UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Northland Family Planning Clinic Inc., et al.	:	
Plaintiffs,	:	Civil Action
v.	:	No. 01-CV-70549
	:	Hon. Judge O'Meara
Jennifer M. Granholm, Attorney General of the State of Michigan, et al.,	:	
Defendants.	:	

PLAINTIFFS' BRIEF IN RESPONSE TO

STATE DEFENDANTS' MOTION

TO AMEND FINDINGS OR TO GRANT RELIEF FROM JUDGMENT

(FILED PURSUANT TO COURT ORDER DATED APRIL 16, 2002)

ORIGINAL

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65

Concise Statement of Issues Presented

The State's motion presents the following issue:

1. Should the Court amend its opinion and order and/or judgment by eliminating the first and second full paragraphs set forth on page 5 of the Court's Memorandum Opinion and Order Denying Defendants' Motion for Judgment on the Pleadings and Granting Plaintiffs' Motion for Summary Judgment?

Controlling or Most Appropriate Authority

Issue 1:

Cases

Carhart v. Stenberg, 11 F. Supp. 2d 1099, 1121 (D. Neb. 1998), *aff'd on other grounds*, 192 F.3d 1142 (8th Cir. 1999), *aff'd*, 530 U.S. 914 (2000)

Causeway Medical Suite v. Foster, 43 F. Supp. 2d 604, 616 (E.D. La. 1999), *aff'd*, 221 F.3d 811 (5th Cir. 2000)

Celotex Corp. v. Catrett, 477 U.S. 317 (1986)

Colautti v. Franklin, 439 U.S. 379, 390-91 (1979)

Evans v. Kelley, 977 F. Supp. 1283, 1311 (E.D. Mich. 1997)

Jane L. v. Bangerter, 61 F.3d 1493, 1501 (10th Cir. 1995), *rev'd and remanded on other grounds sub. nom. Leavitt v. Jane L.*, 518 U.S. 137 (1996)

Lifchez v. Hartigan, 735 F. Supp. 1361, 1363-76 (N.D. Ill.), *aff'd mem.*, 914 F.2d 260 (7th Cir. 1990)

Planned Parenthood v. Miller, 30 F.Supp.2d 1157 (S.D. Iowa 1998), *aff'd on other grounds*, 195 F.3d 386 (8th Cir. 1999), *cert. denied*, 530 U.S. 1274 (2000)

Smith v. Freland, 954 F.2d 343, 348 (6th Cir. 1992)

Tarleton v. Meharry Medical College, 717 F.2d 1523, 1535 (6th Cir. 1983)

Vance v. United States, 90 F.3d 1145, 1148 (6th Cir. 1996)

Women's Medical Prof'l Corp. v. Voinovich, 911 F. Supp. 1051, 1067 (S.D. Ohio 1995), *aff'd on other grounds*, 130 F.3d 187 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998)

Federal Statutes, Rules

Fed. R. Civ. P. 56

I. ARGUMENT

A. In a Facial Challenge, A Court May Properly Consider Facts When Resolving the Issue of Whether a Statute is Unconstitutionally Vague.

The State seems to argue that this Court's consideration of facts, such as the "realities of medical practice," in determining whether the statute is void for vagueness on its face was inappropriate, and that consideration of facts would only be appropriate in a facial challenge if the Court were to consider whether the statute posed an undue burden on the Plaintiffs' right to choose abortion. (*See* State Defs.' Br. at 2-3.) But the question of whether a statute is vague is *not* "independent of the so-called realities of medical practice described by the court," *id.* at 2, as the State claims. As this Court held,

> [t]he 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.

(Memorandum Opinion and Order, slip op. at 4 (Feb. 26, 2002); *see also* Pls.' Mem. of Law in Support of Their Mot. for Summary Judgment, served on May 25, 2001, at 8-13.) Thus, as the Tenth Circuit has stated, "testimony in the record highlights the ambiguity in [statutory] terms." *Jane L. v. Bangerter*, 61 F.3d 1493, 1501 (10th Cir. 1995) (relying on doctor's affidavit testimony in facial challenge to statute), *rev'd and remanded on other grounds sub. nom. Leavitt v. Jane L.*, 518 U.S. 137 (1996).

