CENTER
FOR
REPRODUCTIVE
RIGHTS

Major U.S. Abortion Cases Threatening the Protections of Roe

As of May 2009

Hope Medical Group for Women v. LeBlanc, Federal District Court: In 2007, the Center for Reproductive Rights, on behalf of abortion providers in Louisiana, challenged a state civil liability law that allows an abortion patient to sue a physician for "damage" to the patient or the fetus "occasioned" by an abortion, regardless of negligence or error.[1] The State recently interpreted this Strict Liability Statute to exclude abortion providers from the benefits of Louisiana's medical malpractice reform legislation, which serves to discourage frivolous lawsuits and ensure that health care providers can obtain adequate malpractice insurance. The Center brought the suit after the state-run medical malpractice insurance fund refused to convene a medical review panel, a prerequisite to filing a lawsuit under the malpractice reform legislation, on the grounds that the claims against the physicians involved abortion and therefore were governed solely by the Strict Liability Statute. The Center claims that the Strict Liability Statute, and the denial of access to the malpractice protections available to other physicians, violates the due process, equal protection and privacy rights of the providers and their patients. The Center is currently conducting discovery and preparing for trial in federal court in the Middle District of Louisiana.

Nova Health Systems v. Henry, Oklahoma State District Court: On October 9, 2008, the Center for Reproductive Rights filed a challenge against recent Oklahoma legislation that restricts women's access to abortion and critical health care information. One provision of the law imposes restrictions on the use of mifepristone (also known as RU-486), a medication approved by the FDA for the induction of abortions. The Center claims that this provision is unconstitutionally vague and that it may prohibit physicians from using any regimen other than that specifically approved by the FDA, even though the American College of Obstetricians & Gynecologists strongly recommends a different ("off-label") regimen as more effective, less expensive, and with fewer side-effects. In addition, the law prohibits a physician from performing an abortion unless the woman has undergone an ultrasound and listened to a description of the image. At the same time, the law excuses doctors from liability for withholding information from pregnant women about the fetus, such as the existence of a severe developmental defect, if the woman claims that the denial of information deprived her of the

[1] The constitutionality of the strict liability statute was previously challenged in an action brought by the Center. Although the district court struck down the statute as unconstitutional, *Okpalobi v. Foster*, 981 F. Supp. 977 (E.D. La. 1998), and that ruling was affirmed by a panel of the United States Court of Appeals for the Fifth Circuit, *Okpalobi v. Foster*, 190 F.3d 337 (5th Cir. 1999). It was subsequently reversed by the Fifth Circuit in an *en banc* decision on the ground that plaintiffs in that action lacked standing. *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001) (en banc). The Center then challenged the statute in a state court action; the Louisiana Court of Appeals similarly ruled that the plaintiffs in that action lacked standing. Women's Health Clinic v. State of Louisiana, 825 So.2d 1208 (La. 2002).

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ability to make informed medical decisions, such as whether to terminate the pregnancy. The Center filed the lawsuit in state District Court in Oklahoma, on behalf of Nova Health Systems, one of only three abortion providers in the state, arguing that the law intrudes upon women's privacy and free speech rights, denies health care providers due process, and violates provisions in the Oklahoma constitution requiring that legislation be limited to a single subject. The parties have agreed to a temporary restraining order that will prevent the law from taking effect until the trial court has ruled on the Center's request for a preliminary injunction.[2]

Planned Parenthood Cincinnati Region v. Strickland, U.S. Court of Appeals for the Sixth Circuit and Ohio Supreme Court: In 2004, Planned Parenthood challenged the constitutionality of an Ohio law seeking to limit use of mifepristone for medication abortions. The State claims that the Ohio statute merely prohibits "off-label" use by requiring physicians to provide mifepristone "in accordance with all provisions of federal law that govern the use."[3] Planned Parenthood argues that the statute is void for vagueness because federal law imposes no requirements on physicians with respect to the administration of mifepristone.[4] Planned Parenthood also claims that if the statute prohibits "off-label" use it violates women's constitutional right to bodily integrity and imposes an undue burden on a woman's right to choose an abortion.[5] The district court granted a preliminary injunction, which was upheld in part and vacated in part by the U.S. Court of Appeals for the Sixth Circuit sitting *en banc*.[6] On remand, the district court declared the statute unconstitutional and permanently enjoined its enforcement.[7] The State appealed and the Sixth Circuit certified questions to the Ohio Supreme Court concerning the statute's meaning.[8] Those questions are still pending.

Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds, Federal District Court: In 2005, South Dakota amended its biased counseling law to require physicians to provide women seeking abortions with a written statement that the procedure "will terminate the life of a whole, separate, unique, living human being," with whom the woman has a "constitutionally protected" relationship.[9] Doctors must certify in writing that the patient understands the information.[10] Planned Parenthood challenged the law on the grounds that it violates doctors' free speech rights and imposes an undue burden on women's right to choose an abortion. The district court granted a preliminary injunction, finding that plaintiffs had a fair chance of success on its claim that the amended law violated physician's free speech rights.[11] That decision was appealed,[12] and in June 2008, the U.S. Court of Appeals for the Eighth Circuit, sitting *en banc,* overturned the injunction and remanded the case to the district court.[13]

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[2] More information is available on the Center for Reproductive Rights website at http://www.reproductiverights.org/pr_08_1010OKULTRA.html.
[3] *Planned Parenthood Cincinnati Region v. Strickland*, 531 F.3d 406, 408-09 (6th Cir. 2008).
[4] *Id*. at 411.
[5] *Id*.
[6] *Planned Parenthood Cincinnati Region v. Taft*, 444 F.3d 502 (6th Cir. 2006).
[7] *Planned Parenthood Cincinnati Region v. Taft*, 459 F. Supp. 2d (S.D. Ohio 2006).
[8] *Strickland*, 531 F.3d. at 412.
[9] S.D.C.L. § 34-23A-10.1.
[10] *Id*.
[11] Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds, 375 F. Supp. 2d 881 (D.S.D. 2005).
[12] Planned Parenthood Minnesota v. Rounds, 467 F.3d 716 (8th Cir. 2006), *rehearing en banc granted, opinion vacated* (Jan 09, 2007).
[13] Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds, 530 F.3d 724 (8th Cir. 2008) (*en banc*).

Planned Parenthood of Kansas and Mid-Missouri, Inc. & Dr. Allen Palmer, v. Drummond, Federal District Court and Missouri State Circuit Court: In 2007, Missouri amended its licensing law to require first trimester abortion providers (including providers of only medication abortions) to become licensed as ambulatory surgical centers (ASCs). Missouri is the only state in the country to require first-trimester abortion providers to be licensed as ASCs. In addition, the Missouri Department of Health is requiring existing abortion providers newly subject to licensing under the amended law to meet the physical construction requirements for new facilities, rather than the "grandfather" standards for existing facilities. Planned Parenthood challenged the law in the federal district court in the Western District of Missouri, and the Center for Reproductive Rights intervened in the suit on behalf of Dr. Palmer, an obstetrician-gynecologist who has provided abortions in his current medical office for over 30 years. If the amended law is applied to existing abortion providers in the way urged by the Department of Health, Dr. Palmer will likely be forced to close his practice permanently, and two of the other three existing clinics in Missouri may be forced to cease providing abortions, at least temporarily. The federal district court granted a preliminary injunction and the case is currently set for trial in November, 2009. The Center has also filed a companion case in state court arguing that the State has deprived Dr. Palmer of equal protection of the law and that the regulations should be interpreted to permit existing abortion providers to become licensed under the construction regulations for existing facilities, rather than those designed for newly constructed facilities. In that case, which is pending in the Circuit Court of Cole County, Missouri, the Center has moved for summary judgment and is awaiting a ruling.

Richmond Med. Ctr. for Women v. Herring, U.S. Court of Appeals for the Fourth Circuit: In 2003, the Center for Reproductive Rights, on behalf of William G. Fitzhugh, M.D. and the Richmond Medical Center for Women, filed a case seeking to have Virginia's "Partial Birth Infanticide Act" declared unconstitutional. The Center claims that the Act effectively prohibits the most common second-trimester abortion method by subjecting physicians to possible criminal liability every time they perform a standard dilation and evacuation procedure. After the law was declared unconstitutional by both the district court and the U.S. Court of Appeals for the Fourth Circuit,[14] the United States Supreme Court remanded the case for further consideration in light of its decision in *Gonzales v. Carhart,* upholding the federal 'partial-birth abortion" ban.[15] On remand, a three judge panel once again found the Virginia ban unconstitutional on the grounds that "it imposes an undue burden on a woman's right to obtain an abortion" because it went beyond the federal ban and would outlaw the most common abortion methods starting in the early second trimester.[16] However, the Fourth Circuit voted to grant *en banc* review of the case, thus vacating that opinion. The *en banc* argument was held on October 28, 2008.

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[14] *Richmond Med. Ctr. for Women v. Hicks*, 301 F. Supp. 2d. 499 (E.D. Va. 2004), *aff'd*, 409 F.3d 619 (4th Cir. 2005).
[15] *Herring v. Richmond Med. Ctr.*, 550 U.S. , 127 S. Ct. 2094 (2007).
[16] *See Richmond Med. Ctr. for Women v. Herring*, 527 F.3d 128 (4th Cir. 2008), *petition for rehearing en banc granted*, No. 03-1821 (4th Cir. October 28, 2008).