

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

PLANNED PARENTHOOD OF THE)
HEARTLAND and)
))
DR. JILL L. MEADOWS,)
))
Plaintiffs,)
))
v.)
))
DAVE HEINEMAN, Governor of Nebraska,)
in his official capacity;)
))
JON BRUNING, Attorney General of Nebraska;)
in his official capacity;)
))
KERRY WINTERER, Chief Executive Officer,)
and DR. JOANN SCHAEFER, Director of the)
Division of Public Health, Nebraska Department)
of Health and Human Services, in their official)
capacities; and)
))
CRYSTAL HIGGINS, President, Nebraska Board)
of Nursing, and BRENDA BERGMAN-EVANS,)
President, Nebraska Board of Advanced Practice)
Registered Nurses, in their official capacities;)
))
Defendants.)
_____)

Case No. 4:10-cv-3122

FIRST AMENDED COMPLAINT

Plaintiffs Planned Parenthood of the Heartland (“Planned Parenthood”) and Dr. Jill L. Meadows, by and through their undersigned counsel, bring this Complaint against the above-named Defendants, their employees, agents, and successors in office, and in support thereof state the following:

1. This is a constitutional challenge under 42 U.S.C. § 1983 to L.B. 594, 101st Leg. Reg. Sess. (Neb. 2010), to be codified within Neb. Rev. Stat. §§ 28-325, 28-340, 38-2021, 28-

101, 28-326, 28-327, 28-327.01, 28-327.03, 28-327.04 (“Act”). Among other things, the Act would ban abortions in Nebraska by imposing, as a condition to performing lawful abortions, impossible, unintelligible, and unprecedented so-called “informed consent” requirements on abortion providers that vastly stray from accepted—and, indeed, good—medical practice. A copy of the Act is attached as Exhibit 1 to this Complaint.

2. The Act is scheduled to take effect on July 15, 2010.

3. If the Act takes effect, Plaintiffs and their staff will be subject to licensing penalties, including revocation of Planned Parenthood’s license to operate a health care facility in Lincoln and its staff’s professional licenses, and significant civil penalties, including damages for wrongful death and professional negligence, and its patients will be denied their constitutionally guaranteed right to choose to end a pregnancy. To avoid this irreparable harm, Plaintiffs seek declaratory and injunctive relief against the Act.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this action under 28 U.S.C. §§ 1331 and 1343.

5. Plaintiffs’ claims for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202, Rules 57 and 65 of the Federal Rules of Civil Procedure, and the general legal and equitable powers of this Court.

6. Venue is appropriate under 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to Plaintiffs’ claims occurs in this judicial district.

PARTIES

7. Plaintiff Planned Parenthood is a not-for-profit corporation registered as a foreign corporation doing business in Nebraska. Planned Parenthood operates a health center in Lincoln, Nebraska, which is licensed by the Nebraska Department of Health and Human Services

(“DHHS”). The Lincoln health center provides a broad range of reproductive health services, including, but not limited to, physical exams; pregnancy testing and planning services; contraception and contraceptive education; HIV testing; testing and treatment for sexually transmitted infections; screening for breast, cervical, colon, prostate, and testicular cancer; and abortion. Currently, Planned Parenthood’s Lincoln health center provides surgical abortion services through 16 weeks of pregnancy dated from the first day of the woman’s last menstrual period (“LMP”) and medication abortion services through 9 weeks LMP. Before an abortion, Planned Parenthood takes a number of steps to ensure that informed consent is obtained, including meeting all common and statutory law requirements, and ensuring that the woman is firm in her decision and was not coerced or pressured. Planned Parenthood employs registered nurses and nurse practitioners, also licensed by DHHS, to assist the physician with abortion procedures. Planned Parenthood will be opening a health center in Omaha this year that will provide a wide range of reproductive health services, including abortion. Planned Parenthood also provides abortion services in Iowa and advertises those services in Nebraska. Planned Parenthood sues on its own behalf and on behalf of its current and future physicians, nurses, employees, staff, servants, officer and agents who participate in abortions, and on behalf of its current and future patients seeking abortion services.

8. Plaintiff Dr. Jill Meadows is a practicing obstetrician and gynecologist and is Planned Parenthood’s Medical Director. As such, she has oversight responsibility for the medical services that Planned Parenthood provides, and also shares responsibility for ensuring that these services comply with Planned Parenthood’s legal and professional obligations. She is licensed to practice medicine in Nebraska, and in addition to her duties as medical director she

provides medical services, including some abortion services in Nebraska. Dr. Meadows sues on her own behalf, and on behalf of her current and future patients seeking abortion services.

