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.

Civil Action No. 01-CV-70549

Hon. John C. O'Meara

THE STATE DEFENDANTS' MOTION TO AMEND FINDINGS OR GRANT RELIEF FROM JUDGMENT

Pursuant to Fed. R. Civ. P. 52(b), 59(e), 60(b), and LR 7.1 the State Defendants request the court to amend the findings in its opinion and order dated February 26, 2002 or give them relief from judgment on the following grounds:

1. On February 26, 2002 the court issued an opinion and order upon the State Defendants' motion for judgment on the pleadings and Plaintiffs' motion for summary judgment.

2. Accompanying the opinion was a Judgment of the same date that denied the State Defendants' motion and granted summary judgment to Plaintiffs.

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3. In granting Plaintiffs' summary judgment motion the court made certain factual findings and conclusions in what was otherwise solely a legal analysis.

4. In the "Law and Analysis" section on page 5 of its opinion, the court accepted as true Plaintiffs' factual claims that the statute forces them to cease providing pregnancy tests, ultrasounds and gynecological exams, and the court concluded these are "precisely the services that are needed by women who are attempting to exercise their constitutional right. . . ." Thereafter, the court based a conclusion of law upon these factual findings.

5. The State Defendants believe these factual findings and conclusion of law are immaterial to the vagueness issue decided.

6. The State Defendants ask the court to amend the opinion to eliminate these factual findings and conclusion of law in the first and second full paragraphs on page 5, and/or permit the State Defendants to pursue discovery and evidentiary hearing into the underlying facts alleged to support Plaintiffs' factual claims and the court's factual conclusions.

7. The court's previous Scheduling Orders contemplate the possibility for this relief and reserves the partys' rights to pursue discovery necessitated by the dispositive motions decided February 26, 2002.

8. Accordingly, if the court deems the above-described factual findings and conclusion of law essential to its opinion, the State Defendants request relief from judgment, discovery pursuant to the September 25, 2001 scheduling order, and an evidentiary hearing on Plaintiffs' factual claims and the court's factual conclusions.

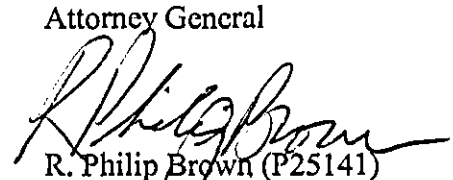
9. If the court deems the above-described factual findings and conclusion of law non-essential, the State Defendants request the opinion and order be amended by eliminating the first and second full paragraphs on page 5.

10. On March 6-7, 2002 the attorneys for each side conferred, movant disclosed the nature of the above motion and its legal basis, and movant requested but did not obtain concurrence in the relief sought.

WHEREFORE, the State Defendants request the court amend its findings or grant relief from judgment as described above.

Respectfully submitted,

JENNIFER M. GRANHOLM
Attorney General



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Dated: March 11, 2002

S:2001002290A Northland/Pleadings/mot to amend findings

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BRIEF IN SUPPORT OF STATE DEFENDANTS' MOTION TO AMEND FINDINGS OR GRANT RELIEF FROM JUDGMENT

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Dated: March 11, 2002

CONCISE STATEMENT OF ISSUES PRESENTED

1. Should the court amend its opinion and order and/or judgment by eliminating immaterial factual findings and conclusions?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Cases

BACKGROUND

The parties filed cross-motions for judgment that were heard October 19, 2001. On February 26, 2002 the court issued an opinion and order upon the State Defendants' motion for judgment on the pleadings and plaintiffs' motion for summary judgment. Accompanying the opinion was a Judgment of the same date that denied the State Defendants' motion for judgment on the pleadings and granted summary judgment to Plaintiffs.

In the "Law and Analysis" section of the opinion the court made the following findings of fact:

> 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.

The court then based a finding of law upon the foregoing facts, stating: "Enforcement of Subsection 9 would *therefore* threaten to inhibit the exercise of a constitutionally protected right." *Id.* (Emphasis supplied). For the reasons that follow, the court should eliminate the above findings of fact and conclusion of law from its opinion and order.

ARGUMENT

I.

A Determination that the Statute Burdens, Inhibits, or Chills a Woman's Right to Choose is Immaterial to the Vagueness Issue.

A vagueness challenge to statutory provisions imposing criminal sanctions attacks the validity of the statute on its face. See *Belle Maer Harbor v Charter Township of Harrison*, 170 F.3d 553, 557 (6th Cir. 1997). Here plaintiffs present a facial challenge because they brought this action before the statute was implemented. Whether a statute violates the constitutional vagueness standard in a facial challenge is a matter of law which the court should decide without reference to the statute's alleged impact upon women seeking an abortion. A vagueness challenge in this context is a legal judgment that the statute does not advise those who must follow it of the conduct that is prohibited. *Grayned v City of Rockford,* 408 U.S. 104, 108 (1972). If the statutory term is so vague that it fails to provide police, prosecutors, jurors, and judges sufficient guidance to make enforcement decisions, it fails that test whether or not it inhibits a woman's choice.

