IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

PLANNED PARENTHOOD GREAT NORTHWEST, HAWAI'I, ALASKA, INDIANA, KENTUCKY, a Washington corporation, Plaintiff, v. STATE OF ALASKA; et al., Defendants.	Case No.: 3AN-19-11710 CI MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

This case challenges an Alaska law, AS 18.16.010(a)(1), and a Board of Nursing policy that bar advanced practice clinicians ("APCs") from providing safe, early abortion care and miscarriage procedures,[1] which they are highly qualified to provide.

Plaintiff Planned Parenthood Great Northwest, Hawai'i, Alaska, Indiana, Kentucky ("Planned Parenthood") brought this case on December 12, 2019, challenging these restrictions as violations of its patients' and APCs' equal-protection rights, as well as of its patients' rights to privacy and liberty.[2] The case was set for trial on August 16, 2021. Defendants obtained a continuance, and the case is now scheduled to be tried on July 25, 2022. Because Plaintiff's patients continue to be deprived of access to constitutionally protected abortion care while this case awaits trial, Plaintiff now seeks to mitigate that irreparable harm by seeking *limited* preliminary injunctive relief.

Specifically, while Plaintiff is challenging a broader range of abortion and miscarriage-related restrictions, Plaintiff seeks a narrow preliminary injunction allowing its APCs to provide medication abortion, a method of ending an early pregnancy in the first 11 weeks using a combination of two oral medications: mifepristone and misoprostol.[3] These medications are safer than some commonly used over-the-counter and prescription

[1] AS 18.16.010(a)(1) bars APC from providing abortion care. In addition, the Board of Nursing has denied APC requests for authorization to perform aspiration procedures to manage miscarriage. Compl. ¶ 6 n.11. APCs do, however, prescribe medications to manage miscarriage. Aff. of Amy Bender in Supp. of Pl.'s Mot. for Prelim. Inj. ("Bender Aff") ¶ 7.
[2] *See* Alaska Const. art. 1, §§ 1, 22.
[3] Expert Aff. of Mark D. Nichols, M.D. ("Nichols Aff.") ¶¶ 19, 24; Bender Aff. ¶ 6; Aff. of Tanya Pasternack ("Pasternack Aff.") ¶ 6.

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medications, such as penicillin, Tylenol, and Viagra,[4] and—critically—Plaintiff's APCs *already* lawfully prescribe them to treat patients experiencing a miscarriage.[5] And Alaska APCs regularly provide higher risk, more complex care.[6] The State's selective refusal to allow APCs to provide medication abortion presents a clear-cut violation of the Alaska Constitution's equal protection and privacy guarantees, similar to that found by the Alaska Supreme Court in examining other unjustified abortion restrictions.[7]

An injunction allowing APCs to provide medication abortion while this case proceeds will mitigate the severe obstacles the challenged restrictions impose on Alaskans seeking abortion care, allowing more Alaskans to be able to both access care and do so earlier in pregnancy.[8] In turn, because patients would be able to access care sooner, more patients would have the option of a medication abortion (which many prefer to a procedural abortion), often closer to home.[9] Thus, the limited relief Plaintiff seeks is warranted in light of Plaintiff's probability of success on the merits of its claim that Defendants are violating

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[4] Nichols Aff. ¶ 31.
[5] Bender Aff. ¶ 13; Pasternack Aff. ¶ 20; *see also* Nichols Aff. ¶ 49.
[6] Nichols. Aff. ¶¶ 46–47; Pasternack Aff. ¶ 18.
[7] *See, e.g., State v. Planned Parenthood of the Great Nw.* ("*Planned Parenthood III*"), 436 P.3d 984, 987, 1000, 1005 (Alaska 2019) (applying equal protection clause to invalidate a state policy "impos[ing] different requirements for Medicaid funding eligibility upon women who choose to have abortions than it does upon women who choose to carry their pregnancies to term"); *State v. Planned Parenthood of Alaska* ("*Planned Parenthood I*"), 171 P.3d 577, 581–84 (Alaska 2007) (applying privacy clause to invalidate statute requiring parental consent for minors seeking an abortion).
[8] Bender Aff. ¶ 45.
[9] *Id.* After 11 weeks of pregnancy, medication abortion is not available, and patients seeking abortion must undergo an aspiration procedure, which is described below and is less available in Alaska. *See* Nichols Aff. ¶ 24; Bender Aff. ¶¶ 6, 39–40; Pasternack Aff. ¶ 11.

Plaintiff's patients' equal-protection and privacy rights by barring APCs from prescribing medications to end a pregnancy while allowing them to prescribe those same medications to manage a miscarriage. It is also warranted to prevent ongoing, irreparable harm to the approximately 1,200 Alaskans who seek abortion care each year.[10]

STATEMENT OF THE CASE

I. Abortion Is Extremely Safe, and Is a Critical Component of Reproductive Health Care.[11]

Legal abortion care is extremely safe.[12] The medication regimen used to end an early pregnancy, commonly referred to as "medication abortion," is safer than some commonly used over-the-counter and prescription medications.[13]

In a medication abortion, the patient takes two oral medications in combination: mifepristone and misoprostol.[14] Mifepristone temporarily blocks the hormone progesterone, which is necessary to maintain pregnancy. Misoprostol, which the patient generally takes at home, causes the uterus to contract and expel its contents in a process similar to a miscarriage.[15] This combination regimen is not only safe but also highly

[10] Defs.' Resp. to Pl.'s Interrog. No. 12.
[11] Plaintiff uses "women" as shorthand for people who are or may become pregnant, but people of other gender identities, including transgender men and gender-diverse individuals, may also become pregnant, seek abortion services, and be harmed by the APC Ban.
[12] Nichols Aff. ¶¶ 13, 17–18, 27–32; Pasternack Aff. ¶ 6.
[13] Nichols Aff. ¶ 31.
[14] *Id.* ¶ 19; Bender Aff ¶ 6; Pasternack Aff. ¶ 6.
[15] Nichols Aff. ¶ 20.

