

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

PLANNED PARENTHOOD OF)
THE GREAT NORTHWEST, JAN)
WHITEFIELD, M.D., and SUSAN)
LEMAGIE, M.D.,)
)
Plaintiffs.)
v.)
)
STATE OF ALASKA,)
)
Defendant.)
_____)

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Clerk of the Trial Courts

Case No. 3AN-10-12279 CI

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, through their counsel of record, set forth the following allegations as their claim for declaratory and injunctive relief.

INTRODUCTION

1. This action challenges the validity under the Alaska Constitution of the parental notification law – to be codified as provisions within Alaska Statutes 18.16.010 through 18.16.040 (“the PNL”) – which requires a physician to provide notice to a parent, legal guardian or custodian of a minor and then delay at least 48 hours before she can obtain an abortion, unless a parent, legal guardian or custodian consents or the minor obtains a court order allowing her to obtain the abortion without such notification or consent. (A copy of the PNL is attached to this Complaint as Exhibit A). The PNL is scheduled to take effect on December 14, 2010.

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2. The PNL violates the rights of minors seeking abortions, as guaranteed by the equal protection and inherent rights clauses of article I, section 1 of the Alaska Constitution. The PNL does so in multiple ways, including, but not limited to, by singling out abortion as the only type of pregnancy-related medical care that requires parental involvement and impermissibly discriminating against female minors on the basis of their sex.

3. Also, the PNL infringes the right to privacy of minors seeking abortions, as guaranteed by article I, section 22 of the Alaska Constitution. The PNL does so by burdening young women's fundamental right to reproductive choice without furthering compelling state interests by the least restrictive means. The PNL will harm minors seeking to exercise their right to reproductive choice in numerous ways. The notification scheme will impair minors' ability to keep their reproductive choices confidential. For some minors, the PNL will serve as a parental consent requirement, because a notified parent will be able to prevent the minor from obtaining an abortion. Other minors, especially but not only abused minors, will suffer parental mistreatment, in some cases including physical violence. The delays imposed by the PNL will increase the health risks of some minors seeking abortions. For some minors, the delays and/or other burdens imposed by the PNL will ultimately prevent them from being able to obtain an abortion. Both on its face and in comparison with notification laws in other states, the burdens created by the PNL are not the least restrictive means of accomplishing any compelling state interest.

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4. Furthermore, the PNL violates Plaintiffs' right to due process, as guaranteed by article I, section 7 of the Alaska Constitution, because in a variety of ways it fails to give clear notice of what conduct is prohibited or required in order to avoid criminal liability. As a result, the PNL subjects Plaintiffs to the risk of arbitrary and discriminatory enforcement and will have a chilling effect on their provision of abortion services to minors.

5. If the PNL goes into effect, it will cause immediate and irreparable harm to female minors under the age of 18 in Alaska and to Alaska's abortion providers. Preventing the PNL from taking effect, on the other hand, will simply preserve the status quo and permit minors to access abortion services in the same manner that they have for more than thirty years.

JURISDICTION

6. This is a complaint for declaratory and injunctive relief brought pursuant to AS 09.40.230 and AS 22.10.020. This court has jurisdiction over the parties and over the subject matter of this dispute pursuant to AS 09.05.015 and AS 22.10.020.

PARTIES

7. Plaintiff Planned Parenthood of the Great Northwest ("PPGNW") is a not-for-profit organization that provides reproductive health care services and sexual education programs in Alaska, Idaho and western Washington. PPGNW was formed as a result of a merger between Planned Parenthood of Alaska, Planned Parenthood of Idaho and Planned Parenthood of Western Washington. Its reproductive health care services

include: abortions; pregnancy testing; birth control; sexually-transmitted disease (“STD”) testing; emergency contraception; pap tests; breast cancer screenings; HIV testing; treatments to prevent cervical cancer; blood testing; and referrals for appropriate medical or social services. PPGNW provides abortions up to 13 weeks, 6 days of pregnancy as measured from the first day of the woman’s last menstrual period (“lmp”). Approximately six to seven percent of PPGNW’s patients seeking abortions in Alaska are women under the age of 18. Many of these young women choose to involve a parent, legal guardian or custodian in their decision to obtain an abortion, though some do not. Physicians who are subject to the PNL perform abortions at PPGNW. Absent the requirements of the PNL, PPGNW would not require its minor patients to notify a parent, legal guardian or custodian, nor would the clinic do so itself without its patients’ permission. PPGNW sues on its own behalf, on behalf of its physicians and staff and on behalf of its minor patients seeking abortions.

8. Plaintiff Jan Whitefield is a board-certified obstetrician and gynecologist licensed to practice in Alaska. Dr. Whitefield provides an array of medical services at Alaska Women’s Health Services in Anchorage, including abortions. Dr. Whitefield and other physicians at that facility perform approximately 500 first trimester abortions per year; of these approximately 6 percent are provided to young women under the age of 18. Although many of their minor patients do involve a parent, legal guardian or custodian in their abortion decision, others do not. Absent the requirements of the PNL, Dr. Whitefield would provide abortions for these patients without notifying their parents,

legal guardians or custodians. Under the PNL, Dr. Whitefield may be both criminally and civilly liable should he provide abortion services to a minor for whom the requirements of the PNL have not been satisfied. Dr. Whitefield sues on his own behalf and on behalf of his minor patients seeking abortions.

9. Plaintiff Susan Lemagie is a board-certified obstetrician and gynecologist licensed to practice in Alaska. Dr. Lemagie provides an array of medical services, including abortions through 19 weeks, 4 days Imp. She provides both medical and surgical abortions, to both adult and minor women. Most of the minors to whom she provides abortions do involve a parent in the decision, but some do not. Absent the requirements of the PNL, Dr. Lemagie would provide abortions for her minor patients without notifying their parents, legal guardians or custodians, unless she were authorized to do so by the patient. Dr. Lemagie sues on her own behalf and on behalf of her minor patients seeking abortions.

10. Defendant, the State of Alaska, represented by the Attorney General through the Department of Law, is authorized to prosecute physicians and others who provide abortion services in violation of the PNL.

