UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

U.S. DIST. COURT CLERK
EAST DIST. MICH.
DETROIT
'01 MAY 29 AM 1:29
FILED

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

ORIGINAL

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs, by and through their undersigned attorneys, hereby move this Court for summary judgment, pursuant to Fed. R. Civ. P. 56, on their claim that Subsection 9 of Act No. 345 of the Michigan Public Acts of 2000, to be codified at M.C.L. § 333.17015 ("the Act"), is unconstitutional. Plaintiffs seek summary judgment on the grounds that Subsection 9 of the Act is unconstitutionally vague and therefore violates the due process clause of the United States Constitution. In the alternative, Plaintiffs also seek summary judgment on the grounds that Subsection 9 of the Act violates the equal protection clause of the United States Constitution and violates physicians' substantive due process rights.

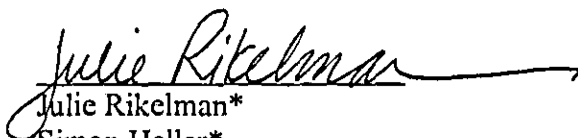
This motion is made upon the accompanying Memorandum of Law and Declarations of Anise Burrell and Anthony Johnson, D.O., and upon the Declarations of Renee Chelian and Carmen Franco, previously filed with this Court in support of Plaintiffs' motion for a preliminary injunction.

30

WHEREFORE Plaintiffs respectfully request that this Court grant their motion for summary judgment; declare Subsection 9 of the Act unconstitutional; and issue a permanent injunction prohibiting the defendants, and their agents and successors in office, from enforcing Subsection 9 of Act No. 345 of the Michigan Public Acts of 2000.

Dated: May 25, 2001

Respectfully submitted,



Julie Rikelman*
Simon Heller*
The Center for Reproductive Law & Policy
120 Wall Street, 14th Floor
New York, NY 10005
(917) 637-3600
Lead Attorneys for Plaintiffs
*Pending Admission

David A. Nacht
Bar Number P47034
LAW OFFICE OF DAVID A. NACHT
201 South Main, Suite 1000
Ann Arbor, MI 48104
(734) 663-7550

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

U.S. DIST. COURT CLERK
EAST DIST. MICH.
DETROIT
'01 MAY 29 AM 1:29
FILED

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. Judge O'Meara

ORIGINAL

DECLARATION OF ANTHONY JOHNSON, D.O..

ANTHONY JOHNSON, D.O., declares and states the following:

1. I am the Director of the Division of Reproductive Genetics at Hutzel Hospital, and a board-certified physician in obstetrics and gynecology, maternal-fetal medicine and clinical genetics. Currently, approximately ninety percent (90%) of my clinical practice involves prenatal diagnosis for pregnancies at risk for genetic and fetal anomalies, and collectively the other 10 percent (10%) pertains to issues of recurrent pregnancy loss, infertility, preconceptual counseling or paternity. As part of my practice, I perform prostaglandin and surgical therapeutic abortions in cases of fetal anomalies and known genetic disorders. In my role as Director of the Division of Reproductive Genetics, I conduct or supervise approximately 2,500 patient visits per year. A copy of my

curriculum vitae, which fully describes my education and professional experience, is attached hereto as Exhibit A.

2. As the Director of the Division of Reproductive Genetics, I am familiar with our billing policies. From my years of experience as a physician, I am also generally familiar with the billing practices of the medical profession. Based on this knowledge and experience, I submit this declaration in support of Plaintiffs' motion for summary judgment against enforcement of certain provisions in Act No. 345 of the Michigan Public Acts of 2000 ("the Act").

3. It is my understanding that the Act prohibits physicians from providing abortions unless they, or other staff, have provided the pregnant woman with certain state-mandated information at least 24 hours prior to the abortion. A physician who is found to have violated the Act is subject to loss of his or her license to practice medicine, and to the imposition of fines of an unspecified amount. Physicians are also criminally liable under the Act. As a physician who provides abortions, I could be criminally liable if I were found not to have abided by the terms of the Act.

4. It is also my understanding that the Act includes a provision that prohibits physicians from obtaining payment for any "abortion related medical service" prior to the expiration of the 24-hour period. See Act No. 345 § 17015(9). If this provision were to apply to consultations and other services provided to women who are trying to decide whether to terminate their pregnancies, then my current billing practices would violate the Act.

5. It is my practice, as well as the practice of the medical profession in general, to require payment for services at the time that those services are rendered. It is my opinion that requesting a patient to pay for services that have actually been provided does not influence that patient's later decisions about his or her medical care.

6. For instance, I recently saw two couples in consultation where both had a fetus that had been diagnosed with spina bifida, a non-lethal fetal anomaly. The gestational ages were comparable, 18 and 20 weeks. The couples came to me to discuss their options on how to proceed with the pregnancy. In order to determine the extent to which the fetus's health was compromised, I took a series of ultrasounds. I then discussed the options available to these couples: expectant management with the anticipation of carrying the pregnancy to term to take the baby home after postnatal surgical repair; the same but with the option of adoption; fetal surgery; and the state-mandated abortion information. In this consultation, as in all consultations that I provide, my goal was to present the couple with all of the information that they needed to make an informed decision; my goal was not to convince them to choose one option over the other. At all times, counseling is non-directive.

7. Each consultation required 1.5 hours of my time, as well as the cost of several ultrasounds. Each couple was expected to pay for these services at that time and each did. I do not believe that requesting prompt payment in any way influenced the couples' decision-making. In fact, one of the couples elected to proceed with *in utero* fetal surgery only after a series of phone calls between my office, consultations with Pediatric

Neurosurgery, and discussions with selective Fetal Therapy Center. The other couple still has not reached a final decision on how to proceed with the pregnancy.

