 Judge O'Meara

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NORTHLAND FAMILY PLANNING CLINIC, INC., et al., Plaintiffs, v. JANET OLSZEWSKI, et al., Defendants.	Civil Action No. 03-71054

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

David A. Nacht
Bar Number P47034
Law Office of David A. Nacht
201 South Main Street, Suite 1000
Ann Arbor, MI 48104
734-663-7550
Facsimile: 734-663-7592

Bebe J. Anderson
Center for Reproductive Rights
120 Wall Street, 14th Floor
New York City, NY 10005
917-637-3600
Facsimile: 917-637-3666

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INTRODUCTION

Defendants' efforts to justify and explain the challenged statutory provisions fail to adequately take into account two key points. First, the statutory language does not merely prohibit prepayment for medical services including abortions, but also prohibits prompt payment for services that have already been provided to a patient, including the very services that some women need in order to decide whether to terminate a pregnancy. Second, by imposing vague and contradictory requirements upon abortion providers, the challenged provisions will result in impaired access to reproductive health services.

Due to the impact that the challenged provisions will have on the provision of constitutionally protected health services, their vagueness is especially problematic and Plaintiffs are entitled to the highest level of scrutiny for their equal protection claim. Not only do the provisions fail to meet the strict scrutiny standard of review, their prohibition of prompt payment for rendered medical services does not even meet the rational basis standard.

In light of the likelihood that Plaintiffs will prevail on their claims, the harms and injury that will result if the delay in payment provisions are allowed to go into effect, and the lack of substantial harm that will result if abortion providers are able to obtain prompt payment for rendered services, the challenged provisions should be preliminarily enjoined.

ARGUMENT

I. Plaintiffs Have a Strong Likelihood of Succeeding on the Merits of Their Claims.

A. The Vagueness of the Challenged Provisions Is Apparent from the Statute Itself and the Submitted Facts Regarding the Provision of Medical Services by Abortion Providers.

Defendants' contention that the challenged provisions are not vague depends in part upon ignoring the clear contradictions between the language of Subsections (9) and (11)(c).

Subsection (9) prohibits a physician from collecting payment for any medical service provided to or planned for a patient "before the expiration of 24 hours from the time the patient . . . receive[s] from that physician or a qualified person assisting the physician [the state-mandated materials and/or] schedule[s] an abortion to be performed by that physician." Act No. 685, § 17015(9). In contrast, Subsection (11)(c) requires a patient, in order to obtain an abortion, to certify that she has not been required to make any payment for any medical service "before the expiration of 24 hours after [she has] received the [state-mandated materials] or 24 hours after the time and date listed on the confirmation form [obtained if the state-mandated information was] viewed from the state of Michigan internet website." Id. § 17015(11)(c). Thus, in Subsection (9) the delay in payment is linked to the patient's receipt of the state-mandated materials only if she receives them from that physician or a qualified person assisting that physician. However, Subsection (11)(c) links the delay in payment to the patient's receipt of state-mandated materials from any source -- in person, by fax, or by mail from any physician or by viewing the state's website. Thus, a patient will be unable to truthfully sign the Acknowledgment and Consent form containing the language mandated by Subsection (11)(c), and therefore will be unable to obtain an abortion, if she paid for a medical service fewer than 24 hours after she viewed the state-mandated information on the state's website or received the materials by fax or mail from that provider or received them in person, by fax, or by mail from some other provider.[1]

Defendants do not attempt to claim -- as they could not -- that the differently worded Subsections (9) and (11)(c) can somehow be read consistently. Instead, they contend that the inconsistencies between Subsection (9) and (11)(c) have no significance because the physician will be complying with the law as long as he or she satisfies Subsection (9) and hands the patient

[1] The different wording as to the 24 hour delay also leaves the meaning of the law unclear, as discussed in Pls.' Mem. of Law in Supp. of their Mot. for T.R.O. and/or Prelim. Inj. ("Pls.' Mem.") at 9-10.

the form required by Subsection (11)(c). See State Defs.' Resp. in Opp'n to Mot. for Prelim. Inj. ("Defs.' Resp.") at 11-12. That contention borders on the frivolous. The state's waiting period statute imposes obligations on abortion providers with which they must comply in order to lawfully perform abortions. One of those requirements is that the physician obtain the patient's signature on the acknowledgment and consent form described in Subsection (11)(c). Act No. 685, § 17015(8)(a). If the patient is unable to sign that form, the physician cannot lawfully perform the abortion. See id. It is not reasonable for an abortion provider to adopt an interpretation of the law that will allow the provider to collect payment while depriving the patient of the right to obtain an abortion. Yet, that is the result urged by Defendants when they say that the differences between what Subsection (9) proscribes and what Subsection (11)(c) proscribes should be ignored by the physician when trying to interpret the restrictions placed upon him by the statute.