Whether the term "abortion related medical services" might embrace such services as pregnancy tests, ultrasounds, and gynecological examinations because the term is vague and undefined is independent of the so-called realities of medical practice described by the court. Who seeks such services, why they seek them, when they seek them and the decision to choose abortion or not after they seek them has nothing whatsoever to do with the salient inquiry in a facial vagueness challenge. The primary legal question involved in a vagueness challenge is if the statute gives reasonable notice of the forbidden conduct. *Evans v Kelley*, 977 F. Supp. 1283,

1304-1305 (1997). The factual findings and conclusion of law in the first and second full paragraphs on page 5 of the court's opinion and order do not help answer this question.

The only time a burden on the right to choose becomes material is when the statute is challenged under the substantive due process standard enunciated in *Planned Parenthood v Casey*, 505 U.S. 833 (1992). "Only where state regulation imposes an *undue burden* on a woman's ability to make this decision does the power of the state reach into the heart of the liberty protected by the Due Process Clause." In *Casey*, the court held: "Regulations which do no more than create a structural mechanism by which the State . . . may express profound respect for the life of the unborn are permitted; if they are not a *substantial obstacle* to the woman's exercise of the right to choose." *Id.* at 877. The statute must be a substantial obstacle for a "large fraction" of women for whom the law is relevant. *Id.* at 895. But this due process test is not relevant in a vagueness challenge, and the burden this statute might impose on a woman's right to choose is immaterial.

II.

Determination That the Statute Burdens a Woman's Right to Choose Cannot be Made Without Discovery and an Evidentiary Hearing on the Underlying Facts.

In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the U.S. Supreme Court placed upon the party *bearing the burden of proof* at trial the obligation to produce evidence refuting a motion for summary judgment. Therefore, if a vagueness challenge requires proof of any facts at all, the Plaintiffs (not the State Defendants) clearly have the burden of proof on that issue at trial. Because the State Defendants do not have the burden of proof at trial, they do not have the *Celotex* obligation to refute Plaintiffs' motion for summary judgment with evidence. Rather, if

proof of the facts are necessary for Plaintiff to prevail, the State Defendants must be permitted to conduct discovery. *Celotex* makes it clear that summary judgment must be preceded by adequate time for discovery.

Moreover, "[t]he general rule is that summary judgment is improper if the non-movant is not afforded a sufficient opportunity for discovery." *Vance v. United* States, 90 F.3d 1145, 1148 (6th Cir. 1996). And "summary judgment should not ordinarily be granted before discovery has been completed." *Smith v. Freland,* 954 F.2d 343, 348 (6th Cir. 1992); *Tarleton v. Meharry Medical College*, 717 F.2d 1523; 1535 (6th Cir. 1983). Here, the parties agreed and the court ordered 240 days for necessary discovery after the court disposed of the legal issues raised by dispositive motions. It cannot be said that the State Defendants have had sufficient opportunity for discovery on relevant factual issues, when the time provided for such discovery by the court has only just begun. Therefore, if proof of facts is necessary, the State Defendants are entitled to discovery regarding those facts, and summary judgment is not appropriate until discovery is completed.

The undue burden, substantial obstacle, and large fraction determinations require factual support at an evidentiary hearing. The *Casey* case came to the court after a trial on the merits (*Id.* at 845), the opinion discussed the trial court's findings (*Id.* at 886-887), and the court relied upon the record to document its finding of undue burden (*Id.* at 896). Therefore, before this court can conclude that the statute burdens, inhibits, or chills a woman's right to choose, it must conduct an evidentiary hearing and support its findings with facts from the record.

III.

The Court's Scheduling Orders Contemplate Discovery and the Possibility of a Trial Upon Essential Factual Issues.

The Court's April 5, 2001 Scheduling Order required either party desiring discovery to file and serve a notice of their desire after the motions and briefs were filed but before August 16, 2001. The State Defendants filed and served a Notice of Intention to Undertake Discovery on August 15, 2001. Thereafter, the court signed a Schedule for Completion of Discovery dated September 25, 2001. This order set the following schedule for:

> . . . [c]ompletion of all discovery, if any, that is still necessary after the court's disposition of the dispositive motions . . . .
>
> 1. Thirty (30) days after the court's opinion/order deciding the pending motion, the parties shall serve upon one another their statement of the remaining factual issues, if any.
>
> 2. Discovery shall be completed two hundred ten (210) days after the court's opinion/order deciding the pending motions.
>
> 3. Thereafter, the court shall set appropriate dates for hearing final motions and for trial if necessary.

Therefore, the court should not have engaged in fact-finding without permitting discovery. And the court should permit discovery and an evidentiary hearing, if necessary, upon all factual issues. The State Defendants request relief from judgment, discovery and an evidentiary hearing, if necessary, upon the court's findings and conclusions of fact if they are not eliminated from the court's opinion and order.

CONCLUSION

For the reasons stated above and in the accompanying motion, the State Defendants request the court to (1) amend its February 26, 2002 opinion and order by eliminating the first and second full paragraphs of page 5; or (2) grant relief from judgment, permit discovery pursuant to the September 25, 2001 scheduling order, and conduct an evidentiary hearing, if necessary, on Plaintiffs' factual claims and the court's factual conclusions.

Respectfully submitted,

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/

PROOF OF SERVICE

On the date below I sent by first class mail a copy of: The State Defendants' Motion to Amend Findings or Grant Relief From Judgment and Brief in Support to:

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I declare that the statements above are true to the best of information, knowledge, and belief.

Dated: March 11, 2002

Marie Parker

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