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 ON CROSS MOTIONS FOR SUMMARY JUDGMENT

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. Planned Parenthood argues that applying the restriction to otherwise qualified physician assistants and advanced practice registered nurses violates Article I, section one of the Alaska Constitution, which protects the right to equal protection, and Article I, section 22 of the Alaska Constitution, which protects the right to privacy. Planned Parenthood asks the court to enjoin the prohibition on these advance practitioner clinicians from performing first trimester medication abortion and aspiration abortion.

Planned Parenthood and the State of Alaska have filed motions for summary judgment. The court DENIES both motions because there are questions of fact regarding whether prohibiting otherwise qualified medical clinicians from providing medication and aspiration abortion substantially burdens patient's fundamental privacy right to make reproductive health

care decisions and access abortion care protected by the Alaska Constitution or violates patients' state constitutional right to equal protection.

Facts and Proceedings

In Alaska only licensed physicians may independently practice medicine, with the exception of advanced practice registered nurses (APRNs) working within their scope of practice.[1] Physician assistants (PAs) are authorized to practice medicine under the "supervision, control, and responsibility" of a physician and may perform any medical diagnosis and treatment within the scope of practice of their collaborating physician.[2] APRNs may practice independently and may perform medical diagnosis and treatment if it is within their scope of practice, defined by national nursing standards.[3] APRNs and PAs (hereafter referred to as advanced practice clinicians or APCs) may dispense controlled substances.[4] The only medical treatment within the scope of practice of the PA's collaborating physician or the APRN's scope of practice that an APC may not perform in Alaska is abortion.[5]

1. *Medication and aspiration abortion have low risks of complication, particularly compared to risks associated with pregnancy and childbirth.*

Generally speaking there are two types of abortion: medication abortion, where a patient takes medication to end a pregnancy, and "procedural abortion," where the clinician uses instruments to end the pregnancy and empty the uterus.[6] The most common form of medication

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1 AS 08.64.170(a); AS 08.64.380(6) (defining the "practice of medicine"); AS 08.68.850(1); AS 08.68.230.

2 AS 08.64.170(a)(1); 12 AAC 40.430(a).

3 AS 08.68.160 (requiring nurses be licensed to practice); AS 08.68.850 (establishing different types of nurses with different scopes of practice, including registered nurses and APRNs); 12 AAC 44.380 (defining APRN as a "licensed independent practitioner who is licensed to practice as a nurse midwife, a clinical nurse specialist, a nurse practitioner, or a certified registered nurse anesthetist, or in more than one role. The individual must be licensed to practice in the role for which the individual has received specialized education.").

4 12 AAC 40.450; 12 AAC 44.440, 445, 447.

5 *See* AS 18.16.010; Power Aff. Ex. A. at 65.

6 Aff. of Shanthi Ramesh, M.D. in Supp. of Summ. J. [hereinafter Ramesh Aff.] ¶ 12.

abortion involves the administration of two medications: mifepristone and misoprostol.[7] Mifepristone blocks progesterone, a hormone necessary to maintain pregnancy.[8] Misoprostol is typically administered within 48 hours following administration of mifepristone and causes the cervix to open and the uterus to contract, expelling the contents of the uterus as occurs in miscarriage.[9] This method of abortion does not require any instruments, anesthesia, or sedation, and may be performed during the first eleven weeks of pregnancy.[10] The effects of the medication (cramping and bleeding) are experienced outside the clinic and providers generally address patient concerns by telephone.[11] When the Food and Drug Administration (FDA) first approved Mifeprex (the trade name for mifepristone) in 2000, physician supervision was required for its administration.[12] In 2016 the FDA eliminated the supervision requirement.[13] The FDA never required a physician to be physically present at administration or to personally administer the medication.[14] Most recently, in January 2023, the FDA eliminated the requirement that mifepristone be dispensed in person, allowing it to be prescribed by mail.[15]

Aspiration abortion is the most common method of procedural abortion during the first fifteen weeks of pregnancy.[16] The procedure typically takes five to ten minutes, and involves

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7 *Id.* ¶ 13.

8 *Id.* ¶ 14.

9 *Id.*

10 *Id.* ¶¶ 14, 16.

11 *Id.* ¶ 19.

12 *Id.* ¶ 15.

13 *Id. But see Alliance for Hippocractic Medicine v. Food & Drug Admin.*, 2023 WL 2825871 (N.D. Texas, April 7, 2023) (granting preliminary injunction staying effective date of FDA's 2000 approval of mifepristone and subsequent actions, including the 2016); *Danco Laboratories, LLC v. Alliance of Hippocratic Medicine*, 143 S.Ct. 1075 (2023) (staying order granting preliminary injunction pending disposition of appeal in 5th Circuit Court of Appeals).

14 *Id.*

15 FOOD & DRUG ADMIN., APPROVED RISK EVALUATION AND MITIGATION STRATEGIES (REMS), MIFEPRISTONE (LAST UPDATE 3/23/2023) available at: https://www.accessdata.fda.gov/scripts/cder/rems/index.cfm?event=RemsDetails.page&REMS=390#tabs-4 (last visited 5/19/2023).