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effective, only rarely requiring follow-up care.[16] Alaskan APCs prescribe these same medications to treat patients experiencing miscarriage.[17]

In the first 11 weeks of pregnancy, measured from the patient's last menstrual period ("LMP"), most patients have a choice between medication abortion and aspiration abortion, a procedure in which the uterus is emptied using suction applied through a thin tube inserted through the vagina and cervix.[18] After 11 weeks LMP, aspiration is the only method available to patients, and after approximately 14 weeks LMP, patients may need cervical preparation, ultrasound guidance, and possible forceps use.[19] In the past three years, approximately 30% of the abortions Planned Parenthood provided in Alaska were medication abortions.[20]

About one in four women in this country will have an abortion by the age of 45.[21] The vast majority of these individuals are poor or have low incomes (75% as of 2014).[22] Women seek abortions for a variety of medical, familial, economic, and personal reasons.[23] Most Alaska women seeking an abortion have children.[24] Nationally, 66% of abortion

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[16] *Id.* ¶¶ 28–29.
[17] Bender Aff. ¶ 7; Pasternack Aff. ¶ 20.
[18] Nichols Aff. ¶ 24.
[19] *Id.*; *see also* Bender Aff. ¶ 39.
[20] Pasternack Aff. ¶ 14.
[21] Nichols Aff. ¶ 25.
[22] *Id.* ¶ 61.
[23] *Id.*
[24] State of Alaska, Dep't of Health & Social Servs. ("DHHS"), *2020 Alaska Induced Termination of Pregnancy Statistics* (Apr. 2021), *available at* http://dhss.alaska.gov/dph/VitalStats/Documents/PDFs/itop/2020AlaskaITOPStatistics.pdf [NOTE: Counsel reviewed this DHHS webpage, which is cited here. Despite best efforts, counsel was unable to confirm the contents of the webpage immediately before filing, as the DHHS website has become unavailable since counsel obtained this information.].

patients plan to have children or have another child when they are older, more financially able to provide for their children, and/or in a more stable, supportive relationship with a partner.[25] Some women end a pregnancy in order to be able to leave an abusive partner; some seek abortions to preserve their life or health by reducing their risk of injury or death; some because they have become pregnant as a result of rape or incest; and others because they decide not to have children at all.[26]

The American College of Obstetricians and Gynecologists ("ACOG"), the American Medical Association ("AMA"), the American Academy of Family Physicians ("AAFP"), the American Osteopathic Association ("AOA"), and the American Academy of Pediatrics ("AAP") have all affirmed that "[r]eproductive healthcare is essential to a woman's overall health, and access to abortion is an important component of reproductive healthcare."[27] Similarly, the American Psychiatric Association ("APA") has deemed access to abortion "a mental health imperative with major social and mental health implications,"[28] and the American Psychological Association has affirmed that "freedom of choice and a woman's control over her critical life decisions promotes psychological health."[29]

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[25] Nichols Aff. ¶ 61.
[26] *Id.*
[27] Br. for Amici Curiae ACOG, AMA, AAFP, AOA & AAP in Supp. of Pet'rs, *Whole Woman's Health v. Cole*, No. 15-274, 2016 WL 74948, at *4 (U.S. Jan. 4, 2016).
[28] Nichols Aff. ¶ 14; APA, *APA Official Actions: Abortions and Women's Reproductive Health Care Rights*, 167 Am. J. Psychiatry 726, 726 (2010), https://ajp.psychiatryonline.org/doi/pdf/10.1176/appi.ajp.2010.167.6.726.
[29] Nichols Aff. ¶ 14; Am. Psych. Ass'n, *Abortion Resolutions*, http://www.apa.org/about/policy/abortion.aspx (last visited June 8, 2021).

II. The State Bans APCs From Providing Medication Abortions, Which They Are Qualified and Willing to Provide.

Alaska's APC Ban[30] prohibits anyone other than a physician from "perform[ing]" an abortion, and defines abortion to include the "prescription" of abortion-inducing medications.[31] For medication abortion, practically speaking, this language prohibits APCs from prescribing the medications themselves, but not from related care such as screening abortion patients, counseling them, or treating their complications. This Ban dates back to 1970, before APCs existed as a regulated class of advanced-level clinicians and long before the FDA approved the medication abortion regimen at issue here.[32] It is wildly out of step with the State's overall policy of affording APCs extremely broad scope to increase health care access, particularly in underserved areas.[33]

The "APC" category includes advanced practice registered nurses ("APRNs") and physician assistants ("PAs").[34] To obtain an APC license, whether as an APRN or as a PA, a clinician must meet rigorous educational, certification, and continuing education

