

IN THE CIRCUIT COURT OF JACKSON COUNTY
STATE OF MISSOURI

PLANNED PARENTHOOD OF KANSAS)
AND MID-MISSOURI, INC.,)

Plaintiff,)

v.)

JANE DRUMMOND, Director of the Missouri)
Department of Health and Senior Services, in)
her official capacity; JEREMIAH W. NIXON,)
Attorney General of Missouri, in his official)
capacity; and JAMES F. KANATZAR,)
Prosecuting Attorney of Jackson County,)
Missouri, in his official capacity,)

Defendants.)

Case No.:

UNRECORDED

PETITION (EA-Declaratory Judgment)

Plaintiff, by its undersigned attorneys, brings this Petition against the above-named Defendants, their employees, agents and successors in office, and in support thereof states the following:

I. Introductory Statement:

1. H.B. 1055, 94th Gen. Assem., 1st Reg. Sess. (Mo. 2007) (“the Act”) requires any facility “operated for the purpose of performing or inducing any second or third trimester abortions or five or more first trimester abortions per month” to be licensed as an ambulatory surgical center. Plaintiff seeks a judgment declaring that this language does not require a facility that provides only medication abortion, and does not provide any surgical services, to be licensed as a surgical center. Plaintiff also seeks an injunction

against the Act being enforced against any of its facilities that provide medication abortion, but provide no surgical services.

II. Parties

A. Plaintiff

2. Planned Parenthood of Kansas and Mid-Missouri, Inc. (“PPKM”) is a not-for-profit corporation, organized under the laws of Missouri. PPKM operates numerous clinics in Missouri and Kansas, at which it provides a broad range of reproductive health care services.

3. Among those clinics, PPKM operates the Brous Center in Kansas City, Missouri. The Brous Center provides general reproductive health care, including family planning services, testing and treatment for sexually transmitted infections, cervical and breast cancer screening services, pregnancy testing, and all-options counseling.

4. The Brous Center also provides medication abortion, and regularly provides more than five medication abortions per month. It does not provide surgical abortions, or any other surgical procedure.

5. The Brous Center has been providing medication abortion since 2005, without notable incidents relating to the health of its patients. The Brous Center was already an experienced abortion provider when it began providing medication abortion, having previously provided surgical abortions from 1975 to 1998.

6. The Brous Center has never been licensed as an Abortion Facility or any other type of ambulatory surgical center, as it was not required to be under the pre-amendment version of the Act.

B. Defendants

7. Defendant Jane Drummond is the Director of the Missouri Department of Health and Senior Services (the “Department”), the agency responsible for deciding applications for ambulatory surgical center licensure, Mo. Rev. Stat. §§ 197.215, 197.220, as well as for adopting the reasonable rules, regulations, and standards necessary to implement Missouri’s Ambulatory Surgical Center Licensing Law, Mo. Rev. Stat. § 197.225.

Director Drummond is sued in her official capacity, as are her agents and successors.

8. Defendant Jay Nixon is the Attorney General for the State of Missouri. The Attorney General is charged with enforcing Missouri’s Ambulatory Surgical Center Licensing Law, and has specific authority to seek injunctive and other relief for violations thereof. Mo. Rev. Stat. § 197.235. Attorney General Nixon is sued in his official capacity, as are his agents and successors.

9. Defendant James Kanatzar is the Prosecuting Attorney for Jackson County, Missouri, where the Brouss Center is located. Mr. Kanatzar is authorized to prosecute violations of the Missouri criminal law, including violations of the Act. Mr. Kanatzar is sued in his official capacity, as are his agents and successors.

III. Jurisdiction and Venue

10. This Petition is filed in this Court under Mo. Rev. Stat. § 527.010 in that Plaintiff seeks a declaratory judgment.

11. Venue is proper in this Court pursuant to Mo. Rev. Stat. § 508.010(2).

IV. The Statutory and Regulatory Framework

12. The Ambulatory Surgical Center Licensing Law is contained at Sections 197.200 et seq. of Missouri's Public Health and Welfare Code. Operation of an ambulatory surgical center without a license is a Class A misdemeanor, with every day of violation constituting a separate offense. Mo. Rev. Stat. § 197.235.

13. Prior to the 2007 Amendment, the Ambulatory Surgical Center Licensing Law required licensure for any "public or private establishment operated primarily for the purpose of performing surgical procedures or primarily for the purpose of performing childbirths." Mo. Rev. Stat. § 197.200 (pre-Amendment version).

14. The Brous Center was not licensed under the pre-Amendment version of the Act, because it did not fall within the statutory definition of ambulatory surgical center.