16 Ramesh Aff. ¶ 20.

insertion of a flexible plastic cannula through the vagina and cervix into the patient's uterus.[17] Suction is used to empty the contents of the uterus.[18] To conduct the procedure, the provider dilates the cervix with a variety and sometimes combination of techniques (stretching with tapered instruments, medication such as misoprostol, or placement of osmotic device to soften the cervix).[19] The amount of dilation required increases with gestational age.[20] This procedure does not require general anesthesia, although patients often elect mild to moderate sedation.[21]

Medication and aspiration abortion have low risks of complications.[22] A 2015 study found that complications requiring hospital admission, surgery, or blood transfusion occur in 0.31 percent of medication abortion cases.[23] Mifepristone and misoprostol have been shown to be as safe as commonly used medications such as ibuprofen.[24] Complications from medication abortion include incomplete abortion, excessive bleeding, and continuing pregnancy.[25] The most common complication from aspiration abortion is excessive bleeding.[26] Over the past five years, Planned Parenthood provided 4,357 aspiration abortions in Alaska and eight of those patients required emergency follow-up care.[27] Abortion is safer the earlier in pregnancy it occurs.[28]

Some patients have medical conditions that make medication abortion safer, such as those with Class III obesity or anomalies of the genital or reproductive tract, all of which can complicate

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17 *Id.*
18 *Id.*
19 *Id.* ¶ 21.
20 *Id.*
21 *Id.* ¶ 23.
22 *Id.* ¶¶ 34-35; Aff. of Tanya Pasternack, M.D. in Supp. of Summ. J. [hereinafter Pasternack Aff.] ¶ 3; Aff. of Amy Bender in Supp. of Summ. J. [hereinafter Bender Aff.] ¶¶ 14-17.
23 Ramesh Aff. ¶ 35 n.15.
24 *Id.* ¶ 35.
25 *Id.* ¶ 36.
26 *Id.*
27 Pasternack Aff. ¶ 7.
28 Aff. of Vanessa Power in Supp. Of Pl.'s Mot. For Summ. J. [hereinafter Power Aff.] Ex. B. at 156-57, 164.

aspiration abortion.[29] Some patients prefer medication abortion because it allows them to end their pregnancy at home with their chosen supports in a non-clinical setting.[30] Some patients are averse to invasive procedures, sedation, or needles.[31] Some patients who have experienced sexual assault, sexual abuse, or other trauma, prefer medication abortion because having an object inserted into the vagina is traumatic.[32] Victims of intimate partner violence sometimes prefer medication abortion because it presents similarly to miscarriage and protects the victim from violence.[33]

Medication and aspiration abortion have significantly lower complication rates than carrying a pregnancy to term.[34] Nationally, as many as ten percent pregnancies carried to term lead to hospitalization for complications associated with pregnancy (not including hospitalizations for delivery).[35] Many severe complications, including hypertension, gestational diabetes, and placental abnormalities, occur late in pregnancy and thus do not pose risks when pregnancy is terminated early.[36]

Labor and delivery also pose significant health risks. In the United States, more than 50,000 pregnancies per year have severe complications associated with labor and delivery, and rates of severe maternal morbidity are increasing.[37] Almost three percent of pregnancies that are delivered vaginally lead to prolonged hospital admission or early readmission.[38] That rate is around nine

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29 Ramesh Aff. ¶ 24.
30 *Id.* ¶ 25.
31 *Id.*
32 *Id.*
33 *Id.*
34 *Id.* ¶ 40.
35 *Id.* ¶ 41.
36 *Id.*
37 *Id.* ¶ 41 n.23 (defining "severe maternal morbidity" as "unexpected outcomes of labor and delivery that result in significant short- or long-term consequences to a woman's health").
38 *Id.* ¶ 42.

percent for cesarean delivery, a major abdominal surgery with substantial morbidity.[39] In Alaska, over 22% of births occur by cesarean delivery.[40] Post-delivery complications include post-partum depression; one study of Alaskan women who recently gave birth found that 26.8% experienced symptoms of post-partum depression; for Alaska Native women the rate is higher, at 30.7% percent.[41]

Nationally the maternal death rate of 23.8 maternal deaths per 100,000 is higher than any other wealthy country.[42] The maternal death rate in Alaska is 10.6 maternal deaths per 100,000 live births, which is lower than the national rate, but more than twenty times higher than the mortality rate associated with abortion in Alaska.[43] In 2017 and 2018 seventy-five percent of maternal deaths in Alaska were from rural communities.[44]

2. *Advanced Practice Registered Nurses and Physician Assistants may be qualified to provide medication and aspiration abortion care.*

Outside Alaska, APCs perform aspiration procedures after incomplete medication abortions and miscarriages.[45] They also provide medication and aspiration abortion.[46] Medical literature indicates that APRNS and PAs provide medication and aspiration abortions as safely as physicians.[47] In Alaska APCs regularly prescribe medications that pose higher risks than medication abortion, diagnose and manage serious complications related to pregnancy and birth,

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39 *Id.*
40 *Id.*
41 *Id.* ¶ 43.
42 *Id.* ¶ 44.
43 *Id.*
44 *Id.*
45 *Id.* ¶¶ 37, 49.
46 Ramesh Aff. ¶ 56 (noting that "Twenty-one states (including the District of Colombia) permit APCs to provide medication abortion. Seventeen states (including the District of Colombia) allow APCs to perform aspiration abortion"); Def.'s MSJ Ex. H, Spetz Dep. *54 (noting that 16-18 states permit APCs to perform medication abortion, and 10-11 states permit APCs to perform aspiration abortion). These numbers may have changed following *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228 (2022) as many states have enacted legislation restricting abortion.
47 Ramesh Aff. ¶¶ 57-58.

and perform other procedures as complex as medication and aspiration abortion, including some medically indistinguishable from medication and aspiration abortion.[48]

3. Alaska law prohibits otherwise qualified Advanced Practice Registered Nurses and Physician Assistants from providing abortion care.