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[30] For purposes of this motion, Plaintiff uses the term "APC Ban" to refer, narrowly, to the state prohibition on APCs providing medication abortion. In its Complaint, Plaintiff used "APC Ban" more broadly to refer to all the challenged restrictions.
[31] AS 18.16.010(a)(1), 18.16.090(1).
[32] *Compare* AS 18.16.010(a)(1) (enacted 1970; renumbered 1978; reorganized 1986; last amended 2004) (criminalizing the provision of abortion by non-physicians), *with* 12 AAC 44.400 (enacted 1980; last amended 2021) (regulating APRNs as a category of advanced-practice medical professional) *and* Nichols Aff. ¶ 18.
[33] *See, e.g.*, AS 08.68.170(c); 12 AAC 40.400, 470, 44.600–620; Defs.' Resp. to Pl.'s Interrog. No. 13 ("Alaska licensing statutes and regulations define the scopes of practice of APRNs and PAs in an open-ended manner, with reference to recognized national educational and credentialing programs . . ."); Expert Aff. of Joanne Spetz in Supp. of Pl.'s Mot. for Prelim Inj. ("Spetz Aff.") ¶ 70.
[34] Spetz Aff. ¶ 7.

requirements.[35] Alaska relies on APCs "more than most states," and "[e]specially in rural areas."[36]

Under Alaska law, upon licensure, APRNs are authorized to independently "perform acts of medical diagnosis and the prescription and dispensing of medical, therapeutic, or corrective measures."[37] PAs can perform similar functions, provided they practice in collaboration with a physician; their scope of practice is outlined in, and determined by, their individual collaboration agreement.[38] Alaska APCs prescribe controlled substances (including drugs with a high potential for abuse and severe psychiatric or physical dependence, like opioids and amphetamines).[39] They also perform a variety of other office-based reproductive health procedures that are at least comparable in clinical complexity and risk to medication abortion, such endometrial biopsies, colposcopies, insertion and removal of intrauterine contraception devices ("IUDs"), and intrauterine insemination.[40] And APCs perform obstetric care, vasectomies, and loop

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[35] *See supra* note 33.
[36] *See* Alaska Div. of Pub. Health, *2021 Primary Care Needs Assessment*, DHHS, at 33 (2021), *available at* https://alaskapca.org/wp-content/uploads/2021/05/SOA_PCO_NA_20211865-1.pdf.
[37] AS 08.68.850; Spetz Aff. ¶ 70.
[38] PAs are authorized to provide a broad range of care, including prescribing similar medications, AS 08.64.170(a)(1);12 AAC 40.450(c); their scope of practice is outlined in an agreement with a collaborating physician, 12 AAC 40.430(a); a physician need not be physically present while care is provided, 12 AAC 40.430; and more experienced PAs can practice more than 30 miles from that physician's office, 12 AAC 40.415(d).
[39] 12 AAC 44.445, 40.450(c); AS 08.64.170(a)(1); Spetz Aff. ¶ 74.
[40] Bender Aff. ¶ 9; Nichols Aff. ¶ 47 (explaining that endometrial biopsies involve "inserting a sterile tube through a patient's cervix into the uterus to suction and remove tissue from the uterine lining"; colposcopies involve "using instruments to magnify the cervix and, when appropriate, removing tissue for biopsy"; IUD insertion and removal

electrosurgical excision procedures ("LEEPs"), which are more complex and carry higher risk than medication abortion.[41] In fact, APCs often *train* other clinicians, *including physicians*, in care that is comparable or higher-risk than abortion.[42]

Planned Parenthood employs or contracts with seven APRNs (four nurse practitioners and three nurse midwives) across its four locations in Alaska, most of them full time.[43] All seven Planned Parenthood APRNs specialize in women's health or family nursing, both of which encompass reproductive health care, and all seven would prescribe medication abortion if legally permitted.[44] Like other Alaska APCs, they provide a broad range of health care services and regularly prescribe medications and perform procedures that are comparable to or higher risk than medication abortion.[45] Indeed, Planned Parenthood's APCs already *do* prescribe the medications used for a medication abortion for purposes of treating miscarriage, and one of them previously provided medication abortion in another state.[46] Planned Parenthood's APCs also already regularly and independently provide all elements of patient care before and after a medication abortion, including diagnosing and dating an intrauterine pregnancy, screening for contraindications,

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sometimes requires ultrasound guidance and forceps; and intrauterine insemination involves "injecting sperm into a patient's uterus as a form of reproductive technology").

[41] Nichols Aff. ¶ 47 (explaining that LEEPs involve "removing abnormal cells by using a thin wire loop that acts like a scalpel, whereby an electric current is passed through the loop, which cuts away a thin layer of the cervix"); Bender Aff. ¶ 9; Pasternack Aff. ¶ 18.

[42] Bender Aff. ¶ 10; Pasternack Aff. ¶ 17.

[43] Bender Aff. ¶ 3.

[44] *Id*. ¶¶ 5, 44; Pl.'s Resp. to Defs.' Interrog. No. 15.

[45] Pasternack Aff. ¶ 20; Spetz Aff. ¶¶ 70–75; *see also* Bender Aff. ¶ 9.

