

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION**

MKB MANAGEMENT CORP, d/b/a RED RIVER
WOMEN’S CLINIC, and KATHRYN L.
EGGLESTON, M.D.,

Plaintiffs,

vs.

BIRCH BURDICK, in his official capacity as State
Attorney for Cass County; WAYNE STENEHJEM,
in his official capacity as Attorney General for the
State of North Dakota; and LARRY JOHNSON,
M.D., ROBERT TANOUS, D.O.; KATE LARSON,
P.A.C., NORMAN BYERS, M.D.; CORY MILLER,
M.D.; KAYLEEN WARDNER; GAYLORD
KAVLIE, M.D.; KENT MARTIN, M.D.; KENT
HOERAUF, M.D.; BURT RISKEDAHL;
JONATHAN HAUG, M.D.; GENEVIEVE GOVEN,
M.D.; AND ROBERT J. OLSON, M.D., in their
official capacities as members of the North Dakota
Board of Medical Examiners,

Defendants.

Case No. *1:13-cv-071*

COMPLAINT

Plaintiffs, by and through their undersigned attorneys, bring this Complaint against the above-named Defendants, their employees, agents, and successors in office, and in support thereof allege the following:

I. PRELIMINARY STATEMENT

1. Plaintiffs bring this civil rights action under the United States Constitution and 42 U.S.C. § 1983 to challenge the constitutionality of two bills enacted this year by the North Dakota legislature: House Bills 1456 and 1305 (to be codified as new sections to N.D. Cent. Code § 14-02.1 and amendments to N.D. Cent. Code §§ 14-02.1-02 and 43-17-31). The bills (hereinafter collectively referred to as “the bans”) are scheduled to take effect August 1, 2013.

House Bill 1456 (“HB 1456”) is attached hereto as Exhibit A. House Bill 1305 (“HB 1305”) is attached hereto as Exhibit B.

2. The bans prohibit abortions prior to viability in violation of clearly established United States Supreme Court precedent that protects the substantive due process rights of women seeking abortions.

3. Plaintiffs seek a declaration that the bans are unconstitutional and injunctive relief prohibiting their enforcement as to previability abortions.

II. JURISDICTION AND VENUE

4. This court has jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3), and 1343(a)(4).

5. Plaintiffs’ action for declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201 and 2202 and by Rules 57 and 65 of the Federal Rules of Civil Procedure.

6. Venue in this Court is proper under 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to this action occurred in this district and some of the Defendants are located in this district.

III. PARTIES

A. Plaintiffs

7. Plaintiff Red River Women’s Clinic (“the Clinic”), located in Fargo, North Dakota, has been in operation since 1998. The Clinic provides a range of reproductive health care to women, including medication and surgical abortions. The Clinic brings claims on behalf of itself, its staff, and its patients.

8. Plaintiff Kathryn Eggleston, M.D., is a physician licensed to practice in North Dakota. Dr. Eggleston is the Clinic’s medical director, and she provides abortions to the Clinic’s patients. Dr. Eggleston brings claims on behalf of herself and her patients.

B. Defendants

9. Defendant Birch Burdick is the State's Attorney for Cass County where the Clinic is located. The State's Attorney's office is charged with prosecuting all public offenses on behalf of the State of North Dakota. N.D. Cent. Code § 11-16-01(1). Both HB 1456 and HB 1305 provide criminal penalties. He is sued in his official capacity.

10. Defendant Wayne Stenehjem is the Attorney General of the State of North Dakota. The Attorney General must "appear and defend all actions against any state officer," and "advise the several state's attorneys in matters relating to the duties of their office." N.D. Cent. Code §§ 54-12-01.3, 54-12-01.4. He is sued in his official capacity.

11. Defendants Larry Johnson, M.D.; Robert Tanous, D.O.; Kate Larson, P.A.C., Norman Byers, M.D.; Cory Miller, M.D.; Kayleen Wardner; Gaylord Kavlie, M.D.; Kent Martin, M.D.; Kent Hoerauf, M.D.; Burt Riskedahl; Jonathan Haug, M.D.; Genevieve Goven, M.D.; and Robert J. Olson, M.D., are the members of the North Dakota Board of Medical Examiners (the "Board"). The Board is authorized to take disciplinary action against the license of a physician. N.D. Cent Code § 43-17-07.1. HB 1456 provides for such disciplinary actions based on violations in some circumstances. Board members are sued in their official capacity.

IV. THE CHALLENGED BANS

12. Current North Dakota law prohibits abortions "[a]fter the point in pregnancy when the unborn child may reasonably be expected to have reached viability," unless "in the medical judgment of the physician the abortion is necessary to preserve the life of the woman" or if "continuation of her pregnancy will impose on her substantial risk of grave impairment of her physical or mental health." N.D. Cent. Code § 14-02.1-04.3. A fetus is viable when it has

the ability “to live outside of the mother’s womb, albeit with artificial aid.” N.D. Cent. Code § 14-02.1-02.14 (to be recodified by HB 1305 as N.D. Cent. Code § 14-02.1-02.16).

