

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

COMPREHENSIVE HEALTH OF PLANNED)
PARENTHOOD GREAT PLAINS, et al.)
)
Plaintiffs,)
)
v.) Case No. 2:16-cv-04313-HFS
)
DR. RANDALL WILLIAMS, in his official)
Capacity as Director of the Missouri)
Department of Health and Senior Services, et al.)
)
Defendants.)

**PLAINTIFFS’ SECOND SUPPLEMENTAL SUGGESTIONS IN FURTHER SUPPORT
OF MOTION FOR PRELIMINARY INJUNCTION**

Plaintiffs submit these supplemental suggestions in support of their Motion for Preliminary Injunction, ECF No. 14, pursuant to the Court’s directive (at Defendants’ request) during oral argument on March 21, 2017 that the parties submit simultaneous supplemental briefing on March 31, 2017.

Counsel for Defendants Hawley and Williams (the “State Defendants”) requested this additional round of briefing regarding the safety of abortion, and specifically regarding responses to a third party subpoena issued by Defendants to the St. Louis Fire Department for information regarding ambulance calls to Plaintiff RHS’s St. Louis health center, as well as regarding Plaintiffs’ tracking and reporting of complications following abortion.

Apparently unsatisfied with the evidence they have submitted thus far, Defendants are on a fishing expedition to turn up any indication that abortion, as provided by Plaintiffs in Missouri, is unsafe. Indeed, in their ongoing attempt to locate non-existent evidence that abortion is unsafe, in addition to the third party discovery based on which the State Defendants originally requested

these submissions, on the day after oral argument on Plaintiffs' preliminary injunction motion they also issued two *additional* third-party subpoenas to private ambulance companies that serve the St. Louis area, Abbott EMS and Gateway Ambulance Service.¹ However, the documents produced in response to these third-party subpoenas only support the documentary evidence and testimony of Plaintiffs' expert Dr. Eisenberg that abortion, both in general and as provided by Plaintiffs, is extremely safe, and that the rate of complications requiring transfer from RHS's health center to a hospital is very low. *See* Documents produced by St. Louis Fire Department, STLFD000001–139, to be filed under seal as Ex. 1; Documents produced by Gateway Ambulance, GATEWAY000001–18, to be filed under seal as Ex. 2; and Documents produced by Abbott EMS, ABBOTT000001–90, to be filed under seal as Ex. 3.

As Dr. Eisenberg explained in his Third Rebuttal Declaration (“Third Eisenberg Rebuttal”), ECF No. 70-2, Defendants' assertions that ambulance calls to RHS's address shows that RHS underreports abortion complications is false, since ambulances have been called to the address for a variety of reasons unrelated to abortion. Third Eisenberg Rebuttal ¶¶ 13–14. The documents produced by the St. Louis Fire Department, as well as the two private ambulance companies Gateway and Abbott EMS, reflect this. For example, the documents show ambulance calls for a patient who fainted and hit her head, STLFD000034–38, male patients who fainted after having their blood drawn, STLFD000066–73 and ABBOTT000049–55, a patient who fainted after having an intrauterine contraceptive device removed, STLFD000074–77, a woman at the RHS location who was suffering an apparent recreational drug overdose, STLFD000039–43, a Planned Parenthood employee who fainted and was then exhibiting stroke symptoms, STLFD000088–91,

¹ The State Defendants issued their third party subpoenas on March 1 and March 22, after the parties' agreed-upon deadline of February 10, 2017 for serving preliminary injunction discovery had already passed. *See* Scheduling Order–Preliminary Injunction Discovery, ECF No. 51.

and a patient exhibiting what appeared to be psychiatric symptoms, ABBOTT000028–34, among other calls unrelated to abortion. Some also reflect calls that appear to relate to complications relating to miscarriage management (also referred to as spontaneous abortion, missed abortion, or nonviable pregnancy), ABBOTT000020–26).²

Furthermore, the documents produced by the fire department and private ambulance companies underscore the information RHS produced in response to discovery requests regarding the rare occasions when patients have been transferred from the health center to a hospital. Indeed, RHS’s discovery responses reflect almost exactly the same number of transfers as the fire department and private ambulance companies’ records do for the years 2012–2016. *See* STLFD000015–118 (reflecting 14 confirmed transfers related to abortion during this time period); ABBOTT000001–90 (reflecting 6 confirmed transfers related to abortion during this period); GATEWAY000001-18 (reflecting no confirmed transfers related to abortion during this period); Ex. 1 to Defs.’ Suppl. Br. in Opp. to Pls.’ Mot. for Preliminary Inj., ECF 65, at RHS0004–5, filed under seal, ECF No. 74 (reflecting 21 transfers during this time period). Regardless, even if there were small discrepancies in the number of transfers reflected, this would do nothing to change the robust showing Plaintiffs have made regarding the safety of abortion services, both in general and at their health centers.