15. The Act amends the Ambulatory Surgical Center Licensing Law to require that "any establishment operated for the purpose of performing or inducing any second or third trimester abortions or five or more first trimester abortions per month" be licensed as an ambulatory surgical center. Mo. Rev. Stat. § 197.200(1) (as amended by the Act).

16. While the Act is an amendment to Missouri's Ambulatory Surgical Center Licensing Law, it has been interpreted by the Department to apply to facilities that provide only medication abortion, and perform no surgical procedures.

17. Specifically, the Department has taken the position that Plaintiff's clinics cannot continue providing medication abortion services without obtaining licensure as ambulatory surgical centers, pursuant to the regulations already in place to implement the pre-Amendment version of the Act.

18. Thus, the question of state law before this court is: does the Act apply to facilities that provide only medication abortions, and perform no surgical procedures?

V. Prior Proceedings in Federal Court

19. The Act was scheduled to take effect on August 28, 2007. On August 20, 2007, PPKM brought suit in the U.S. District Court for the Western District of Missouri seeking a declaration that the Act violates the United States Constitution, and a permanent injunction barring Defendants from enforcing the Act against Plaintiff. See Planned Parenthood of Kansas and Mid-Missouri, Inc. v. Drummond, No. 07-4164 (W.D. Mo. filed August 20, 2007) (First Amended Complaint attached as Exhibit A).

20. On September 24, 2007, the federal district court entered a preliminary injunction enjoining enforcement of the Act against PPKM and a plaintiff-intervenor, Dr. Allen Palmer. 9/24/07 Order (attached as Exhibit B). In so doing, the federal district court held that application of the Act to a facility that provides only medication abortion, and no surgical services, would likely violate the federal constitutional rights of PPKM and its patients, both because it has the purpose and/or effect of imposing a significant obstacle on women seeking an abortion and because it violates the equal protection clause. Exhibit B at 10-11.

21. The federal district court declined to exercise its discretion to stay the federal case pending determination by the Missouri state courts of the state law claim raised here, i.e., that the Act should be construed as not applying to facilities that do not provide

surgical services.¹ However, the court expressly did not decide this issue, and noted that PPKM is free to seek its resolution in state court. 9/24/07 Order at 7 n.1; 11. (Exhibit B).

22. Pursuant to that Order, PPKM brings this action in order to allow this Missouri Court to resolve the issue of whether the Act applies to facilities that provide only medication abortion, and perform no surgery, thus allowing this court to construe this newly-enacted Missouri statute before a federal court passes on its constitutionality.

23. PPKM hereby reserves its right to litigate its federal constitutional claims in federal court, and notifies this Court of the nature of those claims so that they may be taken into account in construing the Act. Cf. England v. Louisiana State Board of Medical Examiners, 375 U.S. 421 (1964). PPKM's federal constitutional claims are: (a) the Act violates the due process clause of the Fourteenth Amendment because it was enacted for the purpose of imposing a substantial obstacle on access to abortion; (b) the Act violates the equal protection clause of the Fourteenth Amendment; (c) the Act and the regulations, as applied by the Department to PPKM, violates the due process clause in

¹ Plaintiff also sought abstention as to a second state law issue: whether another of Plaintiff's clinics ("the Columbia Center"), which has provided surgical abortion services since 1987 (as well as providing medication abortion), is eligible for licensure as a "Pre-Existing Facility," or must comply with the more onerous "New Construction" requirements. This issue is not included in the instant complaint because Plaintiff is appealing the Department's decision that the Columbia Center is not eligible for licensure as a Pre-Existing Facility to the Administrative Hearing Commission. Should PPKM need further relief after the Administrative Hearing Commission proceedings, PPKM reserves its right to amend or file a new action in this Court.

Without deciding the state law issue of which set of requirements applies, the federal district court determined that if the Department imposed the full set of New Construction requirements on the Columbia Center, this would likely create an undue burden on the right to abortion. Accordingly, the court directed parties to enter negotiations as to which New Construction requirements the Department would waive. 9/24/07 Order (Ex. B) at 11-13; 15. These negotiations, which have no bearing on the issue before this Court, are in progress.

that they are being applied by the Department with the purpose and the effect of imposing a substantial obstacle on access to abortion; (d) the Act and the regulations, as applied by the Department to Plaintiff, violates the due process clause in that they are not reasonably related to patient health and safety and depart from accepted medical practice; and (e) the Act and the regulations, as applied by the Department to Plaintiff, violate the equal protection clause.

VI. The Act and Medication Abortion

24. Medication abortion is a Food and Drug Administration-approved, non-invasive method of terminating an early pregnancy by oral medication. It is commonly provided out of doctors' offices and clinics nationwide. It is in no way a surgical procedure.