(A) House Bill 1456

13. Under House Bill 1456, “an individual may not perform an abortion on a pregnant woman before determining, in accordance with standard medical practice,” if the “unborn child” “has a detectable heartbeat.” HB 1456 § 1.1. The only exception to the requirement is if the woman is experiencing a medical emergency. *Id.* Performance of an abortion in violation of this requirement is grounds for disciplinary action against the physician by the state board of medical examiners. HB 1456 § 1.2.

14. House Bill 1456 further provides:

Notwithstanding any other provision of law, an individual may not knowingly perform an abortion on a pregnant woman with the specific intent of causing or abetting the termination of the life of the unborn child the pregnant woman is carrying and whose heartbeat has been detected according to the requirements of section 1 of this Act.

HB 1456 § 2.1.

15. Thus, House Bill 1456 bans abortions in North Dakota after the point in pregnancy when the “heartbeat” can be detected. As described in greater detail below, cardiac activity can be detected very early in pregnancy, usually about two weeks after a woman might first miss her menstrual period.

16. The only exception to the ban when a heartbeat has been detected is for procedures performed “to prevent the death of a pregnant woman, to prevent serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman, or to save the life of an unborn child.” HB 1456 § 2.2(a).

17. Willing performance of an abortion in violation of the ban is a class C felony, punishable by up to five years imprisonment. N.D. Cent. Code § 12.1-31-01.4.

(B) House Bill 1305

18. House Bill 1305 prohibits the knowing performance of an abortion “that the pregnant woman is seeking . . . solely [o]n account of the sex of the unborn child; or [b]ecause the unborn child has been diagnosed with either a genetic abnormality or a potential for a genetic abnormality.” HB 1305 § 2.

19. House Bill 1305 defines “genetic abnormality” to mean: “any defect, disease, or disorder that is inherited genetically. The term includes any physical disfigurement, scoliosis, dwarfism, Down syndrome, albinism, Amelia, or any other type of physical or mental disability, abnormality, or disease.” HB 1305 § 1 (amending N.D. Cent. Code § 14-02.1-02).

20. Violation of HB 1305 is a class A misdemeanor, punishable by up to one year imprisonment. N.D. Cent. Code § 12.1-31-01.5.

V. STATEMENT OF FACTS

21. Pregnancy is commonly measured from the first day of a woman’s last menstrual period (“lmp”). Fertilization typically occurs around two weeks lmp. Pregnancy is generally considered to begin around three weeks lmp, when a fertilized egg typically implants in the uterus. Pregnancy typically lasts until forty weeks lmp.

22. In a normally developing embryo, cells that form the basis for development of the heart later in gestation produce cardiac activity that can be detected with ultrasound.

23. In early pregnancy, standard medical practice for detecting cardiac activity requires the use of vaginal ultrasound.

24. Using vaginal ultrasound, cardiac activity is generally detectable beginning at approximately 6 weeks lmp.

25. Viability, the time when a fetus has a reasonable chance for sustained life outside the womb, does not occur until approximately twenty-four weeks lmp, some four months later.

26. By 6 weeks lmp, many women do not know they are pregnant. Some women, including those who have irregular periods, who have certain medical conditions, who have been using contraceptives, or who are breastfeeding, may not yet realize that they have missed a period. Some women mistake the light bleeding that often occurs early in pregnancy as a period.

27. Even for women with highly regular periods, 6 weeks lmp will be just two weeks after they have missed their period.

28. Red River Women's Clinic is the sole abortion provider in the state of North Dakota. The Clinic provides abortion care up to approximately sixteen weeks lmp. The Clinic typically provides abortions one day per week.

29. Approximately eighty-nine percent of the Clinic's patients obtain abortions at or after 6 weeks of pregnancy.

30. The Clinic's patients obtain abortions for a variety of reasons. Fifty-eight percent already have children and many do not feel they can adequately parent and support additional children. Some younger patients believe that parenthood will prevent completion of their education, which would hinder both their own development and their ability to provide for their children. Other patients seek abortions because they are pregnant as a result of rape, are victims of domestic violence, or because the pregnancy threatens their health.

31. The Clinic serves patients from North Dakota, South Dakota and Minnesota. Many patients travel significant distances for their abortion care.

32. Legal abortion is one of the safest medical procedures in the United States. The risk of carrying a pregnancy to term carries much higher risks of both morbidity and mortality than does obtaining an abortion through around twenty weeks. The mortality rate associated with pregnancy in the United States is approximately fifteen times higher than the risks associated with abortion. Access to safe and legal abortion benefits the health and wellbeing of women and their families.

