IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

SUMMIT MEDICAL CENTER OF ALABAMA INC., ET AL.,

Plaintiffs,

versus

DON SIEGELMAN, ET AL.,

Defendants.

Civil Case No. 02-A-1064-N

DECLARATION OF LOUIS T. PAYNE, M.D.,
IN SUPPORT OF TEMPORARY RESTRAINING ORDER/
PRELIMINARY INJUNCTION

LOUIS T. PAYNE, M.D., deposes and says the following:

1. I am a physician licensed to practice in Alabama, and I am board certified in obstetrics and gynecology. I provide gynecology services at West Alabama Women's Center (West Alabama), a women's reproductive health care facility in Tuscaloosa, Alabama. I am a member of the National Abortion Federation (NAF), a prestigious organization of abortion clinic and providers. I have also been a member of the American College of Obstetrics and Gynecology since 1972.

2. I submit this declaration in support of the Plaintiffs' Motion for a Temporary Restraining Order/Preliminary Injunction against the Alabama's "Women's Right to Know" Act (hereinafter "SB 333" or the Act). Unless this Court blocks enforcement of this statute, my professional practice at West Alabama Clinic, my patients, and myself will suffer irreparable

harm. If called as a witness in support of Plaintiffs' motion for a temporary restraining order/preliminary injunction, I would testify to the matters set forth below.

3. I received my medical degree from University of Alabama in 1964. I completed an internship at University Hospital in Birmingham, Alabama from July 1964 through June 1965, and my residency in obstetrics and gynecology also at the University Hospital in (Birmingham) from July 1965 through June 1968.

4. I have been in private practice since 1968 providing comprehensive gynecological care including annual exams, diagnosis and treatment of problems affecting women's reproductive system, family planning and abortion. For much of that time I also practiced obstetrics which I stopped practicing in 1996. I have provided reproductive services at the West Alabama Clinic since August of 1993. At West Alabama, I strive to ensure that our patients receive quality reproductive health care in a supportive environment. At West Alabama, I provide reproductive services to my patients, including abortions up to 20 weeks gestation as measured from a woman's last menstrual period (lmp).

5. If it goes into effect, SB 333 will directly interfere with West Alabama's operations and endanger our patients' health and well being. If the Act is allowed to go into effect, it will force us to stop performing all abortion procedures at least for the foreseeable future. It is for these reasons that I am a Plaintiff in this lawsuit suing on behalf of myself and on behalf of the patients for whom SB 333 would significantly impede, and in some cases preclude, access to abortion services.

6. Women seek abortions for many reasons. I know from experience that for all women, abortion is a difficult choice.

7. Some women have important medical reasons for wanting an abortion. Among these medical problems are kidney disease, diabetes, cancer, essential hypertension, cardiac disease, a

history of post-partum hemorrhage, sickle cell anemia, alcohol and/or drug abuse, radiation exposure, and contraindicated medications. The vast majority of my patients at the Clinic seek abortions because of their age, their psychological, familial, educational or financial situation, or because their religion or conscientious beliefs preclude having a child at that point in their lives.

8. Under Alabama law, all women are already required to have informed consent counseling before their abortion is performed. At West Alabama, we provide options counseling to our patients by non-licensed counselors who receive extensive training in abortion counseling. During the counseling session, a woman is counseled on her options and her decision to have an abortion so that the woman is informed and not ambivalent about her decision. The counselor also discusses future contraceptive use with the patient. If the patient appears ambivalent about her decision the counselor will refer her to a social agency, or another counselor, and the abortion will be rescheduled to give the patient more time to consider her options. I would not perform an abortion on a patient if she seemed ambivalent or if her decision seemed to be coerced. Counseling is also available after the abortion procedure and patients are encouraged to take advantage of this service.

9. I understand that the Act is scheduled to go into effect on October 14, 2002, but that the Alabama Department of Public Health has 180 days from that date, or until April 12, 2003, to develop and publish the materials I am required to provide to patients seeking abortions. I understand that the Department has the same amount of time to publish numerous forms that are going to be mandatory to provide abortion services.

10. If the Act is not enjoined, I will be required to use materials that do not yet exist in order to continue providing abortion services. I will therefore be in an untenable position: either provide abortions and violate the Act or stop providing abortions altogether. Given that I face

the potential loss of my physician's license and potential criminal liability, I would be forced to stop providing all abortions as of October 14, 2002 if the materials are not ready.

11. The Act requires the Department to publish forms, such as a signature form verifying that the patient has received certain information (SB 333, Section 6(c)) and a signature form for recording the medical conditions associated with a medical emergency abortion (SB 333, Section 7(b)). The Department must also develop a videotape that contains information specified in the Act. See SB 333, Section 6(a). As far as I am aware, none of these materials or forms is ready or is going to be ready by the Act's effective date on October 14, 2002.