STATUTORY FRAMEWORK

Background Regarding Alaska Parental Involvement Laws

11. As is the case with other pregnancy-related procedures, currently a pregnant woman in Alaska – regardless of her age – can access abortion services without

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notification to others and based on her own informed consent. See AS 25.20.025; see also AS 18.16.060.

12. In 1997, the Alaska Legislature passed the Alaska Parental Consent Act, codified as AS 18.16.010(a)(3), 18.16.010(e)–(g), 18.16.020, 18.16.030 (“the PCA”). The PCA prohibited performing an abortion on a minor under age 17 unless a parent, legal guardian or custodian consented to the procedure. The PCA also provided a judicial bypass option for a minor who wished to have an abortion without parental consent.

13. The PCA was challenged, was preliminarily enjoined before it went into effect and was ultimately declared unconstitutional by the Alaska Supreme Court in *State v. Planned Parenthood of Alaska*, 171 P.3d 577 (Alaska 2007). The provisions of the PCA were all permanently enjoined and thus unenforceable.

14. On July 2, 2009, the Lieutenant Governor certified an application for a ballot initiative entitled “The Parental Involvement Initiative, An Act relating to parental involvement for a minor’s abortion” (“the Initiative”). The Initiative sought to “amend[]” selected portions of the enjoined PCA and to “repeal[] and reenact[]” other portions of the enjoined PCA. Specifically, the Initiative stated that it would repeal in its entirety and reenact AS 18.16.020, would amend AS 18.16.010(a) and (g) and AS 18.16.030(a), (b), (c), (j) and (n), and would also “add[] a new section” to be codified as AS 18.16.040).

15. Litigation was initiated challenging the certification as improper on the grounds it failed to meet the standards set forth in Article XI of the Alaska Constitution

and AS 15.45.010 *et. seq.* In addition, the litigation challenged the Summary and Ballot Title adopted by the Lieutenant Governor as insufficient and misleading. The Supreme Court ultimately ruled that the summary was inaccurate but that the Lieutenant Governor could place the Initiative on the ballot without requiring the sponsors to recirculate the petition, provided that the summary was corrected in ways specified by the Court. *Planned Parenthood of Alaska v. Campbell*, 232 P.3d 725 (Alaska 2010).

Summary of the Parental Notification Law

16. The PNL provides in relevant part that “[a] person may not knowingly perform or induce an abortion upon a minor who is known to the person to be pregnant, unmarried, under 18 years of age and unemancipated unless, before the abortion,” a parent, legal guardian or custodian (“a person entitled to notice” or “parent”) has been given actual or constructive notice 48 hours prior to the procedure or has consented in writing (“parental notification or consent” or “parental involvement”); a court actually or constructively authorizes the minor to consent to the abortion without notice to, or consent of, a person entitled to notice; or the minor makes a written and corroborated allegation of abuse. Section 3 of PNL (to be codified at AS 18.16.020).

17. Although an individual designated by the physician may begin the notification process, “the actual notice shall be given by the physician” in person or over the telephone. Section 3 of PNL (to be codified at AS 18.16.020(b)). The physician must document the notice, or notice attempts, and must “take reasonable steps to verify that the

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person to whom the notice is provided” is the minor’s parent, legal guardian or custodian. Section 3 of PNL (to be codified at AS 18.16.020(b)).

18. In order for notice to be provided in person, the physician must require the person entitled to notice to show both “government-issued identification” and “additional documentation of the person’s relationship to the minor.” Section 3 of PNL (to be codified at AS 18.16.020(b)(1)).

19. In order for notice to be provided by telephone, the physician must first “attempt[] to verify” the phone number of the person entitled to notice “through a review of published telephone directories.” Section 3 of PNL (to be codified at AS 18.16.020(b)). The physician must continue to try to reach a person entitled to notice by placing at least five calls over a 24 hour period, with gaps of at least 2 hours between each call attempt. Section 3 of PNL (to be codified at AS 18.16.020(b)(2)). If the person is reached, the physician must “ask[] questions of the person to verify that the person’s relationship to the minor is that of parent, legal guardian, or custodian.” Section 3 of PNL (to be codified at AS 18.16.020(b)).

20. “If actual notice is attempted unsuccessfully after reasonable steps have been taken,” the physician may provide constructive notice by taking “reasonable steps” to verify the mailing address of the person entitled to notice and mailing written notice – by certified mail, delivery restricted to addressee only. Section 3 of PNL (to be codified at AS 18.16.020(c)). Constructive notice is considered to have been given 48 hours after

the certified notice is mailed and must be followed by a 48 hour delay. Section 3 of PNL (to be codified at AS 18.16.020(c),(a)).

21. The statutorily required notification of a parent, legal guardian or custodian will require the minor to wait a minimum of 2 days before she can have an abortion. The mandated notice process could take up to five days or longer, depending on whether the physician is eventually able to reach a person entitled to notice and how long a physician spends trying to reach the person by telephone.

22. A minor who has been abused by a parent, legal guardian or custodian is exempted from the PNL's requirements only if the minor provides the physician with a notarized statement documenting that abuse and also provides corroborated evidence of the abuse in the form of a notarized statement from a law enforcement officer, a representative of the Department of Health and Social Services who has investigated the abuse, a grandparent, a stepparent, or a sibling who is at least 21 years old. Section 3 of PNL (to be codified at AS 18.16.020(a)(4)).

23. The PNL sets forth a "judicial bypass" process through which a minor may seek a court order allowing her to have her abortion without notice to or the consent of a person entitled to notice. Sections 4-8 of PNL (to be codified at AS 18.16.030). A minor initiates this process by filing a complaint in superior court, alleging, *inter alia*, that she is "sufficiently mature and well enough informed to decide intelligently whether to have an abortion" without notice or consent; has been abused by a person entitled to notice; and/or "that the consent of a parent, guardian, or custodian otherwise is not in [her] best

interest.” Section 4 of PNL (to be codified at AS 18.16.030(a)), Section 5 of PNL (to be codified at AS 18.16.030(b)).

