

Little Rock Family Planning Servs. v. Rutledge

Decided Jul 23, 2019

Case No. 4:19-cv-00449-KGB

07-23-2019

LITTLE ROCK FAMILY PLANNING SERVICES, et al., PLAINTIFFS v. LESLIE RUTLEDGE, in her official capacity as Attorney General of the State of Arkansas, et al., DEFENDANTS

Kristine G. Baker United States District Judge

TEMPORARY RESTRAINING ORDER

Before the Court is a motion for a temporary restraining order and/or preliminary injunction filed by separate plaintiffs Little Rock Family Planning Services ("LRFP") and Thomas Tvedten, M.D., on behalf of himself and his patients.¹ Plaintiffs bring this action seeking declaratory and injunctive relief on behalf of themselves and their patients under the United States Constitution and [42 U.S.C. § 1983](#) to challenge three Acts passed by the Arkansas General Assembly: (1) Arkansas Act 493 of 2019, which bans abortion "where the pregnancy is determined to be greater than 18 weeks," as measured from the first day of a woman's last menstrual period ("LMP") in nearly all cases ("Act 493"); Arkansas Act 619, which prohibits a physician from intentionally performing or attempting to perform an abortion "with the knowledge" that a pregnant woman is seeking an abortion "solely on the basis" of: a test "indicating" Down syndrome; a prenatal diagnosis of Down syndrome; or "[a]ny other reason to believe" the "unborn child" has Down syndrome ("Act 619"); and (3) Arkansas Act 700 of 2019, which provides that "[a] person shall not perform or induce an abortion unless that person is a physician licensed to practice medicine in the state of Arkansas and is board-certified or board-eligible in obstetrics and gynecology." *2 ("Act 700" or the "OBGYN requirement"). This Court has jurisdiction under [28 U.S.C. §§ 1331](#) and 1343(a)(3).

¹ Not all named plaintiffs in this lawsuit join the motion for temporary restraining order and/or preliminary injunction (Dkt. Nos. 2, 32).

For the reasons set forth below, the Court grants plaintiffs' motion for a temporary restraining order and has under advisement the request for preliminary injunction (Dkt. No. 2). The Court also denies the pending motions to strike filed by both parties (Dkt. Nos. 75, 76).

I. Procedural History

Plaintiffs filed their complaint and motion for a temporary restraining order and/or preliminary injunction on June 26, 2019 (Dkt. Nos. 1, 2). The challenged Acts take effect on July 24, 2019. On July 1, 2019, defendants filed a motion to extend time for defendants to respond to the complaint and motion for a temporary restraining order and/or preliminary injunction (Dkt. No. 19). The Court set July 17, 2019, as the deadline for defendants to file their written response and July 19, 2019, as plaintiffs' deadline to file a written reply (Dkt. No. 31). The

234. Dr. Aultman states that, according to the FDA, there have been 22 deaths "associated with the administration of Mifepristone." (*Id.*, ¶ 46).

235. Defendants also present the rebuttal declaration of Dr. Aultman (Dkt. No. 73; Rebuttal Decl. of Kathi Aultman, M.D.). Dr. Aultman has reviewed the "17 affidavits and declarations . . . in the record of this case from women who have been hurt by abortion." (*Id.*, ¶ 3). Dr. Aultman states that these affidavits and declarations are "consistent with the experiences of the women I have encountered in my work as a physician and advocate for women and their health issues." (*Id.*).

236. Dr. Aultman relates an incident where she provided gynecologic care to a young woman, and she states that that the young woman claimed that she suffered adverse psychological effects after aborting her pregnancy (*Id.*, ¶ 5).

237. Dr. Aultman also states that she provided care to a woman who came to see her "for continuous spotting and bleeding several months following an abortion." (Rebuttal Decl. of Kathi Aultman, M.D., ¶ 6). Dr. Aultman avers that she learned that the young woman "was given vaginal medication" and "was instructed to sit on the toilet and push." (*Id.*). Ms. Aultman states that she further learned that the young woman then "delivered a 20+ week baby boy into the toilet" and that the "baby drowned in the toilet water." (*Id.*).

238. Dr. Aultman claims that there is "no mechanism for recording or reporting" medical or psychological complications of abortions (*Id.*, ¶ 7). She also states that physicians fear being subjected to litigation for delivering babies with congenital abnormalities and that this is why "many young women feel pressure to abort babies with the potential for such abnormalities." (Rebuttal Decl. of Kathi Aultman, M.D., ¶ 8). *60

239. Attached to Dr. Aultman's rebuttal declaration is a certified criminal record for Dr. Tvedten in the case of *State v. Thomas Harold Tvedten* (*Id.*, ¶ 10). According to this record, Dr. Tvedten was convicted of second-degree criminal mischief for an event that occurred on May 22, 1987. At the hearing, Dr. Tvedten testified that this charge was the result of breaking the camera of an individual who was photographing an abortion clinic.

240. Also attached to Dr. Aultman's rebuttal declaration is a disciplinary report for Dr. Tvedten from the Arkansas State Medical Board. Per this report, Dr. Tvedten's medical license was suspended for three months in 1983 and that his Drug Enforcement Agency registration was suspended for fifteen months, ending in 1984.

241. Dr. Aultman also states that "comparing mortality statistics to maternal mortality statistics is not an apples-to-apples comparison" and that an OBGYN "can handle common complications of abortion that an ordinary licensed physician cannot, such as life threatening hemorrhage or injury to internal organs that might require an abdominal surgery to repair." (*Id.*, ¶ 14).

242. Defendants also present the declaration of Donna J. Harrison, M.D. (Dkt. No. 49-7, at 1-22; Decl. of Donna J. Harrison, M.D.). Dr. Harrison is certified by the ABOG and is the Executive Director of the American Association of Pro-Life Obstetricians and Gynecologists ("AAPLOG") (*Id.*, ¶ 3).

243. Dr. Harrison explains the efficacy of fetal screening and diagnostic tests. She explains that, out of 10,000 general population women whose pregnancies are screened using cell-free DNA screening, 30 of those women will test positive for Down syndrome, while in fact only 10 of them are positive for Down syndrome (*Id.*, ¶ 19).
61 In a high-risk population, out of 10,000 *61 women tested, 119 of those women will test positive, while in fact only 99 of them are in fact positive for Down syndrome (*Id.*, ¶ 20).

244. Dr. Harrison further asserts that women who receive a false positive on a screening test "may be pressured to act on the basis of a positive screening test which is wrong." (Decl. of Donna J. Harrison, M.D., ¶ 32).