

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

COMPREHENSIVE HEALTH OF PLANNED)
PARENTHOOD OF KANSAS AND)
MID-MISSOURI, INC., and)
ORRIN MOORE, M.D.,)
Plaintiffs,)

CIVIL ACTION
CASE NO. 11-cv-2368 JAR/DJW

v.)

SAM BROWNBACK, Governor of the State of)
Kansas,)
ROBERT MOSER, Secretary of the Kansas)
Department of Health and Environment,)
DEREK SCHMIDT, Attorney General of the)
State of Kansas, and)
STEPHEN M. HOWE, District Attorney for)
Johnson County, Kansas, in their official)
capacities,)
Defendants.)

COMPLAINT

Plaintiffs bring this complaint against the above-named Defendants, their employees, agents and successors in office, and allege as follows:

1. This is an action pursuant to 42 U.S.C. § 1983. The State of Kansas has enacted a new law that is intended to eliminate access to abortion services in Kansas by forcing the essentially immediate and summary closing of Plaintiffs' health center that provides abortion services. The law was signed by Defendant Brownback on May 16, 2011. The law makes it a crime for Plaintiffs to provide abortions on or after July 1, 2011, without having first obtained an abortion facility license newly created by the law. This mandate applies to Plaintiffs even

though Plaintiff Comprehensive Health has been licensed by the State as an ambulatory surgical center (“ASC”) for over thirteen years.

2. The law mandates that Defendant Moser promulgate new regulations governing every aspect of Plaintiffs’ medical practice and clinic operation and with which Plaintiffs must comply in order to qualify for the abortion facility license. Pursuant to that mandate, on June 9, 2011, with no public notice or comment, Moser provided draft regulations to Plaintiffs, with notice that Plaintiff Comprehensive Health must certify compliance with the draft regulations and apply for licensure by June 17, in order to be notified on or before July 1, 2011 whether or not it qualified for the new license. Then, on June 13, Moser notified Plaintiffs that the draft regulations were being changed. And, on June 20, after Plaintiff Comprehensive Health had submitted its application on June 17 as required by Moser’s earlier letter, Moser issued new proposed temporary regulations.

3. On June 27, 2011, Moser denied Comprehensive Health’s application, in spite of the fact that Comprehensive Health complied with the overwhelming majority of the requirements in the proposed temporary regulations. Moreover, the new law authorizes Moser to waive non-compliance by a licensed ambulatory surgical center when appropriate to serve the public, provided there will be no significant adverse impact on public health. Plaintiffs requested waivers, either permanent or temporary, to allow time to comply with new requirements that it did not already meet. Moser’s letter denying the application made no mention of this request, apparently denying the request with no explanation.

4. Plaintiffs seek a judgment declaring that the law was enacted for the purpose and, as implemented by Moser, will have the effect of forcing the closure of Comprehensive Health,

in violation of Plaintiffs' rights and the rights of Plaintiffs' patients under the Fourteenth Amendment to the United States Constitution. Plaintiffs seek appropriate injunctive relief.

JURISDICTION AND VENUE

5. This Court has jurisdiction under 28 U.S.C. § 1331 because this case arises under the Constitution and laws of the United States and under 28 U.S.C. § 1343(3) because this case seeks to redress the deprivation under color of state law of rights guaranteed by the Constitution of the United States.

6. Plaintiffs' action for declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201 and 2202.

7. Venue is proper in this district under 28 U.S.C. § 1391(b)(1) because a substantial part of the events giving rise to this action occurred in this district.

PARTIES

Plaintiffs

8. Plaintiff Comprehensive Health of Planned Parenthood of Kansas and Mid-Missouri, Inc. ("Comprehensive Health") is a not-for-profit corporation, organized and existing under the laws of Kansas, with its principal place of business in Overland Park, Johnson County, Kansas. Comprehensive Health has been licensed by the State of Kansas as an ambulatory surgical center since 1997. In addition to other general reproductive health care, Comprehensive Health regularly provides more than five first trimester abortions per month, and second trimester abortions, to its patients. Comprehensive Health is affiliated with Planned Parenthood of Kansas and Mid-Missouri, and Planned Parenthood of Kansas and Mid-Missouri is an affiliate of the Planned Parenthood Federation of America. Thus, Comprehensive Health, in addition to

meeting all of the requirements necessary to be licensed in Kansas as an ambulatory surgical center, also meets all of the medical standards of the Planned Parenthood Federation.