24. The PNL provides that the court must hold a hearing “at the earliest possible time,” but not later than the fifth business day after the complaint was filed, and must enter judgment “immediately after the hearing is concluded.” Section 6 of PNL (to be codified at AS 18.16.030(c)). Failure to hold the hearing by the fifth business day is considered a “constructive order of the court authorizing” the minor to consent to the abortion without parental notice or consent. Section 6 of PNL (to be codified at AS 18.16.030(c)).

25. Minors filing a complaint must be notified that, *inter alia*, there is no filing fee; an attorney will be appointed if the minor has not retained one; the minor may request a telephonic court hearing; and the minor may request an order directing her school to excuse the minor to attend court hearings. Section 8 of PNL (to be codified at AS 18.16.030(n)).

26. The judicial bypass provisions contained within the PCA directed that if a minor established one of several statutory exceptions by clear and convincing evidence the superior court “shall issue an order authorizing complainant to consent to the performance or inducement of an abortion without the consent of a parent, guardian, or custodian.” AS 18.16.030(e) and (g). These provisions of the PCA were omitted from the PNL.

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27. The PNL provides a process for appeal to the Alaska Supreme Court if a bypass request is denied. Section 7 of PNL (to be codified at AS 18.16.030(j)).

28. A knowing violation of the PNL is a felony offense punishable “by a fine of not more than \$1,000, or by imprisonment for not more than five years, or by both.” AS 18.16.010(c).

29. Under the PNL, the presence of a “medical emergency” – as defined in the statute – constitutes a defense to a prosecution or civil suit for failure to comply with the statute. Section 2 of PNL (to be codified at AS 18.16.010(g)).

30. The PNL, by its terms, is scheduled to take effect on December 14, 2010.

BACKGROUND FACTS

The Provision of Abortions to Minors in Alaska

31. Abortion is a very safe medical procedure. Major complications are very rare.

32. The risks associated with childbirth are many times greater than the risks associated with an abortion.

33. Abortion poses little risk of negative psychological consequences or sequelae for women of all ages, and this risk is also lower than that associated with childbirth.

34. There are no abortion providers in many communities in Alaska. Some of the abortion providers in Alaska perform abortions only during the first trimester; later abortions are available in even fewer locations than are first trimester abortions.

35. Many women seeking abortions in Alaska must travel long distances to obtain an abortion. Most, if not all, abortion providers in Alaska have some abortion patients who travel long distances to obtain that service.

36. Where abortions are performed in Alaska, typically the procedure is not available every day of the week; rather, women must schedule their procedures on the days that abortions are available.

37. Generally, abortions are not available in Alaska past 19 weeks and 4 days imp, although in some situations in which a woman's health or life is threatened by her pregnancy she may be able to obtain an abortion slightly later in pregnancy.

38. In Alaska and throughout the United States, most minors who have an abortion do so with the knowledge of one or both of the minor's parents.

39. For those minors who feel they cannot involve a parent, many involve another trusted adult and almost all minors involve someone in their decision to seek an abortion.

40. The younger the minor, the more likely she will be to involve a parent in her decision to obtain an abortion.

41. When minors do not involve a parent, they generally have compelling reasons for not doing so. Such reasons include, but are not limited to, fear of physical violence against the minor or against other family members; of being forced to leave home or otherwise cut off from family; of being forced to continue an unwanted pregnancy and give birth; or of causing other problems between the minor and her parent

or between the minor's parents. Some minors fear that telling a parent will cause the parent's health to suffer or otherwise add stress in a family already coping with serious stressors such as job loss or serious illness. If the PNL goes into effect, some minors will suffer the serious adverse consequences that they had sought to avoid by not informing a parent of their decision to terminate their pregnancy.

42. Some minors who are afraid to involve their parents in their decision to obtain an abortion will go to extreme lengths to avoid doing so, including, but not limited to: committing suicide; obtaining an illegal abortion; self-inducing an abortion; travelling to a jurisdiction where parental involvement is not required; or carrying a pregnancy to term out of fear of retribution if they were to end their pregnancy.

43. Even without notice requirements like those set forth in the PNL, minors already tend to seek abortions later in pregnancy than adults.

44. Although abortion through the 21st week of pregnancy is significantly safer than pregnancy and childbirth, delay of any length in performing an abortion increases the risk to the woman undergoing the procedure.

Burdens Associated with the Parental Notification Law

45. The PNL infringes the rights of all women under the age of 18 to access abortions. Minors will suffer a loss of confidentiality with respect to their reproductive choice. The PNL will make it very difficult for some minors to obtain abortions and will prevent other minors from doing so.

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46. The PNL will put some minors at risk of severe harm. In some circumstances, parents of minors for whom parental notice is not in their best interest will learn of their daughter's pregnancy and planned abortion either because their situation is discovered as they attempt to utilize the bypass process or because the bypass process is so daunting that minors feel they have no option but to allow notification. Some of these minors will be abused, others will be forced to continue their pregnancies and have a child they did not want, and still others will be kicked out of their homes and cut off from their families.

47. The PNL's process for notification by telephone will pose risks for those minors in two parent households – including abused minors – who wish to avoid having one of the parents notified. Some minors may fear that if one of two parents learns of her pregnancy or planned abortion, she may be physically harmed, blocked from obtaining the abortion, or harmed in some other way. Therefore, the minor may ask the physician to avoid notifying that parent. It may be very difficult for the physician to comply with the requirement of multiple telephone calls within a 24 hour period while trying to avoid the risk of that parent learning of the abortion. In addition, it is unclear under the PNL whether telephone calls will count towards the required number of "attempts" if the physician hangs up to avoid that parent learning of the abortion.

48. The PNL will result in delay for minors seeking abortions. Except where a person entitled to notice immediately provides written consent for the minor's abortion, the statute requires that the abortion will be delayed by at least 48 hours following

notification. In those situations in which notification is unsuccessfully attempted by telephone, the statutorily mandated delay will be at least 5 days, due to the required telephone attempts, calculation of when constructive notice is considered to have been given and delay after notification.

49. Moreover, delay is likely to be longer than the periods specified in the PNL. By requiring that actual notice be provided only by a physician, the resultant delay will likely be greater due to limits on physician availability.

