



IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

(1) NOVA HEALTH SYSTEMS, D/B/A)
REPRODUCTIVE SERVICES, on behalf)
of itself, its staff, and its patients,)

Plaintiff,)

v.)

Case No. CV-2015-1838

(2) E. SCOTT PRUITT, in his official capacity)
as Attorney General of Oklahoma,)

(3) STEVE KUNZWEILER, in his official)
capacity as District Attorney for Tulsa)
County,)

(4) LYLE KELSEY, in his official capacity as)
Executive Director of the Oklahoma State)
Board of Medical Licensure and)
Supervision, and)

(5) TERRY L. CLINE, in his official capacity)
as Oklahoma Commissioner of Health,)

Defendants.)

Judge Patricia G. Parrish

FILED IN DISTRICT COURT
OKLAHOMA COUNTY

OCT 28 2015

TIM RHODES
COURT CLERK

38 18

**ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR
TEMPORARY INJUNCTION**

This Court has before it Plaintiff's Motion for Temporary Injunction, seeking to block two Oklahoma statutes, House Bill ("HB") 1721 (2015 Okla. Sess. Laws Serv. Ch. 59) and HB 1409 (2015 Okla. Sess. Laws Serv. Ch. 255). Both statutes are scheduled to take effect on November 1, 2015. Having considered the arguments and evidence presented, for the reasons set forth below, the motion is GRANTED as to HB 1721, and DENIED as to HB 1409.

Findings of Fact

The Plaintiff in this case is Nova Health Systems d/b/a Reproductive Services, on behalf of itself, its staff, and its patients. The two physicians who provide abortions at Reproductive Services are board-certified obstetrician-gynecologists who practice in Tulsa, Oklahoma. Reproductive Services is one of two licensed abortion facilities in Oklahoma, and the sole facility that offers abortions beyond the first trimester of pregnancy.

Defendants, sued in their official capacity, are E. Scott Pruitt, Attorney General of Oklahoma, Steve Kunzweiler, District Attorney for Tulsa County, Terry L. Cline, Oklahoma Commissioner of Health, and Lyle Kelsey, Executive Director of the Oklahoma Board of Medical Licensure and Supervision.

HB 1721 prohibits the performance of an abortion procedure described as a “dismemberment abortion,” defined as a procedure that is done:

with the purpose of causing the death of an unborn child, purposely to dismember a living unborn child and extract him or her one piece at a time from the uterus through the use of clamps, grasping forceps, tongs, scissors, or similar instruments that, through the convergence of two rigid levers, slice, crush, and/or grasp a portion of the unborn child’s body to cut or rip it off.

HB 1721, §§ 3(A), 2(3).

Violation of the ban is a criminal offense, punishable by up to two years in prison and a \$10,000 fine. *Id.* § 7. The act authorizes the following parties to seek injunctive relief against a person who has violated its provisions: a woman upon whom this abortion procedure has been performed or attempted; her spouse, parent, or guardian; any “current or former licensed health care provider of the woman;” and any prosecuting attorney with appropriate jurisdiction. *Id.* § 4. In addition, the act creates a cause of action for damages against a person who violates the ban. *Id.* § 5.

HB 1721 prohibits the performance of an abortion procedure commonly referred to as a Dilation & Evacuation (“D & E”) abortion, which does not include a separate procedure to induce fetal demise. The D & E procedure is used for approximately 95% of all abortions done in the second trimester. Reproductive Services provides pre-viability, second-trimester abortions using D & E procedures for patients up to 17 weeks of pregnancy, as measured from the first day of a woman’s last menstrual period (LMP). Plaintiff’s physicians do not induce fetal demise prior to performing D & E procedures.