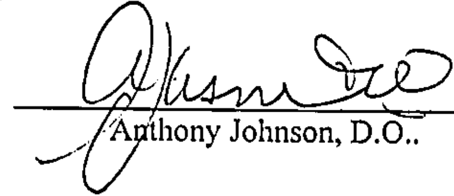
8. I also provide consultations, and expect prompt payment for consultative services, in situations that do not involve abortion. For instance, I recently met with a young patient whose maternal serum screening (MMS) test indicated that the risk the fetus was affected with Down syndrome was high enough to consider further prenatal testing. MSS is a test that is routinely offered in the second trimester of pregnancy to all women as a means of detecting pregnancies at risk for certain fetal anomalies. The goal of the consultation was to explain to the patient what this blood testing does and does not show, and to discuss what its results meant for her and her pregnancy. During this meeting, I discussed with the patient what, if any, diagnostic procedures she may want to undergo in order to provide herself with peace of mind about her fetus's health. The diagnostic procedures available to this patient would include ultrasounds and amniocentesis. I spent 45 minutes with this patient discussing her options. Again, I do not believe that requiring her to provide prompt payment for this consultation influenced her decision about whether she wanted to undergo further testing.

9. In sum, I believe that the Act's requirement that physicians be delayed in receiving payment for services that they have actually provided is an unjustified intrusion into medical practice and is prejudicial.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: Detroit, Michigan

May 23, 2001



Anthony Johnson, D.O..

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

'01 MAY 29 PM 1:29
FILED

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. Judge O'Meara

ORIGINAL

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF

THEIR MOTION FOR SUMMARY JUDGMENT

Julie Rikelman*
Simon Heller*
The Center for Reproductive Law & Policy
120 Wall Street, 14th Floor
New York, NY 10005
(917) 637-3600
Lead Attorneys for Plaintiffs
*Pending Admission

David A. Nacht
Bar Number P47034
LAW OFFICE OF DAVID A. NACHT
201 South Main, Suite 1000
Ann Arbor, MI 48104
(734) 663-7550

I. INTRODUCTION

Plaintiffs seek a permanent injunction against enforcement of Subsection 9 of Act No. 345 of Michigan Public Acts of 2000 ("the Act"), which subjects physicians to vague restrictions on pain of criminal penalties. Subsection 9 makes it a crime for physicians to obtain prompt payment for services that *they have actually rendered* when those services are "abortion related." At the same time, Subsection 9 fails to define what services qualify as "abortion related." Because women who choose to carry to term seek many of the same services as women who choose abortion, the term "abortion related" has no fixed medical meaning. Physicians and their staff are therefore left to guess which services are covered by the Act and how they can comply with its terms. The lack of clarity in Subsection 9 is also an invitation to arbitrary enforcement by zealous prosecutors and will make it difficult for physicians to continue providing needed services to their patients. Therefore, Subsection 9 is unconstitutionally vague and should be struck by this Court.

A. Statement of Issues Presented

Plaintiffs' motion presents the following issues:

1. Whether Subsection 9 is unconstitutionally vague because it fails to provide physicians with notice of the conduct that is proscribed and subjects them to arbitrary enforcement?

2. Whether Subsection 9 violates physicians' and patients' rights to equal protection of the laws because it singles out abortion providers for unique burdens without serving even legitimate state interests?

3. Whether Subsection 9 deprives physicians of property without due process of law by prohibiting them from obtaining payment for medical services that they have provided?

B. Authority In Support of Relief Sought

Issue 1 Stenberg v. Carhart, 120 S.Ct. 2597 (2000); Planned Parenthood v. Casey, 505 U.S. 833 (1992); Colautti v. Franklin, 439 U.S. 379 (1979); Grayned v. City of Rockford, 408 U.S. 104 (1972); Peoples Rights Org. v. City of Columbus, 152 F.2d 522 (6th Cir. 1998); Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187 (6th Cir. 1997); Eubanks v. Wilkinson, 937 F.2d 1118 (6th Cir. 1991).

Issue 2 Stenberg v. Carhart, 120 S. Ct. 2597 (2000); Saenz v. Roe, 526 U.S. 489 (1999); United States v. Virginia, 518 U.S. 515 (1996); Romer v. Evans, 517 U.S. 620 (1996); J.E.B. v. Alabama, 511 U.S. 127 (1994); Planned Parenthood v. Casey, 505 U.S. 833 (1992); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980); Personnel Administrator of Mass. v. Feeney, 442 U.S. 256 (1979); Roe v. Wade, 410 U.S. 113 (1973); Lindsey v. Normet, 405 U.S. 56 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969); Williams v. Rhodes, 393 U.S. 23 (1968); Loving v. Virginia, 388 U.S. 1 (1967); Skinner v. Oklahoma, 316 U.S. 535 (1942); Peoples Rights Organization v. City of Columbus, 152 F.3d 522 (6th Cir. 1998); Mahoning Women's Ctr. v. Hunter, 610 F.2d 456 (6th Cir. 1979), vacated on other grounds, 447 U.S. 918 (1980); Community-Service Broad. of Mid-America, Inc. v. FCC, 593 F.2d 1102 (D.C. Cir. 1978); United States v. Craven, 478 F.2d. 1329 (6th Cir. 1973).

Issue 3 Pearson v. City of Grand Blanc, 961 F.2d 1211 (6th Cir. 1992).

II. PROCEDURAL BACKGROUND AND STATUTORY FRAMEWORK

The Act amends a pre-existing Michigan statute that prohibits women from exercising their constitutional right to choose abortion unless, at least 24 hours prior to the procedure, a physician or other medical staff provides the woman with certain state-mandated information. Plaintiffs originally sought a preliminary injunction against the Act's enforcement because, *inter alia*, the amendments included in the Act banned medical abortions, made all abortions more dangerous for the pregnant woman, and failed to include a meaningful medical emergency exception. Defendants agreed to a settlement of Plaintiffs' claims that cured these constitutional

deficiencies in the Act. But there remains one issue for this Court to resolve on summary judgment: the constitutionality of the Act's Subsection 9.[1]

Subsection 9 prohibits physicians from obtaining payment before the expiration of the 24-hour waiting period required by the Act for an "abortion related medical service" provided to a patient who has "inquired about" or scheduled an abortion. See Act No. 345, § 17015(9).[2] The Act does not provide any definition of what medical services qualify as "abortion related." Id.