50. In addition, the delay will often be compounded by scheduling difficulties resulting from the limited hours when clinics are open, the limited hours when physicians are available to perform abortions, transportation requirements, the minor's work and/or school commitments.

51. When all of these factors are taken into account, the effective length of delay may ultimately amount to a week or more. Because, as noted above, the risks associated with abortion increase as a pregnancy advances, the PNL unnecessarily exposes minors to additional risks to their health.

52. Moreover, delay may result in the minor being unable to obtain an abortion because of increased cost or because abortion services are no longer available.

53. The PNL's requirement that in-person notification is valid only if the person entitled to notice shows government-issued identification, Section 3 of PNL (to be codified at AS 18.16.020(b)(1)), is an unduly burdensome, unreasonable and unnecessary requirement, for reasons including the fact that some individuals do not have

government-issued identification and therefore will not be able to receive in-person notification.

54. The PNL's requirement that in-person notification is valid only if the person entitled to notice shows "additional documentation of the person's relationship to the minor," Section 3 of PNL (to be codified at AS 18.16.020(b)(1)), also is an unduly burdensome, unreasonable and unnecessary requirement.

55. Some minors live in viable family units with parent surrogates – such as a grandparent – without that parent surrogate being a legal guardian or having a formalized "custodial" relationship. The PNL is unduly restrictive because it does not allow for notification of such parent surrogates as an alternative to notification of a "parent, legal guardian or custodian."

56. If a minor wishes to seek a judicial bypass, the potential for delay – and the risks associated with delay – increase. The minor first must prepare and file her complaint. The court then must appoint counsel for her, if she so requests, and schedule and hold a hearing, which could take up to five business days. If the minor obtains a favorable ruling, she must then see a provider in order to obtain the procedure; depending on the clinic hours and physicians' schedules, she may have to wait several additional days before she can have the procedure.

57. If no hearing is held, the minor must wait five business days and then make arrangements to receive or have the clinic receive documentation from the court of the constructive authorization.

58. If the minor's complaint is denied and must be appealed, the minor will experience additional delay in obtaining an abortion.

59. The bypass process also jeopardizes the confidentiality of minors seeking to avoid parental involvement. A minor seeking a bypass in the town or village in which she lives may encounter someone she knows at court. Many minors and their parents may know the court personnel or judges in the local courthouse.

60. Using the bypass process will be burdensome for minors for other reasons, including difficulties associated with: getting to the courthouse to file a complaint and, if seeking an in-person hearing, to attend the hearing; finding an attorney to represent the minor and arranging to confer with the attorney; arranging to be confidentially away from school, work or family to attend the hearing, whether in person or by telephone; and arranging transportation to travel confidentially to court to file the complaint and attend the hearing.

61. In addition, the experience of going to court to seek judicial authorization for an abortion, which necessarily involves addressing sexual matters to a judge, will be frightening and/or intimidating for many minors. Moreover, anxiety associated with this process may cause a minor to delay seeking court approval.

62. For some minors, the anxieties and obstacles created by the judicial bypass process will be so great as to prevent the minor from seeking judicial approval. Thus, some mature minors and some minors in whose best interest it is to proceed without notifying their parents will notify their parents (and possibly suffer emotional or physical

abuse), carry an unwanted pregnancy to term, or even seek an illegal abortion or self-abort.

63. In addition, the judicial bypass process within the PNL is legally insufficient because it does not require that a superior court reviewing a bypass complaint issue an order authorizing the minor to consent to the abortion without parental consent or notice if she has demonstrated maturity, abuse or that dispensing with consent would be in her best interest.

64. The judicial bypass process is inadequate because it neither guarantees that the minor's anonymity will be preserved in the judicial bypass process, nor prohibits court personnel from notifying a parent, guardian or custodian that the minor wants to have an abortion.

65. The PNL fails to adequately protect minors' health. The "medical emergency" defense fails to cover situations in which there is an immediate threat of serious risk to the mental health of the minor. It also fails to apply in some situations in which delay resulting from compliance with the PNL's requirements will present a serious risk to the minor's life or physical health.

66. The PNL also fails to adequately protect minors' health because it does not provide an exemption from its requirements for situations in which a "medical emergency" – even as defined in the PNL – exists. Rather, a physician who performed an abortion when a medical emergency existed is subject to prosecution and civil suit under

the PNL, although he or she may assert the presence of a medical emergency, as defined in the PNL, as a defense.

67. Open and honest communication between parents and children is developed over time and does not arise spontaneously during moments of crisis. Forced communication during moments of crisis can produce negative results.

68. For some minors, the parental notice requirement will function as a consent requirement because, once notified, the minor's parent or parents will exert physical and/or psychological control over the minor that will prevent her from accessing an abortion without parental approval.

The Parental Notification Law's Impact on Abused Minors

69. Minors who are the victims of abuse are especially likely to have the parental notice requirement function as a consent requirement. An abused minor is especially likely to be at risk of a parent or both parents exerting physical and/or psychological control over her that will prevent her from accessing an abortion without parental approval.

70. The provisions of the PNL that permit an abused minor to avoid either notification or a judicial bypass are unduly burdensome and restrictive and are ineffective. The minor must provide a notarized declaration documenting the abuse she has experienced. Moreover, the minor must not only have disclosed the abuse to one of a small number of delineated persons, the third party must have sufficient knowledge to corroborate the abuse and be willing to submit a notarized statement on the minor's

behalf. Given the difficulty that minors have disclosing abuse in the first instance, the additional requirements of the abuse exception make it unlikely that any minor would be able to take advantage of this exception.

71. Many abused minors will not be able to avoid the “parental veto” created by the notice provision by seeking a judicial bypass because, in addition to the obstacles that all minors would face in seeking a bypass, abused minors frequently are subjected to stringent control and monitoring by their parents.

Abortion Compared to Other Medical Treatment Minors Can Obtain Without Parental Notification

72. Minors in Alaska are statutorily empowered to give consent for a wide variety of medical services. AS 25.20.025. Minors are specifically authorized to give consent to and obtain care for a range of reproductive health care, other than abortion – including the diagnosis, prevention or treatment of pregnancy and the diagnosis and treatment of sexually transmitted infections – without parental consent or notification or a court order. AS 25.20.025.

