.060 (Oct. 21, 1976) (attached as Exhibit 5 to Plaintiff's Memo. for Preliminary Injunction).

[11] Attorney General Opinion No. J-66-816-81, Constitutionality of AS 18.16.010, Relating to Abortion (Oct. 7, 1981), 1981 WL 38806 (Alaska A.G.).

. . . . We are informed that the agency has yet to take action in this area and, therefore, strongly suggest that it adopt appropriate regulations in the near future."[12] In the thirty-five years since, DHSS has not adopted any rule or guidance describing the criteria for facilities to perform second-trimester abortions. Violation of the provisions of AS 18.16.010 carries a prison term of up to five years.[13]

At the same time that the legislature enacted AS 18.16.010, it enacted AS 08.64.105, which directed the State Medical Board to adopt regulations to "set standards for facilities, equipment and care of patients in the performance of an abortion."

Pursuant to this directive, the Board adopted 12 AAC 40.060-140. Two of those regulations, 12 AAC 40.100 and 12 AAC 40.120(b), are challenged here.

12 AAC 40.100 (the "Consultation Regulation") provides:

> Abortions interrupting a pregnancy up to and including the twelfth week of gestation may be performed without consultation. Abortions performed after the twelfth week of gestation shall be preceded by consultation with another physician. The consultation shall include an opinion as to the preferred method of termination of pregnancy.

12 AAC 40.120(b) provides:

> During the second or third trimester of a pregnancy, blood, blood derivatives, blood substitutes or plasma expanders shall be immediately available when an abortion is performed [the "Blood Products Regulation"], and an operating room appropriately staffed and equipped for

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12 *Id.* at *1.

13 AS 18.16.010(c) (also providing for a fine up to $1,000).

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> major surgery in accordance with regulations adopted under AS 18.20.060 shall be immediately available [the "Operating Room Regulation"].

A physician who fails to adhere to the Consultation, Blood Products, or Operating Room Regulation can face disciplinary action, including suspension or loss of license.[14]

The challenged regulations are not necessary to ensure the safe provision of second-trimester abortion care. They reflect outdated perceptions of abortion that are wholly out of step with current standards of care.

As to the Consultation Regulation, Planned Parenthood physicians in Alaska are licensed by the State Medical Board. As such, like all licensed physicians in Alaska, they are qualified to determine what care a patient needs, and can and do use their judgment about when a second opinion is beneficial to the care of a patient.[15] Planned Parenthood is aware of no other regulation in Alaska that requires a consultation before a particular procedure may be performed or treatment provided.

Similarly, as to the Blood Products Regulation, it is medically unnecessary and inconsistent with the standard of care to require second-trimester abortion providers to have blood products onsite. Serious complications from a second-trimester abortion are rare, and, among those rare complications, very few require a blood transfusion.[16] If a

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14 AS 08.64.326(7).

15 Pentlicky Aff. ¶ 25; Pasternack Aff. ¶ 18.

16 Pentlicky Aff. ¶ 24; Pasternack Aff. ¶ 17.

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patient experienced such a complication, as with any other patient experiencing a complication requiring transfusion after undergoing outpatient treatment, she would be transferred to a nearby hospital.[17] No other Alaska regulation requires blood products be available onsite in an outpatient (i.e., non-hospital) setting.

Nor is the Operating Room Regulation, to the extent it requires the operating room to be onsite, necessary to ensure the safe provision of second-trimester abortion care, and no similar requirement is imposed on any other outpatient procedure. As explained, it is the standard of care in this country to provide second-trimester abortions in an outpatient facility. Abortion is not "major surgery," nor does it require the sterile environment or equipment necessary in hospital operating rooms.[18] In addition, in the rare case of a complication that would require surgical intervention, Planned Parenthood would, consistent with the standard of care, transfer the patient to a hospital.[19]

While the challenged regulations do nothing to enhance the safety of second-trimester abortions, they prevent Planned Parenthood from providing those procedures in Alaska. Under the policies of the Alaska Blood Bank, it would be virtually impossible for Planned Parenthood to procure the blood products required by the Blood Products

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17 Pentlicky Aff. ¶ 24; Pasternack Aff. ¶ 17.

