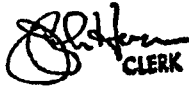


IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

FILED
JAN 22 2002

CLERK

PLANNED PARENTHOOD OF)
MINNESOTA/SOUTH DAKOTA)
and PETER D'ASCOLI, M.D.,)
)
Plaintiffs,)
)
vs.)
)
WILLIAM J. JANKLOW, Governor,)
and MARK BARNETT, Attorney General,)
in their official capacities,)
)
Defendants.)

Civil Case No. *02-4009*
COMPLAINT

I. NATURE OF THE ACTION

1. This action is brought pursuant to 42 U.S.C. § 1983 to enjoin the enforcement of two provisions of South Dakota law: (1) S.D. Codified Laws § 34-23A-4, mandating that abortions performed following the twelfth week of pregnancy and through the twenty-fourth week of pregnancy be performed in a hospital; and (2) S.D. Codified Laws § 22-17-5, which provides that “[a]ny person who performs, procures or advises an abortion other than authorized by chapter 34-23A is guilty of a Class 6 felony” (collectively hereinafter “the challenged provisions”). Plaintiffs seek declaratory and injunctive relief against the challenged provisions because they violate the privacy and due process rights of plaintiffs and their patients as guaranteed by the fourteenth amendment to the United States Constitution.

2. Both the United States Supreme Court and the Eighth Circuit Court of Appeals have struck down as unconstitutional laws virtually identical to South Dakota’s hospitalization requirement. See City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983);

Reproductive Health Services v. Webster, 851 F.2d 1071, 1073-74 (8th Cir. 1988). The Eighth Circuit has also struck down as unconstitutional another effort by South Dakota to impose strict liability on physicians' medical judgments about the provision of abortions. See Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452 (8th Cir. 1995); see also Colautti v. Franklin, 439 U.S. 379 (1979).

3. The challenged provisions impose irreparable harm on women needing abortions in South Dakota and on plaintiffs.

II. JURISDICTION AND VENUE

4. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343. Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202.

5. Venue is proper in the District of South Dakota, Southern Division, pursuant to 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to plaintiffs' claims occur therein.

III. THE PARTIES

A. Plaintiffs

6. Plaintiff Planned Parenthood of Minnesota/South Dakota (hereafter "Planned Parenthood") is a not-for-profit Minnesota corporation registered as a foreign corporation doing business in South Dakota. Planned Parenthood operates two medical clinics in South Dakota: one in Sioux Falls and the other in Rapid City. Planned Parenthood provides reproductive health care services to more than 55,000 patients a year, including approximately 3,200 patients at its South Dakota clinics. Planned Parenthood's services include physical exams, contraception and contraceptive counseling, screening and treatment for cervical and breast cancer, testing for HIV

and sexually transmitted infections, and pregnancy testing and counseling. Planned Parenthood's services also include requests for information about and referrals for abortions. At Planned Parenthood's Sioux Falls clinic, abortions are performed through thirteen (13) completed weeks of pregnancy as measured from the first day of the woman's last menstrual period ("LMP"). Planned Parenthood brings this action on its own behalf and on behalf of its patients who presently or in the future desire, or may desire, abortion services.

7. Plaintiff Peter D'Ascoli, M.D., is a Board Certified obstetrician and gynecologist licensed to practice medicine in both Minnesota and South Dakota. He is the Medical Director of Planned Parenthood. As part of his responsibilities as Medical Director, he provides an array of medical services at Planned Parenthood's Sioux Falls clinic, including abortions through thirteen (13) completed weeks of pregnancy LMP. Dr. D'Ascoli brings this action on his own behalf and on behalf of his patients, who presently or in the future desire, or may desire, abortion services.

B. Defendants

8. Defendant William J. Janklow is the Governor of the State of South Dakota. He is responsible, under South Dakota law, to "see that the laws of the state are faithfully and impartially executed." S.D. Codified Laws Ann. § 1-7-1; S.D. Const. Art. IV, Sec. 3. He is charged with the enforcement of the challenged provisions. Defendant Janklow is sued in his official capacity as Governor of the State of South Dakota.

9. Mark Barnett is the Attorney General of the State of South Dakota. He is the chief law enforcement officer of the State of South Dakota and, when the welfare of the state so demands, has the obligation to prosecute any matter in which the state may be interested.

Pursuant to South Dakota law, he also exercises supervision over the state's attorneys. S.D. Codified Laws Ann. § 1-11-1. Defendant Barnett is sued in his official capacity.

IV. STATUTORY FRAMEWORK

A. The Hospitalization Requirement

10. Under South Dakota law:

An abortion may be performed following the twelfth week of pregnancy and through the twenty-fourth week of pregnancy by a physician only in a hospital licensed under the provisions of chapter 34-12 or in a hospital operated by the United States, this state, or any department, agency or political subdivision of either or in the case of hospital facilities not being available, in the licensed physician's medical clinic or office of practice subject to the requirements of § 34-23A-6.