In order to determine whether an ordinary person can understand what conduct a statute prohibits, courts must, and routinely do, consider the ordinary meaning of statutory terms and whether those terms can be understood within the context of the conduct at issue. Thus, for example, in facial challenges to statutes banning abortion procedures, courts have found the

statutory definitions of the procedures void for vagueness based on testimony as to the meaning of terms used in the statute. *See, e.g.*, *Carhart v. Stenberg*, 11 F. Supp. 2d 1099, 1121 (D. Neb. 1998) ("a doctor of reasonable competence cannot know from a plain reading of the words what 'substantial portion' means, and, as a result, a reasonable doctor and patient cannot be expected to conform his or her conduct to Nebraska's law"), *aff'd on other grounds*, 192 F.3d 1142 (8th Cir. 1999), *aff'd*, 530 U.S. 914 (2000); *Evans v. Kelley*, 977 F. Supp. 1283, 1311 (E.D. Mich. 1997) ("In view of [doctors' testimony], the Court reaches the inescapable conclusion that the language of the definition of 'partial birth abortion' in the Michigan statute is hopelessly ambiguous and not susceptible to a reasonable understanding of its meaning."); *Women's Medical Prof'l Corp. v. Voinovich*, 911 F. Supp. 1051, 1067 (S.D. Ohio 1995) (trial court relied on testimony concerning abortion procedures to find that statute did not provide physicians with any warning as to what conduct was prohibited), *aff'd on other grounds*, 130 F.3d 187 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998). Similarly, in resolving facial challenges to bans on "fetal experimentation" statutes, courts have relied upon evidence as to doctors' understanding of the terms used in the statute in order to determine whether the statutes were vague. *See, e.g., Jane L.*, 61 F.3d at 1501 (considering doctor's affidavit testimony about possible meanings of "experimentation" in deciding that term was vague); *Lifchez v. Hartigan*, 735 F. Supp. 1361, 1363-76 (N.D. Ill.) (granting summary judgment on vagueness grounds based on consideration of how statutory term would encompass other procedures doctor performs), *aff'd mem.*, 914 F.2d 260 (7th Cir. 1990).

The State further errs in arguing that the Court's holding that "the vagueness in Subsection 9 is especially dangerous because it threatens to chill the exercise of the right to

choose," Mem. Opinion and Order, slip op. at 4, was inappropriate because "[t]he 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 [*Casey*]." (State Defs.' Br. at 3.) This is simply not true. The Supreme Court has routinely examined whether the vagueness of a statute threatens to chill the exercise of a constitutional right, and statutes that do so are given heightened scrutiny. *See, e.g.*, *Colautti v. Franklin*, 439 U.S. 379, 390-91 (1979) (statutes that fail to give fair notice or that encourage arbitrary enforcement are void for vagueness and "[t]his appears to be especially true where the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights;" citing other cases). Whether the statute violates substantive due process by imposing an undue burden on women's right to choose is an issue separate from Plaintiffs' vagueness claim, and is an issue this Court did not reach. (*See* Mem. Opinion and Order, slip op. at 2, 6.)

B. This Court Properly Granted Summary Judgment to Plaintiffs Without an Evidentiary Hearing.

The State also seems to argue that the Court cannot rely on the evidence submitted in declarations filed in support of Plaintiffs' Motion for Summary Judgment, but must instead conduct an evidentiary hearing. As this Court noted, however, Defendants' counsel agreed at oral argument that the issues presented by Plaintiffs' motion were legal in nature, and that therefore an evidentiary hearing was not necessary. (*See* Mem. Opinion and Order, slip op. at 3.) Indeed, the facts relied on by this Court, such as the fact that pregnancy tests, gynecological examination and consultations are often sought by women who are in the process of deciding whether to carry a pregnancy to term, and that some of these women decide not to have an abortion and some decide to have an abortion, are so obvious and uncontestable that this Court

could have taken judicial notice of them had Plaintiffs not provided declarations establishing them in this case. *Cf. Smith v. Freland*, 954 F.2d 343, 348 (6th Cir. 1992) (cited in State Defs.' Br. at 4) (rejecting plaintiff's claim that summary judgment should not have been granted based on new theory until she had opportunity for discovery related to that theory, where factual support for theory was "self-evident"). Moreover, the State did not dispute any of the evidence presented by Plaintiffs. Of course, Fed. R. Civ. 56 clearly allows this Court to rely on the uncontested facts presented in affidavits in support of a motion for summary judgment. Fed. R. Civ. P. 56.

The State's argument that a party must be afforded time for discovery before summary judgment, State Defs.' Br. at 3-4, is irrelevant here, given the procedural posture of this case.[1] The Complaint was served in early February 2001 and the attorneys for the State Defendants served their Appearance on or about February 22, 2001. A Scheduling Order was issued on April 25, 2001, setting forth the dates for filing of dispositive motions and providing the parties an opportunity to request discovery after all the papers in support of and opposition to the dispositive motions had been filed. (*See* Scheduling Order dated April 25, 2001.) Although the State Defendants filed a Notice of Intention to Undertake Discovery in August 2001, they did not request that hearing and resolution of the dispositive motions be postponed while they proceeded