It is hardly a demand for "impossible standards of clarity," see Defs.' Resp. at 12, to expect that when the legislature revised the language of Subsection (9) it would revise the corresponding language of Subsection (11)(c) so that they matched.[2] As this Court stated in finding the prior version of the prepayment provisions unconstitutionally vague:

> The Supreme Court has stated that courts do not impose "impossible standards of clarity" by requiring "further precision in the statutory language" where such precision is neither "impossible [nor] impractical." Kolender [v. Lawson], 461 U.S. [352,] 361 [(1983)]. In this case, the state's goal, as explained by Defendants, was to prohibit physicians from requiring non-refundable deposits on the abortion procedure itself. The legislature quite easily could have made Subsection 9 more precise to achieve that goal.

Northland Family Planning Clinic v. Granholm, Civ. Action No. 01-CV-70549, Mem. Op. and Order at 5-6 (Feb. 26, 2002). Here, it was neither impossible nor impractical for the legislature

[2] Although Defendants state that the legislature "amended subsection (11)(c) in an attempt to make it conform to subsection (9)," Defs.' Resp. at 3, the legislature clearly did not do so. Rather, it merely took out the term "abortion-related" before the phrase "medical service" and changed the wording of its reference to the state's website.

to draft Subsection (9) and (11)(c) consistently and clearly. Whether the legislature's failure to do so resulted from carelessness during the legislative process or a deliberate effort to make it more difficult for women to obtain abortions need not concern this Court. The fact remains that the inconsistencies leave abortion providers unclear as to whether they must ensure that their patients have not obtained or viewed the state-mandated materials in any manner before collecting payment for rendered services.

Defendants' contention that Plaintiffs' confusion regarding the challenged provisions consists simply of "make-believe circumstances," Defs.' Resp. at 12, similarly ignores reality: the reality of the provision of abortion services. As explained in Plaintiffs' declarations, women seeking services such as ultrasounds and pregnancy tests do not all do so in the same manner and in the same sequence with regard to their decision whether or not to terminate a pregnancy. See Chelian Decl. ¶¶ 10-11; Franco Decl. ¶¶ 9, 11-12; Burrell Decl. ¶¶ 10-15. The scenarios posed by Plaintiffs are not "make believe," but rather are based on their experiences delivering reproductive health services to women. See Chelian Decl. ¶¶ 12-19; Burrell Decl. ¶¶ 11, 13-15; Franco Decl. ¶¶ 8-12, 15; see also Pls.' Mem. of Law in Supp. of their Mot. for T.R.O. and/or Prelim. Inj. ("Pls.' Mem.") at 10-11. The vagueness in the challenged provisions threatens to inhibit both the provision of the services -- such as ultrasounds and pregnancy tests -- that some women need in order to make an informed choice whether to seek an abortion, and the provision of abortions themselves. See also Pls.' Mem. at 9-11; cf. Northland Family Planning Clinic v. Granholm, Civ. Action No. 01-CV-70549, Mem. Op. and Order at 5 (Feb. 26, 2002) (finding that vagueness of prior version of prepayment provision "threaten[ed] to inhibit the exercise of the constitutionally protected right to abortion"). Therefore, those provisions must meet a high

standard of clarity. See Pls.' Mem. at 7-9. Because they fail to do so, this Court should find them to be void for vagueness.

B. Plaintiffs Are Likely to Succeed on Their Claims that the Delay in Payment Provisions Violate Physicians' and Patients' Rights to Equal Protection.

Defendants distort Plaintiffs' equal protection claims, contending that Plaintiffs are simply claiming "a constitutional right to collect for medical services as they are rendered, without the delay imposed by § 117015(9)." Defs.' Resp. at 5. Defendants ignore the impact the delay in payment provisions will have on the provision of medical services to women and ignore Plaintiffs' claims that the challenged provisions violate the equal protection rights of the patients of physicians who provide abortions, as well as those of the physicians themselves.[3] Compare Defs.' Resp. at 5-10 with Pls.' Mem. at 12-18.

1. The Provisions Implicate the Exercise of the Fundamental Right of Reproductive Choice and Cannot Meet the Strict Scrutiny Standard of Review.

