

**IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA**

(1) NOVA HEALTH SYSTEMS, D/B/A)
REPRODUCTIVE SERVICES, on behalf of)
itself and its patients; and)
(2) LARRY A. BURNS, D.O., on behalf of)
himself and his patients,)

Plaintiffs,

v.

(3) W.A. DREW EDMONDSON, in his official)
capacity as Attorney General of Oklahoma;)
(4) TIM HARRIS, in his official capacity as)
District Attorney for Tulsa County;)
(5) GREG MASHBURN, in his official capacity)
as District Attorney for Cleveland, Garvin, and)
McClain Counties;)
(6) LYLE KELSEY, in his official capacity as)
Executive Director of the Oklahoma State)
Board of Medical Licensure and Supervision;)
and)
(7) GORDON P. LAIRD, D.O., in his official)
capacity as President of the Oklahoma State)
Board of Osteopathic Examiners,

Defendants.

PETITION

1. Plaintiffs NOVA Health Systems, d/b/a Reproductive Services (“Reproductive Services”) and Larry A. Burns, D.O., by and through their undersigned attorneys, bring this Petition against the above-named Defendants, their employees, agents, and successors in office, and in support thereof allege the following:

I. PRELIMINARY STATEMENT

2. Reproductive Services and Dr. Burns bring this action to challenge the validity of House

CV - 2010 - 533

Case No. _____

Judge **NOMA GURICH**

**FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.**

APR 27 2010

PATRICIA PRESLEY, COURT CLERK

by _____
DEPUTY

Bill 2780 (the “Act” or “H.B. 2780”)¹ under the Oklahoma Constitution. H.B. 2780 is attached hereto as Exhibit A. It was enacted on April 27, 2010 and, by virtue of an emergency clause included in the bill, took effect immediately thereafter. H.B. 2780 restricts the performance of abortions in the State of Oklahoma and burdens the free speech rights of abortion providers and their patients. In addition, the Act exposes abortion providers to an array of intimidating civil and administrative penalties to which no other health care providers in the State are exposed.

3. The statute is void-for-vagueness, constitutes an impermissible special law, and violates Plaintiffs’ rights to equal protection of the law and freedom of speech. In addition, it impermissibly burdens the fundamental rights of Plaintiffs’ patients to terminate a pregnancy and avoid unwanted speech in a private setting.

4. Plaintiffs seek declaratory and injunctive relief from these constitutional violations.

II. JURISDICTION AND VENUE

5. Jurisdiction is conferred on this Court by OKLA. CONST. art. VII, § 7(a).

6. Plaintiffs’ claims for declaratory and injunctive relief are authorized by OKLA. STAT. tit. 12, §§ 1651 and 1381 and by the general equitable powers of this Court.

7. Venue is appropriate under OKLA. STAT. tit. 12, § 133 because several Defendants have official residences in Oklahoma County.

III. THE CHALLENGED STATUTE

8. H.B. 2780 was enacted on April 27, 2010, over the veto of Governor Brad Henry.

9. The Act prohibits a woman from obtaining an abortion unless, at least an hour before the procedure, “the physician who is to perform the abortion or induce the abortion, or the certified technician working in conjunction with the physician” (1) “[p]erform[s] an obstetric ultrasound on the pregnant woman, using either a vaginal transducer or an abdominal transducer, whichever

¹ 2010 Okla. Sess. Laws ch. 36 (to be codified at OKLA. STAT. tit. 63, §§ 1-738.1A, 1-738.3d, 1-738.3e).

would display the embryo or fetus more clearly;” (2) “[p]rovide[s] a simultaneous explanation of what the ultrasound is depicting;” (3) “[d]isplay[s] the ultrasound images so that the pregnant woman may view them;” and (4) “[p]rovide[s] a medical description of the ultrasound images, which shall include the dimensions of the embryo or fetus, the presence of cardiac activity, if present and viewable, and the presence of external members and internal organs, if present and viewable.” H.B. 2780, 2010 Okla. Sess. Laws ch. 36, §§ 2(B)(1)-(4) (to be codified at OKLA. STAT. tit. 63, §§ 1-738.3d(B)(1)-(4)). The Act notes that “[n]othing in this section shall be construed to prevent a pregnant woman from averting her eyes from the ultrasound images required to be provided and reviewed with her.” H.B. 2780, 2010 Okla. Sess. Laws ch. 36, §§ 2(C) (to be codified at OKLA. STAT. tit. 63, §§ 1-738.3d(C)).