Alaska Statute 18.16.010(a) provides that "An abortion may not be performed in this state unless the abortion is performed by a physician licensed by the State Medical Board under AS 08.64.200." Adopted in 1970, before Alaskans amended the Alaska Constitution to protect the right to privacy, the legislation decriminalized abortion in Alaska.[49] No other statute restricts APCs from performing a procedure or providing a treatment for which they are otherwise qualified.[50] Under Alaska law, the licensed physician requirement for abortion care is an exception to the statutory and regulatory frameworks that authorize APCs to practice.

The Alaska Board of Nursing is empowered to adopt regulations pertaining to the practice of APRNs, license APRNs, develop standards for nursing practice, and issue advisory opinions whether nursing practice procedures or policies comply with acceptable standards of nursing.[51] The Board has not restricted APRNs from providing aspiration for early miscarriage where it is in their scope of practice.[52] The Board has not restricted APRNs from performing any other procedure or treatment within the APRN's certification, training, and experience.[53]

Planned Parenthood is the only known abortion provider in the state and offers abortion services up to 17.6 weeks as measured from a patient's last menstrual period.[54] Planned Parenthood offers medication abortion through 11 weeks, and aspiration abortion through 13.6

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48 *Id.* ¶¶ 47-50, 52-55; Bender Aff. ¶¶ 7-9, 18-19; Pasternack Aff. ¶¶ 12-13.
49 Ch. 103, § 1, SLA 1970; former AS 11.15.060(a)(1)-(2) (1970).
50 Power Aff. Ex. A. at 65.
51 AS 8.68.100(a)(1)(A), (5), (8), (9).
52 Power Aff. Ex. A. at 92.
53 *Id.* at 67.
54 Pasternack Aff. ¶ 4.

weeks.[55] Patients seeking abortion care must travel to one of the three locations[56] where those services are provided.[57] Planned Parenthood hires per diem physicians to provide abortion care at its locations in Alaska.[58] Most of Planned Parenthood's Alaska APCs, on the other hand, work full-time.[59] Planned Parenthood's standard of care requires that abortions only be performed in the three communities where it operates clinics.[60]

Planned Parenthood APCs specialize in reproductive health and are trained in abortion care, pregnancy assessment, and other gynecological care.[61] APCs at Planned Parenthood's Alaska locations routinely provide healthcare that involves counseling patients, screening for risk factors, and monitoring for complications from abortions.[62] 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.[63] When patients seek medication abortion at Planned Parenthood clinics in Alaska, APCs counsel them, screen them for contraindications, and treat them for complications when they occur.[64]

Before this court entered the preliminary injunction in this case,[65] Planned Parenthood offered medication abortion approximately once per week at each of its locations in the state, and aspiration abortion on more limited days (once a week in Anchorage, twice a month in Fairbanks,

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55 *Id.* ¶¶ 5-6.

56 Planned Parenthood's Soldotna clinic closed in 2022. *Id.* ¶ 5.

57 Bender Aff. ¶¶ 25-26.

58 Pasternack Aff. ¶ 21.

59 *Id.* ¶ 13.

60 State Def.'s Mot. for Summ. J. [hereinafter Def.'s MSJ], Ex. C. *49.

61 Bender Aff. ¶ 12; Pasternack Aff. ¶ 18.

62 Bender Aff. ¶ 6; *see also* Pasternack Aff. ¶ 13 ("Alaska Planned Parenthood APCs provide a broad range of health care services and have extremely broad prescriptive authority; they regularly prescribe medications that are comparable to or higher risk than medication abortion").

63 Bender Aff. ¶ 9.

64 *Id.* ¶ 7.

65 *Order Granting Pl.'s Mot. for Prelim. Inj.* (entered 11/02/2021).

and once a month in Juneau).[66] After the preliminary injunction, Planned Parenthood began providing medication abortion nearly every day that a clinic is open.[67] Planned Parenthood asserts that, since the issuance of the preliminary injunction, there has been an increase in medication abortions.[68] According to Planned Parenthood, increased access to medication abortion has increased access to abortion.[69]

Many Alaskans encounter challenges in accessing medical care generally, due to Alaska's geography.[70] Although the parties disagree on why patients may be delayed in accessing abortion, the impacts of delays are not disputed. The risk of complications after an abortion increases with gestational age.[71] 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 Parenthood patients ineligible for a medication abortion.[72] Patients must then undergo aspiration abortion, which is available on a more limited basis than medication abortion.[73] Moreover, some patients have a medical indication for avoiding aspiration.[74] Planned Parenthood alleges that, due to the difficulty of accessing abortion care in Alaska, some patients have been unable to end their pregnancies.[75]

4. Planned Parenthood's lawsuit and cross-motions for summary judgment.

Planned Parenthood initiated these proceedings against the State of Alaska claiming that the physician requirement established by AS 18.16.010 restricts abortion services in Alaska in violation of the Alaska Constitution's protection of privacy and guarantee of equal protection.