Defendants' assertion that no fundamental right is implicated by the prohibition on payment for actually-rendered services ignores the impact of that prohibition on women's ability to obtain abortions and medical services they need in order to make their decision whether to obtain an abortion. As noted above, the wording of the certification form purports to preclude women from obtaining abortions if they paid for any medical services before they received the state-mandated materials, by any method. See Act No. 685, § 17015(11)(c). Moreover, in order to obtain payment for rendered services without violating the law, several abortion providers anticipate that they may discontinue providing services prior to the day the patient obtains the

[3] Plaintiffs have asserted that the challenged provisions create three impermissible classifications: (1) between patients who seek abortions and those who seek other medical services; (2) between men and women seeking health care: and (3) between physicians who provide abortions and those who provide other types of medical care. See Pls.' Mem. at 12-18; see also Compl. ¶ 45.

abortion procedure. See Burrell Decl. ¶ 18; Franco Decl. ¶ 14. That will impair women's ability to access medical services – such as ultrasounds and pregnancy tests – that they need in order to exercise their right to reproductive choice. See Burrell Decl. ¶¶ 18; Franco Decl. ¶¶ 13-14. Therefore, the challenged provisions must satisfy the strict scrutiny test. See Pls.' Mem. at 12-14.

As discussed in Plaintiffs' opening brief, the prohibition on prompt payment for rendered services does not further the state's interest in fetal life, referenced in Defs.' Resp. at 4-5, except through the impermissible means of obstructing women from obtaining abortions. See Planned Parenthood v. Casey, 505 U.S. 833 (1992). The challenged provisions do not further any compelling state interest and therefore fail the strict scrutiny test. See Pls.' Mem. at 14.

2. The Prohibition on Immediate Payment for Rendered Services is Not Even Rationally Related to a Legitimate State Interest.

Even if this Court views the delay in payment provisions solely as economic regulation -- ignoring, as Defendants do, the impact of the provisions on the provision of abortions and medical services some women seek in order to inform their reproductive choice -- Plaintiffs still have a strong likelihood of succeeding on their claim that the provisions violate the equal protection rights of physicians who provide abortions. Defendants' own arguments and submissions regarding the state's goal show that the prohibition on prompt payment for actually-rendered services is not rationally related to a legitimate state interest.

Defendants assert that the legislature sought to "prevent[] and/or eliminate[] the use of financial incentives, e.g., deposits, prepayments or other inducements, during the 24-hour decisional period" and that "a woman cannot freely contemplate her decision during the decisional period" if she has made a down payment for, or prepaid part of the cost of, an

abortion.[4] Defs.' Resp. at 9. In support of this assertion, Defendants quote from bill analyses prepared for the legislature, which set forth "the problem being corrected." See Defs.' Resp. at 9-10. The bill analyses on which Defendants rely make it clear that the legislation was meant to limit prepayments and down payments for medical services. See id. App. to Defs.' Resp., App. C. Thus, in discussing the impetus for the payment restrictions and the arguments for the bill, the House Legislative Analysis of May 15, 2002, refers to physicians who were requiring patients to make down payments or prepayments "for planned abortions and related services" and then refusing to refund the money to women who decided to carry their pregnancies to term. See id. at 1-3.

Strikingly absent from the legislative history or the arguments put forth by Defendants is any concern about immediate payment for services that are rendered to a patient. Yet the challenged provisions prohibit such payments. Those provisions are not limited to prepayments and deposits, but prohibit the collection of "payment, in whole or in part, for a medical service *provided* or planned" before the expiration of a 24-hour period. Act No. 685, § 17015(9) (emphasis added). Thus, the prohibition that underlies Plaintiffs' equal protection claims -- the prohibition on prompt payment for medical services already rendered to patients -- has no connection to the legislative goal of forbidding "financial inducements" which purportedly might influence a woman's "decision to go ahead with the abortion," Defs.' Resp. at 9.

Not only is the prohibition on payment for rendered services not reasonably tailored to meet the state's ends, it in fact undermines an asserted goal of the state. According to the House

[4] This Court need not consider how ludicrous and insulting such assertions are; taken at face value, they show the lack of relationship between the state's interest and the challenged prohibition on prompt payment for rendered services.

Legislative Analysis cited by Defendants, "[t]he legislature wanted to make sure that a woman who is considering having an abortion receives medically accurate information before she actually has the procedure performed." App. to Defs.' Resp., App. C at 2; see also id. at 3. As explained in Plaintiffs' moving papers, the delay in payment provisions will impair women's ability to obtain pre-abortion medical services which they may need in order to make an informed decision as to whether to obtain an abortion. See Pls.' Mem. at 4-5, 11, 18.

Therefore, forbidding physicians providing abortions from being able to obtain prompt payment for services actually rendered fails even the rational basis test. See also Pls.' Mem. at 16-18. Despite Defendants' characterization of the rational basis test as a virtually meaningless review, the Supreme Court has made it clear that every legislative classification must at least "bear a rational relationship to an independent and legitimate legislative end." Romer v. Evans, 517 U.S. 620, 632-33 (1996). The challenged provisions' treatment of abortion providers and their patients fails this test. Moreover, it presents the danger that the rational basis test must protect against: the classification appears to be "drawn for the purpose of disadvantaging the group burdened by the law." Id.