18 Pentlicky Aff. ¶ ¶ 20-23.

19 Pentlicky Aff. ¶ 9; Pasternack Aff. ¶ 17.

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Regulation, because the Blood Bank provides these products exclusively to hospitals.[20] That policy makes sense in terms of conserving a limited resource, because blood products provided to Planned Parenthood would be wasted since they would not be used, but the policy prevents Planned Parenthood from being able to comply with the Blood Products Regulation. And, as discussed, having blood products onsite is not necessary to protect women's health and safety during a second-trimester abortion. Similarly, the Operating Room Regulation does not advance the safety of second-trimester abortion care, but requiring an onsite operating room equipped for major surgery imposes a prohibitive obstacle to providing second-trimester abortions at Planned Parenthood's Alaska facilities. Planned Parenthood could not establish such an operating room in its current facilities, and the cost of equipping such a room would likely be prohibitive.[21]

IV. Planned Parenthood's Attempts To Provide Second-Trimester Procedures

Seeking to provide second-trimester abortions to its patients in Alaska, on June 12, 2015, Planned Parenthood sent a letter to the Commissioner of DHSS, seeking authority to perform second-trimester abortions.[22] DHSS responded that it had no basis upon

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20 Pasternack Aff. ¶ 17.

21 Poedy Aff. ¶ 7.

22 *Id.* ¶ 4 & Exhibit A.

which to approve or deny the request because it has not adopted regulations or other guidance.[23]

On September 13, 2016, Planned Parenthood sent a letter to the State Medical Board, asserting that the provisions of 12 AAC 40.100 and 120(b) are unnecessary and unconstitutional, and requesting that the Board either rescind the regulations or state in writing that they will not be enforced.[24] Planned Parenthood has not received a response to this letter.[25]

Thus, despite its good faith efforts to work with DHSS and the Medical Board, Planned Parenthood, in the face of significant potential penalties for violating the Restrictions, is in a catch-22 – unable to obtain assurances that it can proceed, and unable to obtain assurances that the Restrictions will not be enforced if it provides second-trimester abortions.

V. The Impact Of The Restrictions On Planned Parenthood's Patients

The Restrictions, and the failure of DHSS to approve Planned Parenthood's request to authorize it to perform second-trimester abortions in Alaska, effectively bar the provision of outpatient second-trimester abortions. Although the Facilities Statute permits second-trimester abortion to be performed in hospitals without approval by

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23 *Id.*

24 *Id.* ¶ 5 & Exhibit B.

25 *Id.*

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DHSS, abortion services are largely unavailable in Alaska hospitals, due to internal hospital policies and other factors that severely limit the circumstances under which abortions will be provided.[26]

As a result, second-trimester abortions are virtually unavailable to women in Alaska.[27] Planned Parenthood's patients and other women seeking second-trimester abortion care therefore have no choice but to seek services out of state, primarily in Seattle.

Many of the women who need a second-trimester abortion do not learn that they must travel out of state until they have been evaluated at a Planned Parenthood health center in Alaska, and it is determined that they are beyond 13.6 weeks lmp. Other patients in their second trimester initially try to obtain an abortion during the first trimester but are unable to do so due to a myriad of obstacles, including lack of resources, being unable to obtain time off of work, or family and job responsibilities. If they were not required to travel to Seattle, Planned Parenthood could schedule and provide an abortion promptly in Alaska.[28]

Being forced to travel out of state for abortion services imposes significant and harmful burdens on women. For women who are able to make the trip, the logistics

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26 Pasternack Aff. ¶ 5.