10. The physician or certified technician performing the ultrasound must also obtain a written certification of compliance from the patient and retain it in the patient’s file for a specified period of time. H.B. 2780, 2010 Okla. Sess. Laws ch. 36, §§ 2(B)(5)-(6) (to be codified at OKLA. STAT. tit. 63, §§ 1-733.3d(2)(B)(5),(6)).

11. The Act defines the term “certified technician” as “a Registered Diagnostic Medical Sonographer who is certified in obstetrics and gynecology by the American Registry for Diagnostic Medical Sonography (ARDMS), or a nurse midwife or Advance Practice Nurse Practitioner in obstetrics with certification in obstetrical ultrasonography.” H.B. 2780, 2010 Okla. Sess. Laws ch. 36, § 1(4) (to be codified at OKLA. STAT. tit. 63, §§ 1-738.1A(4)).

12. Violation of the Act carries severe penalties. An abortion provider who “knowingly or recklessly performs or attempts to perform an abortion” in violation of the Act “shall be guilty of a felony.” OKLA. STAT. tit. § 1-738.5(D).

13. In addition, an abortion provider who performs an abortion in violation of the Act “shall

be considered to have engaged in unprofessional conduct for which the provider's certificate or license to provide health care services" in Oklahoma may be suspended or revoked. H.B. 2780, 2010 Okla. Sess. Laws ch. 36, § 3(E) (to be codified at OKLA. STAT. tit. 63, § 1-738.3e(E)).

14. Furthermore, the Act authorizes a wide range of people – including not only an abortion patient, but also her spouse, parent, sibling, guardian, or current or former licensed health care provider; a district attorney with appropriate jurisdiction; and the State Attorney General – to seek an injunction against an abortion provider who “knowingly” violates H.B. 2780. H.B. 2780, 2010 Okla. Sess. Laws ch. 36, § 3(B) (to be codified at OKLA. STAT. tit. 63, § 1-738.3e(B)). Such an injunction would prohibit the abortion provider from further “performance or attempted performance of an abortion” in violation of the Act; violation of the terms of the injunction would constitute civil contempt, punishable with cumulative fines of \$10,000 for the first violation, \$50,000 for the second violation, \$100,000 for the third violation, and an amount in excess of \$100,000 for each subsequent violation “that is sufficient to deter future violations.” H.B. 2780, 2010 Okla. Sess. Laws ch. 36, §§ 3(B)-(C) (to be codified at OKLA. STAT. tit. 63, §§ 1-738.3e(3)(B)-(C)).

15. The Act also authorizes an abortion patient or, if the patient is an unemancipated minor, her parent or legal guardian, to file a civil action against an abortion provider for “any knowing or reckless” violation of the Act. H.B. 2780, 2010 Okla. Sess. Laws ch. 36, § 3(D) (to be codified at OKLA. STAT. tit. 63, § 1-738.3e(3)(D)). Such a lawsuit may seek actual and punitive damages against the abortion provider. *Id.*

16. Section 6 of the Act declares a state of emergency and provides that the Act shall take effect immediately “after its passage and approval.” H.B. 2780, 2010 Okla. Sess. Laws ch. 36, § 6.