Counsel for the State Defendants also asserted during oral argument that the Plaintiffs in this case have not been providing individual complication reports to DHSS as the State believes they are required to do pursuant to Mo. Ann. Stat. § 188.052, implying that Plaintiffs are bad actors and are hiding complications from DHSS. Neither is true. In fact, DHSS has never requested or

² The documents also reflect additional ambulance calls from times outside the date range of 2012–2016 for which Defendants requested complications data from Plaintiffs. Such calls obviously do nothing to undermine the accuracy and completeness of Plaintiffs’ complication information.

collected individual complication reports from Plaintiffs nor, to Plaintiffs' knowledge, from other entities in the state that treat abortion complications, including physicians, health centers, and hospitals. Suppl. Decl. of Mary Kogut in Supp. of Pls.' Mot. for Prelim. Inj. ("Kogut Decl.") ¶ 6, attached hereto as Ex. 4; Second Suppl. Decl. of Laura McQuade in Supp. of Pls.' Mot. for Prelim. Inj. ("McQuade Decl.") ¶ 4, attached hereto as Ex. 5. DHSS also has not included data regarding abortion complications in any annual reporting it has published regarding abortion, as Mo. Ann. Stat. § 188.052 would require them to do. Kogut Decl. ¶ 6; McQuade Decl. ¶ 4. Far from Plaintiffs attempting to hide complications, DHSS has simply not enforced an individual complication reporting requirement as to Plaintiffs or other entities in the state. DHSS earlier this month requested for the first time that RHS provide such reports, and RHS is working with DHSS to clarify exactly what information they seek and to ensure that RHS complies with this request appropriately. Kogut Decl. ¶ 5.

Furthermore, despite never enforcing an individual complication report requirement, DHSS has had ongoing access to information about any complications experienced by Plaintiffs' patients via the facility licensing process. Kogut Decl. ¶ 3; McQuade Decl. ¶ 3. As part of the facility inspections that DHSS regularly conducts, DHSS representatives review Plaintiffs' quality assurance documents, including minutes of periodic quality assurance meetings which contain information about any complications, and also conduct a review of a random sample of patient charts to ensure that all required state reporting is contained therein. Kogut Decl. ¶ 3; McQuade Decl. ¶ 3. DHSS also reviews RHS's complication log during each inspection and cross-checks to ensure that any complications identified during the random file review are included on the log. Kogut Decl. ¶ 3. These inspections have never resulted in DHSS requesting any additional

complication reporting from either Comprehensive Health or RHS. Kogut Decl. ¶ 3; McQuade Decl. ¶ 3.

Furthermore, on the rare occasions when RHS has transferred a patient from its facility to a hospital, RHS calls DHSS to inform them of the transfer and offers to provide DHSS with the patient's medical records. Kogut Decl. ¶ 4. DHSS generally does request the record, and RHS provides it. *Id.* At times, the DHSS nurse who reviews these records has had follow up questions, and RHS representatives have answered these questions via a phone conversation. *Id.* Therefore, any suggestion that a lack of individual complication reports means that Plaintiffs have been trying to hide complications, or underreport complications, is ludicrous. To the contrary, Plaintiffs have been entirely transparent with their complication and quality assurance records.

The bottom line is, Defendants' continued attempts to show that Plaintiffs are unsafe providers fail; the record in this case shows that abortion is extremely safe in general and in Missouri in particular. And, furthermore, the issue of whether abortion is safe has already been squarely decided by the Supreme Court. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2311 (2016) (recognizing that abortion is "extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure.") (internal citations omitted); *see also MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 772–73 (8th Cir. 2015), *cert. denied*, 136 S. Ct. 981, 194 L. Ed. 2d 4 (2016) (where a party offers evidence that "differs from the Supreme Court's" holdings, this "does not create a genuine dispute") (citing *Churchill Bus. Credit, Inc. v. Pac. Mut. Door Co.*, 49 F.3d 1334, 1336 (8th Cir. 1995)). In addition, as Plaintiffs have repeatedly explained, despite the State Defendants' ongoing focus on the safety of abortion, they have not shown, and in multiple briefs have not even attempted to show, that the Restrictions challenged in this case do anything to reduce the incidence of abortion complications or improve

the way that complications are treated, nor could they. *See* Pls.’ Sur-Surreply Suggestions in Supp. of Pls.’ Mot. for Prelim. Inj., ECF No. 76, at 2–3; Pls.’ Suppl. Suggestions in Further Supp. of Mot. for Prelim. Inj., ECF No. 70, at 2–3.

In short, the State Defendants’ ongoing attempt to distract the Court from the core issues in this case with their fishing expeditions about abortion safety should be rejected. The Restrictions challenged in this case do not advance the state’s interest in women’s health and impose substantial obstacles on women’s access to abortion. For those reasons, under *Whole Woman’s Health*, the Restrictions are plainly unconstitutional and Plaintiffs are entitled to a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2017 a copy of the foregoing has been served upon all counsel of record in this action by electronic service through the Court's CM/ECF system.