As an alternative to Plaintiff’s D & E procedures, which would violate HB 1721, Defendants contend that Plaintiff may instead cause fetal demise prior to the D & E procedure, using either an injection of potassium chloride or an injection of digoxin, or by transecting the umbilical cord. Defendants argue that these procedures are available and as safe as Plaintiff’s current D & E practices, and would not violate HB 1721. Plaintiff argues that inducing fetal demise as suggested by Defendants involves procedures which are either completely unavailable in Oklahoma or extremely limited in availability, and do not reflect standard medical practice at the gestational ages at which Plaintiff provides abortions.

Current Oklahoma informed consent law requires that a physician must provide certain information, and offer the provision of other information, at least 24 hours before performing an abortion, except in the case of a “medical emergency,” defined to mean that the woman’s physical condition “necessitates the immediate abortion of the pregnancy . . . to avert her death or to avert substantial and irreversible impairment of a major bodily function arising from continued pregnancy.” 63 O.S. §§ 1-738.2, 1-738.1A(5). HB 1409 amends those informed consent provisions by requiring the provision of the information at least 72 hours prior to the procedure. HB 1409, § 1. Knowing or reckless violation of the provisions of HB 1409 are

punishable as a felony and would subject a physician to disciplinary action, up to and including license revocation, by the Medical Board. 63 O.S. §§ 1-738.5(A), (D).

Conclusions of Law

“The purpose of a temporary injunction is to preserve the status quo and prevent the perpetuation of a wrong or the doing of an act whereby the rights of the moving party may be materially invaded, injured or endangered.” *Okla. Pub. Emps. Ass’n v. Okla. Military Dep’t*, 2014 OK 48, ¶ 15, 330 P.3d 497, 504 (citation omitted). A moving party may obtain a temporary injunction by showing: (1) a likelihood of success on the merits; (2) the threat of irreparable harm if injunctive relief is denied; (3) that the applicant’s threatened injury outweighs that of the opposing party; and (4) that the injunction is in the public interest. *Dowell v. Fletcher*, 2013 OK 50, ¶ 7, 304 P.3d 457, 460.

I. Likelihood of Success on the Merits

Plaintiff’s claims against HB 1721 are brought under Article II, Section 7 of the Oklahoma Constitution, which provides: “No person shall be deprived of life, liberty, or property, without due process of law.” Although the Oklahoma Supreme Court has not yet determined whether a woman’s right to an abortion is protected under the state constitution, it has previously recognized, when evaluating the constitutionality of abortion laws challenged under the state constitution, that at a minimum, Oklahoma courts are bound by relevant federal standards. *See Okla. Coal. for Reproductive Justice v. Cline*, 2012 OK 102, 292 P.3d 27 (noting that Oklahoma courts are obligated to follow applicable federal law in assessing abortion restrictions); *Nova Health Sys. v. Pruitt*, 2012 OK 103, 292 P.3d 28 (same); *see also In re Initiative Petition No. 349, State Question No. 642*, 1992 OK 122; 838 P.2d 1, 3 fn.4 (explaining that the Court is “required . . . to take judicial notice of the United States Constitution and the

Constitution of the State of Oklahoma” and “to follow the United States Constitution as the supreme law of the land”).

In *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), the U.S. Supreme Court reaffirmed that a woman’s right to obtain an abortion is “a liberty interest” protected by the federal constitution’s due process clause. *In re Initiative Petition No. 349*, 838 P.2d at 3. At the same time, the *Casey* court recognized that states have a legitimate interest “from the outset of the pregnancy” in both protecting the life and health of a mother and promoting respect for “the life of the fetus that may become a child.” *Casey*, 505 U.S. at 846. The *Casey* Court explained that states cannot ban abortions prior to viability, nor may they enact laws which, “while furthering the interest in potential life or some other valid state interest, ha[ve] the effect of placing a substantial obstacle in the path of a woman’s choice.” *Id.* at 877. Pursuant to this standard, Oklahoma courts are “required to preserve a woman’s right to make a decision to obtain an abortion before viability to maintain harmony with the law.” *In re Initiative Petition No. 349*, 838 P.2d at 7-8. The Oklahoma Supreme Court has previously applied the federal undue burden standard set out in *Casey* when analyzing state statutes that restrict abortion. *Cline*, 2012 OK 102, 292 P.3d 27; *Pruitt*, 2012 OK 103, 292 P.3d 28. Following the Oklahoma Supreme Court’s precedent on these issues, this Court will not decide whether the Oklahoma Constitution protects the right to an abortion at this stage, but instead will address Plaintiff’s claims against HB 1721 under federal law.

