

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2009-029110

02/17/2010

HONORABLE DONALD DAUGHTON

CLERK OF THE COURT
R. Aguilera
Deputy

PLANNED PARENTHOOD ARIZONA INC

LAWRENCE J ROSENFELD

v.

TERRY GODDARD, et al.

MARY R O'GRADY

PAULA S BICKETT
PETER A GENTALA
DEBORAH SHEASBY

MINUTE ENTRY

Following Oral Argument on February 5, 2010, the Court took the following Motions under advisement. This is the Court's Final Order on those pending motions.

Defendants' Motion to Dismiss Counts IV and VII of Plaintiff's Complaint

The Court having received and considered Defendants' Motion to Dismiss Counts IV and VII of Plaintiff's Complaint and Memorandum of Points and Authorities in support, Planned Parenthood's Response in Opposition to Motion to Dismiss Counts IV and VII, and Defendants' Reply in Support of Motion to Dismiss Counts IV and VII of Plaintiff's Complaint, and having considered the authorities cited, the oral argument, and being fully informed in the premises,

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IT IS ORDERED denying Defendants' Motion to Dismiss Counts IV and VII of Plaintiff's Complaint.

**Motion for Intervention of Right – Arizona Rules of Civil Procedure 24(a)
and A.R.S. § 12-1841(A)**

The Court having received and considered the Motion for Intervention of Right filed on behalf of Kirk D. Adams, Speaker of the Arizona House of Representatives, Planned Parenthood's Opposition to Motion to Intervene, Speaker Adams' Reply, and having considered the authorities cited and oral argument,

IT IS FURTHER ORDERED denying the Motion for Intervention of Right – Arizona Rules of Civil Procedure 24(a) and A.R.S. § 12-1841(A). Although Kirk D. Adams, Speaker of the Arizona House of Representatives, is entitled under A.R.S. § 12-1841(A) to be "heard," he has not shown that he is entitled to intervene as a party Defendant. He has made no effort whatsoever to show that his participation as a party Defendant will assist the Court in a proper resolution of the issues in this case. Mr. Adams, as Speaker of the Arizona House of Representatives, is entitled to appear as amicus.

The Court now makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

The Court has received and considered Plaintiff's Proposed Findings of Fact and Conclusions of Law in Support of Preliminary Injunction and Defendants' Response to Proposed Findings of Fact and Conclusions of Law. On February 5, 2010, the Court heard extended oral argument on the Proposed Findings of Fact and Conclusions of Law and discussed what each side considered to be appropriate legal authority.

This is a challenge to the constitutionality of certain provisions of H.B. 2564, 49th Leg. Reg. Sess. (Ariz. 2009), ("the Omnibus Act") and the entirety of S.B. 1175, 49th Leg. Reg. Sess. (Ariz. 2009), ("S.B. 1175") (together, "the Acts") under the Arizona Constitution. Plaintiff Planned Parenthood of Arizona, Inc. ("Plaintiff" or "Planned Parenthood") seeks a preliminary injunction to prohibit enforcement of certain provisions (the "Challenged Provisions") of the Omnibus Act and the entirety of S.B. 1175 pending trial on their request for a declaratory judgment that these provisions are unconstitutional, and a permanent injunction against their enforcement. The provisions Planned Parenthood sought to preliminarily enjoin would have:

- (a) Prohibited registered nurse practitioners from providing surgical abortions.

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(b) Required women who choose abortion to receive certain information in person at least 24 hours before the abortion. Planned Parenthood did not seek to enjoin this provision altogether, but rather sought an injunction that would allow the information to be given by telephone rather than in person, thus avoiding the need for every woman to travel to a healthcare center two times in order to receive an abortion.

(c) Required that some of the information that must be given to the woman 24 hours before the abortion must be given by a physician. Planned Parenthood sought an injunction that would allow the information to be given by a qualified staff member, rather than a physician. A separate provision requires some of the Pre-Abortion Information to be given by a licensed healthcare professional. Planned Parenthood did not seek to preliminarily enjoin this provision.