[46] Bender Aff. ¶¶ 7–8; Pasternack Aff. ¶ 20.

providing options counseling, providing follow-up care to ensure that the abortion was complete, and assessing and managing post-abortion complications.[47]

There is no medical justification for prohibiting APCs from prescribing medication for abortion while allowing them 1) to prescribe the same medication for miscarriage; and 2) to provide other care that is comparable or greater in risk and complexity.[48] Medical experts agree. The FDA allows medication abortion to be provided by or under the supervision of APCs as well as physicians, based on studies that the FDA recognized "found no differences in efficacy, serious adverse events, ongoing pregnancy or incomplete abortion between the groups."[49] ACOG, the nation's leading organization of women's health care providers, expressly "oppos[es] restrictions [like the Alaska law] that limit abortion provision to physicians only or obstetrician-gynecologists only," based on studies "show[ing] no difference in outcomes in first-trimester medical and aspiration abortion by provider type and indicat[ing] that trained APCs can provide abortion services safely."[50] Similarly, the National Academies has concluded that "APCs (physician assistants, certified nurse-midwives, and nurse practitioners) can provide medication and aspiration

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[47] Bender Aff. ¶¶ 11–15, 17–19.
[48] Nichols Aff. ¶¶ 47–49; Spetz Aff. ¶ 75.
[49] Nichols Aff. ¶ 51; FDA, Ctr. for Drug Evaluation & Res., *020687Orig1s020, Mifeprex Medical Review(s)* (Mar. 29, 2016), at 79, https://www.accessdata.fda.gov/drugsatfda_docs/nda/2016/020687Orig1s020MedR.pdf.
[50] Nichols Aff. ¶ 52; ACOG, Comm. on Health Care for Underserved Women, Op. No. 612: *Abortion Training and Education* (Nov. 2014, reaff'd 2019), https://www.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/Abortion-Training-and-Education.

abortions safely and effectively."[51] The American Public Health Association ("APHA") and the World Health Organization ("WHO") agree.[52]

III. The APC Ban Severely Restricts Access to Abortion Care and Causes Medical, Emotional, and Financial Harm to Alaskans.

Alaska has a physician shortage, particularly in rural areas.[53] The State has far more licensed APCs than licensed physicians, and APCs are far more likely than physicians to practice in rural and underserved areas of Alaska.[54] Indeed, DHHS has acknowledged that its "state practice and licensure law" for APCs is by design "[l]ess restrictive than in many other states," because "[e]specially in rural areas, Alaska relies on mid-level providers more than most states."[55]

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[51] Nichols Aff. ¶ 52; National Academies, *The Safety and Quality of Abortion Care in the United States*, at 14 (2018).

[52] Nichols Aff. ¶ 52; APHA, Policy No. 20112, *Provision of Abortion Care by Advanced Practice Nurses and Physician Assistants* (Nov. 1, 2011), https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/28/16/00/provision-of-abortion-care-by-advanced-practice-nurses-and-physician-assistants; WHO, *Safe Abortion: Technical and Policy Guidance for Health Systems* 65 (2d ed. 2012).

[53] Pasternack Aff. ¶ 33; Rural Health Info. Hub, *Health Professional Shortage Areas: Primary Care, by County, 2021 - Alaska* (Apr. 2021), https://www.ruralhealthinfo.org/charts/5?state=AK; Rebecca Palsah, *Facing a Shortage of Doctors and Money, the Governor Looks at Cutting the WWAMI Program*, Alaska's News Source (Feb. 19, 2019), https://www.alaskasnewssource.com/content/news/A-shortage-of-doctors-and-money-the-governor-looks-at-cutting-the-WWAMI-program--506075151.html; Ryan McKee, *Direct Primary Care Is a Promising Solution to Alaska's Health Care Shortage*, Anchorage Daily News (May 9, 2021), https://www.adn.com/opinions/2021/05/09/direct-primary-care-is-a-promising-solution-to-alaskas-health-care-shortage/; Alaska Div. of Pub. Health, *supra* note 36, at 33.

[54] Spetz Aff. ¶¶ 66, 77.

[55] Alaska Div. of Pub. Health, *supra* note 36, at 33 (2021), *available at* https://alaskapca.org/wp-content/uploads/2021/05/SOA_PCO_NA_20211865-1.pdf.

Because of Alaska's physician shortage, the APC Ban severely limits abortion services in Alaska.[56] As of 2017, Planned Parenthood's four Alaska health centers were the only publicly-identifiable providers in the entire state.[57] Moreover, abortion is only available at these health centers on an extremely limited basis, when Planned Parenthood's per diem physicians have time away from their own independent practices (which do not include abortion).[58] Specifically, Planned Parenthood can only offer medication abortion approximately one day per week at each of its four health centers, and aspiration abortion is even less available.[59]

In severely limiting the provision of medication abortion without justification, the APC Ban compounds obstacles for patients who are already struggling to access care. Many patients are transient and/or live far from Plaintiff's health centers, and must arrange for long-distance travel, including by plane or boat. If delayed past the window for medication abortion, patients outside of Anchorage often have to travel hundreds of miles to reach Planned Parenthood's Anchorage clinic. Other patients near Juneau or Fairbanks, unable to travel to Anchorage, may have to wait nearly a month before they can be seen by a physician[60] (if they even have that time before passing the gestational age limit)—even though there is no medical reason why they could not receive that care sooner from one of

[56] Pasternack Aff. ¶¶ 32–34 (explaining that these difficulties are compounded by the cost of hiring and particular difficulty of recruiting physicians who are willing to face the stigma and harassment that comes with providing abortion care, especially outside Anchorage and Juneau).
[57] *Id.* ¶ 36.
[58] *Id.* ¶ 35.
[59] Bender Aff. ¶¶ 40, 44.
[60] *Id.* ¶ 40.