Physicians and their staff are subject to civil and criminal penalties if they are found to have violated Subsection 9. The civil penalties include licensure sanctions, such as revocation and suspension of a physician's license to practice medicine, and fines. See M.C.L. §§ 333.16221(l) & 16266. Importantly, there is no limitation on the amount of the fine that may be imposed. See id. A "person who violates or aids or abets another in the violation of" the Act is also guilty of a misdemeanor. M.C.L. § 333.16229. Such a misdemeanor "is punishable as follows: (a) for the first offense, imprisonment for not more than 90 days, or a fine of not more than $100.00, or both; (b) For the second or subsequent offense, by imprisonment for not less than 90 days nor more than 6 months, or a fine of not less than $200.00 nor more than $500.00 or both." Id.

Because Subsection 9 simply provides that a physician "shall not" obtain payment for abortion related services, it does not contain an explicit scienter requirement. See Peoples Rights

---

[1] In the parties' Settlement Agreement, Defendants agreed not to enforce Subsection 9 pending this Court's resolution of Plaintiffs' challenge to its constitutionality. Therefore, Plaintiffs are now moving for a permanent, rather than a preliminary, injunction of Subsection 9.

[2] Subsection 9 provides: "A physician shall not require or obtain payment for an abortion related medical service provided to a patient who has inquired about an abortion or scheduled an abortion until the expiration of the 24-hour period required in subsection (3)."

Org. v. City of Columbus, 152 F.3d 522, 534 (6th Cir. 1998). There is also no scienter requirement elsewhere in the Act that would apply to Subsection 9. Therefore, even physicians and clinic staff who inadvertently violate Subsection 9 will be civilly and criminally liable.

III. STATEMENT OF FACTS

Plaintiffs are clinics and one physician who provide a variety of reproductive services, including abortions, to their patients. Burrell Dec. at ¶ 2; Chelian Dec. at ¶ 2 (submitted with Plaintiffs' Motion for Preliminary Injunction); Franco Dec. at ¶ 2 (submitted with Plaintiffs' Motion for Preliminary Injunction); Amended Complaint at ¶¶ 12-15. Plaintiff Summit Medical Center, in conjunction with Hutzel Hospital, also provides a full range of pre-natal services to its patients who choose to carry to term. Burrell Dec. at ¶ 2. Plaintiffs bring this challenge to Subsection 9 on behalf of themselves, their staff and their patients. Amended Complaint ¶¶ 12-15.

Patients who are pregnant often seek services from physicians because they are unsure about how to proceed with their pregnancy. Burrell Dec. at ¶ 9; Johnson Dec. at ¶ 6. For instance, patients may come to a clinic or to their physician's office to obtain an ultrasound, which will reveal the gestational age of their fetus, in order to help them decide whether to continue or to terminate the pregnancy. Burrell Dec. at ¶¶ 8-9. Patients who are not certain that they are pregnant may ask for a pregnancy test or gynecological examination as well as an ultrasound. Burrell Dec. at ¶ 9. If the patient continues to express interest in obtaining an abortion after receiving these services, clinic staff will provide the patient with the state-mandated 24-hour information at this initial visit. Burrell Dec. at ¶ 9.

In certain circumstances, a patient may need significant time to consult with her physician in order to make an informed choice about her pregnancy. For example, Plaintiffs' expert Dr. Anthony Johnson, who is the Director of the Division of Reproductive Genetics at Hutzel Hospital, recently consulted with two couples, both of whom had a fetus that had been diagnosed with spina bifida, a non-lethal fetal anomaly. Johnson Dec. ¶ 6. In order to determine the extent to which the fetus's health was compromised, Dr. Johnson took a series of ultrasounds for each couple. Id. Then, during the course of 1.5 hour meetings with each couple, he discussed the couples' options, which included carrying to term and keeping the child, carrying to term and placing the child for adoption, fetal surgery to attempt to correct the anomaly, and abortion. Johnson Dec. at ¶¶ 6-7. Dr. Johnson provided the couples with the state-mandated abortion information during those consultations. Johnson Dec. at ¶ 6.

Of the patients who seek services such as pregnancy tests, ultrasounds or consultations with their physicians, and who receive the state-mandated information, some will decide to carry to term and some will choose to obtain an abortion. Burrell Dec. at ¶ 10. Additionally, some patients may decide to continue their pregnancies after these initial diagnostic tests or meetings but then change their minds and return several weeks later in order to terminate the pregnancy. Burrell Dec. at ¶ 11.

In certain circumstances, patients who obtain these initial services continue to be unsure whether they want to terminate their pregnancy or carry to term. Burrell Dec. at ¶ 12. These patients may therefore decide not to obtain the state-mandated information regarding abortion during their initial visit to a physician or clinic. Id. Of these patients, some may never return to

the provider, and therefore, physicians will never know whether they chose to continue their pregnancies. Id.

Plaintiffs' purpose in providing services such as a pregnancy test, ultrasound or gynecological examination to a patient is to help that patient make an informed decision about how to proceed with her pregnancy. Burrell Dec. at ¶ 9; see also Johnson Dec. at ¶ 6. Indeed, Plaintiffs will not provide abortion services to a patient who seems uncertain of her decision. Burrell Dec. at ¶ 3.

As is the custom in the medical profession, Plaintiffs expect payment for services such as ultrasounds and pregnancy tests at the time that those services are rendered. Johnson Dec. at ¶¶ 5, 7-8; Burrell Dec. at ¶ 13. Physicians do not view a request for prompt payment for such services as exerting any influence on that patient's ultimate decision about whether or not to terminate a pregnancy. Johnson Dec. at ¶¶ 5, 7-8. For instance, each of the above-mentioned couples who met with Dr. Johnson paid for the consultation at the end of the visit. Johnson Dec. at ¶ 7. Of these two couples, one has since chosen to attempt fetal surgery, and the other has still not decided how to proceed with the pregnancy. Id.