27 *Id.*

28 Pasternack Aff. ¶ 7.

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associated with traveling to another state forces them to delay the procedure while they make all of the necessary arrangements. In order to obtain a procedure in Seattle, women typically must be away for three days and nights, if not longer.[29] Making arrangements for travel out of state, including getting time off of work, setting up child care, and identifying a person to accompany her and making arrangements for that person to travel, delays women days, if not weeks.[30] Women on Medicaid might face further delays as it can take up to a week to establish Medicaid eligibility and coordinate with Medicaid to approve travel reservations and arrange for travel vouchers.[31] There is only one Seattle hotel that accepts Alaska Medicaid vouchers and, if this residence is filled, the appointment must be delayed.[32] It is not uncommon for flights to be fully booked, which can delay the procedure by a week or require a woman to spend extra days in Seattle because she could not get an earlier flight home.[33] Although abortion is very safe, these delays increase the risks of the abortion.[34] Thus, the Restrictions undermine, rather than advance, maternal health.

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29 Pentlicky Aff. ¶ 16.

30 Pasternack Aff. ¶¶ 8-15; Pentlicky Aff. ¶¶ 14-16.

31 Pasternack Aff. ¶ 13.

32 *Id.*

33 *Id.* at ¶ 11.

34 Pentlicky Aff. ¶ 13.

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In addition to delay, having to travel out of state can involve significant expense, including the cost of travel and lodging for the patient and her companion, and increased costs for the procedure. The State of Alaska bears these expenses for women eligible for Medicaid.[35] For other women, having to come up with money for airfare, lodging, other travel costs, and increased costs for the procedure, all on short notice in order to minimize delay, can be difficult if not impossible.[36] For women who are not on Medicaid and are uninsured or underinsured, these additional costs can be prohibitive. Even women with insurance may have to bear significant cost-sharing.[37]

The need to make all these arrangements and to undertake out of state travel make it more difficult for women to keep confidential the fact that they are seeking an abortion. This is particularly detrimental for women who are in abusive relationships, where revelation of the woman's pregnancy and intention to obtain an abortion could subject her to violence by her abuser.[38]

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35 This means that Medicaid pays the extra costs for travel to Seattle when, but for the Restrictions, the women could receive the same service in Alaska.

36 Pasternack Aff. ¶ 11.

37 *Id.*

38 *See Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833, 892-93 (1992) (women who are victims of spousal abuse may not wish to inform their husbands of pregnancy due to "justifiable fears of physical abuse").

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Some women are ultimately unable to make the trip, and therefore they are forced to continue the pregnancy notwithstanding the challenges they know they will encounter. For example, one young woman from a village flew to Anchorage for what she thought was a first-trimester abortion. But because of her confusion of how to date a pregnancy, it turned out she was in her second trimester. Although poised to be the first person in her family to graduate from high school, the thought of traveling to Seattle was unfathomable. She returned to her village and continued her pregnancy.[39]

Thus, the Restrictions in practice preclude access to second-trimester abortion altogether for some Alaskan women. The burdens imposed by the Restrictions come with no countervailing benefits.

ARGUMENT

I. Planned Parenthood Meets The Requirements For A Preliminary Injunction

Alaska courts employ two standards in deciding motions for preliminary injunctive relief: the balance of hardship test and the probable success on the merits test.[40] Under the balance of hardships test, a preliminary injunction should issue if: 1) the plaintiff is faced with irreparable harm; 2) the opposing party is adequately protected; and 3) the plaintiff raises serious and substantial questions going to the merits of the

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39 Pasternack Aff. ¶ 8.

40 *Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014).

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case.[41] Under the alternative test, if the party seeking an injunction shows probable success on the merits, a preliminary injunction should issue even without a showing of irreparable harm to the moving party or adequate protection of the opposing party.[42]

As discussed below, Planned Parenthood meets both tests. Planned Parenthood has demonstrated irreparable harm to its patients as a result of the restrictions on second-trimester abortion, and that there would be no harm to the State if the restrictions were preliminarily enjoined. And Planned Parenthood has raised not only "serious and substantial questions," but it has established probable success on the merits of its claims.