The U.S. Supreme Court has previously balanced the competing interests at stake here—namely, the State’s asserted interests in protecting potential life and the ethics of the medical profession, and a woman’s liberty interest in terminating a pre-viable pregnancy—and found that a previous ban on D & E abortions was unconstitutional. *See Gonzales v. Carhart*, 550 U.S. 124,

147, 164-65 (2007); *Stenberg v. Carhart*, 530 U.S. 914, 945-46 (2000). While the State's asserted interests are legitimate, this Court finds that Plaintiff has a substantial likelihood of showing that they do not justify HB 1721's imposition of a burden on a woman's right to terminate a pre-viable pregnancy. Thus, this Court finds that Plaintiff has established a substantial likelihood of success on the merits that HB 1721 imposes an impermissible burden by banning D & E abortion procedures, which do not include a separate procedure to induce fetal demise. Based on the evidence presented, the Court preliminarily finds that the alternatives proposed by Defendants are not reasonable, and would likely be unavailable in Oklahoma.

Plaintiff alleges that HB 1409 violates the Oklahoma Constitution's prohibition against special laws, which requires that "[l]aws of a general nature shall have a uniform operation throughout the State, and where a general law can be made applicable, no special law shall be enacted." OKLA. CONST. Art. V, § 59. A law is a "special law" if it "single[s] out less than an entire class of similarly affected persons or things for different treatment." *Reynolds v. Porter*, 1988 OK 88, ¶ 14, 760 P.2d 816, 822. Under Article V, § 59, "a three-pronged inquiry is necessary to determine whether a statute is constitutional: 1) Is the statute a special or general law? 2) If the statute is a special law, is a general law applicable? and 3) If a general law is not applicable, is the statute a permissible special law?." *Id.* at ¶ 13.

With respect to Plaintiff's special law claim against HB 1409, the Court notes that the U.S. Supreme Court in *Casey* upheld an informed consent requirement mandating the provision of certain information to a woman at least 24 hours before performing an abortion, noting the State's legitimate interest in ensuring that a woman's choice to have an abortion is "thoughtful and informed." *Casey*, 505 U.S. at 872, 881-82. Plaintiff does not challenge Oklahoma's informed consent requirements *per se*, but rather HB 1409's increase in the amount of time

required between provision of the information and performance of the abortion, from 24 hours to 72 hours. However, Plaintiff has not yet pointed to any other law that has an existing informed consent period other than those relating to abortion. Thus, HB 1409's increase of the informed consent period from 24 hours to 72 hours affects all similarly situated laws—that is, all laws within the class that provides for reflection or waiting periods—and is therefore not a special law. Similarly, even if HB 1409 is a special law, a more general law is not applicable because Plaintiff has not shown that any other medical procedures require a waiting period that could be increased by a more broadly applicable law, thus failing the second prong of the *Reynolds* test. With respect to the third prong of the *Reynolds* inquiry, the Court finds that the increase in the waiting period is reasonably and substantially related to a valid legislative objective. Accordingly, this Court finds that Plaintiff has not, at this time, established a substantial likelihood of success on the merits of that claim.