In fact, physicians routinely consult with patients outside the abortion context about their options for further medical care and expect prompt payment for such consultations. For instance, Dr. Johnson recently met with a young patient whose blood test revealed that her fetus was at an increased risk for developing Down's Syndrome. Johnson Dec. ¶ 8. During this meeting, he discussed with her what diagnostic procedures, if any, she wanted to undergo in order to provide herself with peace of mind about her fetus's health. Id. At the end of the meeting, the patient was expected to provide payment for the consultation, and Dr. Johnson did not view the request

for payment as exerting any undue influence on her decision whether to obtain additional testing. Id.

Obtaining prompt payment for services such as ultrasounds, pregnancy tests and gynecological examinations is crucial to Plaintiffs' ability to continue providing these services. Some of the patients who receive these services during an initial visit may never return to the same clinic or physician, either because they choose to carry to term and obtain pre-natal care elsewhere, or because they choose to obtain an abortion with another provider. Burrell Dec. at ¶ 13; Franco Dec. at ¶ 11; Chelian Dec at ¶ 13. Because many of the Plaintiffs' patients do not have insurance, Plaintiffs cannot be assured of obtaining payment from these patients unless they do so on the day of the service. Burrell Dec. at ¶ 13; see also Chelian Dec. at ¶ 13; Franco Dec. at ¶ 11.

Furthermore, prohibiting Plaintiffs from obtaining prompt payment for services rendered will leave them vulnerable to abusive conduct by anti-choice activists. The staff of at least one of the Plaintiff clinics believes that previous "patients" have actually been anti-choice activists seeking to expend the staff's time and the clinic's resources. Chelian Dec. at ¶ 14. By preventing Plaintiffs from obtaining payment for services as they are provided, Subsection 9 would enable such individuals to repeatedly seek "abortion related" services without paying for them, in an effort to put Plaintiffs out of business. Id.

If Plaintiffs cannot be assured of obtaining prompt payment for services such as pregnancy tests and ultrasounds, they will be unable to continue providing these services to women who need them in order to make an informed decision about their pregnancy. Burrell

Dec. at ¶¶ 9, 13-14; Chelian Dec. at ¶ 13 (forcing clinic to provide free services would drive clinic out of business); Franco Dec. at ¶ 11 (same).

IV. ARGUMENT

A. Plaintiffs Are Entitled to Summary Judgment.

Summary judgment is appropriate when "the pleadings, depositions, . . . and admissions on file, together with the affidavits, . . . show that 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." Fed. R. Civ. P. 56(c). Only disputes over material facts, or facts that might affect the outcome of the suit, may properly preclude the entry of summary judgment. See Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). Thus, if the material facts of a case are undisputed, summary judgment is appropriate. See, e.g., Hammon v. DHL Airways, Inc., 165 F.3d 441, 447 (6th Cir. 1999). As set forth below, this case involves no genuine issue as to any material fact, and Plaintiffs are entitled to summary judgment.

B. Subsection 9 Is Unconstitutionally Vague.

This Court should permanently enjoin enforcement of Subsection 9 because it is unconstitutionally vague. Subsection 9 prohibits physicians from obtaining payment for an "abortion related medical service," a term that has no fixed meaning in medical practice. Rather, medical practice demonstrates that patients seek many of the same services regardless of whether they are carrying a pregnancy to term or choosing abortion. Because the Act itself does not provide a definition of "abortion related," it fails to give notice to both physicians and prosecutors about whether these *pregnancy-related services* are covered by the Act.

"It is a fundamental component of due process that a law is void-for-vagueness if its prohibitions are not clearly defined." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); accord Peoples Rights Org. v. City of Columbus, 152 F.2d 522, 533 (6th Cir. 1998); Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187, 197 (6th Cir. 1997). Vague laws offend at least two fundamental values. First, they fail to provide the persons targeted by the statutes with "a reasonable opportunity to know what is prohibited, so that [they] may act accordingly." Grayned, 408 U.S. at 108. Thus, vague laws may act as a trap for the innocent. See id. Second, by failing to provide explicit standards by which to assess conduct, vague laws invite arbitrary and discriminatory enforcement by police officers, prosecutors and juries. See Grayned, 408 U.S. at 108-09.

"[T]he degree of vagueness that the Constitution tolerates--as well as the relative importance of fair notice and fair enforcement--depends in part on the nature of the enactment." Voinovich, 130 F.3d at 197 (internal citations omitted). Statutes that impose criminal penalties and lack a scienter requirement must satisfy a particularly high standard of clarity. See id.; see also Peoples Rights Org., 152 F.3d at 533-34. The Constitution demands the greatest clarity from a statute when "the uncertainty induced by [that] statute threatens to inhibit the exercise of constitutionally protected rights." Colautti v. Franklin, 439 U.S. 379, 391 (1979) (citations omitted).

As a statute with criminal penalties that does not include a scienter provision and that affects the constitutional right to choose, the Act must satisfy the strictest standard of clarity in order to pass constitutional muster. Subsection 9 cannot satisfy this exacting standard.

The Act prohibits physicians from obtaining prompt payment for "abortion related" services whenever a patient has scheduled or "inquired about" an abortion. Act No. 345, § 17015(9). The Oxford Dictionary defines "inquire" as "1. examine, investigate;" "2. Seek knowledge of (a thing) by asking a question;" "3. Put a question or questions; ask . . . ." The New Shorter Oxford English Dictionary 1376 (4th ed. 1993). Thus, Subsection 9 is extremely broad and applies to "abortion related" services provided to any patient who has asked even a single question about abortion.