IV. PARTIES

17. Plaintiff Reproductive Services, as part of NOVA Health Systems, is a non-profit charitable corporation that has operated a medical clinic in Tulsa, Oklahoma, since 1974. Reproductive Services provides a range of reproductive health care services, including surgical and medical abortions, contraception counseling and services, pregnancy testing, options counseling, adoption counseling, and referrals for other medical and social services, including referrals to an on-site licensed adoption agency. It is a member of the National Abortion Federation (“NAF”) and is licensed as an abortion facility by the Oklahoma State Department of Health. Reproductive Services brings claims on behalf of itself and its patients.

18. Plaintiff Larry A. Burns, D.O., is a physician who has been licensed to practice medicine in the State of Oklahoma since 1973. As part of his medical practice in Norman, Oklahoma, Dr. Burns provides first-trimester surgical and medical abortions. Dr. Burns’ office is licensed as an abortion facility by the Oklahoma State Department of Health. Dr. Burns brings claims on behalf of himself and his patients.

19. Defendant W.A. Drew Edmondson is the Attorney General of Oklahoma. He is sued in his official capacity.

20. Defendant Tim Harris is the District Attorney for Tulsa County. He is sued in his official capacity.

21. Defendant Greg Mashburn is the District Attorney for Cleveland, Garvin, and McClain Counties. He is sued in his official capacity.

22. Defendant Lyle Kelsey is the Executive Director of the Oklahoma State Board of Medical Licensure and Supervision (“State Medical Board”). He is sued in his official capacity.

23. Defendant Gordon P. Laird, D.O., is the President of the Oklahoma State Board of

Osteopathic Examiners (“State Osteopathic Board”). He is sued in his official capacity.

V. EXISTING REGULATORY FRAMEWORK

24. Prior to the enactment of H.B. 2780, Oklahoma already had in place an extensive set of laws and regulations concerning the performance of abortions, including laws intended to ensure that a woman seeking an abortion is fully informed about the procedure. For example, Oklahoma law mandates that a woman give her “voluntary and informed consent” before having an abortion. OKLA. STAT. tit. 63, § 1-738.2(A). Except in the case of a medical emergency, Oklahoma law provides that consent to an abortion is voluntary and informed if and only if, at least 24 hours prior to the performance of the procedure, the patient is told that “ultrasound imaging and heart tone monitoring that enable the pregnant woman to view her unborn child or listen to the heartbeat of the unborn child are available to the pregnant woman.” OKLA. STAT. tit. 63, § 1-738.2(B)(1)(a)(5).

25. In addition, the State Medical Board is required, on an annual basis, to publish “materials designed to inform the woman of the probable anatomical and physiological characteristics of the unborn child at two-week gestational increments from the time when a woman can be known to be pregnant to full term,” including “pictures or drawings representing the development of unborn children at two-week gestational increments, provided that the dimensions of the unborn child and shall be realistic and appropriate for the stage of pregnancy depicted.” OKLA. STAT. tit. 63, § 1-738.3(A)(2)(a)(2). The State Medical Board is also required to publish a list of public and private agencies that offer “at no cost to the pregnant woman, ultrasound imaging that enables a pregnant woman to view the unborn child.” OKLA. STAT. tit. 63, § 1-738.3(A)(1)(2). Those materials must be made available both in print form and on the Internet. OKLA. STAT. tit. 63, §§ 1-738.3(B)-(C). At least 24 hours before an abortion is

performed, an abortion provider must inform the patient of the availability of those materials.

OKLA. STAT. tit. 63, §§ 1-738.2(B)(2)(c)-(d).

26. Any physician who performs an abortion without first obtaining the voluntary and informed consent of the patient is subject to felony criminal liability and disciplinary action by the State Medical Board or the State Osteopathic Board. OKLA. STAT. tit. 63, § 1-738.5.

VI. FACTUAL ALLEGATIONS

27. In the entire State of Oklahoma, there are only three health care providers that are licensed to operate facilities where abortions are performed. Two of them are Plaintiffs in this case: Reproductive Services and Dr. Burns.

28. Reproductive Services is a nonprofit organization.

29. Two physicians perform the abortions at Reproductive Services. Those physicians divide their time between working at Reproductive Services and at their own private medical practices.

