

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

PLANNED PARENTHOOD OF)
THE GREAT NORTHWEST AND THE)
HAWAIIAN ISLANDS,)

Plaintiffs,)

v.)

STATE OF ALASKA,)

Defendant.)
_____)

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Original Received
NOV 30 2016
Clerk of the Trial Courts

Case No. 3AN-16-____ CI

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Planned Parenthood of the Great Northwest and the Hawaiian Islands, on its own behalf and on behalf of its physicians and patients, by and through its attorneys of record, complains and alleges as follows:

INTRODUCTION

1. Planned Parenthood of the Great Northwest and the Hawaiian Islands (“Planned Parenthood”) brings this action to challenge the constitutionality of antiquated Alaska laws and regulations (collectively “the Restrictions”) that effectively ban outpatient health centers from providing second-trimester abortions. Planned Parenthood currently provides first-trimester surgical and medication abortions at outpatient facilities in Anchorage, Fairbanks, Soldotna, and Juneau. The Restrictions, adopted over 40 years ago, prevent Planned Parenthood from providing abortions after 13 weeks and six days (the first trimester) and thereby force virtually all Alaska women seeking a second-trimester abortion to travel out of state for procedures that can be safely provided in Alaska.

2. The Restrictions violate the privacy, equal protection, and due process rights afforded by the Alaska Constitution to Planned Parenthood, its physicians, and patients because (a) they are unnecessary health regulations without medical basis, which restrict access to second-trimester abortion; (b) they single out women seeking second-trimester abortions, and impose regulatory standards not applied to similar outpatient procedures; and (c) they impose vague standards that prevent Planned Parenthood and its physicians from performing second-trimester abortions in outpatient settings.

JURISDICTION

3. This is a complaint for declaratory and injunctive relief brought pursuant to AS 09.40.230 and AS 22.10.020. This court has jurisdiction over the parties and over the subject matter of this dispute pursuant to AS 09.05.015 and AS 22.10.020.

PARTIES

4. Plaintiff Planned Parenthood of the Great Northwest and the Hawaiian Islands is a not-for-profit organization that provides reproductive health care services and sexual education programs in Alaska, Idaho, Hawaii, and Washington. Its reproductive health care services include: abortions; pregnancy testing; birth control; testing and treatment for sexually-transmitted infections and HIV; emergency contraception; pap tests; breast cancer screenings; treatments to prevent cervical cancer; and referrals for appropriate medical or social services. In Alaska, Planned Parenthood provides abortions in outpatient clinics through 13.6 weeks of pregnancy as measured from the first day of the woman's last menstrual period ("lmp"). Planned Parenthood sues on its own behalf, on

behalf of its physicians, and on behalf of its patients who seek an abortion during the second trimester of pregnancy.

5. Defendant, the State of Alaska, pursuant to AS 44.80.010, is a proper party to any action challenging a statute or regulation.

FACTUAL STATEMENT

Abortion Procedures and Safety

6. Abortion in the United States is a very safe procedure. Prior to an abortion, the woman is examined, typically using ultrasound, to determine the length of the pregnancy. In the first trimester (through 13.6 weeks lmp), an in-clinic (surgical) abortion is typically performed using suction curettage, a procedure that is usually provided in an outpatient setting; a provider dilates the woman's cervix and evacuates the contents of the uterus using a plastic tube attached to a suction device. The procedure usually takes less than 10 minutes. It does not involve an incision.

7. An alternative method of first-trimester abortion, available through 70 days lmp, is medication abortion. To complete a medication abortion, the woman takes medication known as mifepristone at the clinic, followed 24 to 48 hours later by a drug known as misoprostol, which the woman takes at home. She passes the pregnancy in a process similar to menstruation.

8. Second-trimester abortions are performed safely in outpatient facilities throughout the United States. In the early second trimester, the process for surgical abortion is the same as that used for first-trimester surgical abortions. As the pregnancy progresses further into the second trimester, more dilation is needed to complete the

procedure and instruments may be used, in addition to suction, to remove the products of conception.

9. In Alaska, Planned Parenthood provides abortion services through 13.6 weeks lmp, at its health centers in Anchorage, Juneau, Soldotna, and Fairbanks. In 2015, Planned Parenthood performed approximately 1300 abortions for women in their first trimester of pregnancy. Although some women seek second-trimester abortions, Planned Parenthood is unable to provide those services in Alaska because of the Restrictions.

10. Planned Parenthood provides second-trimester outpatient abortions in both Seattle, Washington and Meridian, Idaho. If it were allowed to provide second-trimester abortions in Alaska, Planned Parenthood would provide them in an outpatient clinical setting that is in all material respects identical to the sites in Washington and Idaho, using the same protocols, procedures, and equipment.