9. Defendant Dave Heineman is the Governor of Nebraska. On April 13, 2010, the Governor signed the Act into law, hailing it as “important legislation for Nebraska.” Press Release, Office of Governor Dave Heineman, Gov. Heineman Signs Pro-life Legislation (Apr. 13, 2010), available at http://www.governor.nebraska.gov/news/2010/04/13_pro_life.html.

Defendant Jon Bruning is the Attorney General of Nebraska. The Governor and the Attorney General have broad powers to enforce the State’s statutes. See Neb. Const. art. IV, § 6; Neb. Rev. Stat. § 84-731. In addition, the Attorney General has the power and duty to file a petition in order for the Director of the Division of Public Health of DHHS to discipline a registered nurse or nurse practitioner credentialed under the Uniform Credentialing Act. See Neb. Rev. Stat. § 38-186. Defendants Heineman and Bruning, their employees, agents, and successors in office, are sued in their official capacity.

10. Defendant Kerry Winterer is the Chief Executive Officer of DHHS and, as such, is charged with supervising and being responsible for the administration of the department. See id. § 81-3117(1). DHHS consists of six divisions, including the Division of Public Health, see id. § 81-3113, which is charged with administering the regulation and licensure of health care facilities and health care services, and administering the regulation and licensure of health-related professions and occupations, see id. § 81-3116(5). Defendant Dr. Joann Schaefer is the Director of the Division of Public Health and the Chief Medical Officer. Defendant Schaefer has the power and duty to take disciplinary action against a health care facility license for, among other things, violations of state laws. See id. §§ 71-448 to 449; 175 Neb. Admin. Code § 7-006. In addition, Defendant Schaefer has the power and duty to impose sanctions against registered

nurses and nurse practitioners, including license suspension or revocation, in a disciplinary action. See Neb. Rev. Stat. § 38-196. Defendants Winterer and Schaefer, their employees, agents, and successors in office, are sued in their official capacity.

11. Defendants Crystal Higgins and Brenda Bergman-Evans are the Presidents of the Nebraska Board of Nursing and Board of Advanced Practice Registered Nurses, respectively. The purpose of each board is to protect the health, safety, and welfare of the public as prescribed in the Uniform Credentialing Act. See id. § 38-161(1). The duties of each board include “providing recommendations related to the issuance or denial of credentials [and] disciplinary action” See id. § 38-161(2). Defendants Higgins and Bergman-Evans, their employees, agents, and successors in office, are sued in their official capacity.

ACT

12. Read literally, the Act dramatically expands existing informed consent requirement by compelling providers of abortion services—prior to performing an abortion—to engage in the unprecedented and impossible task of

- (1) identifying, retrieving, and reviewing thousands of articles—dating back more than a century, in dozens of different languages, and appearing in any of thousands of worldwide journals—for information related to so-called “risk factors” and “complications” associated with abortion as those terms are broadly defined in the Act;
- (2) evaluating every patient for the infinite list of “risk factors” culled from this enormous body of literature and informing the patient of the results of the evaluation in writing; and
- (3) disclosing an equally vast list of “complications” and quantified “risk rates” associated with those risk factors.

See Act, §§ 4(4)-(5). The Act requires Plaintiffs to conduct these evaluations and make these disclosures without regard to the validity of the findings in the articles and without regard to whether the information is applicable and material to their patients.

13. The Act further provides that if a physician performs an abortion on a minor without providing the information required above to the minor's parent or legal guardian, the physician bears the burden of proving that the minor was capable of independently evaluating the information given to her. Id. § 8.

14. Moreover, the Act states that "[a]ny physician advertising services in this state shall be deemed to be transacting business in this state pursuant to section 25-536 and shall be subject to the provisions of section 28-327." Id. § 10(4).

15. The Act imposes significant civil penalties on providers who fail to comply with any of its requirements. Indeed, if Plaintiffs miss even one of the potentially hundreds if not thousands of "risk factors," associated complications, and/or quantified "risk rates" mentioned in the enormous body of literature, they could be liable for damages for the wrongful death of the fetus, even without a showing by the plaintiff that she suffered the complication about which the physician allegedly failed to warn her, as well as for professional negligence, and costs and attorney's fees. Id. §§ 6-7.

16. The Act imposes drastically different requirements for both the factual showings required and damages calculation for wrongful death and professional negligence in the context of violation of the informed consent requirements for abortion than in any other context. Among other differences, the Act creates a presumption that the woman would not have had the abortion if the physician had complied with the informed consent requirements, id. § 10(1), and allows recovery for pain, emotional distress, and related injuries without any showing of physical injury,

id. § 10(2). It also could create liability solely based on a showing that the physician knew or should have known that not all requirements of the informed consent law were met, without any need to show any other element usually required for tort liability. See id. § 6(2).