(d) Potentially required physicians to provide some of the Pre-Abortion Information, even when the abortion is by medication, not surgery, although medication abortion is routinely provided by RNPs and physician assistants (“PAs”), as permitted by Arizona law.

(e) Required a parent’s consent to their daughter’s abortion to be notarized.

(f) Expand Arizona’s “right to refuse” law such that health care providers may refuse to facilitate an abortion, and may refuse to participate in or facilitate emergency contraception and some other contraceptives, without exception for emergencies.

Planned Parenthood provides a wide range of reproductive health services, including abortions, to women and men in Arizona. Planned Parenthood operates 19 healthcare centers, which are located in Flagstaff, Globe, the Phoenix metropolitan area, Prescott, Tucson, and Yuma. These healthcare centers serve over 70,000 health care patients annually. In addition, more than 30,000 teens and adults are served annually by Planned Parenthood’s education and outreach efforts. Planned Parenthood healthcare centers offer a range of services including contraceptive counseling and services, sexually transmitted infection (including HIV) testing and treatment, well-woman exams, vaccinations, vasectomies, and cancer screening. In addition, Planned Parenthood’s healthcare centers in Flagstaff, the Phoenix metropolitan area, Prescott, Tucson, and Yuma provide surgical and/or medication abortion services.

Planned Parenthood sued on behalf of: itself; its Medical Director who supervises the provision of all abortion services at Planned Parenthood healthcare centers; the physicians, RNPs and PAs who provide abortion services at its healthcare centers; its patients; and the parents of minors who consent to their daughters’ abortions, but whose identities may be made public due to provisions in the Omnibus Act.

There are two types of first-trimester abortions: medication abortion (sometimes referred to as RU-486 or the abortion pill) and surgical abortion (also known as aspiration abortion). Medication abortion is only available through nine weeks of pregnancy, dated from the first day

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of the woman's last menstrual period ("LMP"). Aspiration abortion is available throughout the entire first trimester.

Medication abortion is a Food and Drug Administration-approved method of terminating an early pregnancy by taking oral medication that causes the woman to miscarry within a relatively short time.

Patients who choose medication abortion must agree to return to the healthcare center for a follow-up visit to confirm that the abortion is complete.

The first trimester "surgical" abortion procedure is a simple procedure more aptly referred to as "aspiration abortion" because the provider uses either a hand-held suction device or a suction machine to gently aspirate the contents of the uterus. At Planned Parenthood the procedure is performed at a healthcare center on an outpatient basis.

A patient's decision between having a medication abortion and an aspiration abortion is often a very important and personal one.

Some women choose medication abortion over aspiration abortion because they find it less invasive and more like a spontaneous miscarriage. Also, some women choose medication abortion because it offers more privacy and allows them to feel that they have more control over the process. Some women choose aspiration abortion over medication abortion because the procedure can be completed relatively quickly, is more predictable, and is completed while the woman is still in the healthcare center.

Planned Parenthood also provides second-trimester abortion services using the dilation and evacuation ("D&E") method. The D&E procedure is generally performed over two consecutive days, although the woman is permitted to go home overnight. On the first day, the cervix is slowly dilated. On the second day, the uterus is evacuated with a combination of suction and other instruments.

A second-trimester abortion is more complicated and carries more risk than a first-trimester abortion (although it is still an extremely safe procedure).

Ten out of fifteen of Arizona counties, including some of the poorest and most rural counties, appear to have no health care professional providing abortion services.

Planned Parenthood performs the vast majority of the medication and surgical abortion procedures in the state. Of these procedures, approximately 95% are performed in the first trimester of pregnancy and more than half are medication abortions.

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Planned Parenthood provides medication abortion services on limited days of the week at healthcare centers located in the Phoenix metropolitan area, Tucson, Flagstaff, Prescott, and Yuma. Planned Parenthood's medication abortion services are provided almost exclusively by qualified RNPs and physician assistants. Currently, Planned Parenthood has no physician working on-site at its Flagstaff, Prescott or Yuma healthcare centers, or at its six medication abortion sites (where surgical abortions are not offered) in the Phoenix metropolitan area and Tucson.