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66 Pasternack Aff. ¶¶ 21-22.
67 *Id.* ¶ 22.
68 Pl.'s Mot. for Summ. J. 10 (citing Pasternack Aff. ¶ 22, Bender Aff. ¶ 11, and Power Aff. Ex. I *40-41).
69 *Id.* 10.
70 Def. MSJ 4 (citing Ex. B *105).
71 Pasternack Aff. ¶ 3.
72 Ramesh Aff. ¶ 73; Bender Aff. ¶ 29.
73 Bender Aff. ¶ 29; Pasternack Aff. ¶¶ 21-22.
74 Pasternack Aff. ¶ 8.
75 Bender Aff. ¶ 30; Ramesh Aff. ¶ 80.

This court issued a preliminary injunction enjoining the State from enforcing the physician requirement against otherwise qualified APCs providing medication abortion.[76] The parties have now filed cross-motions for summary judgment.

In its motion, Planned Parenthood argues that the physician requirement is unconstitutional because it restricts abortion access by delaying, and sometimes preventing, abortion care.[77] Specifically, it argues that AS 18.16.010 violates the Alaska equal protection clause by discriminating between pregnant patients seeking abortion and pregnant patients seeking miscarriage treatment, and violates patients' right to privacy by substantially burdening their right to access abortion services.[78] Planned Parenthood submitted evidence supporting its assertion that AS 18.16.010 burdens patients' rights, and that some of those burdens were mitigated after the preliminary injunction.

In opposition, the State argues that Planned Parenthood has not met its burden to demonstrate that, as a matter of law, the physician requirement actually restricts access to abortion.[79] The State argues that Planned Parenthood's evidence submitted in support of its motion for summary judgment does not demonstrate that delays in abortion care or restrictions on access are the result of the physician requirement.[80] Instead, the State argues that the delays are the result of the business and operational decisions of Planned Parenthood and the geographic challenges of providing medical care in Alaska.[81]

The State points to its expert's opinion, based on a statistical evaluation of data collected by Planned Parenthood and publicly available data that the licensed physician requirement does

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76 *Order Granting Pl.'s Mot. for Prelim. Inj.*
77 Pl.'s MSJ 1-2.
78 *Id.* 17, 20.
79 Opp'n to Pl.'s Mot. for Summ. J. [hereinafter Def.'s Opp'n.] 4-5.
80 *Id.* at 5-15.
81 *Id.*

not contribute to an access problem.[82] The State argues that, because Planned Parenthood has not presented evidence that the injunction resulted in an overall increase in the number of abortions performed during the period the injunction has been in place, the physician requirement does not, as a matter of law, substantially burden the right to abortion.[83] According to the State, Planned Parenthood must prove an increase in the number of abortions to show that the physician requirement imposes a substantial burden on the right to abortion.[84] The State argues that the Department of Health and Social Services has not identified an access problem with respect to abortion, and that Planned Parenthood utilizes telehealth to provide medication abortions more than its per diem doctors' clinic schedules would suggest.[85] And the State notes that Planned Parenthood's physician positions are fully staffed, and that it has turned away physicians interested in providing abortion care.[86] The State argues that Planned Parenthood has not demonstrated the real-world effects of the statute and that any burden imposed on abortion access is caused by Planned Parenthood's business model, not AS 18.16.010.[87]

Discussion

1. Legal standard for motions for summary judgment

A court will only grant summary judgment if "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law."[88] Initially, "the moving party has the burden of showing that the case presents no material issue of fact and that the law requires judgment in its favor."[89] To meet this burden, the moving party "must submit admissible

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82 Def.'s Mot. for Summ. J. 12-13.
83 *Id.* at 26, 30.
84 *Id.*
85 *Id.* at 6-9.
86 *Id.* at 9-11.
87 *Id.* at 35.
88 Alaska R. Civ. P. 56(c).
89 *Brock v. Rogers & Babler, Inc.*, 536 P.2d 778, 782 (Alaska 1975).

evidence."[90] Once the moving party has met this obligation, the non-movant, to defeat summary judgment, must produce "admissible evidence reasonably tending to dispute or contradict the movant's evidence."[91] "Assertions of fact in pleadings and memoranda are not admissible evidence and cannot be relied upon for the purpose of summary judgment."[92]

A court "will not engage in a weighing of the evidence on summary judgment; there is a 'genuine issue' of material fact as long as the non-movant has presented *some* evidence in support of its legal theory."[93] The court must make all reasonable inferences in favor of the non-movant.[94] Further, "when factual disputes exist, the non-movant's version of the facts must be accepted as true and capable of proof."[95]

2. *There are questions of fact precluding summary judgment on Planned Parenthood's claim for violation of the right to privacy.*

When the law places a substantial burden on the exercise of a fundamental right, the state must show a compelling state interest and "demonstrate that no less restrictive means of advancing the state interest exists."[96] In 1972, Alaska voters adopted the right to privacy as an amendment to the Alaska Constitution.[97] The privacy clause covers two primary categories of rights: the "right of personal autonomy," and the right to "shield sensitive personal information from public disclosure."[98] Planned Parenthood's challenge concerns the right to personal autonomy.