17. Further, a health care facility where abortions are performed in violation of the Act faces licensing penalties, including fines, suspension, and/or revocation of its license to operate. See Neb. Rev. Stat. §§ 71-448 to 449; 175 Neb. Admin. Code § 7-006.

18. Finally, a health care professional other than a physician—including a registered nurse or a nurse practitioner—who assists in the performance of abortions in violation of the Act may face professional discipline, including license suspension or revocation. See Neb. Rev. Stat. §§ 38-178 to 179, 196.

19. The Act adds to the existing informed consent statute which already requires that, prior to the abortion, the patient be told: “[t]he particular medical risks associated with the particular abortion procedure to be employed including, when medically accurate, the risks of infection, hemorrhage, perforated uterus, danger to subsequent pregnancies, and infertility,” “[t]he probable gestational age of the unborn child at the time the abortion is to be performed,” “[t]he medical risks associated with carrying her child to term,” and “[t]hat she cannot be forced or required by anyone to have an abortion and is free to withhold or withdraw her consent for an abortion.” Id. §§ 28-327(1)(a) to (d).

FACTUAL ALLEGATIONS

A. Standard Informed Consent Practice

20. The Act’s requirements dramatically depart from the accepted standard for informed consent: to enable the patient to make meaningful decisions about his or her medical care by providing the patient with the information that is likely to be material to those decisions.

21. In order to accomplish that goal, selectivity is key, as patients who receive too much information are likely to become “flooded” and no longer able to process the information in any meaningful way, thereby damaging their ability to make informed medical decisions. Thus, physicians develop general knowledge of and familiarity with the significant risks and benefits of the medical treatment or procedure being considered, as well as risk factors that would, if present, significantly change those risks and benefits. This does not mean being aware of, much less disclosing, every potential complication or risk factor of the treatment or procedure that has ever been discussed in the medical literature. Rather, the physician’s obligation is to develop general knowledge of and familiarity with the *significant* potential complications of the treatment or procedure being considered, as determined by some combination of the complication’s frequency and its severity, as well as the risk factors that, if present, would change the information the physician would give the patient about potential complications.

22. Physicians focus on significant complications and risk factors because they are likely to be material to the patient—that is, relevant to the patient in making a meaningfully informed medical decision. Exercising medical judgment to determine which information is likely to be material to the patient is an essential part of the physician’s role.

23. In contrast to the requirements of the Act, physicians do not develop their knowledge of complications and risk factors by doing a literature survey of every article ever published in a peer-reviewed journal on the treatments or procedures they provide. Rather, in typical practice, physicians develop this knowledge and familiarity from a variety of sources that synthesize and digest the information in the medical literature, including publications, committee opinions, and practice guidelines from professional organizations; review articles in major medical journals; presentations at medical associations and continuing medical education

meetings; and conversations with other physicians about their practices. This allows physicians to stay informed about developments in their areas of practice, as well as to rely appropriately on the judgment of those with expertise in study methodology and statistical analysis.

B. Impossibility of Complying with the Act's Requirements

24. Read literally, it is impossible to comply with the Act's requirements.

PubMed/MEDLINE is an online, searchable database of approximately 20 million journal article citations. The Thomson Reuters Master Journal List ("MJL") is a list of approximately 16,500 journal titles, and some of the article citations published in the journals included on the MJL can be searched electronically using a search engine called "Web of Science." It is impossible to search every article ever published in any of the journals included on PubMed/MEDLINE or in the MJL through PubMed/MEDLINE or Web of Science. Second, of the articles that can be searched electronically through PubMed/MEDLINE or Web of Science, there is no way to search electronically the full text of those articles and, thus, even the broadest search would not yield every responsive article. Third, even if these limitations did not exist, it would be impossible to craft a comprehensive search that efficiently retrieves responsive articles. There are many additional limitations related to searching PubMed/MEDLINE and the MJL, including the fact that the MJL is routinely updated with potentially responsive materials, but users cannot easily access information about which journals have been recently added or deleted; many of the potentially responsive articles on PubMed/MEDLINE and Web of Science could be in any of multiple foreign languages; and merely to retrieve articles that may contain responsive information could cost Planned Parenthood an exorbitant amount of money. Finally, even a review of only a few articles that are potentially responsive makes clear that it would be

impossible for Plaintiffs to evaluate patients for every risk factor and disclose every associated complication and quantified risk rate described in the literature covered by the Act.

C. Vagueness of the Act's Requirements

25. If there are certain implicit limitations on the Act's requirements, it is completely unclear what those are. For example, Plaintiffs do not know whether there are any limits on the materials that must be searched or whether providers can use their medical judgment to determine what information must be included in the patient evaluation and discussion.

