UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NORTHLAND FAMILY PLANNING CLINIC, INC., *et al.*,

Plaintiffs,

v.

JENNIFER M. GRANHOLM, Attorney General of the State of Michigan, *et al.*,

Defendants.
_____/

Case No. 01-70549

Honorable John Corbett O'Meara

MEMORANDUM OPINION AND ORDER DENYING DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS AND GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

This matter came before the court on Plaintiffs' May 29, 2001 motion for summary judgment and Defendants' June 26, 2001 motion for judgment on the pleadings. Response and reply briefs were filed; and oral argument was heard October 19, 2001. The court finds that the Michigan statute at issue is unconstitutionally vague for the reasons set forth below.

BACKGROUND FACTS

Plaintiffs are family planning clinics, medical centers, and a medical doctor who seek a permanent injunction against enforcement of Subsection 9 of Act No. 345 of Michigan Public Acts of 2000; Mich. Comp. Laws Ann. § 333.17015(9). Subsection 9 makes it a crime for physicians to obtain immediate payment for services that have been rendered to a patient when those services are "abortion related." Defendants are the Attorney General of the State of Michigan; the prosecuting attorneys from Oakland, Berrien, Wayne and Macomb Counties; the director of the Michigan Department of Community Health; and the chairperson of the Michigan Board of Medicine.

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Subsection 9 reads as follows: "A physician shall not require or obtain payment for an abortion related medical service to a patient who has inquired about an abortion or scheduled an abortion until the expiration of the 24-hour period required in subsection (3)." Plaintiffs also challenge, on the same grounds, the requirement in subsection (11)(c) that the acknowledgment and consent form which states:

> I certify that I have not been required to make any payments for an abortion or any abortion related medical service before the expiration of 24 hours after I received the written materials listed in paragraphs (a), (b), and (c) above, or 24 hours after the time and date listed on the confirmation form if paragraphs (a), (b), and (c) were received from the internet website described in subsection (5).

Plaintiffs argue that the term "abortion related medical services" is vague and that the delay in payment violates substantive due process and the equal protection rights of the physicians.

STANDARD OF REVIEW

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

The court must view the evidence in a light most favorable to the nonmovant as well as draw all reasonable inferences in the nonmovant's favor. See United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). The movant bears the burden of demonstrating the absence of all genuine issues of material fact. "The burden on the moving party may be discharged by 'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Once the moving party discharges that burden,

the burden shifts to the nonmoving party to set forth specific facts showing a genuine triable issue. Fed. R. Civ. P. 56(e).

To create a genuine issue of material fact, however, the nonmovant must do more than present some evidence on a disputed issue. As the United States Supreme Court stated in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986), "There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the [nonmovant's] evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (Citations omitted).

When questioned at oral argument about whether an evidentiary hearing would be necessary in this case before a decision on the motions, Defendants' counsel stated that because the vagueness, due process and equal protection challenges were all facial challenges to the statute and because the statute had not been implemented yet, the arguments present legal, not factual, issues. Transcript at 24-25, 31. Therefore, the court will rule on the motions without an evidentiary hearing.

LAW AND ANALYSIS

State statutes enjoy a presumption of constitutionality, which requires the court to construe the statute to avoid constitutional difficulty. This same principle also requires the court to give deference to the statute whenever possible. McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969). Federal courts should exercise great restraint in enjoining state laws and not substitute their own judicial policy preferences for those of elected policymakers. Only when a statute is clearly unconstitutional and/or clearly violates controlling judicial precedent should a federal court step in and enjoin a state law. Kevorkian v. Thompson, 947 F. Supp. 1152 (E.D. Mich. 1997).

Plaintiffs allege that use of the term "abortion related medical service" in Subsection 9 renders it unconstitutionally vague. Patients seek many of the same services regardless of whether they are carrying a pregnancy to term or choosing abortion. Because the Act does not provide a definition of "abortion related," it fails to give notice to both physicians and prosecutors about whether these *pregnancy-related* services are covered under the Act.