Despite its broad scope, Subsection 9 contains no definition of the term "abortion related medical service." See Act No. 345, § 17015 (9). Because the Act fails to provide a definition, this Court must construe the term in accordance with its ordinary or natural meaning. See Voinovich, 130 F.3d at 200. But that is not possible here because the term "abortion related medical service" has no ordinary or natural meaning in medical practice. See supra at pp. 4-6; Burrell Dec. at ¶ 10; Chelian Dec. at ¶ 13; Franco Dec. at ¶ 11.

Services such as pregnancy tests, ultrasounds, gynecological examinations 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 Act. See supra at pp. 4-5; Burrell Dec. at ¶ 10; Chelian Dec. at ¶ 13; Franco Dec. at ¶ 11; see also, e.g., Peoples Rights Org., 152 F.3d at 533 (law is vague if it does not give a person of ordinary intelligence a reasonable opportunity to know what is prohibited).

The Act also provides no guidance to physicians about the conduct required of them when a patient changes her mind about her pregnancy. For instance, sometimes a patient who comes for an initial visit and receives a pregnancy test or ultrasound, as well as the state-mandated information, will decide during that same visit to continue her pregnancy. Burrell Dec. at ¶ 11. The patient may later change her mind, however, and then return to the clinic or physician's office in several weeks to obtain an abortion. Id. Even if it were clear that the Act would permit a physician to obtain prompt payment initially, when the patient expressed the intent to carry to term, the Act does not explain whether the patient's later decision to obtain an abortion would render the earlier services "abortion related" and therefore make the physicians' actions in obtaining prompt payment illegal. Id; see also Act No. 345, § 17015 (9).

Even if one could conclude that Subsection 9 clearly applied to services such as pregnancy tests and ultrasounds, how to comply with Subsection 9 would remain murky. For instance, some patients may come to a clinic or doctor's office, inquire about an abortion, and receive services such as a pregnancy test or ultrasound but, because of continued uncertainty about terminating the pregnancy, decide not to receive the state-mandated materials during this initial visit. Burrell Dec. at ¶ 12. The Act does not explain whether the prohibition on obtaining prompt payment prior to the expiration of the 24-hour period applies in such situations, where the patient has arguably received "abortion related medical services" but where the 24 hour period has not even begun to run. Id.; see also Act No. 345, § 17015 (9).

If Subsection 9 did apply in the above situation, physicians would face an even greater quandary about how to comply with its requirements. Because some patients who seek initial visits will never return to the clinic or physician's office, the staff would not know when, if ever,

the patient had received the state-mandated information, and therefore when the 24-hour period required by the Act had expired. Burrell Dec. at ¶ 12. In these circumstances, the staff could never know when it would be appropriate to bill the patient under Subsection 9. Id.[3]

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. See Peoples Rights Org., 152 F.3d at 535-38 (considering facts about gun ownership and striking down as unconstitutionally vague portions of statute prohibiting ownership of certain guns). 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. See id. (considering statute with criminal penalties and no scienter requirement).

But the vagueness in Subsection 9 is especially dangerous because it threatens to chill the exercise of the right to choose. See Colautti, 439 U.S. at 391. If this Court upholds Subsection 9, Plaintiffs will be forced to cease providing services such as pregnancy tests, ultrasounds and gynecological examinations to patients who seek them at initial clinic visits. Burrell Dec. at ¶¶ 13-14; see also Chelian Dec. at ¶ 13; Franco Dec. at ¶ 11. Yet, 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. See Planned Parenthood v. Casey, 505 U.S. 833, 852-53,

[3] The problem of knowing when to bill for "abortion related medical services" for patients who have not yet obtained the state-mandated information would affect all physicians in Michigan, not just abortion providers. For example, a woman who is unsure whether she is pregnant may seek a pregnancy test from her regular physician. In receiving the results of the test, the patient may "inquire about" abortion, thus triggering Subsection 9's restrictions. If the physician then refers the patient to an abortion provider for further information, the referring physician will not know when to bill for the services provided because he or she may not learn when, if ever, the patient obtained the state-mandated information.

857 (1992) (discussing the constitutional right to make personal decisions relating to family relationships and childbearing). Without these services, women in Michigan would be prevented from exercising this right, and Subsection 9 is therefore unconstitutional.[4]

C. Subsection 9 Violates Physicians' and Patients' Rights to Equal Protection

Alternatively, if this Court finds that Subsection 9 is not vague, it should strike it as unconstitutional under the Equal Protection Clause. The Equal Protection Clause of the United States Constitution "commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Ctr. 473 U.S. 432, 439 (1985) (quoting Plyler v. Doe, 457 U.S. 202, 216 (1982)). Although the Constitution does not prohibit all forms of "discrimination" among groups, it does forbid distinctions that (1) are invidious, (2) unnecessarily burden the fundamental rights of one group, or (3) are arbitrary or irrational. See, e.g., Cleburne, 473 U.S. at 439-42; Williams v. Rhodes, 393 U.S. 23, 30-31 (1968).

The Supreme Court has developed three different levels of review under the Equal Protection Clause. Cleburne, 473 U.S. at 439-42. The Court employs strict scrutiny -- the highest level of review -- if the classification concerns a "suspect" class or burdens a fundamental right. See, e.g., Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (law burdening

[4] This Court should not attempt to save Subsection 9's constitutionality by narrowing its scope or by supplying definitions that the Act itself does not contain. As the Supreme Court recently reiterated in Stenberg v. Carhart, 120 S.Ct. 2597 (2000), federal courts cannot adopt "a narrowing construction of a state statute unless such a construction is reasonable and readily apparent." Id. at 2616 (internal citations omitted). Subsection 9 is not "genuinely susceptible" to a narrowing construction and should be struck. Id; see also Eubanks v. Wilkinson, 937 F.2d 1118, 1122 (6th Cir. 1991) (federal courts do not rewrite statutes to create constitutionality).

right to travel); Loving v. Virginia, 388 U.S. 1, 11 (1967) (race-based classification); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (law burdening right to procreate). If the government classifies along lines that are not quite "suspect," but nonetheless give rise to some of the same concerns as suspect classifications, the Court utilizes an intermediate level of review. See, e.g., United States v. Virginia, 518 U.S. 515, 531 (1996) (classification based on sex). For all other classifications, the Court considers whether the government's classification is rationally related to a legitimate state interest. See, e.g., Cleburne, 473 U.S. at 439-40; United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 174-75 (1980).