Planned Parenthood provides surgical abortion services on limited days of the week throughout the first trimester and up to 24 and 20 weeks LMP, respectively, in Phoenix and Tucson.

Apart from one solo-practice physician who appears to provide a limited number of medication and first-trimester aspiration abortions as part of his medical practice in a town about an hour southwest of Flagstaff, Planned Parenthood operates the only healthcare centers open to the public that provide medication abortion outside Tucson and the Phoenix metropolitan area.

Apart from the provider located outside of Flagstaff, there are no providers of surgical abortion services outside Tucson and the Phoenix metropolitan area. Abortions after 20 weeks LMP are available only in Phoenix.

There are no post-viability abortions performed in Arizona, as these procedures are banned by state law in almost all instances. A.R.S. § 36-2301.01.

Planned Parenthood ensures that, as required by state law and medical ethics, its patients have given an informed and voluntary consent to all medical services.

Planned Parenthood is an accredited affiliate of Planned Parenthood Federation of America ("PPFA"). PPFA has a Medical Affairs department, comprised of medical professionals, that prepares "standards and guidelines," including standards and guidelines for informed consent, including a very detailed informed consent process for abortion, which affiliates must follow in order to maintain their affiliation.

As part of its existing informed consent protocol, Planned Parenthood provides all abortion patients with information and counseling, including information about the nature and risks of the abortion procedure and alternatives to abortion, including prenatal care and adoption. Some of this information is provided orally, and some in writing. Women who request it receive information on fetal development.

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As part of the informed consent process, which takes place on the day the abortion is performed, trained non-physician staff members discuss each woman's situation with her privately to determine whether she has fully considered and is firm about her decision, and to confirm that it is a voluntary decision.

Planned Parenthood does not challenge the requirement that it provide the information mandated by the Challenged Provisions to every abortion patient 24 hours before an abortion is performed. Its challenge is to the requirement that women receive the information in person – a requirement that forces every woman to come to a healthcare center for an additional, medically unnecessary visit, regardless of how far away she lives and what other obstacles she faces. Planned Parenthood proposes to instead provide the mandated information by telephone, and to continue to provide informed consent in person at the healthcare center on the day of the procedure.

Planned Parenthood also challenges the requirement that certain Pre-Abortion Information be provided by a physician, as opposed to another qualified staff member to whom responsibility has been delegated by a physician.

Many of Planned Parenthood's abortion patients are poor (indeed, many at or below 150% of the federal poverty level), and have difficulties raising the money they need to pay for the procedure and to make arrangements to come in for their appointment. Some patients delay appointments in order to raise money for the procedure and related expenses. Others have to delay payment for such basic expenses as rent or food. If these patients were required to come to the healthcare center an additional time at least 24 hours before an abortion, they would be forced to incur additional expenses they can ill afford. Further, if the Two-Trip Requirement were allowed to go into effect it would cause significant disruption to Planned Parenthood's practice that would ultimately force Planned Parenthood to increase the price for abortions, further burdening its patients. In some cases, the Two-Trip Requirement would cause women to significantly delay their abortion, or even prevent them from obtaining an abortion altogether.

Some patients travel from great distances to receive abortion services at Planned Parenthood's healthcare centers. For example, patients travel from the most northern regions of the state to have a surgical abortion at one of Planned Parenthood's healthcare centers in the Phoenix metropolitan area (for many, the closest area where they can have a surgical abortion), because they are too late in their pregnancies to have a medication abortion or for personal reasons prefer surgical abortion. Tucson is the closest city where abortion services are available for women in the outlying cities of southern Arizona, as well as for women from parts of Mexico. Flagstaff is the closest city where abortion services are available for many women in Coconino County, which at 18,661 square miles is the second-largest county in the nation. Patients also travel to Flagstaff from the neighboring Mohave, Navajo and Apache Counties,

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which have no healthcare facilities that provide abortions, as well as from Utah, Nevada, Colorado and New Mexico.