33. A variety of tests may be performed to check for fetal genetic abnormalities. These include amniocentesis, which is typically performed at fifteen to twenty weeks Imp, and chorionic villus sampling and nuchal translucency screening, which are typically performed at ten to twelve weeks Imp.

34. Over the past forty years, safe and legal abortion has been important to facilitating women's equal participation in society, including in the economic and social life of the nation. The availability of abortion enables women to decide whether or not to forego educational and economic opportunities due to unplanned pregnancy, whether to raise children with an absent or unwilling partner, and whether to accept the risk of carrying medically-compromised or non-viable pregnancies to term.

35. Pregnant women are capable of deciding whether to terminate a pregnancy, taking into account all relevant factors. Forcing women to carry to term promotes the stereotyped notions that motherhood is the preferred, natural, and proper state for women, and that women are not capable of making decisions about the timing, number, and spacing of children, but rather must be protected from the consequences of making decisions that others see as wrong.

VI. THE IMPACT OF THE BANS ON PLAINTIFFS AND THEIR PATIENTS

36. House Bill 1456 and House Bill 1305 bar women from obtaining pre-viability abortions in contravention of their constitutional rights. Immediately upon taking effect, House Bill 1456 would prohibit approximately eighty-nine percent of the abortions currently performed at the Clinic, creating a near-total ban on abortion in North Dakota.

37. Moreover, faced with a loss of patient revenue of such magnitude, the Clinic would almost certainly have to close. Because the Clinic is the only clinic providing abortions in North Dakota, House Bill 1456 would thus have the practical effect of completely banning abortions in the state.

38. The bans present Dr. Eggleston with an untenable choice: to face criminal prosecution for continuing to provide abortion care in accordance with her best medical judgment, or to stop providing the care her patients seek.

39. These harms constitute irreparable harm to Plaintiffs and their patients.

FIRST CLAIM FOR RELIEF

(HB 1456 Substantive Due Process)

40. Plaintiffs reallege and hereby incorporate by reference Paragraphs 1 through 39 above.

41. House Bill 1456 bans abortion prior to viability, in violation of the substantive due process rights of Plaintiffs' patients, guaranteed by the Fourteenth Amendment of the United States Constitution.

SECOND CLAIM FOR RELIEF

(HB 1456 Equal Protection)

42. Plaintiffs reallege and hereby incorporate by reference Paragraphs 1 through 41 above.

43. By enacting a near-complete ban on abortion in North Dakota, thereby all but eliminating access to health care that is needed only by women, and by denying women the autonomy to determine the number, timing and spacing of their children, thereby reinforcing outmoded stereotypes of women's role in society, House Bill 1456 discriminates against women on the basis of sex in violation of their right to equal protection guaranteed by the Fourteenth Amendment.

THIRD CLAIM FOR RELIEF

(HB 1305 Substantive Due Process)

44. Plaintiffs reallege and hereby incorporate by reference Paragraphs 1 through 43 above.

45. House Bill 1305 bans some previability abortions, in violation of the substantive due process rights of plaintiffs' patients, guaranteed by the Fourteenth Amendment.

FOURTH CLAIM FOR RELIEF

(HB 1305 Equal Protection)

46. Plaintiffs reallege and hereby incorporate by reference Paragraphs 1 through 45 above.

47. By preventing only women from choosing medically appropriate health care treatment and by denying women autonomy to determine whether and when to carry a pregnancy to term, including cruelly forcing women to carry a pregnancy to term in situations where the fetus has no reasonable chance for sustained life, and thereby reinforcing outmoded stereotypes of women's primary role as mothers, House Bill 1305 discriminates against women

on the basis of sex in violation of their right to equal protection guaranteed by the Fourteenth Amendment.

REQUEST FOR RELIEF

Wherefore, Plaintiffs respectfully request that this Court:

1. Issue a declaratory judgment that HB 1456, to be codified within N.D. Cent. Code § 14-02.1, is unconstitutional as applied to previability abortions, under the substantive due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution and in violation of 42 U.S.C. § 1983;
2. Issue preliminary and permanent injunctive relief restraining Defendants, their employees, agents, and successors from enforcing HB 1456 as to previability abortions.
3. Issue a declaratory judgment that HB 1305, to be codified within N.D. Cent. Code § 14-02.1, is unconstitutional as applied to previability abortions, under the substantive due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution and in violation of 42 U.S.C. § 1983;
4. Issue a permanent injunction restraining Defendants, their employees, agents, and successors from enforcing HB 1305 as to previability abortions.
5. Issue an order prohibiting Defendants, their employees, agents, and successors from bringing enforcement actions for previability abortions performed while a Preliminary Injunction is in effect against HB 1456;
6. Award Plaintiffs their reasonable costs and attorney's fees pursuant to 42 U.S.C. § 1988; and
7. Grant such other or further relief as the Court deems just, proper and equitable.

RESPECTFULLY SUBMITTED this 25th day of June, 2013.



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*Motion for Admission Pending