The Act singles out physicians that provide "abortion related services" and their patients for the imposition of a unique burden: a restriction on obtaining prompt payment for already-rendered services. Through Subsection 9, the Act creates at least two impermissible classifications: 1) between physicians who provide and patients who seek "abortion related medical services" and those who provide and seek other medical services; 2) between men and women seeking health care.

1. Subsection 9 Improperly Singles Out Abortion Related Services From Other Services.

a. Subsection 9 Does Not Serve A Compelling State Interest.

The Act restricts the ability of physicians to obtain prompt payment for rendered services *only* when those services are "abortion related." Thus, the Act isolates abortion from the rest of the provision of medicine and subjects abortion providers and patients to unique burdens. This singling out of abortion for different treatment must be analyzed under strict scrutiny because, as explained below, the real impact of Subsection 9 will be to make it more difficult for women to

exercise their fundamental right to choose. See Roe v. Wade, 410 U.S. 113 (1973) (right to abortion prior to viability is part of fundamental rights to liberty and privacy); see also Stenberg v. Carhart, 120 S. Ct. 2597, 2604 (2000) (right to choose abortion prior to viability is an established principle); Planned Parenthood v. Casey, 505 U.S. 833, 846, 852-53, 857 (1992) (same); Mahoning Women's Ctr. v. Hunter, 610 F.2d 456, 460 (6th Cir. 1979) (applying strict scrutiny to equal protection challenge to regulations of abortion providers), vacated on other grounds, 447 U.S. 918 (1980).[5]

To survive strict scrutiny, the classification between abortion and other medical procedures must be necessary to serve a compelling state interest. See Saenz v. Roe, 526 U.S. 489, 499 (1999); Mahoning, 610 F.2d at 460. The only two state interests that have been recognized as compelling in the abortion context are the interests in maternal health and potential life. Casey, 505 U.S. at 878; Roe, 410 U.S. at 162. The state's interest in potential life can only be promoted prior to viability through means "calculated to inform the woman's free choice, not hinder it." Casey, 505 U.S. at 877. Subsection 9 does not serve either of these two recognized state interests.

First, Subsection 9 does not serve an interest in potential life. Asking patients to pay for

[5] A classification that impacts upon a fundamental right is subject to strict scrutiny regardless of whether the law embodying the classification actually violates the substantive right. See, e.g., Shapiro, 394 U.S. at 634 ("any classification which serves to penalize the exercise of [a constitutional] right" must meet strict scrutiny); id. at 638 (because classification "touch[ed]" on fundamental right, it was subject to strict scrutiny); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 54 (1983) (strict scrutiny applied when government action "impinges" upon a fundamental right); Community-Service Broad. of Mid-America, Inc. v. FCC, 593 F.2d 1102, 1122 (D.C. Cir. 1978) (en banc); United States v. Craven, 478 F.2d. 1329, 1338 (6th Cir. 1973) (strict scrutiny applies when legislative classifications "affect" fundamental rights).

services that they *have actually received* is standard medical practice and does not exert any undue influence on a patient's decision about whether to carry to term. See supra at pp. 5-6. Just as patients who consult with an orthopedic surgeon are no more likely to choose to proceed with surgery merely because the surgeon requests that they pay for diagnostic x-rays, women are no more likely to choose abortion merely because they have paid for diagnostic services such as pregnancy tests or ultrasounds. See id. Second, Subsection 9 bears no relation to maternal health whatsoever.

Instead, Subsection 9's real impact will be to make it *more* difficult for women to make an independent choice about whether or not to continue their pregnancy, thus undermining the entire purpose of "informed consent" statutes like the Act. As the Sixth Circuit recognized in Mahoning, the constitutionality of a regulation, like Subsection 9, which places restrictions on abortion providers must be judged by its actual impact on a woman's right to abortion. See 610 F.2d at 460. If permitted to take effect, Subsection 9 will cause physicians to cease providing services such as pregnancy tests, ultrasounds, and consultations by preventing them from obtaining prompt payment for these services. See supra at pp. 7-8. Yet, these are precisely the services that women need in order to make an informed decision about how to proceed with their pregnancy. See supra at pp. 4-7. Thus, Subsection 9 will prevent the "effective enjoyment" of a woman's constitutional right to decide whether to terminate her pregnancy. Mahoning, 619 F.2d at 460.

b. Subsection 9 Is Not Rationally Related to A Legitimate State Interest.

Even if this Court applies only rational basis review to the challenged classification, Subsection 9 still must fall because the classification is not rationally related to a legitimate state interest. To be rational, classifications must be "reasonably tailored to achieve [the state's] ends and . . . [must be] uniformly and nondiscriminatorily applied." Lindsey v. Normet, 405 U.S. 56, 78 (1972).

Rational basis review is "not toothless" and both the Sixth Circuit and the Supreme Court have recently struck down statutes after finding that they were irrational under the Equal Protection Clause. See Romer v. Evans, 517 U.S. 620, 631-33 (1996); Peoples Rights Org. v. City of Columbus, 152 F.3d 522, 531-32 (6th Cir. 1998) (striking down statute restricting the possession of certain firearms). As the Supreme Court ruled in Evans:

> [E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. . . . By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.

Evans, 517 U.S. at 632-33.