73. A woman who is pregnant – adult or minor – has only two choices: continuing the pregnancy and giving birth or having an abortion. Abortion, prenatal treatments and childbirth present inherent risks to a minor’s health.

74. The decision-making process regarding which pregnancy outcome a woman will choose – abortion or having a child – is the same and women are often considering both options simultaneously.

75. Minors are equally competent to decide to continue a pregnancy or to decide to have an abortion, as well as make other medical decisions, and to weigh the risks and benefits of different courses of action.

76. Choosing to continue a pregnancy and have a child involves significant decision-making capabilities. Even beyond consideration of the life altering consequences of having a child and deciding whether to parent that child or place the child for adoption, minors who continue a pregnancy must determine where to seek care, whether to comply with suggested care, and whether to undergo procedures, such as amniocentesis or a caesarian section, that require balancing the pregnant minor's own health interests with the interests of the fetus.

77. Pregnancy is far riskier to a minor's health than abortion, and pregnancy is more dangerous for a minor under the age of 18 than for a woman of 25.

78. Minors have a higher risk than adult women of developing certain pregnancy-related complications, including preeclampsia, preterm labor and preterm birth. Some of these conditions are associated with insufficient prenatal care and result in a high mortality rate for minors.

79. Pregnant women should begin prenatal care as soon as possible. However, many minors – and many adults – do not receive all the prenatal care that physicians recommend or do not follow recommendations for prenatal care. As is also true for adults, some minors who carry a pregnancy to term do not receive prenatal care at all. The lack of prenatal care can pose serious threats to the pregnant minor and the fetus.

80. Abortion carries less risk of negative psychological consequences than does continuing a pregnancy and giving birth.

81. Whether a pregnant minor is obtaining abortion services, prenatal care, other pregnancy-related care or STD-related care, she must provide a medical history and give informed consent for any procedures to be performed. For both abortion services and other pregnancy-related care, a pregnant minor is given instructions regarding complications and followup care.

82. Some pregnant minors do not inform their parents of, or involve their parents in, obtaining care associated with sexual activity.

83. Some pregnant minors do not inform their parents of their pregnancy until the time to obtain an abortion has passed. In some instances, parents do not learn of their daughters' pregnancy until their daughters have given birth.

84. To the extent that parental involvement would benefit pregnant minors who decided to have an abortion, it would also benefit minors who decided to continue a pregnancy and give birth.

85. The classifications created by the PNL do not further any compelling state interests.

86. The classifications the PNL draws are both underinclusive and overinclusive to further any legitimate governmental interests.

87. The PNL places unique constraints upon access to abortion, a reproductive service sought only by women; comparable constraints are not placed upon men seeking medical care.

88. The PNL reinforces certain outmoded stereotypes of women as less capable than men of making their own reproductive health decisions and of women as childbearers. By doing so, the PNL harms female minors.

89. The PNL reinforces certain outmoded stereotypes of the abilities of women who are married or emancipated compared to those that are not. By doing so, the PNL harms female minors.

The Parental Notification Law's Vagueness

90. The PNL requires that, when providing notice by telephone, a physician must take "reasonable steps" to verify that the person to whom he or she is providing notice is the parent, legal guardian or custodian of the minor by, *inter alia*, "attempting to verify through a review of published telephone directories that the number" is the parent's and attempting to "verify" that the person on the telephone is the parent, legal guardian or custodian by "asking questions."

91. The PNL is vague about what a physician is required to look at in order to satisfy the review of "published telephone directories." There are multiple printed directories, from different telephone services, covering different cities and/or regions in Alaska. In addition, there are multiple telephone directories on the internet. The PNL does not provide guidance as to whether physicians must obtain and review hard copies

of phone books – and, if so, which ones – and whether internet telephone directories are encompassed by the phrase “published telephone directories.”

92. For a variety of reasons, many individuals’ phone numbers cannot be verified by a review of published directories, whether those be hard copies or internet-based. For example, many Alaska households have only a cellular telephone and cell phone numbers are not listed. For reasons of privacy or security, other individuals choose not to list their phone numbers. Some individuals live in households where the phone is registered in another person’s name. The PNL does not provide any guidance as to how a physician can “verify” the person’s telephone number and provide notice in such circumstances.

93. The PNL does not give any guidance on the questions that a physician must ask in order to satisfactorily verify the identity of a parent, legal guardian or custodian.

94. This uncertainty over how to verify the identity of the person entitled to notice is particularly problematic for minors who live with a person who has legal or custodial responsibility for the minor, but is not a parent or legal guardian. Within extended family structures, it is not uncommon for an adult who is neither a parent nor a legal guardian to act as a custodian for minors, but in many cases, these relationships are not formalized through courts, government agencies or formal agreements with parents and therefore there may be no formal document or proceedings to reference as proof of a custodial relationship. As a result, it is not clear how a physician can verify a person’s custodial relationship to a minor via documentation or at all.

95. The PNL permits physicians to provide constructive notice by certified mail “[i]f actual notice is attempted unsuccessfully after reasonable steps have been taken as described” under the PNL. Section 3 of the PNL (to be codified at AS 18.16.020(c)). The PNL fails to give physicians adequate notice of what constitutes an unsuccessful attempt to provide actual notice.

96. Likewise, the PNL fails to provide adequate notice as to what constitutes “reasonable steps” to verify a mailing address when providing constructive notice to a person entitled to notice.

97. The PNL does not describe how notice can be lawfully provided if a physician is not able to make at least five attempts to reach a person entitled to notice within a 24 hour period.

98. Because of all of these vague requirements, Plaintiffs remain unsure of what they must do to comply with the PNL.

99. Uncertainty over how they can comply with the PNL’s vague notification requirements will deter physicians from using the notice option in many circumstances and those minors will need parental consent or a court order to obtain an abortion.

100. If the PNL goes into effect, Plaintiff physicians risk criminal prosecution, arbitrary and discriminatory enforcement and civil lawsuits if they violate the PNL.