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Planned Parenthood's highly skilled APCs. These delays also increase costs, because, even though exceedingly safe, abortion is a more complex, more expensive procedure with increased gestational age.[61]

Most of Plaintiff's patients live in low-income households and work low-wage jobs with limited time off, usually without pay.[62] Most are parents, and must arrange for childcare coverage, which can be harder the farther they have to travel for care.[63] People with low incomes often face transportation limitations, such as lacking or sharing a car or having a low-functioning car, that make it particularly hard for them to travel long distances.[64] Ten percent of Alaska households lack a car.[65] Patients in these circumstances have a particularly hard time accessing the limited care available.

Many patients need to keep their decision confidential, to avoid coercion or retaliation from family, friends or others.[66] By limiting the days on which patients can access care, delaying patients, and forcing them to travel farther, the APC Ban jeopardizes this confidentiality, exposing these patients to a range of harms and potentially depriving them of access to abortion care altogether.[67] Loss of confidentiality is particularly harmful for the 10% of abortion patients who suffer intimate partner violence.[68] Many abusive

[61] Pasternack Aff. ¶ 11; Nichols Aff. ¶ 60.
[62] Bender Aff. ¶¶ 32–33; Pasternack Aff. ¶ 44.
[63] Bender Aff. ¶ 35.
[64] Nichols Aff. ¶ 78.
[65] Bender Aff. ¶ 36.
[66] Nichols Aff. ¶ 77; Bender Aff. ¶ 34.
[67] Nichols Aff. ¶ 77; Bender Aff. ¶ 34.
[68] Nichols Aff. ¶ 78; Bender Aff. ¶ 28.

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partners coerce their victims into becoming and staying pregnant as a means of control.[69] They often monitor their victims to prevent them from accessing abortion services.[70] Women deprived of access to abortion, and their children, are less likely to escape abusive situations.[71]

The net effect of limited abortion access is that Alaskans are delayed and in some cases prevented from accessing abortion care.[72] Public health experts have recognized this as a significant problem.[73] The National Academies of Sciences, Engineering and Medicine ("National Academies") has stated that, although abortion care is far safer than childbirth, its risks increase with gestational age.[74] For some women, medication abortion is the safest option; if delayed past 11 weeks, they no longer have that option.[75] Continued pregnancy, in itself, poses particular medical risks for some women.[76] It also can be traumatic for some women, for example, for those pregnant as a result of rape.[77] And some women, prevented

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[69] Nichols Aff. ¶ 78; Bender Aff. ¶ 28.
[70] Nichols Aff. ¶ 78; Bender Aff. ¶ 28.
[71] Nichols Aff. ¶ 78.
[72] *Id.* ¶¶ 60, 67, 70–72; Bender Aff. ¶¶ 38–42.
[73] Nichols Aff. ¶ 52.
[74] *Id.* ¶ 72 & n.79. The National Academies is a body composed of highly esteemed experts that was first established by Congress in 1863 to provide independent, objective expert analysis and advice to the nation to inform public policy. *Id.* ¶ 28.
[75] Bender Aff. ¶ 39 (noting that Planned Parenthood "regularly" sees patients delayed past the window for medication abortion). In addition to some women having medical conditions that make medication abortion a safer option, many women strongly prefer this option. *Id.*; Nichols Aff. ¶ 26; Pasternack Aff. ¶ 9.
[76] Nichols Aff. ¶¶ 40, 75–76; Bender Aff. ¶¶ 30–31; Pasternack Aff. ¶ 43.
[77] Nichols Aff. ¶ 26; Bender Aff. ¶ 29.

from accessing abortion care, will attempt to end their own pregnancy, including by dangerous means.[78]

Women forced to carry unwanted pregnancies to term face a range of serious adverse outcomes. They are exposed to increased risks of death and major complications from childbirth.[79] And as compared to other pregnant women, they and their newborns are also at risk of other negative health consequences such as delayed use of prenatal care, lower breastfeeding rates, and poor maternal and neonatal outcomes.[80] They are significantly less likely to be able to bring themselves and their families out of poverty.[81] And women who are victims of intimate partner violence will, in many cases, face increased difficulty escaping that relationship (because of new financial, emotional, practical and legal ties to that partner).[82]

The risks of carrying an unwanted pregnancy to term do not fall equally. The medical risks and adverse outcomes for women carrying to term and their children are worse for those struggling with poverty, as most of Plaintiff's patients are, as compared to the general population.[83] Some of these risks may be higher for those living in rural areas, where there are fewer medical providers.[84] These risks fall disproportionately on Alaska

[78] Nichols Aff. ¶ 72; Bender Aff. ¶ 41.
[79] Nichols Aff. ¶ 75.
[80] *Id.* ¶ 36.
[81] *Id.*
[82] *Id.* Rates of intimate partner violence are especially high in Alaska. *See* Alaska Div. of Pub. Health, *supra* note 36, at 17.
[83] Nichols Aff. ¶ 36.
[84] *Id.*

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Native, Native American and Black women, who suffer significantly higher rates of maternal mortality and morbidity.[85]

If this Court grants Plaintiff's requested temporary relief with respect to medication abortion, patients will have instantly expanded access, as Planned Parenthood will be able to immediately offer medication abortion care five to six days per week in Anchorage, five days per week in Fairbanks, three days per week in Juneau, and four days per week in Soldotna.[86] Not only would this allow for more flexible scheduling, but it would also make it far easier for Planned Parenthood to reschedule patients when severe weather interrupts clinical operations or disrupts travel.[87] This would allow more patients to access care, and allow patients to access care sooner in their pregnancy, including early enough that they have the option to use medications alone, as opposed to a more invasive procedure.[88]