Subsection 9 is wholly irrational and serves no legitimate state interest whatsoever. There is simply no justification for prohibiting physicians from obtaining payment for services that they have *actually provided*. Cf. Lindsey, 517 U.S. at 78 ("nothing in the special purposes of the [statute at issue] or in the special characteristics of the [regulated] relationship . . . warrant[ed] this discrimination."). If permitted to take effect, Subsection 9 will merely make it more difficult for women to obtain needed medical services. See supra. Thus, like the statute at

issue in Peoples Rights Org., Subsection 9 "fails, indeed defies" the rational basis inquiry. See 152 F.3d at 532.

Importantly, the fact that Subsection 9 is directed towards only a small, politically unpopular group -- abortion providers -- bolsters this conclusion. As the Supreme Court has cautioned, courts must carefully question classifications that disadvantage politically unpopular groups because such classifications "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." Romer, 517 U.S. at 634. Subsection 9 is nothing more than an attempt to make it more difficult for abortion providers to conduct their practice of medicine, and this Court should find it unconstitutional under the Equal Protection Clause.

2. Subsection 9 Impermissibly Discriminates on the Basis of Sex.

Subsection 9 burdens the ability to obtain health care that is provided *only* to women. It is therefore also unconstitutional under the Equal Protection Clause because it constitutes sex discrimination.

"Classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination." Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 273 (1979) (citing Caban v. Mohammed, 441 U.S. 380, 398 (1979) (Stewart, J., dissenting)). As the Supreme Court has recognized, there is a "real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of archaic and overbroad generalizations about gender, or based on outdated misconceptions concerning the role of females in the home rather than in the marketplace and world of ideas." J.E.B. v. Alabama, 511 U.S. 127, 135 (1994) (citations omitted) (internal

quotation marks omitted). As a result of the heightened suspicion that attaches to sex-based classifications, the Court has determined that such classifications are subject to a more exacting level of scrutiny than the rational relationship standard. See id. at 152 (Kennedy, J., concurring) ("our case law does reveal a strong presumption that gender classifications are invalid").

"[A] party seeking to uphold government action based on sex must establish an 'exceedingly persuasive justification' for the classification. To succeed, the defender of the challenged action must show 'at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.'" United States v. Virginia, 518 U.S. at 524 (quoting Mississippi Univ. for Women v. Hogan, 485 U.S. 718, 724 (1982)). Subsection 9 fails this standard.

Like other gender-based laws, Subsection 9 will harm women in the guise of providing them a benefit by making it more difficult for them to make informed decisions about their medical care. Further, the discriminatory means employed – regulating only abortion and none of the medical care sought by men or by both men and women – is not substantially related to the achievement of any important government objective. Accordingly, Subsection 9 impermissibly discriminates on the basis of sex.

D. Subsection 9 Violates' Physicians' Rights to Substantive Due Process.

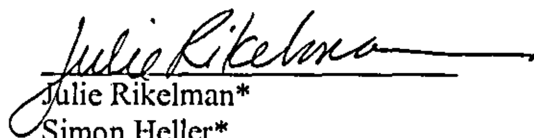
Subsection 9 also violates physicians' substantive due process rights. Legislative actions that deprive citizens of life, liberty or property cannot be arbitrary and must have some rational basis. See, e.g., Pearson v. City of Grand Blanc, 961 F.2d 1211, 1223 (6th Cir. 1992).

Subsection 9 prohibits a standard and accepted medical practice, requesting prompt payment for medical services. Johnson Dec. at ¶¶ 5-7. As described above, the prohibition of this accepted medical practice is irrational. Subsection 9 therefore arbitrarily deprives physicians of their property -- the right to obtain payment for services that they have provided -- and should be struck by this Court.

III. CONCLUSION

For the foregoing reasons, the Court should find Subsection 9 unconstitutional and permanently enjoin its enforcement.

Respectfully submitted,



Julie Rikelman*
Simon Heller*
Center for Reproductive Law & Policy
120 Wall Street, 14th Floor
New York, NY 10005
(917) 637-3600
Lead Attorneys for Plaintiffs
*Pending admission

David A. Nacht, P.C.
Bar Number P. 47034
201 South Main, Suite 1000
Ann Arbor, MI 48104
(734) 663-7550

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

U.S. DIST. COURT CLERK
EAST DIST. MICH.
DETROIT

'01 MAY 29 AM 1:29

FILED

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.	

ORIGINAL

DECLARATION OF ANISE BURRELL

ANISE BURRELL, declares and states the following:

1. I am the Administrator of Summit Medical Center of Michigan Inc. ("Summit"), which is a plaintiff in this lawsuit.

2. Summit is a women's reproductive health center facility located in Detroit, Wayne County, Michigan. Through its physicians, it provides a full range of reproductive health services to its patients, including: gynecological services; prenatal care services; pregnancy testing; detection and treatment of sexually transmitted diseases; non-directive options counseling; abortion up to 24 weeks lmp; contraceptives counseling; and contraceptives. Summit provides prenatal care in cooperation with the Hutzel Hospital. Patients who obtain pre-natal care at Summit deliver at Hutzel Hospital.

3. It is Summit's policy not to provide abortion services to a patient who seems uncertain of her decision.

4. As Summit's Administrator, I am responsible for the every-day operations of the clinic. My duties include ordering supplies for the clinic, supervising the clinic's personnel, assisting with the drafting of the clinic's policy and procedures manual, obtaining payment from patients, and doing the clinic's accounting. I also participate in patient care by providing non-directive options counseling for patients choosing whether to continue their pregnancies and by supporting abortion patients when they are in the procedure room.

5. I have been Summit's Administrator for the past three (3) years, and I have worked at Summit for the past sixteen (16) years. My first position at Summit was as a certified lab technician. Subsequently, I assumed supervisory roles at the clinic, such as supervising the clinic's daily operations and clinic staff. Because of my years of experience at the clinic, I am familiar with our medical practices for both abortion and pre-natal care services. I am also familiar with the circumstances of many patients who come to the clinic, and who are in the process of choosing whether or not to carry a pregnancy to term. Based on this knowledge and experience, I submit this declaration in support of Plaintiffs' motion for summary judgment against enforcement of certain provisions in Act No. 345 of the Michigan Public Acts of 2000 ("the Act").