S.D. Codified Laws Ann. § 34-23A-4.

11. The length of a pregnancy can be measured in two different ways. One measurement dates the pregnancy from the first day of the woman's last menstrual period ("LMP"). The other measurement dates the pregnancy from fertilization. This measurement is two weeks less than LMP. Section 34-23A-4 does not state which measurement it is using for its 12 week cut-off for abortions performed at outpatient clinics.

12. If there are no hospital facilities "available," then South Dakota law requires that abortions performed following the twelfth week of pregnancy be performed:

in a facility which has a blood bank or a sufficient supply of blood immediately available and such facilities shall provide for Rhesus factor (Rh) testing and Rhogam, Gammulin or any other product of equivalency inoculations shall be required for women undergoing abortion who have the Rh-negative factor.

S.D. Codified Laws Ann. § 34-23A-6.

B. Strict Liability

13. “Any person who performs, procures or advises an abortion other than authorized by chapter 34-23A is guilty of a Class 6 felony.” S.D. Codified Laws Ann. § 22-17-5. This criminal provision imposes strict liability on the physician regardless of the reasonableness of his professional judgment. Class 6 felonies are punishable by two years in jail, a \$2,000 fine, or both. S.D. Codified Laws Ann. § 22-6-1. Conviction of a violation of the challenged provisions constitutes unprofessional and dishonorable conduct, and is grounds for cancellation, revocation, limitation or suspension of the physician’s license to practice medicine. S.D. Codified Laws Ann. §§ 36-4-29, 36-4-30(6).

C. Reporting Requirements

14. South Dakota law requires that for each abortion performed, the physician must report, to the State, the approximate gestational age, in weeks, of the fetus. S.D. Codified Laws Ann. § 34-23A-34. “Any person who knowingly or recklessly fails to submit” such a report or “submits false information” is guilty of a Class 2 misdemeanor. S.D. Codified Laws Ann. § 34-23A-42. Class 2 misdemeanors are punishable by 30 days in jail, a \$200 fine, or both. S.D. Codified Laws Ann. § 22-6-2.

V. FACTUAL ALLEGATIONS

A. The Hospitalization Requirement

15. Planned Parenthood’s Sioux Falls clinic is the only outpatient clinic providing abortions in the state of South Dakota. At its Sioux Falls clinic, Planned Parenthood provides abortions for women from all over the state of South Dakota and from several surrounding states, including Minnesota, Iowa, North Dakota, and Nebraska. It is not uncommon for Planned

Parenthood's patients to travel as much as 300 or 400 miles each way to Sioux Falls to obtain an abortion. An abortion at Planned Parenthood costs between \$400 and \$450.

16. A South Dakota woman who is unable to secure an abortion at Planned Parenthood must travel long distances out of state to obtain such medical care.

17. In South Dakota, abortions are virtually unavailable in hospitals. There is only one hospital – Sioux Valley Hospital – that has reported to the State that abortions have been performed at their facilities. Sioux Valley Hospital will only allow abortions under very limited circumstances, *i.e.*, when the woman's life or health would be significantly endangered by continuing the pregnancy, or when the fetus appears to have serious and uncorrectable medical conditions or genetic disorders.

18. Even if a woman were able to find a hospital in South Dakota that was willing to allow an abortion, the fee, which can easily run as much as \$2,000 or \$3,000 – more than five times the amount charged by Planned Parenthood – is out of reach for most women.

19. South Dakota's hospitalization requirement serves no medical purpose whatsoever. Abortion is an extremely safe surgical procedure; it is safer than a penicillin shot. United States government data shows that there is no increased complication rate for abortion performed during the second trimester of pregnancy in out-patient facilities as compared to hospitals. Even in 1983, before the significant advances in abortion practice that have occurred since that time, medical evidence established that abortions could be performed safely in appropriate non-hospital settings through at least 18 weeks of pregnancy. Akron, 462 U.S. at 436-37 (citing inter alia American Public Health Ass'n Recommended Program Guide for Abortion Services (Revised 1979), 70 Am. J. Public Health 652, 654 (1980) and American

College of Obstetricians and Gynecologists, Standards for Obstetric-Gynecologic Services 54 (5th ed. 1982)); Webster, 851 F.2d at 1074.

20. Planned Parenthood's Sioux Falls clinic does not meet the "blood bank" requirements of South Dakota Codified Laws § 34-23A-6.

21. Compliance with the "blood bank" requirements would be medically unwise and unnecessary. The instance of an abortion complication requiring a blood transfusion or other emergency medical care is extremely rare. If such a complication were to occur, Planned Parenthood would transfer the patient to the Sioux Valley Hospital, which is located only a short distance from Planned Parenthood's clinic and where plaintiffs have made arrangement for patients to be transferred when necessary.