II. Absent Injunctive Relief, Alaskan Women Will Be Irreparably Harmed

The Restrictions impose unnecessary rules that effectively ban almost all second-trimester abortions in the state.[43] The unavailability of second-trimester services in Alaska irreparably harms women seeking those services.[44] These harms include: delay in obtaining abortion, with increased health risks; loss of privacy; increased anxiety; and for some women, complete inability to obtain an abortion at all. *See supra* at 13-15.

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41 *Id.*

42 *City of Kenai v. Friends of the Rec. Cntr., Inc.*, 129 P.3d 452, 457 (Alaska 2006).

43 Pasternack Aff. ¶ 5.

44 *West Alabama Women's Cntr. v. Miller*, No. 2:15-cv-497-MHT, 2016 WL 6395904, at *25 (M.D. Ala. October 27, 2016) (irreparable harm established where law would preclude access to abortion after 15 weeks).

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Plaintiff's showing that the Restrictions delay abortions is in itself enough to establish irreparable harm. It is well accepted that, although abortion is a very safe procedure, including in the second trimester, the risks increase with the duration of the pregnancy.[45] Thus, the delays imposed by the Restrictions on every woman seeking an abortion after the first trimester alone are sufficient to demonstrate irreparable harm.[46]

In addition, as the Alaska Supreme Court has observed, "[i]f a woman is unable to obtain an abortion near her home, there is an increased chance that she will have to reveal her pregnancy to others in order to arrange the necessary travel."[47] Thus, forcing women to travel to another state jeopardizes their right to privacy about their abortion decision, which is "among the most private and sensitive" decisions.[48]

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45 *State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska*, 28 P.3d 904, 907 (Alaska 2001).

46 *See Harris v. Bd. of Supervisors*, 366 F.3d 754, 766 (9th Cir. 2004) (affirming a finding of irreparable harm where hospital closure would result in indigent patients experiencing, among other harms, medical complications due to delayed treatment).

47 *Valley Hosp. Ass'n v. Mat-Su Coal. for Choice*, 948 P.2d 963, 968 n.8 (Alaska 1997).

48 *Id.* at 968.

Moreover, as shown *infra* at 20-26, the Restrictions infringe on the fundamental right of women to make reproductive decisions, which also constitutes irreparable harm.[49]

III. Defendant Will Be Adequately Protected If The Preliminary Injunction Is Granted

In stark contrast to the irreparable harm faced by Planned Parenthood's patients without an injunction, preliminarily enjoining the Restrictions will cause no harm to Defendant. As demonstrated, the Restrictions perpetuate antiquated medical standards rather than modern best practices, and harm rather than advance women's health. For more than 30 years DHSS has declined to issue regulations, suggesting either an impermissible intention to block outpatient second-trimester abortions, or no desire to put the Restrictions into effect. In either case, the State, by its inaction on Planned Parenthood's attempts to work within the existing regulatory scheme, cannot now claim that it will be harmed by preliminary injunctive relief.

Furthermore, an injunction will prevent harm to the State because the public, and thus the State, is harmed by the deprivation of the constitutional rights of Alaskans.

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[49] *See Pilgrim Med. Grp. v. N.J. State Bd. of Med. Exam'rs*, 613 F. Supp. 837, 848-49 (D.N.J. 1985) (issuing preliminary injunction against requirement that abortions be performed in hospitals); *see also Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981) (a finding that the constitutional right of reproductive choice is threatened or impaired "mandates a finding of irreparable injury").

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Moreover, the State will benefit financially by not having to pay for travel expenses for women reliant on Medicaid to travel out of Alaska for second-trimester services.