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90 *Id.*

91 *Olivit v. City & Borough of Juneau*, 171 P.3d 1137, 1142 (Alaska 2007) (citing *Cikan v. ARCO Alaska, Inc.*, 125 P.3d 335, 339 (Alaska 2005)).

92 *Brock*, 536 P.2d at 783.

93 *Alakayak v. British Columbia Packers, Ltd.*, 48 P.3d 432, 449 (Alaska 2002).

94 *Id.*

95 *Mitchell v. Teck Cominco Alaska, Inc.*, 193 P.3d 751, 757 (Alaska 2008).

96 *Doe v. Dep't of Pub. Safety*, 444 P.3d 116, 125-26 (Alaska 2019); *see also Huffman v. State*, 204 P.3d 339, 345-46 (Alaska 2009) (citing *Myers v. Alaska Psychiatric Inst.*, 138 P.3d 238, 245-46 (Alaska 2006)).

97 Susan Orlansky & Jeffrey M. Feldman, *Justice Rabinowitz and Personal Freedom: Evolving A Constitutional Framework*, 15 Alaska L. Rev. 1, 8 (1998); Alaska Const. art. I, § 22.

98 *Doe*, 444 P.3d at 126.

In *Valley Hospital Association, Inc. v. Mat-Su Coalition for Choice*[99] the Court held that a patient's reproductive choice is a fundamental right protected by the right to privacy, and that the Alaska Constitution protects that right more broadly than the United States Constitution.[100] The court held:

> reproductive rights are fundamental, and that they are encompassed within the right to privacy expressed in article I, section 22 of the Alaska Constitution. These 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. These fundamental reproductive rights include the right to an abortion.[101]

Since then, applying strict scrutiny in both substantive due process and equal protection analyses, the Court has struck down statutes requiring that minors seeking abortion obtain parental consent[102] and notification,[103] as well as restrictions on the use of Medicaid to pay for abortion.[104]

A court must begin a privacy analysis with a presumption of constitutionality.[105] The "party raising a constitutional challenge to a statute bears the burden of demonstrating the constitutional violation."[106] Invoking the right to privacy and the fundamental right to abortion does not automatically trigger strict scrutiny.[107] Instead, for strict scrutiny to apply, a plaintiff must show that a law substantially burdens that right.[108] If a law limits non-fundamental privacy or liberty

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99 948 P.2d 963 (Alaska 1997).

100 *Id. at* 966-969.

101 *Id.* at 969.

102 *State v. Planned Parenthood of Alaska*, 171 P.3d 577 (Alaska 2007) (*Planned Parenthood 2007)* (ruling on privacy grounds).

103 *Planned Parenthood of The Great Nw. v. State*, 375 P.3d 1122 (Alaska 2016) (*Planned Parenthood 2016)* (ruling on equal protection grounds).

104 *State v. Planned Parenthood of the Great Nw.*, 436 P.3d 984 (Alaska 2019) (*Planned Parenthood 2019)* (ruling on equal protection grounds); *State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904 (Alaska 2001) (*Planned Parenthood 2001 I*) (ruling on equal protection grounds).

105 *Planned Parenthood 2007*, 171 P.3d at 581 (citing *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 260 n.14 (Alaska 2004)).

106 *Baxley v. State*, 958 P.2d 422, 428 (Alaska 1998).

107 *Cf. State v. Alaska Democratic Party*, 426 P3d 901, 909 (Alaska 2018) (strict scrutiny applies to laws that substantially burdens right to vote, while laws that impose "modest or minimal burdens require only that the law is reasonable, non-discriminatory, and advances 'important regulatory interests'").

108 *Id.*

interests, "the state must identify a legitimate governmental purpose and show that the challenged legislation bears a close and substantial relationship to that purpose."[109]

The State argues that this case should be treated differently from other constitutional challenges because the statute was "clearly constitutional" when it was enacted in 1970 and the legislature intended to increase access to abortion.[110] But the State's argument does not accurately reflect the constitutional or legislative history at issue in this case. The legislature enacted the physician requirement as part of the statute that initially legalized abortion in 1970.[111] The law was passed two years before voters established a state constitutional right to privacy in 1972.[112] Then in 1997, the Court in *Valley Hospital* held that abortion is protected by the fundamental right to privacy in the Alaska Constitution.[113] The court considers the constitutionality of the statute today, not in 1970.[114]

Planned Parenthood cites the Alaska Supreme Court's prior decisions for the proposition that "laws that restrict access to abortion are invalid unless they satisfy strict scrutiny."[115] This proposition is correct, but does not mean that, as a matter of law, strict scrutiny applies to Planned Parenthood's challenge to the physician requirement. Instead, the level of scrutiny applied depends on whether the law actually impairs or deters the exercise of a constitutional right. The fundamental constitutional right at issue includes decisional autonomy-- the right to reproductive

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109 *Sampson v. State*, 31 P.3d 88, 92 (Alaska 2001) (holding that right to physician-assisted suicide is not fundamental and that state law ban on the practice bears a close and substantial to a legitimate state interest).

110 Def.'s Mot. for Summ. J. 19.

111 Ch. 103, § 1, SLA 1970; former AS 11.15.060(a)(1)-(2) (1970).

112 *See* Orlansky, *supra.*

113 *Valley Hosp.*, 948 P.2d at 965.