22. Compliance with the "blood bank" requirements would also be extremely expensive and wasteful. Large amount of blood would have to be obtained on an ongoing basis; equipment would have to be purchased to store the blood; staff would have to be employed for purposes of transfusing the blood; and multiple other steps would have to be taken to comply with applicable federal regulations and accepted standards for blood banking.

B. Strict Liability

23. The South Dakota law improperly imposes strict criminal liability on a physician. Under the challenged provisions, a physician may be convicted of a felony even if he in good faith believed prior to performing an abortion that the gestational age of the fetus was earlier than the 12 week cut-off imposed by South Dakota law.

24. There are numerous ways to determine gestational age and no one of them provides a precise measurement. Gestational age may be determined, prior to an abortion,

according to the woman's report of the first day of her last menstrual period, from a pelvic examination, and/or from an ultrasound. Each of these methods has a margin of error of at least as much as plus or minus eight days for gestations of approximately 12 to 14 weeks, and often these methods can be off by as much as four weeks.

25. Following an abortion, gestational age may be determined by examination of the fetal tissue. This method is also an estimate and does not provide a precise measurement of gestational age.

C. Impact On Women And The Provision Of Abortions

26. Because the South Dakota law does not allow a physician to rely on his clinical judgment in assessing gestational age prior to performing an abortion, it will force physicians to steer wide of the 12 week cut-off in order to avoid the risk of being prosecuted. Physicians, therefore, will stop performing abortions for women with a gestational age approaching the 12 week cut-off.

27. Plaintiffs' patients will be irreparably harmed. They will be forced to travel out of state for abortions that could be safely performed at the Planned Parenthood clinic. This travel will increase the cost to the woman and delay the procedure.

28. Any delay in obtaining abortion is significant because gestational age is an important determinant of medical risk. Although abortion is one of the safest surgical procedures, both the morbidity (risk of major complications) and mortality (risk of death) rates for abortion increase as the pregnancy advances through the second trimester.

29. Therefore, the delay that will be imposed by the challenged provisions will increase the risk to the woman's health. Delay will also increase the cost of the procedure.

30. For many women, the increased cost will place the abortion out of financial reach; for other women, the combined impact of the increased cost and the travel out-of-state will also make it impossible to obtain an abortion.

31. The challenged provisions “place[] a significant obstacle in the path of women seeking an abortion.” See Akron, 462 U.S. at 434 (finding city’s hospitalization requirement unconstitutional). The challenged provisions impede the ability of women to exercise their right to terminate a pregnancy without furthering any legitimate, substantial, or compelling state interest.

CLAIMS FOR RELIEF

COUNT I – RIGHT TO DUE PROCESS OF LAW

32. Plaintiffs hereby reaffirm and reallege each and every allegation made in ¶¶1-31 above as if set forth fully herein.

33. The challenged provisions violate the rights of plaintiffs’ patients to privacy as guaranteed by the fourteenth amendment to the United States Constitution by requiring abortions performed following the twelfth week of pregnancy to be performed in a hospital, and by imposing strict liability on a physician.

COUNT II – RIGHT TO DUE PROCESS OF LAW

34. Plaintiffs hereby reaffirm and reallege each and every allegation made in ¶¶1-33 above as if set forth fully herein.

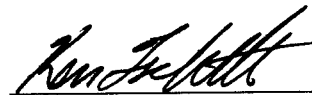
35. The challenged provisions violate the rights of plaintiffs to due process as guaranteed by the fourteenth amendment to the United States Constitution by imposing strict liability.

WHEREFORE, plaintiffs request that this Court:

1. Issue a declaratory judgment that S.D. Codified Laws § 34-23A-4, which mandates that abortions performed following the twelfth week of pregnancy and through the twenty-fourth week of pregnancy be performed in a hospital, violates the rights of plaintiffs' patients as protected by the fourteenth amendment to the United States Constitution and is therefore void and of no effect;
2. Issue a declaratory judgment that S.D. Codified Laws § 22-17-5, which imposes strict liability on individuals who perform, procure, or advise abortions in violation of Chapter 34-23A, violates the rights of plaintiffs and their patients as protected by the fourteenth amendment to the United States Constitution and is therefore void and of no effect;
3. Issue preliminary and permanent injunctive relief, without bond, restraining the enforcement, operation, and execution of South Dakota Codified Laws §§ 22-17-5 and 34-23A-4 by enjoining defendants, their agents, employees, appointees or successors from enforcing, threatening to enforce, or otherwise applying these provisions.
4. Grant plaintiffs attorneys' fees, costs and expenses pursuant to 42 U.S.C. § 1988; and
5. Grant such further relief as this Court deems just and proper.

Dated: January 22, 2002

Respectfully submitted,



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