D. Untruthful, Misleading, and Not Relevant Information Required by the Act

26. Read literally, the Act will require Plaintiffs to provide information to patients that is not true and/or is misleading, and is not in any way relevant to their medical decision-making. This includes (among other examples) information on supposed risk factors, complications, and risk rates that have been rejected by mainstream medicine, or were found only in methodologically flawed and unreliable studies; or in studies of out-of-date medical practice and procedures; or studies in developing countries with vastly different medical and social contexts from those of patients receiving services in Nebraska.

E. Additional Burdens Imposed by the Act

27. Read literally, the Act will require Plaintiffs' patients to undergo extensive medical and psychosocial evaluations for supposed risk factors that could trigger disclosure obligations under the Act, thus requiring them to disclose highly personal, intrusive information that is not relevant to their medical care as a condition to abortion.

28. In the case of minor patients, by requiring that the results of these extensive evaluations be disclosed to the minor's parent or legal guardian unless the physician can prove "that the [minor] was capable of independently evaluating the information given to her," the Act

requires minors to disclose to a parent or legal guardian, highly personal, intrusive information that is not relevant to their medical care as a condition to abortion.

FIRST CLAIM FOR RELIEF

29. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 28.

30. By imposing impossible requirements on abortion providers as a condition to performing abortions, the Act effectively bans abortions in violation of a woman's right to liberty and privacy guaranteed by the Fourteenth Amendment to the United States Constitution.

SECOND CLAIM FOR RELIEF

31. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 30.

32. By failing to give adequate notice of the conduct proscribed, the Act is impermissibly vague in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

THIRD CLAIM FOR RELIEF

33. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 32.

34. By requiring the disclosure of untruthful, misleading, not relevant, and/or not reasonable information to patients, the Act violates the right against compelled speech protected by the First Amendment to the United States Constitution and imposes an undue burden on women's right to choose abortion in violation of their right to liberty and privacy guaranteed by the Fourteenth Amendment to the United States Constitution.

FOURTH CLAIM FOR RELIEF

35. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 34.

36. By subjecting out-of-state providers who advertise services in Nebraska to the requirements of the Act, the Act violates the Commerce Clause and the Due Process Clause of the United States Constitution.

FIFTH CLAIM FOR RELIEF

37. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 36.

38. By treating informed consent for abortion differently than for any other medical service or procedure, the Act violates providers' and their patients' rights to equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

SIXTH CLAIM FOR RELIEF

39. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 38.

40. By requiring patients to disclose highly personal, intrusive information that is not medically relevant to the abortion procedure as a condition to abortion, the Act violates patients' right to liberty and privacy guaranteed by the Fourteenth Amendment to the United States Constitution.

SEVENTH CLAIM FOR RELIEF

41. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 40.

42. By requiring minors to disclose highly personal, intrusive information that is not medically relevant to the abortion procedure to a parent unless the physician can prove “that the [minor] was capable of independently evaluating the information given to her” as a condition to abortion, the Act violates minor patients’ right to liberty and privacy guaranteed by the Fourteenth Amendment to the United States Constitution.

INJUNCTIVE RELIEF

43. If the Act is allowed to take effect, Plaintiffs and their staff and patients will be subject to irreparable harm for which no adequate remedy at law exists.

44. Enforcement of the Act will cause irreparable harm by threatening Plaintiffs and their staff with significant licensing penalties, including revocation of Planned Parenthood’s license to operate a health center and its staff’s professional licenses; significant civil penalties, including damages for wrongful death and professional negligence, costs, and attorneys’ fees; substantial financial harm; and ongoing violations of their constitutional rights and those of their patients; depriving Plaintiffs’ patients of their constitutional right to decide whether to have a child; and preventing Plaintiffs’ patients from obtaining an abortion in Nebraska (or by any provider in any of the surrounding states who advertises services in Nebraska), thereby causing them significant harm.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs ask this Court:

- A. To enter a judgment declaring that the Act violates the United States Constitution.
- B. To issue a permanent injunction, restraining Defendants, their employees, agents, and successors in office from enforcing the Act or taking any action based on supposed violation of the Act.

C. To issue such interim injunctive relief as may be necessary to maintain the status quo pending award of a final judgment.

D. To award Plaintiffs their attorneys' fees and costs pursuant to 42 U.S.C. § 1988.

E. To grant such other and further relief as the Court deems just and proper.

Dated: July 12, 2010

BY: PLANNED PARENTHOOD OF THE
HEARTLAND

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OF COUNSEL FOR PLAINTIFF

*Application for admission *pro hac vice*
pending

CERTIFICATE OF SERVICE

I, Andrea D. Snowden, am one of the attorneys of record for Plaintiff and hereby certify that on the 12th day of July, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

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