30. Although Reproductive Services has repeatedly tried to hire an additional physician, it has been unable to find another physician willing to deal with the danger, stigma, and legal burdens of being an abortion provider in Oklahoma.

31. The standard of care for abortion provision does not require the performance of a pre-abortion ultrasound if other means can be used reliably to confirm the existence of an intrauterine pregnancy and determine the gestational age of the pregnancy. Such other means may include patient history, physical examination, and biochemical testing.

32. Reproductive Services performs a pre-abortion examination of every patient seeking an abortion. The purposes of the examination are to confirm intrauterine pregnancy and determine the gestational age of the pregnancy. At Reproductive Services, the pre-abortion examination always includes an ultrasound.

33. Dr. Burns also performs pre-abortion examinations for the purposes of confirming intrauterine pregnancy and determining the gestational age of the pregnancy. At Dr. Burns' office, the pre-abortion examination does not always include an ultrasound. Dr. Burns only performs an ultrasound when, in his clinical judgment, it is indicated, or when it is requested by a patient.

34. At Reproductive Services, ultrasounds are performed by licensed practical nurses who have received on-site training in the use of both transabdominal and transvaginal ultrasound. That training consisted of a course with both didactic and clinical elements, taught by the Director of Medical Imaging Education at Red Rocks Community College in Arvada, Colorado, as well as several clinical training sessions conducted by a technologist affiliated with NAF. In addition, the nursing staff relies on the Reproductive Services physicians for advice and review of the ultrasounds performed at the clinic.

35. Neither Reproductive Services nor Dr. Burns employs anyone who is a "certified technician" within the meaning of the Act.

36. The certification process required to obtain the "certified technician" credential is lengthy, expensive, and not required by the standard of care for pre-abortion ultrasound. Licensed practical nurses do not possess the educational prerequisites to obtain the "certified technician" credential.

37. At Reproductive Services, ultrasound imaging for an abortion patient is completed before the physician who will perform the abortion arrives at the facility. Requiring the physician to perform the ultrasound imaging himself or herself, or requiring that the ultrasound imaging be performed while the physician is on-site, would drastically reduce the number of abortions that Reproductive Services could perform. Reproductive Services would not be able to meet the

demand for abortions from its patients and might not be able to remain in business.

38. Dr. Burns typically performs a pre-abortion examination of a patient immediately before commencing an abortion procedure. Requiring that an ultrasound be performed at least an hour prior to commencing an abortion procedure would limit Dr. Burns' flexibility in scheduling patients and reduce the number of abortions that he could perform.

39. Reproductive Services and Dr. Burns use both transabdominal and transvaginal ultrasound for pregnancy dating. A transabdominal ultrasound is performed by passing a small, handheld device, known as a transducer, back and forth across the patient's abdomen, while a transvaginal ultrasound is performed by placing a transducer into the patient's vagina.

40. The decision about which method of ultrasound to use for a given patient is based on the gestational age of the pregnancy and clinical judgment. In some cases, it is not possible to predict with certainty which method of ultrasound will produce the clearest image of the pregnancy.

41. It is not clear what a physician or certified technician must say about an ultrasound image to satisfy the requirements of the Act.

42. By compelling physicians and certified technicians to disregard a patient's wishes about whether to hear a description of the patient's ultrasound image or have the image thrust into her line of sight, the Act requires physicians and certified technicians to violate principles of medical ethics.

43. By compelling physicians and certified technicians to disregard a patient's wishes about whether to hear a description of the patient's ultrasound image or have the image thrust into her line of sight, the Act impairs the physician-patient relationship.

44. The Act singles out abortion providers for different and more burdensome treatment than

all other health care providers regulated by the State. Such differential treatment is not rationally related to the promotion of women’s health or any other important governmental interest.