12. The Act also requires the Department to publish specific information materials listed in the statute. I am aware that the Department has started to develop some of these information materials because my clinic's administrator received a draft version of the materials in July. I understand that we have not yet received a final version of the informational materials, however, nor has the Department indicated that the materials are finalized.

13. I have looked at the draft materials sent out in July and they have a number of problems that make me think that the drafted materials are not going to be usable by the Act's effective dates. The materials also contain numerous factual inaccuracies that will at best confuse my patients and at worst provide false information that will mislead them about the treatment we are providing.

14. For example, the State's draft states that medical abortion is "[o]nly an option up to 49 days (7 weeks) after LMP." See Declarations Exhibit 1 (attached to Ayers Decl.) at 18. But that is untrue; we provide medical abortion through 63 days or 9 weeks lmp. In addition, the Draft states that a woman will be given three pills of mifepristone to be taken orally, see Declarations Exhibit 1 (attached to Ayers Decl.) at 19, but we administer only one pill. The rest of the information regarding medical abortion is similarly inaccurate and confusing. It does not

accurately describe accepted medical abortion regiments and it conflicts with the standard of care for medical abortion in Alabama.

15. In addition, regarding medical abortion, the brochure lists reasons that women should avoid medical abortion, but it fails to list the most important reason that a woman should not be administered medical abortion: namely, if she is not willing to follow-up with a surgical procedure in case there are any complications with the medication. This omission is critical and the list is incomplete and inaccurate.

16. The brochure is replete with inaccuracies that render it misleading and harmful to my patients. For example, when describing a first-trimester surgical abortion procedure (as required by SB 333), the State inaccurately says that a physician may insert laminaria to dilate a woman's cervix. See Declarations Exhibit 1 (attached to Ayers Decl.) at 21. But a first-trimester surgical procedure does not require dilating a woman's cervix with laminaria and, in fact, in all my years of experience, we have never used laminaria in a first-trimester surgical abortion. In contrast, the materials make no mention of the use of laminaria in a second-trimester surgical abortion procedure, see Declarations Exhibit 1 (attached to Ayers Decl.) at 22, even though that is precisely when a woman's cervix may need to be medically dilated. We consistently use laminaria for all second-trimester procedures after 16 weeks lmp. This type of erroneous information renders it unusable. Moreover it is not realistically possible for me to provide the State's draft brochure to patients and then "correct" all of the inaccuracies by providing accurate information. It would take far too much time to try and set the record straight on all of the false information contained in the brochure, and it would confuse my patients about what source of information they should trust. It would plainly be harmful to my patients to provide them with blatantly false information and to mislead them about the medical services they are receiving. It

would significantly compromise my patients' confidence in the medical care they are receiving at what is already a fairly stressful time for them.

17. Another way the State's draft brochure is inaccurate is that it states that a surgical abortion "[d]oes not require follow-up in all cases." See Declarations Exhibit 1 (attached to Ayers Decl.) at 21. But at West Alabama we strongly encourage our patients to return for a follow-up visit after a surgical abortion procedure so that we can ensure that their uterus has returned to normal and that they are fully recovered. We strongly advise our patients to return for follow-up care and, in fact, the cost of that visit is included in the cost of the procedure. Thus, the State's materials are in direct tension with the course of treatment that we recommend to our patients. It is for our patients benefit that we ask them to return for a follow-up visit and the brochure would undermine our request by creating the impression that a follow-up visit is not typically required.

18. In addition, the Department has attempted to create regulations to implement the Act, but they have not followed their own procedures to put those into effect. I am aware that under Alabama law, the Department must publish written notice of any new rules and regulations at least 35 days in advance of soliciting comments on those regulations. The Department has not followed its own rules for how to properly implement the Act and it will not be able to do so in time for the October effective date. Instead, the Department has indicated it is going to issue emergency rules to implement the Act. But there is no "immediate danger to the public health" by providing abortions without the Act's new requirements. Abortion care in Alabama is one of the safest and most routine surgical procedures performed. The Department has never stated in writing that there is an immediate danger to the public health, although I understand it is obligated to do so if it wants to circumvent the proper time requirements for implementing the Act's regulations.

19. I am also concerned about SB 333's requirements for providing abortions any time after 19 weeks gestation.

20. I understand that SB 333 requires me to inform a woman seeking an abortion any time after she is 19 weeks pregnant the her fetus may be able to survive outside of the womb. But this information is manifestly false.