The void-for-vagueness doctrine requires a statute to: a) define the prohibited conduct with sufficient definiteness that ordinary people can understand what conduct is prohibited, and b) permit enforcement in a non-arbitrary, non-discriminatory manner. Kolendar v. Lawson, 461 U.S. 352, 357 (1983). Vague laws offend at least two fundamental values. First, they fail to provide the persons targeted by the statutes with "a reasonable opportunity to know what is prohibited so that [they] may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Second, by failing to provide explicit standards by which to assess conduct, vague laws invite arbitrary and discriminatory enforcement by police officers, prosecutors and juries. See id., at 108-09.

"[T]he degree of vagueness that the Constitution tolerates–as well as the relative importance of fair notice and fair enforcement–depends in part on the nature of the enactment." Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187, 197 (6th Cir. 1997) (citations omitted). Statutes that impose criminal penalties and lack a scienter requirement must satisfy a particularly high standard of clarity. See id.; see also Peoples Rights Org., Inc. v. City of Columbus, 152 F.3d 522, 533-34 (6th Cir. 1998). The Constitution demands the greatest clarity from a statute when "the uncertainty induced by [that] statute threatens to inhibit the exercise of constitutionally protected rights." Colautti v. Franklin, 439 U.S. 379, 391 (1979) (citations omitted). In this case Subsection 9 is a statute that both imposes

criminal penalties without a scienter requirement *and* threatens to inhibit the exercise of the constitutionally protected right to abortion.

Services such as pregnancy test, ultrasounds, gynecological examination and consultations are often sought by women who are in the process of deciding whether to carry a pregnancy to term. Because some of the women who seek these services ultimately choose to continue the pregnancy and some ultimately choose to have an abortion, abortion providers do not know whether these *pregnancy-related* services qualify as "abortion related" under the statute.

The reality of medical practice demonstrates that Subsection 9 provides no coherent guidance to physicians, or to the prosecutors seeking to enforce its provisions, about the type of conduct that it proscribes. This lack of precision in a statute that imposes criminal penalties, and does so even when physicians act in good faith, renders Subsection 9 unconstitutionally vague. Moreover, the vagueness in Subsection is especially dangerous because it threatens to chill the exercise of the right to choose. If the court were to uphold Subsection 9, Plaintiffs have declared that they would be forced to cease providing services such as pregnancy tests, ultrasounds and gynecological examinations to patients who seek them at initial visits. Burrell Dec. at ¶¶ 13-14; see also Chelian Dec. at ¶ 13; Franco Dec. at ¶ 11. However, these services are precisely the services that are needed by women who are attempting to exercise their constitutional right to decide whether to obtain an abortion. Enforcement of Subsection 9 would therefore threaten to inhibit the exercise of a constitutionally protected right.

The Supreme Court has stated that courts do not impose "impossible standards of clarity" by requiring "further precision in the statutory language" where such precision is neither "impossible [nor] impractical." Kolender, 461 U.S. at 361. In this case, the state's goal, as explained by

Defendants, was to prohibit physicians from requiring non-refundable deposits on the abortion procedure itself. The legislature quite easily could have made Subsection 9 more precise to achieve that goal.

Because the court has found Subsection 9 to be unconstitutionally vague, it need not consider Plaintiffs' due process and equal protection arguments.

ORDER

For the reasons set forth above, it is hereby **ORDERED** that Plaintiffs' May 29, 2001 motion for summary judgment is **GRANTED.**

It is further **ORDERED** that Defendants' June 26, 2001 motion for judgment on the pleadings is **DENIED.**

John Corbett O'Meara
U. S. District Judge

Dated: 2-26-02

PURSUANT TO RULE 77(d), FRCivP
COPIES MAILED TO:

Attorneys of record

ON FEB 26 2002

DEPUTY COURT CLERK