45. By requiring ultrasound technicians at licensed abortion facilities to be “certified technicians,” the Act treats ultrasound technicians at licensed abortion facilities differently than all other ultrasound technicians who perform non-diagnostic ultrasounds on pregnant women for purposes of intrauterine pregnancy confirmation and gestational dating, including those who are identified by the State Medical Board pursuant to OKLA. STAT. tit. 63, § 1-738.3(A)(1)(2). Such differential treatment is not rationally related to the promotion of women’s health or any other important governmental interest.

46. The Act embodies sex-based stereotypes and treats women differently than men. Such differential treatment is not rationally related to the promotion of women’s health or any other important governmental interest.

47. On the same day that it enacted H.B. 2780, the State of Oklahoma enacted House Bill 2656 (“H.B. 2656”). Okla. Sess. Laws ch. 36 (to be codified at OKLA. STAT. tit. 63, § 1-741.12). H.B. 2656 precludes a woman from recovering damages based on any legal claim that “the defendant’s act or omission contributed to the mother’s not having obtained an abortion.” Okla. Sess. Laws ch. 36 (to be codified at OKLA. STAT. tit. 63, § 1-741.12(C)). It applies to situations in which a physician intentionally withholds from a pregnant woman information that the fetus she is carrying has severe developmental anomalies.

VII. CLAIMS FOR RELIEF

First Claim for Relief **(Vagueness)**

48. The allegations of paragraphs 1 through 47 are incorporated as though fully set forth herein.

49. The Act is vague in violation of OKLA. CONST. art. II, § 7 because it fails to afford a person of ordinary intelligence a reasonable opportunity to know what is prohibited by its terms.

Second Claim for Relief
(Special Law)

50. The allegations of paragraphs 1 through 47 are incorporated as though fully set forth herein.

51. The Act constitutes an impermissible special law in violation of OKLA. CONST. art. V, § 59 because it singles out less than an entire class of similarly situated persons for different treatment.

Third Claim for Relief
(Equal Protection)

52. The allegations of paragraphs 1 through 47 are incorporated as though fully set forth herein.

53. The Act violates the principle of equal protection of the laws, which is guaranteed by OKLA. CONST. art. II, § 7, by subjecting Plaintiffs to an unreasonable classification.

Fourth Claim for Relief
(Equal Protection)

54. The allegations of paragraphs 1 through 47 are incorporated as though fully set forth herein.

55. The Act violates the principle of equal protection of the laws, which is guaranteed by OKLA. CONST. art. II, § 7, by subjecting Plaintiffs' patients to discrimination on the basis of their sex.

Fifth Claim for Relief
(Free Speech)

56. The allegations of paragraphs 1 through 47 are incorporated as though fully set forth

herein.

57. The Act violates OKLA. CONST. art. II, § 22 because it requires Plaintiffs to engage in unwanted, government-mandated speech.

Sixth Claim for Relief
(Free Speech/Privacy)

58. The allegations of paragraphs 1 through 47 are incorporated as though fully set forth herein.

59. The Act violates OKLA. CONST. art. II, § 22 because it requires Plaintiff's patients to listen to unwelcome speech by the government while in a private setting.

Seventh Claim for Relief
(Right to Terminate a Pregnancy)

60. The allegations of paragraphs 1 through 47 are incorporated as though fully set forth herein.

61. The Act violates the right of Plaintiffs' patients to terminate a pregnancy, which is protected as an inherent right by OKLA. CONST. art. II, § 2 and as a fundamental right by OKLA. CONST. art. II, § 7.

VIII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

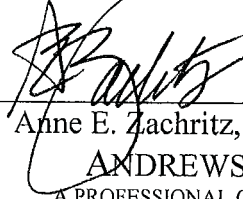
62. Issue a declaratory judgment that H.B. 2780 violates the Oklahoma Constitution and is void and of no effect; and

63. Issue permanent injunctive relief, without bond, restraining Defendants, their employees, agents, and successors in office from enforcing H.B. 2780; and

64. Grant such other and further relief as the Court may deem just and proper, including reasonable attorney's fees and costs.

Dated: April 27, 2010

Respectfully submitted,



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**Out-of-State Attorney Applications filed*

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