IV. Planned Parenthood Has Raised Serious And Substantial Questions And Has Also Demonstrated Probable Success On The Merits

A. Abortion is a fundamental right under the Alaska Constitution

The Alaska Supreme Court has made clear that reproductive rights, including the right to abortion, are fundamental rights.[50] For purposes of both privacy and equal protection, "[t]hese rights may be legally constrained only when the constraints are justified by a compelling state interest, and no less restrictive means could advance that interest."[51]

B. The Restrictions violate the right to privacy

The State may not infringe on the fundamental privacy right to make reproductive decisions except "when necessary to further a compelling state interest and only if no less restrictive means exist to advance the interest."[52] Courts assessing whether restrictions on abortion violate the right to privacy undertake a three-step inquiry: First, does the

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50 *Planned Parenthood of the Great Northwest v. State* ("PPGNW"), 375 P.3d 1122, 1137-38 (Alaska 2016); *Valley Hosp. Ass'n*, 948 P.2d at 969.

51 *Valley Hosp. Ass'n*, 948 P.3d at 969 (applying strict scrutiny to an abortion restriction under the privacy clause); *State v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 909 (Alaska 2001) (applying the same standard to an abortion restriction under the equal protection clause).

52 *State v. Planned Parenthood of Alaska*, 35 P.3d 30, 41 (Alaska 2001).

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challenged regulation infringe on the fundamental right to make reproductive decisions?[53] Second, does the regulation further a compelling state interest?[54] And third, if the regulation furthers a compelling interest, does it do so by the least restrictive means?[55]

As shown below, while each of the Restrictions burdens the fundamental right to make reproductive decisions, none of them advances a compelling state interest.

1. The Facilities Statute

Under the first step in the inquiry, it is clear that the Facilities Statute, as currently enforced by DHSS, infringes on the fundamental privacy right of Planned Parenthood's patients. The Facilities Statute prohibits the performance of second-trimester abortions outside of a hospital unless the facility has been approved by DHSS. Yet DHSS has refused to approve Planned Parenthood's health centers, while at the same time failing to issue regulations setting standards for such approval. As enforced by DHSS, the Facilities Statutes operates to limit second-trimester abortions in Alaska to hospitals, effectively banning them in the state and thereby forcing Planned Parenthood's patients to travel out of state for services.

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53 *See State v. Planned Parenthood of Alaska*, 171 P.3d 577, 582 (Alaska 2007) (requirement that minors obtain parental consent or judicial approval "no doubt" burdens fundamental right to privacy).

54 *Id.; see also PPGNW*, 375 P.3d at 1148 (Fabe, J., concurring) (a law that burdens the "fundamental right to reproductive choice" "can only survive review if it advances a compelling state interest") (citations omitted).

55 *State v. Planned Parenthood of Alaska*, 171 P.3d at 582-83.

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In assessing a law limiting the performance of second-trimester abortions to hospitals, the United States Supreme Court noted that the requirement created burdens on women due to increased costs for the procedure and limited availability.[56] The Court further explained:

> Thus, a second-trimester hospitalization requirement may force women to travel to find available facilities, resulting in both financial expenses and additional health risks. It therefore is apparent that a second-trimester hospitalization requirement may significantly limit a woman's ability to obtain an abortion.[57]

Similarly here, there can be no doubt that the Facilities Statute burdens the right of Planned Parenthood's patients to terminate a pregnancy.

Under the second step of the analysis, the Facilities Statute fails to further a compelling state interest. The only plausible interest that could be offered in support of the statute is that it advances the health or safety of women seeking abortions. But, as shown, it does not. *See supra* at 13-15, 17. Barring outpatient health centers from providing second-trimester abortions is contrary to the current standard of care in Alaska and the United States, and, in fact, harms women's health rather than furthers it.

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56 *See City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 434-35 (1983), *overturned on other grounds by Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

57 *City of Akron*, 462 U.S. at 434-35 ("there can be no doubt that [the] second-trimester hospitalization requirement places a significant obstacle in the path of women seeking an abortion").