25. Since its approval in 2000, an increasing number of women, in Missouri and throughout the country, have chosen medication over surgical abortion in early pregnancy. Many women choose medication abortion over surgical abortion because they find it less invasive and more like natural miscarriage. Also, some women choose the method because it allows the patient to feel she has more control over the process.

26. Plaintiff's clinics use the most common combination of medications to induce abortion, mifepristone, a female hormone necessary to maintain early pregnancy, and misoprostol, a synthetic steroid used to soften and open the cervix and induce uterine contractions.

27. The patient takes mifepristone at the clinic, then takes the misoprostol at her home twenty-four to forty-eight hours later. The products of conception are passed at home, usually approximately four or five hours after the patient takes the misoprostol.

28. As noted above, the Act is an amendment to Missouri's Ambulatory Surgical Center Licensing Law, which (as its name suggests) governs facilities providing surgical services, as well as facilities operated primarily for the purpose of performing childbirths.

29. The Act amends the definition of "ambulatory surgical center" to include, with certain exceptions not applicable here, "any establishment operated for the purpose of performing or inducing any second-trimester abortions, or five or more first-trimester abortions a month." The Act does not use the term "medication abortion," or the names of any specific medications.

30. In this context, "induce" can have many meanings. Surgical abortion is a type of induced abortion. And "inducing abortion" can also refer to the procedure known as induction abortion. In an induction abortion, which is performed later in pregnancy, the physician induces labor and the patient stays in the facility under medical supervision throughout the labor and delivery process. Paul D. Blumenthal, MD, MPH, et al., Abortion by Labor Induction, in A Clinician's Guide to Medical and Surgical Abortion 139 (Maureen Paul ed. 1999) ("Induction abortion is defined as the termination of pregnancy by stimulation of labor-like contractions that cause eventual expulsion of the fetus from the uterus.").

31. On information and belief, the regulations implementing the Ambulatory Surgical Center Licensing Law were developed to safeguard patient health and safety during surgical procedures (and, in the case of the birthing center regulations, childbirth). On information and belief, the regulations governing requirements for Abortion

Facilities, which were promulgated in 1987 – thirteen years before the FDA’s approval of medication abortion – were developed in connection with surgical abortion procedures.

VII. The Department’s Interpretation of the Act

32. Notwithstanding the non-surgical nature of medication abortion, the Department has taken the position that the Act requires facilities that provide only medication abortion to be licensed as ambulatory surgical centers.

33. Following Governor Blunt’s signature of the Act on July 6, on July 18, PPKM sought clarification from the Department that the Brous Center is not required to be licensed under the Act because it performs no surgical procedures. PPKM 7/18/07 Letter (attached as Ex. C).

34. On July 31, the Department responded with a letter stating that the Act requires any facility providing five or more medication abortions a month to be licensed as an ambulatory surgical center. Department 7/31/07 Letter (attached as Ex. D).

35. If the Act is construed to apply to medication abortion, a facility that provides only medication abortion would be required to comply with numerous physical requirements that were developed in connection with surgical abortion procedures. These requirements have no bearing on patient health or safety during the prescription of an oral medication.

36. As noted above, in issuing a preliminary injunction enjoining the Act’s application to Plaintiff, the federal district court determined that it the Act applies to facilities that provide only medication abortion, and perform no surgery, that application

is likely unconstitutional. If the Act does not apply to medication abortion these constitutional problems are avoided.

COUNT ONE

DECLARATORY JUDGMENT AS TO THE SCOPE AND MEANING OF THE ACT

37. Plaintiff hereby realleges and incorporates by reference paragraphs 1 through 35 above.

38. There is presently a controversy between Plaintiff and Defendants as to the scope and meaning of the Act.

39. Plaintiff requests that the Court interpret the Act and declare that it does not require facilities that provide only medication abortion, and perform no surgical abortions or other surgical procedures, to be licensed as ambulatory surgical centers.

WHEREFORE Plaintiff requests that this Court:

1. Issue a declaratory judgment that the Act does not apply to facilities that provide only medication abortion, and perform no surgical abortion or other surgical procedures, to be licensed as ambulatory surgical centers;
2. Issue permanent injunctive relief, without bond, restraining the enforcement, operation, and execution of the Act against the any facility operated by Plaintiff that provides only medication abortion, and performs no surgical abortion or other surgical procedures;
3. Grant Plaintiff costs pursuant to Mo. Rev. Stat. § 527.100; and

4. Grant such further relief as this Court deems just and proper.

Respectfully submitted,



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