For patients who travel significant distances to obtain an abortion, an additional trip to the healthcare center will mean an array of additional expenses they cannot afford, including money for gas and in some cases hotel accommodations, as well as additional lost money from work and/or additional childcare expenses. For some patients these additional expenses, the need to make arrangements, and other obstacles will lead to increased delay in obtaining an abortion, or even make it impossible for them to obtain an abortion altogether.

Many patients, especially poor patients coming from smaller towns and rural areas, have to borrow a car or arrange (and perhaps pay) for a ride. This need to arrange transportation already is often a cause of delay, and would be a cause of delay for many more women if they had to come to the healthcare center an additional time at least 24 hours before the abortion. Further, in some areas patients frequently face severe weather and road conditions, and the Two-Trip Requirement would double the chances that patients will encounter these obstacles, again leading to delay.

For many patients, the closest healthcare provider who offers abortion services offers only medication abortion. Medication abortion can be provided only through 63 days from the woman's last menstrual period. When a patient is outside this 63-day window, Planned Parenthood refers her to the nearest provider of surgical abortions, which in many cases is much further away. If every patient had to arrange for an additional trip to the healthcare center at least 24 hours before a medication abortion, this would happen more frequently. For some women, being referred to a surgical abortion provider in Phoenix or Tucson will mean that they are unable to obtain an abortion.

Many of Planned Parenthood's abortion patients are single mothers with young children, and must arrange for childcare while they are at the healthcare center. This is particularly problematic for patients who have to stay overnight because they are having an abortion later in the pregnancy and require a two or three-day procedure. If every woman had to come to the healthcare center an extra time, at least 24 hours before the abortion, arranging for childcare would cause additional delay and expense. In some cases, these consequences may prevent the woman from having an abortion altogether.

Planned Parenthood's Medical Director, a physician, is in charge of the physicians and advanced practice clinicians who perform abortion services at Planned Parenthood's healthcare centers.

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Since 2001, more than half the aspiration abortion procedures that Planned Parenthood provides in Tucson have been provided by a highly-skilled RNP. In 2008, the RNP performed approximately 1200 first-trimester aspiration abortion procedures, more than 70% of the first-trimester aspiration procedures. To date in 2009, the RNP has performed almost 80% of the first-trimester aspiration procedures at Planned Parenthood in Tucson.

Planned Parenthood's practice of using an RNP to provide aspiration abortions was specifically approved by the Arizona State Board of Nursing ("Board") after a thorough and extensive investigation.

On May 6, 2008, the Advanced Practice Committee of the Board ruled 11-0 that "it is within the scope of practice of a nurse practitioner to perform a first-trimester aspiration abortion provided the procedure is within the nurse practitioner specialty certification population; the nurse practitioner has met the education requirements of A.A.C. § 4-10-508(C); and there is documented evidence of competency in the procedure." (*Available at* <http://www.azbn.gov/documents/meetings/Advanced%20Practice%20Committee/2008/Advance%20Practice%20Committee%20Meeting.05.06.08.pfd>.)

On May 14, 2008, by a vote of 6-1, the Board adopted the unanimous recommendation of the Advanced Practice Committee. (*Available at* <http://www.azbn.gov/documents/meetings/Board%20Meetings/2008/Board%20Minutes/MAY%202008%20MINUTES.pdf> at 23-24.)

If the Physician-Only Requirement were allowed to go into effect, it would severely restrict access to aspiration abortion services in Arizona.

In all cases, Planned Parenthood requires that a parent sign a parental consent form attesting that he or she has given consent for the minor to have an abortion procedure. In addition, in the case where the parent is not able to accompany the minor to the abortion procedure, Planned Parenthood calls the parent who signed the parental consent form to confirm that the parent gives consent for the minor to have the abortion and will not proceed with the procedure until such confirmation has been received. Planned Parenthood also requires that the minor provide signed picture identification for the parent to verify the signature on the parental consent form. A copy of the picture ID is kept in the patient's medical record.

Conclusions of Law

The Equal Privileges and Immunities Clause of the Arizona Constitution provides that: "No law shall be enacted granting . . . privileges or immunities which, upon the same terms, shall not equally belong to all citizens . . ." Ariz. Const. art. II § 13.