114 In addition, in 1997 the legislature broadened the definition of abortion to include medication abortion when it passed legislation restricting abortion, rendering this argument even less persuasive. Ch. 14, §§ 2, 3, 6, SLA 1997.

115 Pl.'s MSJ 17.

choice,[116] and bodily autonomy--the right to access abortion care.[117] To trigger strict scrutiny, the physician requirement must actually limit or deter the exercise of the fundamental right.

Alaska Supreme Court decisions considering privacy challenges to legislation affecting abortion have applied strict scrutiny.[118] In *Valley Hospital*, the Alaska Supreme Court concluded that the hospital's policy of not providing abortion care at all (with some exceptions) interfered with the protected right to abortion.[119] In *State v. Planned Parenthood*[120] (*Planned Parenthood 2001 II*), the court extended *Valley Hospital*'s holding to minors, holding that the Alaska Constitution protects minors' privacy rights in their reproductive decisions and that the state may only restrict the minor's right to privacy if it does so to advance a compelling interest through the least restrictive means.[121] But in that case, the law itself expressly restricted a minor's reproductive choice, allocating authority to a parent or judge to consent or to withhold consent to the abortion care the minor sought.

There are disputes of material fact whether the statute substantially burdens a fundamental right. Planned Parenthood presented evidence that the physician requirement causes delay in access to abortion care and that the delay prevents patients from accessing medication abortion, resulting in increased risk to patient health, in some cases prevents patients from accessing abortion at all.[122] Planned Parenthood also presented evidence that, since entry of the preliminary

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116 *See Planned Parenthood 2016*, 375 P.3d at 1139; *see also State v. Planned Parenthood,* 35 P.3d 30, 40 (Alaska 2001) (*Planned Parenthood 2001 II*).

117 *See Valley Hosp.*, 948 P.2d at 970.

118 *See id.* at 969; *Planned Parenthood 2001 II,* 35 P.3d at 44-45.

119 *See Valley Hosp.*, 948 P.2d at 971.

120 35 P.3d 30 (Alaska 2001).

121 *Id.* at 41.

122 *See e.g.*, Pasternack Aff. ¶ 30; Ramesh Aff. ¶¶ 73, 80; Bender Aff. ¶¶ 11, 20, 29.

injunction, it has been able to offer appointments for medication abortion almost every day its centers are open, resulting in an increase in the number of medication abortions.[123]

Planned Parenthood presented evidence that, if its APCs were permitted to perform aspiration abortions, it could increase the number of days it could offer the procedure.[124] According to Planned Parenthood, this would reduce the delay for patients receiving the procedure, which in Juneau can be as long as two to three weeks.[125] It would also give more patients the option of aspiration abortion, which some patients prefer because it is a less drawn-out process than medication abortion.[126] Reducing delay may have significant impacts on patients who are close to the 13.6 week cutoff, who are transient, or who are traveling to the clinic from outside Juneau, Fairbanks, or Anchorage for care.[127]

The State disputes the weight and credibility of Planned Parenthood's evidence. For example, the State asserts that because of telehealth, a patient at one clinic can receive a medication abortion from a physician located at another clinic, suggesting that its capacity to offer medication abortion services with the physician requirement is greater than Planned Parenthood portrays.[128] The State also asserts that any limitations on Planned Parenthood's ability to offer abortions is the result of its business decisions to staff its clinics with per diem physicians rather than full-time physicians.[129] The State does not dispute the harm to patients when abortion care is delayed.[130] But the State asserts that Planned Parenthood's evidence regarding the harms of delay do not

123 Pasternack Aff. ¶ 22.
124 *Id.* ¶ 24.
125 *Id.*
126 *Id.*
127 *Id.* ¶ 27.
128 Def.'s Opp'n. 7.
129 *Id.* 6-7.
130 *Id.* 12.

relate specifically to abortion care in Alaska, or draw a causal link between the physician requirement and delay in Alaska.[131]

Planned Parenthood submitted affidavits from providers regarding their patients' experiences in support of its assertion that AS 18.16.010 imposes a burden on patients' constitutional rights.[132] The State objects to portions of two of those affidavits including statements by patients, arguing that the testimony lacks foundation and is inadmissible hearsay.[133] Planned Parenthood argues that this testimony falls under hearsay exceptions, and that it is the type of testimony that courts have previously accepted.[134]

The provider testimony, or portions of it, may be admissible under either rule 703 or 803(4). The providers are offered as experts, and may rely on hearsay to form their opinions under Alaska Rule of Evidence 703, even if the underlying hearsay is inadmissible. In addition, "[r]ule 803(4) admits three types of statements: (1) medical history, (2) past or present sensations, and (3) inception or general cause of the disease or injury. All three types are admissible where they are 'reasonably pertinent to diagnosis or treatment.'"[135] Delays in scheduling, and the reasons for it, are relevant to patients' treatment options.[136] Accordingly, the court considers those affidavits.

The State argues that because the testimony is vague and does not provide significant details about the patients' experiences, they should be excluded.[137] The State's arguments raise questions about the credibility of that testimony or the weight it should be given, but the evidence

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131 *Id.* 12-14.