ARGUMENT

I. STANDARD FOR GRANTING A MOTION FOR A PRELIMINARY INJUNCTION

Under Alaska law, plaintiffs may obtain preliminary injunctive relief if they meet either of two tests: the probable-success-on-the-merits test or the balance-of-hardships test.[89] The first test considers simply whether a plaintiff shows "probable success on the merits."[90] Under the balance of hardships test, relief is warranted if "(1) the plaintiff [is]

[85] *Id.* ¶ 76 & n.83.
[86] Bender Aff. ¶ 44.
[87] *Id.* ¶ 37.
[88] *Id.* ¶¶ 39–45; Pasternack Aff. ¶¶ 37, 40–44.
[89] *Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014).
[90] *Id.* at 54–56.

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faced with irreparable harm; (2) the opposing party [is] adequately protected; and (3) the plaintiff [has] raise[d] serious and substantial questions going to the merits of the case," meaning that "the issues raised cannot be frivolous or obviously without merit."[91]

Although only one test need be satisfied, Plaintiff satisfies both. Plaintiff has made a clear showing of likely success on the merits of its claims. Alternatively, continued enforcement of the APC Ban will irreparably harm Plaintiff's patients and staff, while the State will suffer little or no harm in being barred from enforcing an antiquated and medically unnecessary prohibition, and Plaintiff has certainly raised "serious and substantial" legal issues in this case.

II. PLAINTIFF SHOWS A LIKELIHOOD OF SUCCESS ON THE MERITS

For the reasons set forth below, Plaintiff has made a clear showing of likelihood of success in establishing that Defendants' ban on APCs' provision of medication abortion is unconstitutional.

A. The Alaska Constitution Protects the Right to Abortion

Article I, section 22 of the Alaska Constitution provides: "The right of the people to privacy is recognized and shall not be infringed." This protection is stronger than that afforded to privacy by the United States Constitution.[92] It protects, as a fundamental right, "[a] woman's control of her body, and the choice whether or when to bear children, [which]

[91] *Id.* (citing *State v. Kluti Kaah Native Vill. of Copper Ctr.*, 831 P.2d 1270 (Alaska 1992) (quoting *Messerli v. Dep't of Nat. Res.*, 768 P.2d 1112, 1122 (Alaska 1989)); *City of Kenai v. Friends of Recreation Ctr., Inc.*, 129 P.3d 452, 456 (Alaska 2006) (quoting *State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 978 (Alaska 2005)).
[92] *Valley Hosp. Ass'n, Inc. v. Mat-Su Coal. for Choice*, 948 P.2d 963, 968 (Alaska 1997).

involves the kind of decision-making that is "necessary for . . . civilized life and ordered liberty."[93] Likewise, Article I, section 1 of the Alaska Constitution, which provides that "all persons are equal and entitled to equal rights, opportunities, and protection under the law,"[94] "affords greater protection to individual rights than the United States Constitution's Fourteenth Amendment."[95]

The Alaska Supreme Court has repeatedly recognized that, based on these two protections, laws that restrict access to abortion are invalid unless they satisfy strict scrutiny.[96] Applying strict scrutiny, the Court has invalidated a range of abortion restrictions, such as laws that require minors to involve their parents before obtaining an abortion and restrictions on state funding for abortion care.[97]

The Court's privacy and equal protection analyses "closely resemble[]" each other;[98] the only difference is that a privacy analysis asks whether the *restriction* itself is the least restrictive means of advancing a compelling state interest,[99] whereas an equal protection analysis asks whether the state's *selective* restriction of a particular class, and not of similarly situated classes, is the least restrictive means of advancing a compelling

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[93] *Id.* at 967 (quoting *Baker v. City of Fairbanks*, 471 P.2d 386, 401–02 (Alaska 1970)).
[94] Alaska Const. art I, § 1.
[95] *Alaska C.L. Union v. State*, 122 P.3d 781, 756 n.16, 787–88 (Alaska 2005) (quoting *Malabed v. North Slope Borough*, 70 P.3d 416, 420 (Alaska 2003)); *see also Planned Parenthood III*, 436 P.3d at 1000.
[96] *Mat-Su Coal. for Choice*, 948 P.2d at 967–72 (applying analysis under a state right to privacy); *Planned Parenthood I*, 171 P.3d at 581–85 (same); *Planned Parenthood of the Great Nw. v. State* ("*Planned Parenthood II*"), 375 P.3d 1122, 1137–43 (Alaska 2016) (applying equal protection analysis); *Planned Parenthood III*, 436 P.3d at 1000–04 (same).
[97] *See supra* note 96.
[98] *Planned Parenthood II*, 375 P.3d at 1138.
[99] *See Planned Parenthood I*, 171 P.3d at 583–85.

state interest.[100] Under either analysis, a restriction is invalid if it is underinclusive or overinclusive.[101]

B. The APC Ban Is Subject to, and Fails, Strict Scrutiny

The APC Ban restricts access to abortion.[102] It also discriminates between women seeking an abortion and other pregnant women, restricting APC care for the former but not the latter class.[103] For both reasons, it is subject to strict scrutiny.