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Strict scrutiny is appropriate when “the right that is to be affected is considered fundamental.” *Simat*, 56 P.3d at 32; see also *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 811 (Ariz. 1994) (strict scrutiny test applies when a fundamental right “has been implicated”); *Kenyon v. Hammer*, 688 P.2d 961, 975 (Ariz. 1984) (same when a fundamental right is “affected”); *Eastin v. Broomfield*, 570 P.2d 744, 754 (Ariz. 1977) (same when statute “places a heavier burden” on a fundamental right).

In *Simat*, the Arizona Supreme Court ruled that Arizona citizens have a fundamental right to choose abortion under the United States Constitution, and that they also have a separate right to equal treatment under the Equal Privileges and Immunities Clause of the Arizona Constitution. *Simat*, 56 P.3d at 32.

Contraception is also a fundamental right, thus triggering strict scrutiny for the Challenged Provisions’ discriminatory treatment of this basic health care service. *Standhardt v. Superior Court*, 77 P.3d 451, 455 n.6 (Ariz. Ct. App. 2003).

Simat’s application of strict scrutiny is not limited to laws that discriminate against the exercise of the right to have an abortion to protect one’s health: the fundamental right that gives rise to strict scrutiny in *Simat* is the right to choose abortion in general; not the right to choose abortion in a particular situation. *Simat*, 56 P.3d at 32 (“Arizona citizens enjoy a fundamental right to choose abortion”).

The Undisturbed Private Affairs Clause provides: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Ariz. Const. art. II, § 8.

The Undisturbed Private Affairs Clause guarantees “greater privacy rights” than the United States Constitution. *Standhardt*, 77 P.3d at 460; see also *Simat*, 56 P.3d at 32 n.2, 34 (*Rasmussen* recognized right “not found” in federal law; having invalidated the challenged statute under the Equal Privileges clause, the *Simat* court “[declined to] reach the question of whether the greater privacy right contained in article II, § 8 of Arizona’s constitution would yield the same result”) (emphasis added). Accordingly, restrictions on abortion that are permissible under the Fourteenth Amendment to the U.S. Constitution may violate the Undisturbed Private Affairs clause of the Arizona Constitution.

The Undisturbed Private Affairs Clause protects the right of an individual to “chart his or her own plan of medical treatment,” which includes the right to refuse medical treatment. *Rasmussen*, 741 P.2d at 682.

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ORDER

On September 29, 2009, this Court granted Plaintiff's Application for Preliminary Injunction which was amended on September 30, 2009, pursuant to *Plaintiff's Motion to Correct Clerical Mistake in 9/29/09 Minute Entry*. On October 9, 2009, Defendants filed a Rule 59(i) Motion to Alter or Amend the September 30, 2009 Amended Judgment.

The Court having now considered Plaintiff's Proposed Findings of Fact and Conclusions of Law, Defendants' Objections to Plaintiff's Proposed Findings of Fact and Conclusions of Law, having considered the pleadings, the Memoranda, the Declarations, oral argument of counsel, the Arizona Constitution, and having adopted in this Order its own Findings of Fact and Conclusions of Law, and being fully informed in the premises, the Court finds the Plaintiff has established the following:

1. A strong likelihood of success on the merits;
2. The possibility of irreparable injury if the requested relief is not granted;
3. A balance of hardships favoring Plaintiff; and
4. Public policy favoring a grant of the Injunction.

IT IS FURTHER ORDERED granting Defendants' Rule 59(i) Motion to Alter or Amend September 30, 2009 Amended Judgment to include the Findings of Fact and Conclusions of Law made by the Court in this Order. The balance of the Amended Judgment entered on September 30, 2009 is correct and remains in full force and effect.

IT IS FURTHER ORDERED signing this Minute Entry as a formal written Order of the Court this 19th day of February, 2010.

HONORABLE DONALD DAUGHTON
JUDGE OF THE SUPERIOR COURT

This case is eFiling eligible: <http://www.clerkofcourt.maricopa.gov/efiling/default.asp>