132 Bender Aff.; Pasternack Aff.

133 Def.'s Mot. for Summ. J. 27.

134 Pl.'s Opp'n. to Def.'s Mot. for Summ. J. [hereinafter Pl.'s Opp'n.] 21-22.

135 *Sluka v. State*, 717 P.2d 394, 399 (Alaska Ct. App. 1986) (quoting *United States v. Iron Shell*, 633 F.2d 77, 83 (8th Cir. 1980)).

136 As the State notes, a "delay in presenting for abortion care- whatever the cause of the delay- may affect the type of abortion available to the patient." State's Reply in Supp. of Mot. for Summ. J. 11 n.22.

137 Def.'s Opp'n. 16-19.

is not so unreliable that it must be excluded. Because trial courts do not make credibility determinations or weigh evidence at the summary judgment stage, whether the physician requirement imposes a substantial burden on the right to abortion cannot be determined on a motion for summary judgment.[138] Because there is a genuine issue of material fact, the court cannot conclude as a matter of law that the physician requirement must survive strict scrutiny.

In its motion for summary judgment, the State presented evidence that the restrictions on providers do not have any statistical impact on patients' ability to obtain abortion.[139] This evidence contradicts Planned Parenthood's evidence that the restriction results not just in delays in care but in denial of access to abortion services. First, the State argues (as it did in opposition to Planned Parenthood's motion for summary judgment) that Planned Parenthood cannot show that any delay or obstacle to access abortion is solely due to the physician requirement for providing abortions. Rather, the State argues, that delays and obstacles are caused by such factors as Planned Parenthood's decision to staff its clinics with per diem physicians instead of full-time physicians, the limited schedule that Planned Parenthood provides for medication abortion despite its telehealth capabilities, and the geographic obstacles that burden access to medical care in rural Alaska.[140] But Planned Parenthood is not required to prove that the physician requirement is the only barrier to patients seeking abortion care in order to prevail on its claim.[141] Other barriers are part of the real world the court must consider in determining whether the physician requirement actually burdens the right.

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138 *See Christensen v. Alaska Sales & Serv., Inc.*, 335 P.3d 514, 520 (Alaska 2014).

139 *See e.g.*, Aff. of Michael J. New, PH.D. [hereinafter New Aff.] ¶¶ 9-11.

140 Def.'s Mot. for Summ. J. 7-11, 32-35.

141 *See, eg., Planned Parenthood 2016,* 375 P.3d 1122 (holding that it was a burden to require minors to notify their parents even though the law did not categorically ban minors from getting abortions); *Planned Parenthood 2019,* 436 P.3d 984 (holding that it was a burden to restrict Medicaid funding for abortion even though restricting Medicaid funding doesn't prevent low-income patients from finding alternative funding sources); *Valley Hosp.*, 948 P.2d 963 (holding that it was a burden for a single hospital to not provide abortion care even though patients could go elsewhere for care).

Second, the State relies on the opinion of its expert that the physician requirement does not impede access to abortion in Alaska.[142] The State's expert asserts that the increase in the abortion rate after this court entered a preliminary injunction is statistically insignificant, and that there has not been a reduction in delay between when an appointment for an abortion is sought and when the patient receives the care.[143] The State argues that the statistical evidence it presents is, as a matter of law, more reliable than the evidence presented by Planned Parenthood.[144] But Planned Parenthood casts doubt on the reliability of the State's expert's methods and opinion.[145] And even if the injunction did not result in a statistically significant increase in the overall number of abortions, Planned Parenthood points to other evidence tending to support a finding of a substantial burden, such as an increase in the number of medication abortions and a reduction in gestational age at the time the pregnancy is terminated. The State's arguments and evidence merely underscore that there is a genuine dispute of material fact whether the physician requirement substantially burdens the right to abortion, not that it is entitled to judgment as a matter of law.

A court may not decide between conflicting evidence or weigh evidence and types of evidence at the summary judgment stage. The court denies both motions for summary judgment.

3. There are questions of fact precluding summary judgment on Planned Parenthood's equal protection claim.

The equal protection clause in the Alaska Constitution provides that "all persons are equal and entitled to equal rights, opportunities, and protection under the law."[146] In the early years of statehood, the Court followed the federal tiered approach for equal protection analyses.[147] But

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142 Def.'s Mot. for Summ. J. 11-13.
143 New Aff. ¶¶ 9-11, 29-33.
144 Def.'s Mot. for Summ. J. 11-16.
145 Pl.'s Opp'n. 26-28.
146 Alaska Const. art. I, § 1.
147 Paul E. McGreal, *Alaska Equal Protection: Constitutional Law or Common Law?*, 15 Alaska L. Rev. 209, 254 (1998).

today an equal protection analysis under the Alaska Constitution differs from a federal analysis.[148] In the mid 1970's the Court adopted a "more flexible 'sliding scale' test."[149] The Alaska equal protection clause is "more protective of individual rights" than the federal counterpart.[150]

The party raising the equal protection challenge has the burden of demonstrating a constitutional violation, and the court starts with a presumption of constitutionality.[151] To perform an equal protection analysis, the court, "must identify and assess the nature and importance of the competing personal and governmental interests at stake, identify the relevant level of scrutiny for governmental action, and assess the means chosen to advance governmental interests."[152]

The State's equal protection clause requires "equal treatment of those similarly situated."[153] This requires a determination of which classes must be compared.[154] Planned Parenthood asserts that the relevant classes are patients seeking abortion care and patients seeking other pregnancy-related treatment such as birth, which carries higher risks to the patient than abortion.[155]

Planned Parenthood reaches this classification by reading AS 18.16.010 alongside Alaska statutes and regulations authorizing APCs to provide medical care.[156] The State argues that classification may only be based on the terms of AS 18.16.010, which means that the relevant classes are licensed physicians and everyone else.[157] But classification can involve interpreting multiple relevant statutes "[t]aken together."[158] The challenged classification is based on the

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148 *See State v. Anthony*, 810 P.2d 155, 157 (Alaska 1991).