101. The vagueness in the PNL will chill physicians from relying on the telephone and constructive notice provisions.

102. Because of the fear of criminal prosecution and civil suits, in some instances, the PNL's vagueness will cause physicians to require the person entitled to notice to appear in person.

103. The PNL will have a chilling effect on Plaintiffs' provision of abortion services to minors.

COUNT I: VIOLATION OF RIGHT TO EQUAL PROTECTION

104. Plaintiffs reallege each allegation made in paragraphs 1-103, above.

105. The Act violates the rights of female minors under the equal protection and inherent rights clauses of article I, section 1 of the Alaska Constitution in several ways, including, but not limited to, the following:

(a) by singling out abortion as the only type of pregnancy-related medical care to which unemancipated minors may not obtain confidential care without parental involvement or a court order;

(b) by singling out abortion as the only one of a broad range of medical services and treatments associated with sexual activity to which unemancipated minors may not obtain confidential care without parental involvement or a court order;

(c) by singling out for differential treatment unemancipated women under 18 who live on their own and manage their own financial affairs who choose to abort a pregnancy from unemancipated women under 18 who live on their own

and manage their own financial affairs who choose to obtain any other form of confidential medical care;

(d) by discriminating against female minors by placing restrictions upon a reproductive health service obtained only by women;

(e) by imposing particular burdens on pregnant minors who live in remote areas of the state that lack readily accessible judicial and legal services;

(f) by imposing differential burdens on minors who are married or emancipated and those who are not; and

(g) by singling out abortion as the only medical procedure that minors are not permitted to give consent for and obtain immediately if the parent, legal guardian or custodian of the minor cannot be contacted.

COUNT II: VIOLATION OF RIGHT TO PRIVACY

106. Plaintiffs reallege each allegation made in paragraphs 1-105, above.

107. The PNL violates the privacy rights of minors under article II, section 22 of the Alaska Constitution because it burdens their fundamental right to reproductive choice in numerous ways – as set forth above – and does so without furthering compelling state interests by the least restrictive means in several ways. The ways in which the PNL fails to further compelling state interests by the least restrictive means include, but are not limited to, the following:

(a) it applies to 17 year olds when the State has previously determined that application of the PCA to 17 year olds was not necessary to further its asserted interests;

(b) it imposes unnecessary delays on minors seeking abortions by imposing a 48 hour waiting period following notification and by requiring observation of the 48 hour delay even when a parent, legal guardian or custodian has previous notice of the abortion;

(c) it imposes unnecessarily burdensome procedures for providing notice;

(d) it fails to adequately address the problems faced by abused minors; and

(e) it fails to provide a legally sufficient judicial bypass process.

COUNT III: VIOLATION OF RIGHT TO DUE PROCESS OF LAW

108. Plaintiffs reallege each and every allegation made in paragraphs 1-107, above.

109. The PNL violates Plaintiffs' right to due process as guaranteed by article I, section 7 of the Alaska Constitution, because it fails to give clear notice of what conduct is prohibited and/or required to avoid criminal liability, it subjects Plaintiffs to a substantial likelihood of arbitrary and discriminatory enforcement, and it will have a chilling effect on Plaintiffs' provision of abortion services to minors, thereby violating the fundamental rights of Plaintiffs' patients. It fails to give clear notice of what conduct is prohibited and/or required in several ways, including, but not limited to, the following:

FELDMAN ORLANSKY
& SANDERS
500 L STREET
FOURTH FLOOR
ANCHORAGE, AK
99501
TEL: 907.272.3538
FAX: 907.274.0819

(a) its requirement to review “published telephone directories” is vague and ambiguous;

(b) it fails to give fair notice of how a physician can provide notification if the telephone number of the parent, legal guardian or custodian does not appear in a telephone directory;

(c) it is vague and confusing as to how a physician providing telephone notice can satisfactorily verify the identity of a parent, legal guardian, or custodian;

(d) it is vague in its use of the term “custodian;”

(e) it is unclear as to what constitutes an unsuccessful attempt to provide actual notice to a parent, legal guardian or custodian;

(f) it fails to provide adequate notice as to what constitutes “reasonable steps” to verify a mailing address when a physician is providing constructive notice to a parent, legal guardian or custodian; and

(g) its medical emergency provision, including the definition of the term “medical emergency,” fails to give clear notice of what is required to avoid criminal liability based on a medical emergency defense.

COUNT V: REQUEST FOR INJUNCTIVE RELIEF

110. Plaintiffs reallege each and every allegation made in paragraphs 1-109, above.

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111. Plaintiffs request the issuance of an injunction against the operation and enforcement of the PNL to protect them and their staffs from criminal penalties, to prevent the chilling of constitutionally protected rights of them and their minor patients and to prevent harm to the lives and health of their minor patients.

112. Plaintiffs meet the standard for injunctive relief because: (1) Plaintiffs and their patients face irreparable harm if an injunction is not issued; (2) Defendant can be adequately protected from harm; and (3) Plaintiffs' claims raise serious and substantial questions going to the merits of the case. Moreover, Plaintiffs can make a clear showing of probable success on the merits.

PRAYER FOR RELIEF

Accordingly, based on the facts set forth above, Plaintiffs request that judgment be entered in their favor, and against Defendant, as follows:

1. For declaratory judgment that the parental notification law violates the rights of Plaintiffs and their patients as protected by the Alaska Constitution and is therefore void and of no effect.

2. For injunctive relief restraining the enforcement, operation and execution of the parental notification law and enjoining Defendant, its agents, employees, appointees or successors from enforcing, threatening to enforce or otherwise applying the provisions of that statute.

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3. For Plaintiffs' costs and attorney fees incurred in connection with obtaining the relief sought in this proceedings; and
4. For such other relief as the court may deem just and equitable.

DATED this 19 day of November, 2010.

FELDMAN ORLANSKY & SANDERS

By



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ALASKA BAR ASSOCIATION NO. 7605029

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*Motions to appear *pro hac vice* to be filed

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THE PARENTAL INVOLVEMENT INITIATIVE
"An Act relating to parental involvement for a minor's abortion."