9. Plaintiff Orrin Moore, M.D., is a Board Certified obstetrician and gynecologist licensed to practice medicine in Kansas. Dr. Moore is the Medical Director of Comprehensive Health and the primary abortion care provider at Comprehensive Health, and has served in these capacities since 2004.

10. Plaintiffs bring this action on their own behalf and on behalf of their patients who presently desire, or, in the future, may desire, abortion services in Kansas.

Defendants

11. Defendant Sam Brownback is the Governor of Kansas. Under the Kansas Constitution, the supreme executive power rests with Brownback and he is responsible for the enforcement of the laws of the state. Governor Brownback is sued in his official capacity, as are his agents and successors.

12. Defendant Robert Moser is the Secretary of the Kansas Department of Health and Environment (“KDHE”), the agency responsible for deciding applications for licensure pursuant to the Act, as well as for promulgating reasonable rules, standards, and regulations to implement the Act. Secretary Moser is sued in his official capacity, as are his agents and successors.

13. Defendant Derek Schmidt is the Attorney General of Kansas. Attorney General Schmidt is authorized to assist in the prosecution of and take over prosecutions of violations of Kansas criminal laws, upon the request of a District Attorney. Attorney General Schmidt is sued in his official capacity, as are his agents and successors.

14. Defendant Stephen M. Howe is the District Attorney for Johnson County, Kansas, where Comprehensive Health is located. District Attorney Howe is authorized to prosecute

violations of Kansas criminal laws, including violations of the Act. Mr. Howe is sued in his official capacity, as are his agents and successors.

Comprehensive Health and Provision of Abortion Services

15. Comprehensive Health is one of only three abortion providers in the entire state of Kansas. Comprehensive Health provides surgical abortions through 21 weeks and 6 days of pregnancy, as measured from the first day of the woman's last menstrual period ("LMP"). It also provides medication (*i.e.*, non-surgical) abortion through 9 weeks of pregnancy LMP.

Comprehensive Health offers abortion services five days a week. On average, Comprehensive Health provides approximately 400 abortions per month. Approximately 90% of those abortions are provided in the first trimester. Comprehensive Health does not provide abortions at or near fetal viability (the stage of pregnancy where a fetus can survive with artificial support separate from the woman).

16. Comprehensive Health has an excellent record of safely providing health care services, including abortions.

17. Because all of the abortion providers in the state of Kansas are located in the Kansas City area, women from all over the state travel to Comprehensive Health for abortion services. For some women, this can mean travelling extremely long distances, as the state spans more than 550 miles. Many of the women who seek abortions at Comprehensive Health are also indigent and receive some private financial assistance in order to help them pay for their abortion.

The Act

18. On May 16, 2011, Defendant Brownback signed into law Kansas House Substitute for Senate Bill 36 (the "Act"), which requires that any facility in which five or more

first trimester elective abortions are performed in a month, or any second or third trimester elective abortion, be licensed in accordance with the Act. Act, §§ 1(f), 2, 7. In setting this threshold, the Act makes no distinction between surgical abortion and medication abortion, which is an abortion option through nine weeks of pregnancy and requires only the ingestion of medicine and no surgery.

19. The Legislature elected to have the Act take effect upon publication in the statute books, which occurs on July 1, 2011.