II. Irreparable Injury

The Court finds that Plaintiff has established a threat of irreparable harm as to the impact of both HB 1721 and HB 1409. Oklahoma law defines harm as “irreparable” where it “is incapable of being fully compensated by money damages,” or where the measure of damages is too “speculative” to calculate. *Tulsa Order of Police Lodge No. 93 v. City of Tulsa*, 2001 OK CIV APP 153, ¶ 28, 39 P.3d 152, 159. For temporary injunction purposes, most courts have held that a threatened deprivation of a constitutional right is itself irreparable harm, and that no further showing of irreparable harm is required. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001); *Entm't Merchs. Ass'n v. Henry*, No. CIV-06-675-C, 2006 WL 2927884, at *2 (W.D. Okla. Oct. 11, 2006); 11A Charles Alan Wright, et al., *Fed. Prac. & Proc. Civ.* § 2948.1 (3d ed.).

Because Plaintiff's challenges to both HB 1721 and HB 1409 allege a violation of constitutional rights, this Court finds that Plaintiff has established a threat of irreparable harm should the acts be enforced.

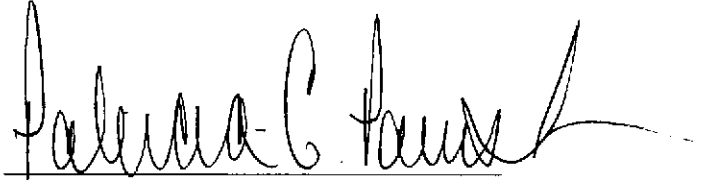
III. Balance of Hardships and Public Interest

Turning to the remaining temporary injunction factors, this Court finds that Plaintiff has established that the threat of injury to its patients outweighs any threatened harm to the Defendants, and further, that a temporary injunction would serve the public interest. *See, e.g., ACLU v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999) (holding threatened injury to plaintiffs' constitutionally protected rights outweighed "whatever damage the preliminary injunction may cause Defendants' inability to enforce what appears to be an unconstitutional statute"); *Entm't Merchs. Ass'n v. Henry*, No. CIV-06-675-C, 2006 WL 2927884, at *3 (W.D. Okla. Oct. 11, 2006) (noting it is always in the public interest to protect constitutional liberties).

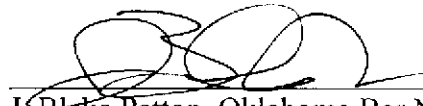
The Court hereby grants the temporary injunction against enforcement of HB 1721. Defendants, their employees, agents, and successors in office are hereby temporarily enjoined from enforcing the provisions of the act until and unless the Court orders otherwise. However, because Plaintiff has not demonstrated that it is likely to succeed on the merits of its special law claim against HB 1409, Plaintiff's motion for a temporary injunction against enforcement of HB 1409 is denied.

IT IS SO ORDERED.

Dated October 28, 2015


Patricia G. Parrish
District Court Judge 10/28/15

APPROVED AS TO FORM:

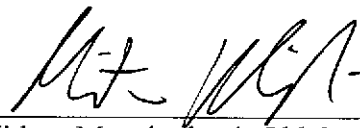

J. Blake Patton, Oklahoma Bar No. 30673
WALDING & PATTON PLLC
400 N. Walker Avenue, Suite 195
Oklahoma City, OK 73102-1889
Phone: (405) 605-4440
Fax: N/A
Email: bpatton@waldingpatton.com

and

Autumn Katz*
New York Bar Registration No. 4394151
Tiseme Zegeye*
New York Bar Registration No. 5075395
CENTER FOR REPRODUCTIVE RIGHTS
199 Water Street
New York, NY 10038
Phone: (917) 637-3723
Fax: (917) 637-3666
Email: akatz@reprorights.org
tzegeye@reprorights.org

**Admitted to Practice by Order dated
October 2, 2015.*

ATTORNEYS FOR PLAINTIFF


Mithun Mansinghani, Oklahoma Bar No. 32453
Deputy Solicitor General
OKLAHOMA OFFICE OF THE ATTORNEY GENERAL
313 NE 21st Street
Oklahoma City, OK 73105
Phone: (405) 522-4392
Fax: (405) 522-0608
Email: Mithun.Mansinghani@oag.ok.gov

ATTORNEY FOR DEFENDANTS