BE IT ENACTED BY THE PEOPLE OF THE STATE OF ALASKA:

* **Section 1.** AS 18.16.010(a) is amended to read:

- (a) An abortion may not be performed in this state unless
- (1) the abortion is performed by a physician licensed by the State Medical Board under AS 08.64.200;
 - (2) the abortion is performed in a hospital or other facility approved for the purpose by the Department of Health and Social Services or a hospital operated by the federal government or an agency of the federal government;
 - (3) before an abortion is knowingly performed or induced on a **pregnant**, [AN] unmarried, unemancipated women under 18 years of age, **notice or consent have** [HAS] been given as required under AS 18.16.020 or a court has authorized the minor to proceed with the abortion **without parental involvement** under AS 18.16.030 and the minor consents; for purposes of enforcing this paragraph, there is a rebuttable presumption that a women who is unmarried and under 18 years of age is unemancipated;
 - (4) the woman is domiciled or physically present in the state for 30 days before the abortion; and
 - (5) the applicable requirements of AS 18.16.060 have been satisfied.

* **By Order No. 70 of The Alaska Supreme Court, dated June 2, 2010, the following subsections of existing law are set out here:**

AS 18.16.010(c) provides:

(c) A person who knowingly violates a provision of this section, upon conviction, is punishable by a fine of not more than \$1,000, or by imprisonment for not more than five years, or by both.

AS 18.16.010(e) provides:

(e) A person who performs or induces an abortion in violation of (a)(3) of this section is civilly liable to the pregnant minor and the minor's parents, guardian, or custodian for compensatory and punitive damages.

* **Sec. 2.** AS 18.16.010(g) is amended to read:

(g) It is a [AN AFFIRMATIVE] defense to a prosecution or claim for violation of (a)(3) of this section that, **in the clinical judgment of the physician or surgeon**, compliance with the requirements of (a)(3) of this section was not possible because, **in the clinical judgment of the physician or surgeon**, an immediate threat of serious risk to the life or physical health of the pregnant minor from the continuation of the pregnancy created a medical emergency necessitating the immediate performance or inducement of an abortion. In this subsection,

(1) "clinical judgment" means a physician's or surgeon's subjective professional medical judgment exercised in good faith;

(2) "defense" has the meaning given in AS 11.81.900(b);

(3) "medical emergency" means a condition that, on the basis of the physician's or surgeon's good faith clinical judgment, so complicates the medical condition of a pregnant minor that

(A) [(1)] an immediate abortion of the minor's pregnancy is necessary to avert the minor's death; or

(B) [(2)] a delay in providing an abortion will create serious risk of medical instability caused by a substantial and irreversible impairment of a major bodily function of the pregnant minor.

* By Order No. 70 of The Alaska Supreme Court, dated June 2, 2010, the following section of existing law (held unconstitutional in *State v. Planned Parenthood of Alaska*, 171 P.3d 577 (Alaska 2007)) is set out here:

§ 18.16.020. Consent required before minor's abortion

A person may not knowingly perform or induce an abortion upon a minor who is known to the person to be pregnant, unmarried, under 17 years of age, and unemancipated unless, before the abortion, at least one of the following applies:

(1) one of the minor's parents or the minor's guardian or custodian has consented in writing to the performance or inducement of the abortion;

(2) a court issues an order under AS 18.16.030 authorizing the minor to consent to the abortion without consent of a parent, guardian, or custodian, and the minor consents to the abortion; or

(3) a court, by its inaction under AS 18.16.030, constructively has authorized the minor to consent to the abortion without consent of a parent, guardian, or custodian, and the minor consents to the abortion.

* **Sec. 3.** AS 18.16.020 is repealed and reenacted to read:

Sec. 18.16.020. Notice or consent required before minor's abortion. (a) A person may not knowingly perform or induce an abortion upon a minor who is known to the person to be pregnant, unmarried, under [17] **18** years of age, and unemancipated unless, before the abortion, at least one of the following applies:

(1) (A) one of the minor's parents, the minor's legal guardian, or the minor's custodian has been given notice of the planned abortion not less than 48 hours before the abortion is performed, or (B) the parent, legal guardian, or custodian has consented in writing to the performance or inducement of the abortion -- if a parent has consented to the abortion the 48 hour waiting period referenced in subsection (A) above does not apply;

(2) a court issues an order under AS 18.16.030 authorizing the minor to consent to the abortion without notice or consent of a parent, guardian, or custodian, and the minor consents to the abortion;

(3) a court, by its inaction under AS 18.16.030, constructively has authorized the minor to consent to the abortion without notice and consent of a parent, guardian, or custodian, and the minor consents to the abortion; or

(4) the minor is the victim of physical abuse, sexual abuse, or a pattern of emotional abuse committed by one or both of the minor's parents or by a legal guardian or custodian of the minor and the abuse is documented by a declaration of the abuse in a signed and notarized statement by

(A) the minor; and

(B) another person who has personal knowledge of the abuse

who is

(i) the sibling of the minor who is 21 years of age or older;

(ii) a law enforcement officer;

(iii) a representative of the department of Health and Social Services who has investigated the abuse;

(iv) a grandparent of the minor; or

(v) a stepparent of the minor.

(b) In (a)(1) of this section, actual notice must be given or attempted to be given in person or by telephone by either the physician who has referred the minor for an abortion or by the physician who intends to perform the abortion. An individual designated by the physician may initiate the notification process, but the actual notice shall be given by the physician. The physician giving notice of the abortion must document the notice or attempted notice in the minor's medical record and take reasonable steps to verify that the person to whom the notice is provided is the parent, legal guardian, or custodian of the minor seeking an abortion. Reasonable steps to provide notice must include

(1) if in person, requiring the person to show government-issued identification along with additional documentation of the person's relationship to the minor; additional documentation may include the minor's birth certificate or a court order of adoption, guardianship, or custodianship;

(2) if by telephone, initiating the call, attempting to verify through a review of published telephone directories that the number to be dialed is that of the minor's parent, legal guardian, or custodian, and asking questions of the person to verify that the person's relationship to the minor is that of parent, legal guardian, or custodian; when notice is attempted by telephone but the physician or physician's designee is unsuccessful in reaching the parent, legal guardian, or custodian, the physician's designee shall continue to initiate the call, in not less than two-hour increments, for not less than five attempts, in a 24-hour period.