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Indeed, providing abortions in outpatient settings has been the standard of care for decades. More than 30 years ago, the United States Supreme Court, in striking down a second-trimester hospitalization requirement, recognized that fact.[58] Citing, among other evidence, the recommendations of the American Public Health Association and the American College of Obstetricians and Gynecologists, the Court concluded that the asserted health justification for the law was fatally undercut by evidence establishing that second-trimester abortions can be safely performed in an outpatient clinic.[59]

As Planned Parenthood's evidence shows, what was true in 1983 remains true today. Second-trimester abortions can be safely performed in an outpatient setting and women's health concerns do not justify limiting the performance of those procedures to hospitals. Planned Parenthood has therefore demonstrated that DHSS's enforcement of the Facilities Statute does not advance a compelling state interest.[60]

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58 *Id.* at 437.

59 *Id.* at 436-37; *see also Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft*, 462 U.S. 476, 481-482 (1983) (striking down hospitalization requirement for abortions after the first trimester); *McCormack v. Herzog*, 788 F.3d 1017, 1030 (9th Cir. 2015) (citing *Akron* in striking down an Idaho law requiring all second-trimester abortions to be performed in a hospital).

60 Importantly, DHSS authorizes payment for Medicaid patients who have an abortion at a Planned Parenthood outpatient facility in Seattle, and other outpatient facilities in Washington, thereby in effect recognizing Planned Parenthood as a provider that meets the standard of care for Alaska citizens. Pentlicky Aff. ¶ 18.

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Because the Facilities Statute fails under the second prong of the privacy analysis, there is no need for this court to determine whether the means chosen by the State are the least restrictive. However, the Facilities Statute plainly fails under this prong as well. DHSS's current enforcement of the statute is not the least, but is the most, restrictive application possible. In addition, the statute itself is unnecessary because the safety of second-trimester abortions can be ensured by treating those procedures in the same manner as similar outpatient procedures. Alternatively, a less restrictive means of advancing the State's interest would be for DHSS to approve Planned Parenthood's facilities for the performance of second-trimester abortion.

2. The Operating Room and Blood Products Regulations

The Operating Room and Blood Products Regulations each prevent the provision of second-trimester abortions outside of a hospital. *See supra* at 10-11. For the same reasons as the Facilities Statute, therefore, Planned Parenthood has established that the Operating Room and Blood Products Regulations burden the right to abortion.

As to the second step in the court's inquiry, Planned Parenthood has demonstrated that, by effectively preventing second-trimester abortions in outpatient facilities in Alaska, the Operating Room and Blood Products Regulations harm women's health.

That these regulations do not advance a compelling state interest is further demonstrated by the fact that they are out of sync with modern practice and wholly unnecessary to ensure that second-trimester abortions are provided safely. *See supra* at 9.

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Comparable, and even riskier, procedures are performed in outpatient settings without meeting the Operating Room and Blood Products Regulations. To whatever extent these regulations may have furthered the State's interest in maternal health when adopted, they no longer reflect the standard of care. Where, as here, the method by which the State has chosen to advance its interests is not in the least efficacious, and in fact undermines maternal health, the Operating Room and Blood Product Regulations do not advance the State's interests.[61]

As with the Facilities Statute, it is not necessary for the court to consider least restrictive means, given that the Operating Room and Blood Products Regulations do not further a compelling interest. But if the court does reach the question, it should easily find that there is a less restrictive means of ensuring women's health, namely to treat abortion in the same way that comparable procedures are regulated.

3. The Consultation Regulation

The Consultation Regulation infringes on the fundamental privacy right of women seeking second-trimester abortions by forcing the woman's abortion provider to consult

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61 *See Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 208 (Alaska 2007) (striking a law under strict scrutiny where "the methods it employs in support of its admirable goals [were of] questionable efficacy"); *see also Breese v. Smith*, 501 P.2d 159, 172 (Alaska 1972) (striking a regulation under strict scrutiny where the government failed to show with "hard facts" a causal relationship between the operation of the law and furtherance of the interests).