11. Many comparable, and even more risky, procedures are legally performed in outpatient clinics in Alaska, including endometrial ablation, hysteroscopic surgery to remove fibroids, hysteroscopic sterilization, vasectomy, and colonoscopy.

The Restrictions

12. In 1970, the legislature enacted legislation, now codified at AS 18.16.010, setting forth the circumstances under which abortion may be legally performed in Alaska. AS 18.16.010(a) (the "Facilities Statute") provides: "An abortion may not be performed in this state unless . . . (2) the abortion is performed in a hospital or other facility approved for the purpose by the Department of Health and Social Services"

13. In 1974 and 1976, the Department of Law, at the request of the Department of Health and Social Services (“DHSS”) issued memoranda explaining that, in light of decisions of the United States Supreme Court regarding constitutionally permissible burdens on women’s right to abortion, DHSS could not enforce the Facilities Statute as to first-trimester abortions, but could enforce it as to second-trimester abortions. In 1981, the Department of Law, again at the request of DHSS, issued an Attorney General’s opinion that reiterated that the Facilities Statute is invalid as applied to first-trimester abortions. The opinion further states that “your agency is nonetheless responsible for the approval of facilities in which abortions are to be performed beyond the first trimester. . . . We are informed that the agency has yet to take action in this area and, therefore, strongly suggest that it adopt appropriate regulations in the near future.” In the thirty-five years since, DHSS has not adopted any rule or guidance setting forth criteria for facilities that wish to provide second-trimester abortions.

14. At the same time that it enacted the statute now codified as AS 18.16.010, the legislature enacted AS 08.64.105 (the “Regulation Statute”), which directed the State Medical Board to adopt regulations to “set standards for facilities, equipment and care of patients in the performance of an abortion.” Pursuant to this directive, the Board adopted regulations governing abortion, set forth in 12 AAC 40.060-140, two of which, 12 AAC 40.100 and 12 AAC 40.120(b), are challenged here.

15. The first challenged regulation, 12 AAC 40.100, (the “Consultation Regulation”) provides: “Abortions interrupting a pregnancy up to and including the twelfth week of gestation may be performed without consultation. Abortions performed after the

twelfth week of gestation shall be preceded by consultation with another physician. The consultation shall include an opinion as to the preferred method of termination of pregnancy.” Twelve weeks gestation is equivalent to fourteen weeks lmp.

16. Plaintiff is aware of no other regulation where the Board requires a consultation before a procedure can be performed or treatment provided.

17. A mandatory consultation is not necessary to protect the health of women seeking second-trimester abortions. Planned Parenthood physicians in Alaska are licensed by the State Medical Board. As such, they, like all licensed physicians in Alaska, are qualified to determine the care a patient needs, and can and do use their judgment about when a second opinion is beneficial to the care of a patient.

18. The requirement that a physician consult with a second physician before performing an abortion is woefully outdated, and does not reflect the standard of medical care for abortions or similar procedures. The requirement has the potential to create delays while the physician consults with the second physician, including the time the second physician may need to examine the medical records or meet with a patient. The requirement also conflicts with existing decisions of the United States Supreme Court finding similar requirements unconstitutional.

19. Even if it were otherwise permissible to require consultation, which it is not, the Consultation Regulation does not provide clear guidance to physicians wishing to perform second-trimester procedures. For example, it is not clear whether the consultation may occur through a telephone call between the physicians, or whether the second physician must review patient records, or even conduct a physical examination of the

patient. Nor is it clear what weight, if any, the physician performing the abortion must accord to the opinion of the consultant physician regarding what method of abortion should be used, or whether or how the consultation must be reflected in the patient's or clinic's records.

20. The second challenged regulation, 12 AAC 40.120(b), imposes two onerous and unnecessary requirements by mandating that during the second trimester of a pregnancy "blood, blood derivatives, blood substitutes or plasma expanders shall be immediately available when an abortion is performed" (the "Blood Products Regulation") and that "an operating room appropriately staffed and equipped for major surgery in accordance with regulations adopted under AS 18.20.060 shall be immediately available" (the "Operating Room Regulation"). (AS 18.20.060 has since been repealed.)

21. The Blood Products Regulation is unnecessary for the provision of safe second-trimester abortion care. Serious complications from a second-trimester abortion are rare, and among those rare complications, very few require a blood transfusion. Should a complication arise that necessitates the administration of blood products, the standard of care for abortion patients, as with other patients in an outpatient setting, would be transfer to a hospital.