20. As a result, as of July 1, 2011, it is a class A nonperson misdemeanor to perform abortions in any setting, including a licensed ambulatory surgical center, other than a facility licensed pursuant to the Act. *Id.* §§ 8(a), (c). The maximum penalty for a class A nonperson misdemeanor is one year in jail and a \$2500 fine. Kan. Stat. Ann. §§ 21-6602(a)(1), -6611(b)(1). The Act also sets out an elaborate penalty scheme for violations of any provisions of the Act or of any rules and regulations adopted thereunder. The Act establishes Class I, II, and III violations, with every day of violation constituting a separate offense. The penalties range from \$100 to \$5000, depending on the type of violation and number of prior violations. Act, §§ 6(d), (f).

21. The Act requires Moser to adopt rules and regulations for the licensure of facilities performing abortions. At a minimum, the rules and regulations are required to prescribe standards for: (1) adequate private space that is specifically designated for interviewing, counseling and medical evaluations; (2) dressing rooms for staff and patients; (3) appropriate lavatory areas; (4) areas for pre-procedure hand washing; (5) private procedure rooms; (6) adequate lighting and ventilation for abortion procedures; (7) surgical or gynecologic examination tables and other fixed equipment; (8) post-procedure recovery rooms that are

supervised, staffed and equipped to meet the patients' needs; (9) emergency exits to accommodate a stretcher or gurney; (10) areas for cleaning and sterilizing instruments; and (11) adequate areas for the secure storage of medical records and necessary equipment and supplies.

Id. § 9.

22. The Act states that any facility seeking to be licensed to perform abortions must submit an application to KDHE on forms and in the manner required by Moser. Such application is required to contain "affirmative evidence of the ability of the applicant to comply with such reasonable standards and rules and regulations" adopted pursuant the Act. After "receipt of such application and verification by [KDHE] that the applicant is in compliance with all applicable laws and rules and regulations," Moser must issue a license. *Id.* §§ 2(b), (c).

23. At the time the Legislature considered and enacted the Act, it was fully aware that there were three existing abortion providers in the state.

24. However, the Act does not expressly provide for the ability of a pre-existing abortion provider, such as Comprehensive Health, to request a temporary permit or license while KDHE considers and adopts implementing regulations. Nor does the Act expressly provide for any reasonable period in which pre-existing abortion providers can work towards compliance with newly promulgated regulations.

25. The Act does allow Moser to "make exceptions to the standards set forth in law or in rules and regulations when it is determined that the health and welfare of the community require the services of the hospital or ambulatory surgical center and that the exceptions, as granted, will have no significant adverse impact on the health, safety or welfare of the patients of such hospital or ambulatory surgical center." *Id.* § 2(g).

Past Practices for Implementing New Licensing Regulations to Existing Facilities

26. Pursuant to the Kansas Rules and Regulations Filing Act, Kan. Stat. Ann. § 77-415 *et seq.*, the standard process for adopting permanent regulations requires that an agency, among other requirements, provide 60 day notice to the public of the opportunity to comment on the proposed regulations by writing and/or at a public hearing.

27. In addition to permanent regulations, a temporary regulation may be promulgated “*if preservation of the public peace, health, safety, or welfare necessitates or makes desirable putting such rule and regulation into effect*” before a permanent regulation could take effect through the standard rulemaking procedures. *Id.* § 77-422 (emphasis added). Temporary regulations need not follow public notice, comment and hearing procedures. *Id.*

28. On information and belief, in prior instances where an act of the Legislature has required the licensure of specific types of facilities for the first time, or has required existing licensed facilities to comply with a new licensing scheme, the Legislature has allowed for the provision of a temporary license or permit to pre-existing facilities, and/or allowed pre-existing facilities a reasonable period to work towards compliance with new regulations once they are finally promulgated through a standard notice and comment process.

Moser’s Implementation of the Act

29. On May 26, 2011, KDHE notified Comprehensive Health by letter that: 1) it intended to prepare final draft regulations for distribution to clinics on or before June 13, along with applications for licensure; 2) that it was not soliciting comment on the draft regulations; 3) applications were required to be submitted by June 17; 4) inspections would have to occur between June 20 and 30; and 5) licenses would be issued to facilities in compliance with the new regulations on July 1, the effective date of the Act.