21. As a matter of medical fact, a fetus cannot independently survive outside the womb before 23 or 24 weeks gestation at the earliest. A 19-week and one day old fetus is not viable and, in my opinion, the attempt to sustain a 19-week and one day old fetus would be needlessly cruel. In the case of women carrying fetuses with genetic anomalies, their fetuses will never be able to survive outside of the womb at 19 weeks and one day or anytime after that point. Thus the Act requires me to provide all patients seeking abortions after 19 weeks gestation with false information. To do so would harm my patients and mislead them about the medical care they are receiving. It would also violate my ethical duty as a physician to provide my patients with information I know is untrue.

22. I am also aware that SB 333 requires me to inform a woman seeking a procedure after 19 weeks that she has the "right" to request that I perform the abortion procedure most likely to preserve the life of the fetus. I cannot tell if the Act is redundant and is merely informing a woman of a right she already has, namely to request a course of medical treatment, or if the Act is creating an enforceable right for a woman to require me to perform the abortion procedure of her choice. I am unclear if it means the latter as it appears to me it could. Especially since the Act requires me to tell a woman this information verbally, thus making it seem like I am offering her the abortion method of her choice. I am fearful that the Act creates this type of right because it would subject me to having to perform a medical procedure that is opposed to my best medical judgment. This would be a completely unworkable position for me

as a physician, as it deprives me entirely of my medical judgment and discretion, as well as my autonomy. It would be an unprecedented requirement as I know of no other class of physicians who is required by law to perform a procedure regardless of their best medical judgment.

23. The abortion procedure most likely to preserve the life of the fetus is a hysterotomy. A hysterotomy is a disfavored abortion procedure that is akin to cesarean section that involves making an incision into a woman's uterus in order to remove the fetus. It is a major surgical procedure that cannot be performed in a clinic setting but must be performed in a hospital. It presents significantly greater risks to a woman's health than an abortion procedure performed in a clinic setting.

24. Although I have privileges at the local hospitals, I would not typically perform a hysterotomy as a routine abortion procedure and I can think of almost no circumstances where a hysterotomy procedure would be my best medical judgment for a preferred abortion procedure.

25. If the Act goes into effect, I will be forced to counsel a woman seeking abortions after 19 weeks gestation that she has the right to ask me to perform a hysterotomy. As I am not clear if she will be able to enforce that right by enlisting a private attorney or having me prosecuted if I fail to oblige her request, I will be forced to stop performing abortions after 19 weeks gestation rather than face the Act's creation of a new right for my patients.

26. Although I believe that SB 333 will have an adverse effect on all women, based on my experience, women who are the survivors of abuse, rape, or incest will be especially hurt by the new provisions. In 2002, I have already treated several women who reported that their pregnancies were the result of rape; there were many other patients whose pregnancies we suspected were the result of rape but who did not want to discuss the issue with me or my staff. Many more were the victims of physical abuse at the hands of a husband or boyfriend. In my experience, at least one woman each week appears to me as if she is in an abusive relationship.

In the last year alone, I have seen at least 6 women, most of whom were minors, who were survivors of rape and incest and had become pregnant as a result.

27. Because I provide abortions after 19 weeks gestation, I have also seen a significant number of women who were carrying previously-wanted pregnancies who learned grave news about their fetus, such as that their fetus was no longer alive or that it had significant defects that rendered it not possible for the fetus to live after birth.

28. These sad cases often occur after 19 weeks gestation, as some defects are only able to be detected at that point in pregnancy. Fortunately, these types of cases are infrequent, but on average I see patients in these circumstances approximately once a month, and I would estimate that I have already seen about 6-10 cases this year alone.

29. Although SB 333 has a medical emergency exception that permits an abortion to be performed without following the statute's informed consent provisions, it does not appear to provide an exception for women who are victims of rape or incest. It also does not provide an exception for women who are carrying previously wanted pregnancies. Without an exception that permits me not to subject these women to the mandatory statements about support obligations and adoption agencies, for example, SB 333 will cause these women significant and unnecessary harm. It would be extremely cruel for me to "inform" these women of the mandatory information, and to do so would serve no legitimate purpose, but the Act appears to make no exception for the woman's circumstances except in the most dire of medical emergencies. It does not permit me the discretion not to administer all of the required information if, in my best judgment, the information will have severe and adverse effects on a woman's mental and emotional well-being.

30. I do not believe that SB 333 will contribute to women making informed decisions about abortion. On the contrary, it will lead to an outright ban on abortions given that the

Department materials are not ready; it will require me to provide incorrect information to women who are seeking abortions any point after 19 weeks gestation; it will create a right for women to demand that I perform a procedure regardless of my medical judgment; and it will endanger the emotional and mental health women who are in abusive relationships, survivors of rape and incest, and women who are seeking to terminate previously wanted pregnancies. It is for all of these reasons that I respectfully request that the Court grant Plaintiffs' Motion for a Temporary Restraining Order / Preliminary Injunction.

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

Dated: September 9, 2002

Louis T. Payne, M.D.

LOUIS T. PAYNE, M.D.