22. While there is no medical justification for the Blood Products Regulation, it presents a significant barrier to the provision of abortion care. Under the policies of the Alaska Blood Bank, it would be virtually impossible for Planned Parenthood to procure the required blood products, which are provided exclusively to hospitals. Those policies make sense because any blood products provided to an outpatient clinic like Planned

Parenthood would be wasted because they would not be used and would have to be discarded and replaced. Thus, the Blood Products Regulation does not advance the health of women seeking abortion, and it also undermines public health by wasting a critical but limited medical resource.

23. The requirement that blood products be immediately available is not imposed on any other outpatient procedures in Alaska, even those procedures that might be more likely to result in complications requiring blood transfusions.

24. Similarly, requiring that an operating room for "major surgery" be "immediately available," to the extent that it requires the operating room to be on site, is unnecessary for the provision of safe abortion care after the first trimester. Indeed, the United States Supreme Court has invalidated requirements that all second-trimester abortions be performed in a hospital for this reason.

25. The procedure rooms used by Planned Parenthood to provide first-trimester abortions in Alaska are appropriate for the provision of second-trimester abortions. As is the standard of care, Planned Parenthood uses the same procedure rooms to provide second-trimester abortions in Seattle and Meridian as used for first-trimester procedures, and those facilities are the same in all material respects as the procedure rooms used for procedures in Alaska.

26. In addition, in the rare case of a complication that would require surgical intervention, Planned Parenthood would, consistent with the standard of care, transfer the patient to a hospital for care.

27. While the Operating Room Regulation does not advance the safety of second-trimester abortion care, requiring an on-site operating room equipped for major surgery imposes a prohibitive obstacle to its provision. It is not possible for Planned Parenthood to establish such an operating room in its current facilities, and the cost of equipping such a room would likely be prohibitive. Compliance with the Operating Room Regulation would impose high costs, and is not necessary for the safe provision of second-trimester procedures.

28. The requirement that an operating room equipped for major surgery be immediately available is not imposed on any other outpatient procedures in Alaska, even those that are riskier than abortion.

29. Moreover, the terms “appropriately staffed and equipped for major surgery” are vague. The meaning of these terms is not clear from their context, nor are they further defined in the regulations.

30. In addition, the requirement that blood products and an operating room staffed and equipped for major surgery be “immediately available” is vague and does not give Planned Parenthood adequate notice of what is required to comply with the regulation. The term “immediately available” could mean that a facility must be located close to a hospital so that a patient can be safely transported by ambulance, or it could mean that a facility must have the required operating room and blood products on site. Under the former interpretation, Planned Parenthood’s Alaska clinics may provide second-trimester abortions, but under the latter they may not.

The Restrictions Preclude the Provision of Most Second Trimester Abortions in Alaska

31. Because of the Restrictions, Planned Parenthood and its physicians are effectively prohibited from providing second-trimester abortions in outpatient facilities in Alaska. Although the Facilities Statute permits second-trimester abortion to be performed in hospitals without approval by DHSS, on information and belief, abortion services are largely unavailable in hospitals in Alaska, due to internal policies that severely limit the circumstances under which abortions will be provided and other factors. Planned Parenthood's patients must therefore travel to a health center out of state, where they receive care in similar facilities and under the same standards that they would receive if second trimester services were available at Planned Parenthood in Alaska.

32. Rather than promoting women's health, the Restrictions harm women by preventing them from receiving safe second-trimester abortions in Alaska. The Restrictions mean that some women will receive care later in pregnancy because they must travel out of state. While abortion is a safe procedure, the risks increase with advancing gestational age. The delays caused by the Restrictions therefore adversely affect, rather than advance, women's health.

33. The financial and emotional burdens that result from having to travel out of state for services can be significant. Women must make travel arrangements, take time off – up to several days – from work, and arrange child care. Even for women who can overcome the financial and logistical hurdles, travel out of state to a large and unfamiliar city can be stressful. In addition, women must make these same arrangements for the

person accompanying them. The need to make all these arrangements make it more difficult for women to keep confidential the fact that they are seeking an abortion.

34. For some women, the burdens of travel compel them to forgo an abortion entirely. For these women, the Restrictions operate as a total ban on abortion.

35. Only women seeking second-trimester abortions are singled out for the discriminatory and burdensome requirements imposed by the Restrictions, which are not imposed on any other type of comparable outpatient procedure.

Planned Parenthood's Attempts to Provide Second-Trimester Abortions

36. For more than a year, Planned Parenthood has attempted to ascertain how it could provide second-trimester abortions in Alaska without running afoul of the Restrictions. In June 2015, Planned Parenthood sent a letter to DHSS Commissioner Valerie Davidson seeking approval to perform second-trimester abortions in its outpatient clinics in Alaska. The letter explained that such care could be safely performed and urged the Department to approve the request so that women could receive services in Alaska, rather than having to travel out of state.