II. Plaintiffs Satisfy the Other Required Factors for Issuance of a Preliminary Injunction.

Defendants' arguments that Plaintiffs have not met the other requirements for injunctive relief are based mainly on their erroneous analysis of the Act's effect. As discussed above and in Plaintiffs' opening brief, the delay in payment provisions will interfere with the exercise of the right of reproductive choice. For example, some women will be unable to sign the certification form as worded in Act No. 685 and therefore will be unable to obtain an abortion or, at a minimum, will be further delayed in obtaining an abortion. Thus, Plaintiffs have satisfied the

required showings that a preliminary injunction will prevent irreparable harm and serve the public interest. See Pls.' Mem. at 19-20.

Defendants' contention that threat of criminal prosecution is necessary to show irreparable harm is clearly incorrect. See Defs.' Resp. at 14-15. If it were correct, it would be impossible to obtain injunctive relief from non-penal statutes, which simply is not the case. In addition, the revocation of a professional license has been recognized to be a quasi-criminal penalty. See Women's Med. Ctr. of NW Houston v. Bell, 248 F.3d 411, 422 (5th Cir. 2001). Moreover, decades-old precedent specifically permits plaintiffs to avoid the unacceptable alternative of being forced to violate an unconstitutional law in order to challenge its constitutionality. See, e.g., Doe v. Bolton, 410 U.S. 179, 188 (1973). Instead, a pre-enforcement challenge is the classic and approved method for challenging unconstitutional statutes that restrict the right to abortion. See, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 845 (1992). Abortion providers should not have to risk licensure penalties if they guess incorrectly at the meaning of the delay in payment provisions.

Defendants' reliance on U.S. v. Salerno is also misplaced. See Defs.' Resp. at 16-17, citing U.S. v. Salerno, 481 U.S. 739 (1987). First, it is well established that the Salerno "no set of circumstances" standard does not apply to vagueness challenges involving constitutional rights. Rather, where, as here, "the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights," the statute will be held vague on its face even when it could have had some legitimate application. Colautti v. Franklin, 439 U.S. 379, 391 (1979) (citations omitted). In fact, in Kolender v. Lawson, the Supreme Court specifically rejected the contention that a statute should not be held unconstitutionally vague on its face unless it is vague in all its applications. Kolender v. Lawson, 461 U.S. 352, 359 n.8 (1983). Second, the Sixth

Circuit has clearly held that the "no set of circumstances" standard set forth in Salerno does not apply to facial challenges to restrictions on abortion. Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187, 195-96 (6th Cir. 1997) ("We hold that this circuit should 'follow what the Supreme Court actually did – rather than what it failed to say – and apply the undue-burden test' [citation omitted] without regard to Salerno.").

Finally, Defendants have failed to articulate any harms that will result if abortion providers can continue to receive prompt payment for ultrasounds, pregnancy tests, and other medical services that have been rendered to a patient. Individuals will not suffer substantial harm if this Court preliminarily enjoins the delay in payment provisions. Nor would such an injunction harm the public interest. In fact, the public can best be served by preliminarily enjoining the vague and discriminatory delay in payment provisions.

CONCLUSION

For all the foregoing reasons and those set forth in Plaintiffs' opening papers filed in support of their motion for preliminary injunctive relief, this Court should preliminarily enjoin enforcement of the delay in payment provisions in Act No. 685 of Michigan Public Acts of 2002.

Dated: April 21, 2003.

Respectfully Submitted,

David A. Nacht
Bar Number P47034
201 South Main, Suite 1000
Ann Arbor, MI 48104
734-663-7550
Facsimile: 734-663-7592

Bebe J. Anderson
Center for Reproductive Rights
120 Wall Street, 14th Floor
New York City, NY 10005
917-637-3600
Facsimile: 917-637-3666

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CERTIFICATE OF SERVICE

I declare that on April 21, 2003, I served a copy of Plaintiffs' Reply Memorandum of Law in Support of Their Motion for Temporary Restraining Order and/or Preliminary Injunction and Plaintiffs' Motion to Exceed Page Limit for Reply Brief and Brief in Support Thereof by serving true copies thereof by facsimile and First Class mail, post pre-paid to:

Michael A. Cox,
Attorney General
Ronald J. Styka
Santiago Rios
Assistant Attorneys General
Michigan Department of Attorney General
Community Health and Public Administration Division
P.O. Box 30217
Lansing, MI 48909
facsimile: (517) 373-0241

Bebe J. Anderson