/s/ Melissa A. Cohen

Melissa A. Cohen

EXHIBIT 4

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**SUPPLEMENTAL DECLARATION OF MARY M. KOGUT IN SUPPORT OF
PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

Mary M. Kogut declares the following:

1. I previously submitted a declaration in this case entitled “Declaration of Mary M. Kogut in Support of Plaintiffs’ Motion for Preliminary Injunction,” ECF 15-2, dated December 12, 2016. I am President and Chief Executive Officer of Plaintiff Reproductive Health Services of Planned Parenthood of the St. Louis Region (“RHS”). I am responsible for the management of this organization, and therefore am familiar with our operations and finances, including the services we provide and the communities we serve. I submit this declaration in support of Plaintiffs’ Motion for a Preliminary Injunction.

2. As a licensed facility, RHS works hard to ensure that it is complying with all regulatory requirements the Department of Health and Senior Services (“DHSS”) believes are required of it.

3. Information regarding abortion complications at RHS has been available to DHSS as part of the facility licensing process. For example, as part of the licensing process, DHSS

conducts an in-depth inspection of RHS annually. During an inspection, DHSS representatives review RHS's quality assurance process, including reviewing RHS's complication logs as well as minutes from RHS's periodic quality assurance meetings, which include tracking of complications. DHSS representatives also review a random sample of patient records, and during that review, DHSS representatives ensure the presence of all required state reporting and forms. When a patient record reviewed during this process indicates that the patient experienced a complication, the DHSS representative cross-checks to ensure that the complication is reflected on RHS's complication log. To the best of my knowledge, the inspection process has never resulted in DHSS requesting any additional reporting regarding complications.

4. In addition, beginning several years ago, on the rare occasions when RHS transfers a patient from its facility to a hospital, RHS began calling DHSS to inform them of the transfer and offer to provide DHSS with the patient's medical records. DHSS generally does request that we provide the record, and we promptly do so. At times, the DHSS nurse who reviews these records has follow up questions, and RHS representatives answer these questions via a phone conversation.

5. DHSS has never before requested or collected individual complication reports from RHS. During the past few months, RHS staff have been in communication with DHSS representatives from the Bureau of Vital Statistics regarding pathology reports DHSS has received for some of RHS's patients and we have been working with DHSS to provide additional information regarding those patients. DHSS requested individual complication reports for those patients on March 17, 2017, and this is the first time RHS has received such a request from DHSS. RHS is working with DHSS to attempt to clarify exactly what information DHSS is requesting and how DHSS would like RHS to comply with this request.

6. To my knowledge, DHSS has never before requested or collected individual complication reports from other entities in the state of Missouri that may treat complications following abortions, including other health centers, doctors' offices and hospitals. It also appears from DHSS's website that it has never published data regarding abortion complications in any annual reporting. *See Data and Statistical Reports*, Mo. Dep't. of Health & Senior Servs., <http://health.mo.gov/data/vitalstatistics/data.php> (collecting all prior vital statistics reports regarding abortion).

7. RHS switched from a paper medical record system to an electronic health records system during the second half of 2012. Therefore, for 2013 forward, patient charts are maintained in electronic format. For prior years, patient charts are maintained in paper format and stored in off-site archives.

Dated: March 31, 2017

/s/ Mary M. Kogut

Mary M. Kogut

EXHIBIT 5

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**SECOND SUPPLEMENTAL DECLARATION OF LAURA MCQUADE IN SUPPORT
OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

I, Laura McQuade, declare and state the following:

1. I previously submitted two declarations in this case entitled “Declaration of Laura McQuade in Support of Plaintiffs’ Motion for a Preliminary Injunction,” ECF 15-1, dated December 12, 2016, and “Supplemental Declaration of Laura McQuade,” ECF 41-1, dated January 31, 2017. I am the President and Chief Executive Officer of Comprehensive Health of Planned Parenthood Great Plains (“Comprehensive Health”). I am responsible for the management of this organization, and, therefore, am familiar with our operations and finances, including the services we provide and the communities we serve. I submit this declaration in support of Plaintiffs’ Motion for a Preliminary Injunction.

2. During the periods when the Columbia and Kansas City health centers have held ASC licenses in Missouri, we have striven to ensure compliance with all Department of Health and Senior Services (“DHSS”) requirements.

3. When these health centers have held licenses, information regarding any complications experienced by our patients was available to DHSS through the facility licensing process. DHSS conducted annual inspections, during which it reviewed the quality assurance processes at the health centers, including reviewing minutes from periodic quality assurance meetings, which contain tracking information regarding any complications. DHSS also conducted random reviews of patient charts during these inspections, and that review included checking to ensure the presence of all required state reporting and forms. DHSS representatives in particular requested to see for each patient the individual abortion report required by the state. We also maintained electronic logs regarding abortion complications; however, DHSS never asked to see them. The inspection process at the Kansas City and Columbia health centers never resulted in DHSS requesting any additional reporting regarding complications.

4. DHSS has never before requested or collected individual complication reports from the Kansas City or Columbia health centers. To the best of my knowledge, DHSS has not requested or collected such reports from other entities in the state that may treat complications following abortions, and also has not published data regarding abortion complications in any annual reporting. *See Data and Statistical Reports*, Mo. Dep't. of Health & Senior Servs., <http://health.mo.gov/data/vitalstatistics/data.php> (collecting all prior vital statistics reports regarding abortion).

Dated: March 31, 2017

/s/ Laura McQuade

Laura McQuade