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with another physician. Additionally, the Consultation Regulation imposes unnecessary delays. Planned Parenthood therefore has satisfied the first prong of the court's inquiry.

The Consultation Regulation does not further a compelling state interest. There is no medical reason why a physician who provides an abortion must consult with another provider prior to performing the abortion. To the contrary, throughout medicine, doctors are provided with the ability to make decisions in conjunction with their patients, using their best medical judgment. This is no less true for abortion providers.[62]

In fact, the question of whether the Consultation Regulation advances a compelling interest in women's health was settled by the United States Supreme Court in 1973 in *Doe v. Bolton*,[63] the companion case to *Roe v. Wade*.[64] In *Doe*, the plaintiffs challenged a statute requiring two physicians to concur in the judgment of the woman's treating physician that an abortion was necessary. The Supreme Court invalidated the requirement, noting that "the attending physician's best clinical judgment" "should be sufficient."[65] The Court further explained: "If a physician is licensed by the State, he is recognized by the State as capable of exercising acceptable clinical judgment," and "[r]equired acquiescence by co-practitioners has no rational connection with a patient's

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62 Pasternack Aff. ¶ 18; Pentlicky Aff. ¶ 25.

63 410 U.S. 179, 198-99 (1973).

64 410 U.S. 113 (1973).

65 *Doe*, 410 U.S. at 199 (internal quotations omitted).

needs and unduly infringes on the physician's right to practice."[66] By virtue of conferring a license to practice medicine in Alaska, the State Medical Board has determined that a physician "possesses the requisite qualifications."[67] Accordingly, the State cannot meet its burden of showing that the Consultation Regulation serves a compelling interest.

As with the other challenged Restrictions, because the Consultation Regulation does not serve a compelling interest, it is unnecessary to determine whether it advances a compelling interest by the least restrictive means. Plainly, however, it does not. Any interest asserted by the State could be equally served by treating abortions as all other medical procedures are treated: by leaving it to the abortion provider to determine if a consultation is needed.

C. The Restrictions violate the right to equal protection

In assessing a challenge under Alaska's equal protection clause, a court undertakes a three-step process: first, it determines "what weight should be afforded to the constitutional interest;" second, it examines the "purposes served by a challenged statute;" and third, it assesses whether the means chosen by the State are appropriately

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66 *Id.* (further noting that no other medical procedure in the state required concurrence by other physicians).

67 *Id.* (internal citations and quotations omitted).

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tailored to its asserted goals.[68] At each step, the State's burden is determined by the nature of the interest involved.

Where, as here, the Restrictions implicate the fundamental right of privacy, the State's interests must be compelling, and the means chosen must be narrowly tailored and the least restrictive means of achieving the State's goals.[69] This analysis to similar to that applicable to privacy claims, in that both require identification of a compelling interest, advanced by the least restrictive means.[70] But "[t]hey differ in what aspect of a law is subjected to this strict review: its infringement of the fundamental right or its discriminatory treatment of the fundamental rights of two different groups."[71]

1. The Restrictions treat similarly situated patients differently

The Alaska Supreme Court has recently addressed the framework applicable to determining, for purposes of equal protection, whether "differently treated groups are similarly situated."[72] A court first "decide[s] which classes must be compared," and then determines if the challenged restrictions "ha[ve] a discriminatory purpose or [are] facially

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68 *PPGNW*, 375 P.3d at 1137.

69 *Id.* at 1137-38.

70 *Id.* at 1146 (Fabe, J., concurring).

71 *Id.*

72 *PPGNW*, 375 P.3d at 1135 (internal quotations and citations omitted).