149 *Id.* (quoting *State v. Erickson*, 574 P.2d 1, 11–12 (Alaska 1978)).

150 *Id.* (citing *Sonneman v. Knight*, 790 P.2d 702, 706 (Alaska 1990)).

151 *Planned Parenthood 2019*, 436 P.3d at 992; *Planned Parenthood 2016*, 375 P.3d at. 1133.

152 *Planned Parenthood 2016*, 375 P.3d at 1132.

153 *Id.* at 1135 (quoting *Planned Parenthood 2001 I*, 28 P.3d at 909); Alaska Const. art. I, § 1.

154 *Id.* at 1135.

155 Pl.'s MSJ 20-22; Pl.'s Opp'n. 9-10.

156 Pl.'s Opp'n. 9.

157 Def.'s Mot. for Summ. J. 39.

158 *Watson v. State*, 487 P.3d 568, 571 (Alaska 2021), *reh'g denied* (June 18, 2021). *See also, Harris v. Millenium Hotel*, 330 P.3d 330, 334 (Alaska 2014) (interpreting the Alaska Workers' Compensation Act together with the Marriage Amendment to the Alaska Constitution).

exercise of the fundamental right to reproductive choice, not the rights of physicians or other medical providers (or anyone without training) to provide a particular type of medical treatment. The classification imposes different burdens on pregnant patients based on their decisions whether to terminate or continue their pregnancies.[159]

Accordingly, the proper classes are pregnant patients seeking abortion services and pregnant patients seeking other pregnancy-related medical care. Where the classification of groups is defined by statute, whether they are similarly situated is a question of law.[160] Here the determination of classes is a matter of law because the statute is facially discriminatory by treating the two classes unequally.[161]

Under Alaska's equal protection test, the court must determine the level of scrutiny to apply, using a sliding-scale test.[162] The weight of the constitutional interest impaired is the most important variable.[163] Next, the court considers the interests of the State served by the regulation.[164] If the impact of the challenged regulation is minimal, the State need only show legitimate objectives to survive an equal protection challenge.[165] "But if 'the objective degree to which the challenged legislation tends to deter [exercise of constitutional rights]' is significant, the regulation cannot survive constitutional challenge unless it serves a compelling state interest."[166] This does not require proof of actual deterrence; "the relevant criteria are the fact and the severity of the restriction." The question is whether the regulation operates in such a

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159 *See Planned Parenthood 2019*, 436 P.3d at 1000-01.
160 *Id.* at 1000; *Planned Parenthood 2016*, 375 P.3d at 1135-1137.
161 *See Planned Parenthood 2016*, 375 P.3d at 1135.
162 *Planned Parenthood 2001 I*, 28 P.3d at 909.
163 *Id.*
164 *Id.*
165 *Id.*
166 *Id.* (quoting *Alaska Pac. Assur. Co. v. Brown*, 687 P.2d 264, 271 (Alaska 1984) (abrogated by statute on other grounds)).

way that reasonable patients exercising their right to terminate a pregnancy would be deterred, and the degree of that deterrence.[167]

There are questions of fact whether the physician requirement restricts access to abortion or impairs the fundamental right to abortion.[168] Planned Parenthood has presented evidence tending to show that the physician requirement causes delay which increases the risk to individuals' health in a number of ways.[169] Those ways include: more patients undergoing higher risk procedures than medication; more patients receiving medication abortion later results in a higher risk of complications; and more patients prevented from accessing aspiration abortion in Alaska.[170] The State has presented evidence tending to show that the physician requirement does not cause delay, or that any impact is minimal.

Planned Parenthood's motion for summary judgment must be denied because it has not shown that it is entitled to judgment as a matter of law based on facts not reasonably in dispute that the regulation substantially burdens a fundamental, triggering survive strict scrutiny.[171] The State's motion must be denied because it has not shown that there is no genuine dispute of facts and that it is entitled judgment as a matter of law that the physician requirement does not burden a fundamental constitutional right.

Conclusion

For the foregoing reasons, the court DENIES both cross motions for summary judgment.

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167 *See Alaska Pac. Assur. Co.*, 687 P.2d at 273.

168 *See* pp. 16-19, *supra.*

169 Pl.'s Mot. for Summ. J. 9-14.

170 *Id.*

171 The State has not argued that the physician requirement could survive strict scrutiny.

DONE this 23rd day of May 2023, at Anchorage, Alaska.

Josie Garton
Superior Court Judge

I certify that on 5/23/2023
a copy of the above was mailed to
each of the following at their
addresses of record:

Catherine Humpreville
Camila Vega
Vanessa Power
Veronica Keithley
Shannon Bleicher
Margret Paton-Walsh
Megyn Weigand
Jeffrey Pickett
Christopher Robison
Harriet Milks

Elsie Roehl
Judicial Assistant