6. It is my understanding that the Act prohibits physicians from providing abortions unless they, or other clinic staff, have provided the pregnant woman with certain state-mandated information at least 24 hours prior to the abortion. A physician

who is found to have violated the Act is subject to loss of his or her license to practice medicine, and to the imposition of fines of an unspecified amount. Physicians, as well as persons who aid the physician, are also criminally liable for violating the Act. Thus, I, as well as other members of my clinic's staff, could be held criminally liable under the Act's terms.

7. The Act includes a provision that prohibits physicians from obtaining payment for any "abortion related medical service" prior to the expiration of the 24 hour period. See Act No. 345 § 17015(9). But the Act does not define when services qualify as "abortion related," and therefore, my staff and I cannot know how to ensure that we are complying with the Act's requirements.

8. For instance, it is Summit's practice to perform an ultrasound on all patients on the day of the abortion procedure, and to perform a pregnancy test as well if the patient is less than ten weeks pregnant. We follow this practice in order to confirm that the patient is pregnant, to determine the fetus's gestational age, and to exclude the possibility of an ectopic pregnancy.

9. But patients often seek these services at an initial visit to the clinic in order to help them make a decision about whether they want an abortion. Patients whose decision may depend on the stage of their pregnancy will ask for an ultrasound. Patients who are not certain that they are pregnant may ask for a pregnancy test or gynecological examination as well as an ultrasound. If the patient continues to want information about obtaining an abortion after receiving these services, my staff will provide her with the state-mandated information at this initial visit.

10. Of the patients who have come for this initial visit in the past, some have decided to carry to term and to obtain pre-natal care at our clinic, and some have chosen to obtain an abortion at our clinic. Because patients who ultimately want pre-natal care as well as patients who ultimately choose abortion request services such as pregnancy tests and ultrasounds, my staff and I do not know whether these services should be considered "abortion related" or whether they are merely pregnancy related. Thus, we do not know whether these services are subject to the Act's restrictions on obtaining prompt payment.

11. Additionally, sometimes a patient who comes for an initial visit and obtains a pregnancy test or ultrasound as well as the state-mandated information may decide at that same visit to continue her pregnancy but then change her mind and return to the clinic several weeks later to obtain an abortion. In this situation, even if the Act would have permitted my staff to obtain immediate payment for the ultrasound and pregnancy test at the time the patient obtained these services, it is unclear to me whether the patient's later decision to obtain an abortion would render these services "abortion-related" and make our earlier actions in obtaining payment illegal.

12. Even if my staff and I could guess when the Act applies to services such as pregnancy tests and ultrasounds, in some circumstances, we could never know when the 24-hour period required by the Act had expired, and therefore, when we were permitted to obtain payment under the Act. For example, some patients who obtain a pregnancy test or ultrasound at an initial visit continue to be unsure whether they want to terminate their pregnancy or carry to term. They may therefore decide not to obtain the

state-mandated information regarding abortion during this visit. Because some of these patients never return to the clinic, it would be impossible for us to know when, if ever, these patients received the state-mandated materials, and when the 24-hour period required by the Act expired. Thus, in this circumstance, my staff and I would be uncertain about when we could bill the patient for the services we provided.

13. If the term "abortion related medical services" includes services such as pregnancy tests and ultrasounds, my clinic may no longer be able to provide these services to patients who need them in order to decide whether to continue their pregnancy. It is Summit's practice to charge patients for ultrasounds and pregnancy tests on the day that the patient receives those services. The fee for an ultrasound is $50-$75, and the fee for a pregnancy test is either $10 or $20, depending on whether the patient wishes to confirm the pregnancy with a blood test. Obtaining prompt payment from patients who request these services at an initial visit is crucial because some may not return to the clinic, either because they choose to carry to term and obtain pre-natal care elsewhere, or because they choose to obtain an abortion with another provider. Because nearly all of the clinic's patients do not have insurance, the clinic cannot be assured of obtaining payment from these patients unless we obtain it on the day of the service. If we cannot be sure of obtaining payment, we cannot afford to continue providing the service.

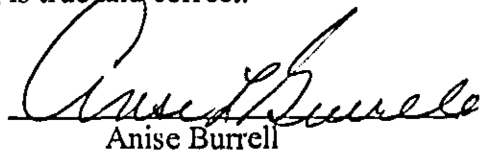
14. Thus, if the Act's payment restriction is permitted to take effect, my staff and I will have two options. We can continue to obtain prompt payment for services such as ultrasounds and pregnancy tests and risk incurring criminal penalties under the Act. Or, we can stop providing such services to our clients who need them in order to make an

informed decision about their pregnancy. Faced with these options, I believe that my staff and I will be forced to cease providing these services to the patients who request them at an initial visit to the clinic. If this occurs, our patients will not have the information they need to make the best choice for them.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: DETROIT, Michigan

May 14, 2001



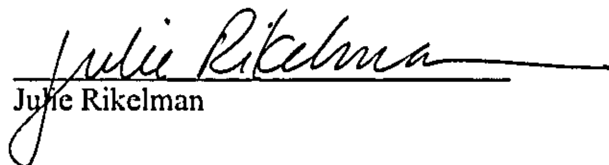
Anise Burrell

Frank Krycia
Assistant Corp. Counsel
1 South Main
8th Floor
Mt. Clemens, MI 48043

Michael E. Duggan
Carolyn M. Breen
Assistant Prosecuting Attorney
12th Floor, 1441 St. Antoine
Detroit, MI 48226

James M. Straub
Straub, Seaman and Allen
1014 Main Street
St. Joseph, MI 49085

Bill Pierson
Corporation Counsel
1200 North Telegraph Road
Pontiac, MI 48341



Julie Rikelman

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

SEE CASE FILE FOR ADDITIONAL DOCUMENTS OR PAGES THAT WERE NOT SCANNED