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discriminatory – i.e., whether the classes are treated unequally."[73] As the Court explained, this inquiry is a legal question: "Under the applicable scrutiny level, do the stated rationales for the [] law justify discriminating" between the two groups?[74]

Here, the classes to be compared are women seeking outpatient second-trimester abortions and patients receiving other similar outpatient procedures. There is nothing about a second-trimester abortion in terms of risk or complexity that distinguishes it from many other procedures that are performed in outpatient facilities, such as first-trimester abortion or surgical completion of miscarriage, hysteroscopy, IUD insertion, endometrial biopsy, endometrial ablation, lesion removal from female genital areas, colonoscopy, endoscopy, or lithotripsy.[75] Thus, these two groups re similarly situated. Despite this similarity, the classes are treated unequally. Only second-trimester abortion is effectively banned in the outpatient setting, while comparable or even riskier procedures, like those listed above, are not. Only second-trimester abortion is required to have a hospital-style operating room and blood products available, while other similar outpatient procedures have no such requirements. Similarly, the Consultation Regulation applies only to patients seeking second-trimester abortion; the State does not require physicians providing any other type of medical care to consult with a second physician. The

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73 *Id.* at 1135.

74 *Id.* at 1136.

75 Pentlicky Aff. ¶ 19.

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Restrictions clearly discriminate against women seeking second-trimester outpatient abortions as compared to patients seeking comparable procedures. As a result, the court must examine, under strict scrutiny, whether the State's rationale for the Restrictions justifies this discrimination.

2. The Restrictions do not serve a compelling interest and are not narrowly tailored

Under the first step in the equal protection analysis, a court evaluates "the importance of the personal right infringed upon to determine the State's burden in justifying its differential infringement."[76] As the Alaska Supreme Court recently reiterated in applying this test:

> It has long been established that the Alaska Constitution's privacy clause guarantees the fundamental right to choose between pregnancy termination and carrying to term. And it has long been established that a law burdening the fundamental right of reproductive choice demands strict scrutiny.[77]

As to the second step of the inquiry – whether the State's interest in the discriminatory treatment is compelling – the Alaska Supreme Court recently stated, "[t]o prove an interest compelling in the equal protection context, the State must show that the interest actually needs to be vindicated because it is significantly impaired at present."[78] This is a high bar, and one that the State cannot meet here. As demonstrated, the

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76 *PPGNW*, 375 P.3d at 1137.

77 *Id.* at 1137-38.

78 *Id.* at 1138 n.88.

Restrictions are not necessary to address a significant impairment to the State's interests in the health of women seeking abortion. Rather, they undermine women's health. *See supra* at 13-15, 17. Thus, the Restrictions fail under the second prong of the strict scrutiny equal protection analysis because there is no justification, let alone a compelling interest, for the discriminatory treatment.

Given that the Restrictions fail under the second prong of the equal protection analysis, this court need not determine whether they are the least restrictive means of accomplishing the State's goals.[79] But here, too, the Restrictions fall far short of the close means-to-end fit required when a fundamental right is subject to unequal treatment. As demonstrated, because the Restrictions are out of step with current medical practice and do not advance the health of women seeking abortion, they are fatally over-inclusive.

For these reasons, Planned Parenthood has established both substantial and serious questions and probable success on the merits of its equal protection claims.

CONCLUSION

As shown, Planned Parenthood has established each of the four factors necessary to obtain preliminary injunctive relief, and respectfully requests that this court issue a Preliminary Injunction restraining enforcement of the Restrictions and enjoining

[79] *State, Dep't of Health & Soc. Servs.*, 28 P.3d at 913 (declining to consider means-end fit in an equal protection challenge to a restriction on Medicaid funding for abortion where "the State has not asserted an interest sufficiently compelling to justify denying medically necessary care to women who need abortions").

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Defendant, its employees, agents, appointees, and successors from enforcing, threatening to enforce, or otherwise applying the Restrictions until this case is finally resolved or upon further order of this court.

Dated this 4th day of January, 2017.

By: Susan Orlansky

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