Defendants suggest that the APC Ban is medically necessary because, so they assert, only physicians can safely screen patients before a medication abortion and treat any resulting complications.[104] Not so. The medical consensus is that medication abortion is extremely safe,[105] and that APCs are qualified to provide safe medication abortion care.[106] Indeed, Alaska courts have described abortion care as "'quintessentially' and 'extraordinarily' safe."[107] Medication abortion is medically equivalent to miscarriage care APCs provide, and lower risk than the obstetric care they provide.[108] There is also expert consensus that public health considerations militate toward *expanding* access to abortion

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[100] *See Planned Parenthood II*, 375 P.3d at 1139–43; *Planned Parenthood III*, 436 P.3d at 1004–05.
[101] *Planned Parenthood II*, 375 P.3d at 1138; *Planned Parenthood III*, 436 P.3d at 1004.
[102] *See supra* Part III.
[103] *See supra* Part II.
[104] Defs.' Resp. to Pl.'s Interrog. No. 4.
[105] *See* Nichols Aff. ¶¶ 13, 17–18, 27–32; Pasternack Aff. ¶ 6; *see also* Defs.' Resp. to Pl.'s Req. for Admis. No. 5 (admitting that medication and aspiration abortion have lower complication rates than those associated with carrying a pregnancy to term and delivering a child).
[106] *See supra* Part II.
[107] *Planned Parenthood II*, 375 P.3d at 1141 (citing trial court findings with approval).
[108] *See supra* Parts I–II.

so that patients can obtain that care earlier in pregnancy, when it is a safer, and so that women are not forced to carry to term.[109] Given this clear consensus, there is no "medically-acknowledged, *bona fide* health risk" that would justify the State's intrusion into "the patient's own informed health care decisions made in partnership with his or her chosen health care provider,"[110] nor is there any justification for the State's decision to restrict care for women seeking abortion care but not for those seeking other pregnancy-related care.

Even setting the expert consensus aside, Defendants' justification, on its face, does not match the actual effect of the APC Ban. The APC Ban does not prohibit APCs from screening patients before a medication abortion or managing complications after they have taken the medications, as Plaintiff's APCs already do in the regular scope of their practice.[111] The only act the APC Ban prohibits is actually prescribing the medications. Defendants have offered no argument, nor could they, that APCs are somehow clinically unqualified to undertake this act. Critically, in the rare event that a patient has a complication from a medication abortion, this invariably occurs after she has left the clinic;[112] under Planned Parenthood's protocols, she calls an after-hours line where nurses

[109] Nichols Aff. ¶¶ 53–59; *see also Planned Parenthood II,* 375 P.3d at 1141 (citing findings that "abortion raises *fewer* health concerns . . . than does giving birth" (emphasis in original)).
[110] *Armstrong v. State*, 989 P.2d 364, 380, 384 (Mont. 1999); *id.* at 387 ("There is simply no evidence in the record of this case that laws requiring pre-viability abortions be performed only by a physician to the exclusion of a trained, experienced and medically competent physician assistant-certified, working under the supervision of a licensed physician, are necessary to protect the life, health or safety of women in this State.").
[111] *See supra* Part II.
[112] Bender Aff. ¶ 15.

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assess her need for follow-up or emergency care, consulting a physician as needed.[113] This would still be the case for a patient experiencing a complication from a medication abortion absent the APC Ban.[114] Thus, the factual context here does not support any general assertion that the State is protecting patients by barring APCs from prescribing medication abortion.[115]

Even were there evidence that medication abortion carries risks justifying legal restrictions, which there is not, the APC Ban would be underinclusive because it does not apply to miscarriage care, which involves the same medications and the same associated risks, or to higher-risk obstetrics care.[116] Nor does the APC Ban apply to other comparable or higher risk care that APCs routinely provide, such as LEEPs, vasectomies, or endometrial biopsies.[117] The APC Ban is also *over*inclusive, for numerous reasons. To name a few: 1) the APC Ban makes no exception for patients who urgently need abortion care, including because they are victims of sexual assault or intimate partner violence or are about to become ineligible for a medication abortion, or because they are transient or

[113] *Id.* ¶¶ 16–20.
[114] *Id.* ¶ 21.
[115] *Cf. Planned Parenthood II*, 375 P.3d at 1139–40 (state assertions of a general interest in protecting minors "requires context").
[116] Nichols Aff. ¶ 49; *see also id.* ¶¶ 20, 22. In their discovery responses, Defendants attempt to distinguish miscarriage care as more time-sensitive than abortion care. *See* Defs.' Resp. to Pl.'s Interrog. No. 22. Even if accurate, this assertion would not actually justify restricting safe medication abortion. At any rate, it is inaccurate. Bender Aff. ¶ 43; Pasternack ¶ 38; Nichols Aff. ¶¶ 9, 39–40.
[117] *See supra* Part II; *cf. Armstrong*, 989 P.2d at 381 (faulting the state for barring an APC plaintiff from providing abortion care while "ma[king] no attempt to prohibit her from performing other more risky medical procedures such as uncomplicated deliveries of babies, inserting [intrauterine devices], and prescribing and administering most drugs") (citation omitted)).

