

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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. John C. O'Meara

FILED
APR 4 2002
U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

**REPLY BRIEF OF THE STATE DEFENDANTS
IN SUPPORT OF THEIR MOTION TO AMEND
FINDINGS OR GRANT RELIEF FROM JUDGMENT**

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Dated: April 3, 2001

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CONCISE STATEMENT OF ISSUES PRESENTED

1. Should the court amend its opinion and order and/or judgment by eliminating immaterial factual findings and conclusions?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Cases

Belle Maer Harbor v Charter Township of Harrison,

170 F.3d 553, 557 (6th Cir. 1997)

Celotex Corp. v Catrett,

477 U.S. 317 (1986)

Evans v Kelley,

977 F. Supp. 1283, 1304-1305 (1997)

Grayned v City of Rockford,

408 U.S. 104, 108 (1972)

Planned Parenthood v Casey,

505 U.S. 833 (1992)

Smith v. Freland,

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

Tarleton v. Meharry Medical College,

717 F.2d 1523; 1535 (6th Cir. 1983)

Vance v. United States,

90 F.3d 1145, 1148 (6th Cir. 1996)

BACKGROUND

The State Defendants ask the court to eliminate non-essential, immaterial factual findings concerning the burden that Subsection 9 allegedly has upon womens' exercise of their right to choose. Alternatively, if the court determines that the factual findings are essential, the State defendants ask that they be given discovery and an evidentiary hearing. Plaintiffs respond by arguing (1) the question of burden upon the right to choose is a separate question that this court did not decide, and (2) the State Defendants waived discovery both by failing to conduct discovery earlier and by stating to the court on the record that "the arguments present legal, not factual, issues." (Memorandum Opinion and Order, slip op. at 3.)

ARGUMENT

I. If the Court did Not Decide That Subsection 9 Burdens Womens' Right To Choose, The Factual Findings are Non-essential and Immaterial.

Accepting plaintiffs' claim that Subsection 9 would force plaintiffs to cease providing pregnancy tests, ultrasounds and gynecological examinations, the court found that the statute threatens to inhibit the exercise of a constitutionally protected right. That sounds to the State Defendants like a finding that Subsection 9 burdens womens' right to choose. If, as plaintiffs argue, that is not a finding that the statute burdens womens' right to choose, the facts upon which it is based are non-essential and immaterial and should be eliminated from the court's opinion. Acceptance of plaintiffs' claim that Subsection 9 will force them to cease providing pregnancy tests, ultrasounds, and gynecological exams is not necessary to the decision. At the very least, if that is not a finding that the statute burdens the right to choose, the court should clearly and expressly so state. Otherwise, the vagueness problem can never be cured by amending the statute. In the absence of a clear expression of the court's actual intent, acceptance of plaintiffs' claims as presently formulated can and most likely will be used by plaintiffs to invalidate on *res*

judicata grounds any subsequent amendment to Subsection 9. Without clear recognition by the court that it does not find these claims as fact and does not find a burden on the right to choose, any future efforts to amend to Subsection 9 are doomed before they start because a statute that has already been found to burden the right of choice cannot be saved by curing vagueness.

II. The State Defendants Did Not Waive Discovery.

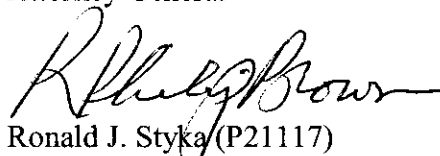
The State Defendants made every effort to simplify the case by deciding legal issues and identifying necessary factual issues, while preserving factual determination of those issues. Plaintiffs and the court joined this effort by agreeing in stipulations and orders to preserve factual issues for determination after discovery and trial. Indeed, at oral argument counsel for the State Defendants stated on the record that he thought the competing motions could be decided as a matter of law. However, his statement was not a concession that factual issues could or should be decided on motions. He was never asked that question. Rather, the statement was simple recognition of the same observation presented now that any factual issues are non-essential and immaterial. Under these circumstances, it would be most unfair and clear error to find as fact or law—without an evidentiary hearing requiring plaintiffs to meet the large fraction, substantial obstacle, and undue burden tests—that Subsection 9 burdens the right to choose by causing plaintiffs to cease providing pregnancy tests, ultrasounds, and gynecological exams.

CONCLUSION AND RELIEF SOUGHT

For the reasons stated above and in the accompanying motion, the State Defendants request the court to (1) amend its February 26, 2002 opinion and order by eliminating the first and second full paragraphs of page 5; (2) clearly and expressly state (a) it does not find as fact that Subsection 9 will cause plaintiffs to cease providing pregnancy tests, ultrasounds, and gynecological exams and (b) it does not find as a matter of law that Subsection 9 burdens womens' right to choose; or (3) grant relief from judgment, permit discovery pursuant to the September 25, 2001 scheduling order, and conduct an evidentiary hearing, if necessary, on Plaintiffs' factual claims and the court's factual conclusions.

Respectfully submitted,

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s: 2001002290A Northland; pldgs; reply brf supp mot amend findings

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PROOF OF SERVICE

The undersigned certifies that on April 3, 2002, a copy of the Reply Brief of The State Defendants' In Support Of Their Motion to Amend Findings or Grant Relief From Judgment was served upon the parties of record in the above cause by mailing the same to them at their respective address with first class postage fully prepaid thereon.

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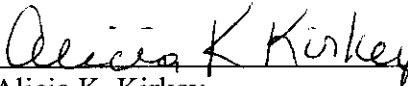
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