37. DHSS responded that it had no basis upon which to approve or deny the request because it has not adopted regulations or other guidance.

38. On September 13, 2016, Planned Parenthood sent a letter to the State Medical Board, asserting that the provisions of 12 AAC 40.100 and 120(b) are unnecessary and unconstitutional, and requesting that the Board either rescind the regulations or state in writing that they will not be enforced. Planned Parenthood has not received a response to this letter.

39. Thus, despite its good faith efforts to work with DHSS and the Board, Planned Parenthood, in the face of significant potential penalties for violating the Restrictions, is in a catch-22 – unable to obtain assurances that it can proceed, and unable to obtain assurances that the Restrictions will not be enforced if it provides second-trimester abortions.

COUNT I: RIGHT TO PRIVACY

40. Planned Parenthood re-alleges each allegation made in paragraphs 1-39 above.

41. The Restrictions violate the fundamental privacy rights, guaranteed under Article 1, section 22 of the Alaska Constitution, of women to terminate a pregnancy after the first trimester because they burden the fundamental right to reproductive choice without furthering compelling state interests by the least restrictive means in the following ways:

A. By effectively banning outpatient abortions in Alaska after the first trimester;

B. By imposing unnecessary and burdensome requirements that force virtually all women seeking second-trimester abortions to obtain those services outside of Alaska, resulting in delay, increased medical risks, increased financial and emotional burdens, and in some instances, precluding access to abortion.

C. By imposing vague requirements that make it impossible for Planned Parenthood and its physicians to provide abortions without fear of criminal and civil penalties.

COUNT II: EQUAL PROTECTION

42. Planned Parenthood re-alleges each allegation made in paragraphs 1-41 above.

43. The Restrictions violate the equal protection rights, guaranteed under the equal protection and inherent rights clauses of Article I, sections 1 and 3 of the Alaska Constitution, of Planned Parenthood, its physicians, and its patients seeking second-trimester abortions because they create discriminatory classifications by establishing medical standards not otherwise required for similar medical procedures and other outpatient surgical procedures.

COUNT III: DUE PROCESS

44. Planned Parenthood re-alleges each and every allegation made in paragraphs 1-43, above.

45. The Blood Products and Operating Room Regulations violate Planned Parenthood's and its physicians' rights to due process as guaranteed by Article I, section 7 of the Alaska Constitution, because they are vague and fail to give clear notice of what conduct is prohibited and/or required to avoid disciplinary action by the Medical Board. The vagueness of the regulations also subjects Planned Parenthood and its physicians to potential arbitrary and/or selective enforcement.

46. The failure of DHHS to adopt regulations pursuant to the Facilities Statute, or to approve Planned Parenthood's request to provide second-trimester abortions also

violates Plaintiff's right to due process as guaranteed by Article I, section 7 of the Alaska Constitution.

47. The Department's inaction must be construed as a de facto denial, which arbitrarily prevents Planned Parenthood and its physicians from providing second-trimester procedures.

COUNT IV: REQUEST FOR INJUNCTIVE RELIEF

48. Planned Parenthood re-alleges each allegation made in paragraphs 1-47 above.

49. Planned Parenthood requests an injunction against all of the Restrictions as follows:

A. Against the Department of Health and Social Services, the Department of Law, and any other agency or person with enforcement authority, from enforcing AS 18.16.100(a)(2); and

B. Against the State Medical Board and any other agency or person with enforcement authority, from enforcing 12 AAC 40.100 and 120(b).

50. Planned Parenthood meets the standard for injunctive relief because: (a) Planned Parenthood, its physicians, and its patients face irreparable harm if an injunction is not issued; (b) Defendant will not be harmed if an injunction is issued; and (c) Planned Parenthood's claims raise serious and substantial questions going to the merits of the case. Moreover, Planned Parenthood can make a clear showing of probable success on the merits.

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PRAYER FOR RELIEF

Accordingly, based on the facts set forth above, Planned Parenthood requests that judgment be entered in its favor and against Defendant as follows:

1. For declaratory judgment that the Restrictions violate the privacy, equal protection, and due process guarantees of the Alaska Constitution, and are therefore void and of no effect;
2. For injunctive relief restraining enforcement of the Restrictions and enjoining Defendant, its employees, agents, appointees, and successors from enforcing, threatening to enforce, or otherwise applying the Restrictions;
3. For Plaintiff's costs and attorneys' fees incurred in obtaining the relief sought in this proceeding; and
4. For such other relief as this court may deem just and equitable.

Dated this 30th day of November, 2016.

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