30. On June 9, 2011, Comprehensive Health received a second letter from KDHE with “a copy of the draft regulations as of [that] date” and an application form. KDHE stated that in order to be scheduled for an inspection prior to June 30, a completed application had to be submitted by June 17, and that all requirements in the legislation and “proposed regulations” must be met prior to being licensed. KDHE also stated that a decision on the application would be made “on or before July 1, 2011.” On June 13, Comprehensive Health was notified that the “draft regulations” provided on June 9 had “been reviewed by the office of the Attorney General, who has requested edits and other amendments.” The letter stated that once the regulations were “final,” a copy would be provided to Comprehensive Health. On June 17, without any further update from KDHE on the status of the regulations, Comprehensive Health submitted an application to be licensed as an abortion facility. In an attached letter, it expressed its objections “to the ‘process’ by which the Act is being implemented” with no adherence to standard rulemaking procedures.

31. In addition, pursuant to KDHE’s authority to make exceptions to the standards set forth in law or in rules and regulations under section 2(g) of the Act, Comprehensive Health formally requested an exception to any portions of the draft regulations with which it did not comply—to the extent there were any. Comprehensive Health explained that it is a licensed ASC providing services to women and men in Kansas and that “it should be apparent the health and welfare of the community requires [it to] be able to continue to do so, and doing so will not endanger the health and welfare of [its] patients.” Comprehensive Health alternatively requested a temporary waiver so that, to the extent possible and reasonable, it could take steps to address whatever shortcomings, if any, are found under the draft regulations. Comprehensive Health also notified KDHE in the letter that it has abortions scheduled early in July, and throughout the

month of July, and that a denial of a license would significantly endanger its patients' health and welfare.

32. On June 20, 2011—ten days before the effective date of the Act and after it had already submitted its application—Comprehensive Health received by fax a copy of the “proposed regulations,” which KDHE stated it “inten[ded] to have the State Rules and Regulations Board consider . . . prior to July 1 with an effective date of July 1, 2011.” The proposed temporary regulations contained a number of changes and additions from the prior “draft” regulations, including but not limited to, requiring compliance with: newly defined terms; having numerous rooms in the facility designated for specific purposes, along with square footage and temperate requirements for rooms; certification and training requirements for staff; as well as the development and implementation of certain written policies and procedures. The regulations are to be promulgated at Kan. Admin. Regs. §§ 28-34-126 to -144.

33. The proposed temporary regulations made no provision for a pre-existing abortion provider, such as Comprehensive Health, to request and apply for a temporary permit or license while the regulations undergo the standard notice, comment, and public hearing procedure. Nor do the regulations allow for any reasonable period in which a pre-existing abortion provider can come into compliance with the temporary regulations.

34. On June 21, 2011, the day immediately after receiving a copy of the proposed temporary regulations, Comprehensive Health was notified by KDHE that an inspection related to its application would take place on the following two days: June 22 and 23.

35. On June 22 and 23, 2011, three surveyors from KDHE spent over twenty hours inspecting Comprehensive Health's facility, supplies, equipment, practices, and policies and

procedures. At the time of the inspection, the regulations had not been approved by the State Rules and Regulations Board.

36. At the end of the inspection, the CEO and President of Comprehensive Health, Peter Brownlie, was provided with a survey inspection report.

37. On June 27, 2011, KDHE notified Comprehensive Health that its application for a facility license could not be “granted at this time.” The letter cited “violations” of the proposed temporary regulations that were noted in the survey inspection report. The letter advised Comprehensive Health that it could submit written credible evidence that all of the “violations” had been remedied, and could request a re-inspection. The letter continued: “A determination to grant a follow-up inspection will be made based upon [Comprehensive Health’s] credible allegation of compliance.” The “violations” noted in the survey inspection report almost all related to requirements established in the draft regulations that a facility stock supplies and have written policies and procedures for preserving the life of a newborn infant. However, Comprehensive Health does not perform abortions at or near that stage of pregnancy where a fetus may be viable. Thus, compliance with these requirements is entirely unnecessary. Nonetheless, Comprehensive Health has undertaken to comply with them. Prior to the inspection, all mandated supplies had been ordered, as was noted in the survey inspection report.