(c) If actual notice is attempted unsuccessfully after reasonable steps have been taken as described under (b) of this section, the referring physician or the physician intending to perform an abortion on a minor may provide constructive notice to the minor's parent, legal guardian, or custodian. Constructive notice is considered to have been given 48 hours after the certified notice is mailed. In this subsection, "constructive notice" means that notice of the abortion was provided in writing and mailed by certified mail, delivery restricted to addressee only, to the last known address of the parent, legal guardian, or custodian after taking reasonable steps to verify the mailing address.

(d) A physician who suspects or receives a report of abuse under this section shall report the abuse as provided under AS 47.17.020.

(e) A physician who is informed that the pregnancy of a minor resulted from criminal sexual assault of the minor must retain, and take reasonable steps to preserve, the products of conception and evidence following the abortion for use by law enforcement officials in prosecuting the crime.

* **Sec. 4.** AS 18.16.030(a) is amended to read:

(a) A woman who is pregnant, unmarried, under 18 years of age, and unemancipated who wishes to have an abortion without **notice to or** the consent of a parent, guardian, or custodian may file a complaint in the superior court requesting the issuance of an order authorizing the minor to consent to the performance or inducement of an abortion without **notice to or** the consent of a parent, guardian, or custodian.

* **Sec. 5.** AS 18.16.030(b) is amended to read:

(b) The complaint shall be made under oath and must include all of the following:

- (1) a statement that the complainant is pregnant;
- (2) a statement that the complainant is unmarried, under 18 years of age, and unemancipated;
- (3) a statement that the complainant wishes to have an abortion without **notice to or** the consent of a parent, guardian, or custodian;
- (4) an allegation of either or both of the following:
 - (A) that the complainant is sufficiently mature and well enough informed to decide intelligently whether to have an abortion without **notice to or** the consent of a parent, guardian, or custodian; or
 - (B) that one or both of the minor's parents or the minor's guardian or custodian was engaged in physical abuse, sexual abuse, or a pattern of emotional abuse against the minor, or that the consent of a parent, guardian, or custodian otherwise is not in the minor's best interest;
- (5) a statement as to whether the complainant has retained an attorney and, if an attorney has been retained, the name, address, and telephone number of the attorney.

* **Sec. 6.** AS 18.16.030(c) is amended to read:

(c) The court shall fix a time for a hearing on any complaint filed under (a) of this section and shall keep a record of all testimony and other oral proceedings in the action. The hearing shall be held at the earliest possible time, but not later than the fifth business day after the day that the complaint is filed. The court shall enter judgment on the complaint immediately after the hearing is concluded. If the hearing required by this subsection is not held by the fifth business day after the complaint is filed, the failure to hold the hearing shall be considered to be a constructive order of the court authorizing the complainant to consent to the performance or inducement of an abortion without **notice to or** the consent of a parent, guardian, or custodian, and the complainant and any other person may rely on the constructive order to the same extent as if the court actually had issued an order under this section authorizing the complainant to consent to the performance or inducement of an abortion without such consent.

* **Sec. 7.** AS 18.16.030(j) is amended to read:

(j) If the complainant files a notice of appeal authorized under this section, the superior court shall deliver a copy of the notice of appeal and the record on appeal to the supreme court within four days after the notice of appeal is filed. Upon receipt of the notice and record, the clerk of the supreme court shall place the appeal on the docket. The appellant shall file a brief within four days after the appeal is docketed. Unless the appellant waives the right to oral argument, the supreme court shall hear oral argument within five days after the appeal is docketed. The supreme court shall enter judgment in the appeal immediately after the oral argument or, if oral argument has been waived, within five days after the appeal is docketed. Upon motion of the appellant and for good cause shown, the supreme court may shorten or extend the maximum times set out in this subsection. However, in any case, if judgment is not entered within five days after the appeal is docketed, the failure to enter the judgment shall be considered to be a constructive order of the court authorizing the appellant to consent to the performance or inducement of an abortion without **notice to or** the consent of a parent, guardian, or custodian, and the appellant and any other person may rely on the constructive order to the same extent as if the court actually had entered a judgment under this subsection authorizing the appellant to consent to the performance or inducement of an abortion without **notice to or the** consent of another person. In the interest of justice, the supreme court, in an appeal under this subsection, shall liberally modify or dispense with the formal requirements that normally apply as to the contents and form of an appellant's brief.

* **Sec. 8.** AS 18.16.030(n) is amended to read:

(n) Blank copies of the forms prescribed under (1) of this section and information on the proper procedures for filing a complaint or appeal shall be made available by the court system at the official location of each superior court, district court, and magistrate in the state. The information required under this subsection must also include notification to the minor that

- (1) there is no filing fee required for either form;
- (2) no court costs will be assessed against the minor for procedures under this section;
- (3) an attorney will be appointed to represent the minor if the minor does not retain an attorney;
- (4) the minor may request that the superior court with appropriate jurisdiction hold a telephonic hearing on the complaint so that the minor need not personally be present;

(5) the minor may request that the superior court with appropriate jurisdiction issue an order directing the minor's school to excuse the minor from school to attend court hearings held under this section and to have the abortion if one is authorized by the court and directing the school not to notify the minor's parent, legal guardian, or custodian that the minor is pregnant, seeking an abortion, or is absent for purposes of obtaining an abortion.

* **Sec. 9.** AS 18.16 is amended by adding a new section to read:

Sec. 18.16.040. Reports. For each month in which an abortion is performed on a minor by a physician, the physician shall file a report with the Department of Health

and Social Services indicating the number of abortions performed on a minor for that month, the age of each minor, the number of previous abortions performed on each minor, if any, and the number of pregnancies of each minor, if any, and the number of consents provided under each of the exceptions enumerated under AS 18.16.020(a)(1) - (4). A report filed under this section may not include identifying information of the minor other than the minor's age.