[1] Moreover, *Celotex Corp. v. Catrett* (cited in State Defs.' Br. at 3) does not support the State's position. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (a party moving for summary judgment need not support its motion with evidentiary material negating its opponent's claim). Although it is true, under *Celotex*, that the State was not required to submit evidentiary materials in support of its motion for summary judgment, it is not true that the State could fail to dispute the evidence relied upon by Plaintiffs, have summary judgment entered against it, and then claim that it should be allowed discovery on the issues presented by Plaintiffs. *See, e.g., Vance v. United States*, 90 F.3d 1145, 1148 (6th Cir. 1996).

with any discovery.[2] Instead, after a telephonic conference between the parties and the Court's Clerk, the parties agreed upon a schedule for "completion of all discovery, if any, that is still necessary after the court's disposition of the dispositive motions now scheduled for hearing on October 19, 2001 . . . ." (*See* Schedule for Completion of Discovery, executed by parties on Sept. 19, 2001.) As the Sixth Circuit has stated, "in most instances, a post-judgment motion asserting a need for discovery will be too little, too late." *Vance v. United States*, 90 F.3d 1145, 1148 (6th Cir. 1996) (court concluded that case "present[ed] the rare exception to the rule that a party must fully inform the district court prior to its decision on a summary judgment motion of the need for additional discovery") (cited in Defs. State's Br. at 4). Here, the State Defendants had more than adequate opportunities to engage in whatever discovery they felt they needed in this case, in particular if they felt they needed discovery in order to respond to Plaintiffs' Motion for Summary Judgment.

Finally, the State's contention that the "undue burden, substantial obstacle, and large fraction determinations require factual support at an evidentiary hearing," State Defs.' Br. at 4, is both incorrect and irrelevant. Courts can and have held statutes unconstitutional using an undue burden analysis on motions for summary judgment. *See, e.g., Planned Parenthood v. Miller*, 30 F.Supp.2d 1157 (S.D. Iowa 1998) (on motion for summary judgment, holding statute banning "partial-birth abortions" void for vagueness in reliance on physicians' testimony offered through affidavits about generally accepted meaning of statutory terms), *aff'd on other grounds*, 195 F.3d

[2] Thus, *Tarleton v. Meharry Medical College* (cited in State Defs.' Br. at 4) is inapposite. In *Tarleton*, the plaintiff had filed a motion to continue discovery, objecting to unresponsive answers to interrogatories and requesting that the district court extend the time for discovery, but the district court failed to consider or rule on that motion before deciding the defendants' motion for summary judgment. *Tarleton v. Meharry Medical College*, 717 F.2d 1523, 1535 (6th Cir. 1983).

386 (8th Cir. 1999), *cert. denied*, 530 U.S. 1274 (2000); *Causeway Medical Suite v. Foster*, 43 F. Supp. 2d 604, 616 (E.D. La. 1999) (same), *aff'd*, 221 F.3d 811 (5th Cir. 2000); *see also* Fed. R. Civ. P. 56 (summary judgment appropriate if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."). Of course, this Court did not strike the statute on the basis that it places an undue burden on a woman's right to choose abortion, but rather on vagueness grounds and therefore the State's argument is irrelevant.

C. Defendants Had Adequate Opportunity for Discovery and the Scheduling Order Contemplated Resolution of this Case by the Grant of Summary Judgment.

As the State acknowledges, this Court's April 25, 2001 Scheduling Order provided that pre-trial discovery could occur after a ruling on dispositive motions if discovery was "still necessary after the court's disposition of the dispositive motions." (*See* State Defs.' Br. at 5 [quoting Schedule for Completion of Discovery].) The Scheduling Order certainly did not by its terms contemplate that if one party disagreed with the Court's ruling on the dispositive motions, that party would be entitled to discovery and an evidentiary hearing on the issue(s) resolved in that ruling. (*See also* Schedule for Completion of Discovery, executed by parties on Sept. 19, 2001 [providing schedule for "completion of all discovery, if any, that is still necessary after the court's disposition of the dispositive motions now scheduled for hearing on October 19, 2001 . . . ."].) In this case, where the Court has disposed of the final issue pending before it and granted permanent injunctive relief to Plaintiffs, precluding enforcement of Section 9 of the Act, no such discovery period is necessary.

CONCLUSION

For all of the reasons set forth above, State Defendants' Motion to Amend Findings or Grant Relief from Judgment should be denied in its entirety.

Dated: May 3, 2002

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Bebe J. Anderson, hereby certify that on this 3rd day of May, 2002, I caused to be served true and correct copies of Plaintiff's Brief in Response to State Defendants' Motion to Amend Findings or Grant Relief from Judgment (Filed Pursuant to Court Order Dated April 16, 2002) on:

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