38. By the time Moser denied the Comprehensive Health application on June 27, 2011, most of the missing supplies had arrived. Those that had not arrived were expected to be delivered by the close of business on June 30. In a letter dated June 28, 2011, Comprehensive Health advised Moser of the arrival and the expected arrival of these supplies. Comprehensive Health requested a re-inspection on July 1, and renewed its request, to the extent necessary, for a waiver, or a temporary waiver in the interim.

39. At the time of the inspection, Comprehensive Health also had not completed writing the mandated policies and procedures relating to preserving the health of a newborn infant. Comprehensive Health advised the surveyors that all of these policies and procedures would be completed before July 1, 2011, which was also noted on the survey inspection report. Since the inspection—again, although these requirements are completely unnecessary—Comprehensive Health has completed all of the required policies and procedures. In its June 28 letter, Comprehensive Health advised Moser of this fact.

40. Other than supplies and policies and procedures relating to newborn infants, the remaining “violations” related to establishing policies and procedures for post-abortion procedure recovery time, follow-up contact with the patient, a requirement for a manual physical exam of a woman even if she is choosing medication abortion, one medical record-keeping requirement, and the posting of a sign with the contact information for KDHE. At the time of the inspection, Comprehensive Health advised KDHE that all of these matters would be remedied by July 1, 2011, and the inspection report notes that fact. Since the inspection, these policies and procedures have been written and the requisite sign has been posted. In its June 28 letter, Comprehensive Health advised Moser of this fact.

41. In a letter dated June 29, 2011, KDHE notified Comprehensive Health that it would conduct the requested re-inspection on June 30. However, KDHE again declined to respond to Comprehensive Health’s request for waivers of any remaining shortcomings.

Impact of the Act, Regulatory Scheme, and Licensure Denial on Plaintiffs and Their Patients

42. Moser’s denial of Comprehensive Health’s application, including Moser’s refusal to grant the requested waivers, was for the purpose of eliminating access to abortion services in Kansas.

43. Moser's denial of Comprehensive Health's application, including Moser's refusal to grant the requested waivers, will have the effect of making abortion almost completely, if not completely, unavailable in Kansas.

44. The Act, by making the provision of abortion services without a facility license a crime effective July 1, 2011, mandating that regulations be promulgated setting standards for compliance, and making no provision for an interim status for providing abortions legally while coming into compliance, was enacted for the purpose and will have the effect of making abortion almost completely, if not completely, unavailable in Kansas.

45. Moser's implementation of the Act, by circulating changing drafts of regulations, establishing completely unworkable timetables for compliance, and making no provisions for an interim status for providing abortions legally while coming into compliance, was done for the purpose and will have the effect of making abortion almost completely, if not completely, unavailable in Kansas. On information and belief, other than Plaintiffs, there are only two other publicly available abortion providers in Kansas. On information and belief, neither of those providers will have been granted a facility license prior to July 1, 2011. Plaintiffs have abortions scheduled starting on July 6, with women calling daily to arrange an appointment for an abortion. Without judicial relief, these abortions will have to be cancelled, in each instance posing risks to the health of the women involved and, for some women, posing the risk that they will not be able to obtain an abortion. Although abortion is one of the safest surgical procedures, the risks associated with abortion increase as the pregnancy advances.

46. Moreover, medication abortion is only provided through nine weeks of pregnancy. Even though this method of abortion does not involve surgery, except in very rare circumstances, the denial of Comprehensive Health's license, absent judicial relief, will prevent

women who would choose this non-surgical option for terminating their pregnancies from being able to do so.