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traveling to Plaintiff's health centers from far away and may not be able to return;[118] 2) it applies to all APCs, regardless of their level of training or experience; indeed, it applies regardless of whether APCs have safely provided medication abortion care in other states;[119] and 3) it applies to APCs regardless of whether they are able to perform any necessary follow-up care (such as, in rare cases, an aspiration procedure) or refer the patient for that care.[120]

At bottom, the APC Ban is a poor fit for the State's interest in protecting patients because it was enacted in 1970, over 50 years ago, when safe, legal medication abortion had not even been developed (let alone studied, or approved by the FDA) and APCs did not exist as a category of authorized health care providers in Alaska.[121] As the Connecticut Attorney General reasoned in construing that state's 1974 law not to ban APCs from providing medication abortion:

> In 1974, at the time the Public Health Code regulation was enacted, it would not have been contemplated by the Department that a pill would be administered to terminate a pregnancy. . . . Undoubtedly, the purpose of enacting [the law] was to protect women from undergoing surgical procedures by those untrained and unqualified individuals who were performing illegal abortions under unsanitary conditions prior to the *Roe v. Wade* decision.[122]

[118] *See supra* Part III.
[119] *See supra* Part II.
[120] *See supra* Part II.
[121] *See supra* note 33.
[122] Ct. Op. Att'y Gen. No. 15 (2001), *available at* https://portal.ct.gov/AG/Opinions/2001-Formal-Opinions/Senator-George-Jepsen-State-Capitol-2001015-Formal-Opinion-Attorney-General-of-Connecticut.

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Rather than acknowledge this inescapable logic, Defendants seek to continue enforcing Alaska's 1970 statute, against APCs, even as to medication abortion. The State's approach to medication abortion stands in stark contrast to its general approach to regulating APCs: "defin[ing] the scopes of practice of APRNs and PAs in an *open-ended* manner, with reference to recognized national educational and credentialing programs, in recognition of the *constantly-evolving* nature of the educational and certification programs of these professions as well as the constantly-evolving nature of medical knowledge and procedures."[123] This contrast highlights what a poor fit the APC Ban is for the State's asserted interest and why the APC Ban cannot possibly meet the close tailoring requirements of strict scrutiny.

For these reasons, the APC Ban plainly fails strict scrutiny review. It does not advance patient safety at all, still less is it the least restrictive means of doing so.

III. THE BALANCE OF HARMS FAVORS PLAINTIFF

Plaintiff and its patients will suffer irreparable harm if the APC Ban is not preliminarily enjoined with respect to the provision of medication abortions. As set forth more fully in Part III, absent relief, many Alaskans will be delayed past the point when they can have a medication abortion, and will be left with an abortion procedure as their only option. For some, this will mean further travel and additional delay because aspiration care is even less available than medication abortion. Additional travel and delay will impose costs on patients who are already struggling economically, and make it harder for

[123] Defs.' Resp. to Pl.'s Interrog. No. 13 (emphasis added).

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them to keep their decision private. Delay will also increase medical risk because abortion is safer the earlier it occurs in pregnancy. And, for some women, the APC Ban's effects will be prohibitive, forcing them to carry their pregnancy to term. Harm that results from denial of the right of reproductive choice "is as irreparable as any that can be imagined: not only does it flow from the deprivation of constitutional rights, but it also creates a situation which is irreversible and not compensable."[124]

On the other side of the scale, Defendants will not be harmed if the APC Ban is preliminarily enjoined to the limited degree Plaintiff seeks. As set forth more fully in Part II, the APC Ban does not further the health of Alaskans; to the contrary, there is a clear medical consensus that APCs can safely provide medication abortion, and that doing so further the public health.[125] Even if the State could point to some way it would be harmed by an injunction, the injunction should still issue because of Plaintiff's clear showing of likelihood of success on the merits.[126]

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[124] *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) (citing *Elrod v. Burns*, 472 U.S. 347 (1976) (finding that when the constitutional right of reproductive choice is threatened or impaired, it "mandates a finding a finding of irreparable injury"); *Chalk v. U.S. Dist. Court Cent. Dist. of Cal.*, 840 F.2d 701, 710 (9th Cir. 1988) (acknowledging that when plaintiff's non-monetary deprivation is irreparable, a delay in obtaining relief, "even if only a few months, pending trial represents precious . . . time irretrievably lost"); *Bragel Int'l, Inc. v. Charlotte Russe, Inc.*, No. CV 15-8364, 2016 WL 9450449, at *2 (C.D. Cal. Dec. 5, 2016) (granting preliminary injunction to prevent plaintiff from suffering irreparable harm while waiting for delayed trial).

[125] *See supra* Part II.

[126] Because an injunction barring enforcement of an invalid statute will not harm the State, no bond should be required. *See Kritz v. State*, Nos. 3DI-99-12 CI, 3AN-99-4488 CI, 1999 WL 34793395 (Alaska Sup. Ct. Mar. 1999) (granting a preliminary injunction against the State's enforcement of a successful ballot initiative, holding the statute unconstitutional

Finally, for the reasons articulated in Section II, Plaintiff has raised serious and substantial questions going to the merits of its claim. For all these reasons, Plaintiff meets the balance of harms test and this Court should grant a preliminary injunction.

CONCLUSION

Plaintiff has made the required showing for issuance of an order preliminarily enjoining the enforcement, operation, and execution of the APC Ban with respect to patients seeking medication abortions. Therefore, Plaintiff respectfully requests that this Court enter the attached proposed order.

Dated this 21st day of June 2021.

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and declaring "[t]he bond requirement of Civil Rule 65(c) is inapplicable in this type of litigation"), *rev'd on other grounds sub nom. Alaskans for a Common Language, Inc. v. Kritz,* 3 P.3d 906 (Alaska 2000) (reversing an intervention ruling).

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CERTIFICATE OF SERVICE

This certifies that on June 21, 2021, a copy of the foregoing and five attached affidavits was served via email on:

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