47. Plaintiffs have no adequate remedy at law

FIRST CLAIM FOR RELIEF

48. Plaintiffs hereby reallege and incorporate by reference paragraphs 1 through 47 above.

49. The Act and Moser's implementation of the Act, including but not limited to the July 1, 2011 effective date with no provision for interim status, the temporary regulations, the process by which Comprehensive Health was required to seek and demonstrate eligibility for an abortion facility license, and Moser's denial of Comprehensive Health's application for a license, violate Plaintiffs' patients' rights of liberty and privacy under the Fourteenth Amendment to the United States Constitution, in that they have the purpose and effect of imposing a substantial obstacle on access to abortion.

SECOND CLAIM FOR RELIEF

50. Plaintiffs hereby reallege and incorporate by reference paragraphs 1 through 49 above.

51. The Act and Moser's implementation of the Act, including but not limited to the July 1, 2011 effective date with no provision for interim status, the temporary regulations, the process by which Comprehensive Health was required to seek and demonstrate eligibility for an abortion facility license, and Moser's denial of Comprehensive Health's application for a license, violate Plaintiffs' right not to be deprived of liberty and property without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

THIRD CLAIM FOR RELIEF

52. Plaintiffs hereby reallege and incorporate by reference paragraphs 1 through 51 above.

53. The Act and Moser's implementation of the Act, including but not limited to the July 1, 2011 effective date with no provision for interim status, the temporary regulations, the process by which Comprehensive Health was required to seek and demonstrate eligibility for an abortion facility license, and Moser's denial of Comprehensive Health's application for a license, violate Plaintiffs' and Plaintiffs' patients' rights to equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

FOURTH CLAIM FOR RELIEF

54. Plaintiffs hereby reallege and incorporate by reference paragraphs 1 through 53 above.

55. The Act and regulations violate Plaintiffs' patients' rights to liberty and privacy secured under the Fourteenth Amendment to the United States Constitution in that they impose burdens on the exercise of that right that are unreasonable and irrational.

FIFTH CLAIM FOR RELIEF

56. Plaintiffs hereby reallege and incorporate by reference paragraphs 1 through 55 above.

57. The Act and regulations violate Plaintiffs' patients' rights to equal protection of the laws secured under the Fourteenth Amendment to the United States Constitution in that they impose burdens on the exercise of that right that are unreasonable and irrational and not imposed on any comparable medical procedure.

NOTICE OF STATE LAW CLAIMS

58. Defendants' actions are also illegal and unconstitutional under various provisions of state law. Plaintiffs are foreclosed from bringing these claims in this Court pursuant to the Eleventh Amendment to the United States Constitution. Plaintiffs cannot assert these claims in this Court; but Plaintiffs are not waiving them. These claims include, but are not limited to, that Moser's implementation of the Act through the adoption of temporary regulations is in violation of the Kansas Rules and Regulations Filing Act, Kan. Stat. Ann. § 77-415 *et seq.*

WHEREFORE, Plaintiffs request that this Court:

1. Grant Plaintiffs a judgment declaring that the Act as implemented by Defendant Moser violates rights secured to Plaintiffs' patients by the Fourteenth Amendment to the United States Constitution;

2. Grant Plaintiffs a judgment declaring that the Act as implemented by Defendant Moser violates rights secured to Plaintiffs by the Fourteenth Amendment to the United States Constitution;

3. Grant Plaintiffs immediate injunctive relief and, to the extent necessary, final injunctive relief enjoining Defendants from enforcing any provision of the Act against Plaintiffs until such time that Defendants have implemented the Act in a way that does not violate the rights of Plaintiffs;

4. Grant Plaintiffs immediate and final injunctive relief enjoining Defendants from enforcing any provision of the Act against Plaintiffs;

5. Grant Plaintiffs attorneys' fees, costs and expenses pursuant to 42 U.S.C. § 1988;
and

6. Grant such further relief as this Court deems equitable and just under the circumstances.

Respectfully submitted, June 30, 2011

s/Lee Thompson

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**Application for Admission Pro Hac Vice
Forthcoming*

DESIGNATION OF PLACE OF TRIAL

Plaintiff designates Kansas City, Kansas as the place of trial.