

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

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

Plaintiffs,

DR. ALLEN PALMER, on behalf of himself and)
his patients,)

Plaintiff-Intervenor,)

v.) Case No. 07-4164-CV-C-ODS

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;)

DANIEL K. KNIGHT, Prosecuting Attorney of Boone)
County, Missouri, in his official capacity;)

and JAMES F. KANATZAR, Prosecuting Attorney of)
Jackson County, Missouri, in his official capacity,)

Defendants.)

INTERVENOR COMPLAINT OF DR. ALLEN PALMER

Plaintiff-Intervenor,¹ Dr. Allen Palmer, by his undersigned attorneys, brings this complaint against the above-named Defendants, their employees, agents and successors in office, and in support thereof states the following:

¹ Filed simultaneously with this Complaint is Dr. Palmer's Motion to Intervene and Request for Expedited Consideration, and Suggestions in Support of Motion to Intervene by Dr. Allen Palmer.

I. Introduction

1. This is an as-applied challenge brought by Dr. Allen Palmer under 42 U.S.C. § 1983 claiming that Defendants' application to Plaintiff-Intervenor of the recently-enacted amendment to Missouri's Ambulatory Surgical Center Licensing Law contained in HCS/HB1055, which is to be codified at Mo. Rev. Stat. § 197.200 (hereinafter, "the Act" or "the 2007 Amendment"), and of its implementing regulations (the "regulatory scheme"), violates rights secured to Plaintiff and his patients by the Fourteenth Amendment to the United States Constitution.

2. The Act requires facilities to be licensed as ambulatory surgical centers ("Surgi-Center") if they are "operated for the purpose of performing . . . five or more first trimester abortions per month." Violation of the Act is a Class A misdemeanor. The Act took effect on August 28, 2007.

3. Plaintiff-Intervenor provides first-trimester abortions at his private office in Bridgeton, Missouri. He has been providing first-trimester abortions continuously since 1976 at his office without notable incidents relating to the health of his patients who obtained abortions.

4. Missouri's Department of Health and Senior Services ("DHSS") provided no response to Plaintiff-Intervenor's repeated requests for guidance about whether the Act applies to his provision of abortion services at his private office or, if so, in what manner it will be applied to him until the afternoon of August 28, 2007. The information finally provided by DHSS is, however, internally inconsistent. In particular, it is the position of DHSS that Dr. Palmer "must comply with 19 CSR 30-30.010 through 19 CSR 30-30.040," but that he cannot avail himself of an exemption for private physicians' offices contained in 19 CSR 30.010(1)(B)(2), or of any "grandfather" provision applicable to the General Design and Construction Standards. The positions taken by DHSS regarding application of the Act to Dr. Palmer are not apparent from

the face of the Act or the regulations. Moreover, requiring Dr. Palmer to meet all of the requirements for ambulatory surgical centers is both medically unnecessary and physically impossible at his current Bridgeton location.

5. As a result, in the absence of relief from this Court, Plaintiff-Intervenor will be forced to cease all abortion services at his private office beginning on September 5, 2007 (when he is next scheduled to provide abortion procedures), thereby causing him to suffer irreparable loss of income, loss of future patients, and causing irreparable harm to women seeking abortions both by eliminating the only private physician office in Missouri that provides abortion services and by forcing existing patients who request abortions to a different provider or location, even though the patient and Dr. Palmer would prefer continuity of care. These harms violate both his rights to due process of law and equal protection, and the right to privacy of his patients, all guaranteed by the Fourteenth Amendment.

II. Jurisdiction And Venue

6. This court has jurisdiction under 28 U.S.C. §§ 1331 and 1343.

7. Plaintiff-Intervenor's action for declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201 and 2202.

8. 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 because Defendants Drummond and Nixon, in their official capacities, reside in the Western District of Missouri.

III. Parties

A. Plaintiff-Intervenor

9. Plaintiff-Intervenor Allen Palmer, D.O., is a doctor of osteopathy licensed to practice medicine in Missouri. He maintains a private gynecology practice, Women's Care Gynecology,

Inc. (“WCG”), in Bridgeton, Missouri (“Bridgeton office”). He is a distinguished fellow in the American College of Osteopathic Obstetricians and Gynecologists, and holds admitting privileges at four hospitals in Missouri. He is also a clinical instructor of Obstetrics and Gynecology at Washington University School of Medicine in St. Louis.

10. Plaintiff-Intervenor provides general primary care services and reproductive health care, including family planning services, testing and treatment for sexually transmitted infections, cervical and breast cancer screening services, pregnancy testing, and first-trimester abortions at his Bridgeton office. He regularly provides more than five first-trimester surgical abortions per month. He has been providing abortion services continuously since 1973 at the same Bridgeton office.

11. Plaintiff-Intervenor brings this action on his own behalf and on behalf of his patients who presently or in the future desire, or may desire, abortion services in Missouri.

B. Defendants

12. Defendant Jane Drummond is the Director of the Missouri Department of Health and Senior Services (“DHSS”), the agency responsible for deciding applications for Surgi-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.

13. Defendant Jay Nixon is the Attorney General of 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.

IV. The Statutory and Regulatory Framework

14. Missouri's Ambulatory Surgical Center Licensing Law ("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.

15. Prior to the 2007 Amendment, licensure as a Surgi-Center was required, in relevant part, 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.

16. The regulations governing Surgi-Center exclude from licensure a "facility used as an office or clinic for the private practice of a physician." 19 CSR 30-30.010(1)(B)(2). Although the DHSS has directed Dr. Palmer to comply with 19 C.S.R. 30-30.010(1)(B)(2), and although Dr. Palmer's practice is a private physician practice, DHSS has indicated that the exemption from licensure as a Surgi-Center is not available to Dr. Palmer or WCG.

17. The 2007 Amendment requires 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 a Surgi-Center.

18. In implementing Missouri's licensing law, DHSS has established regulations governing three different types of Surgi-Centers: general Surgi-Centers; abortion facilities; and birthing centers. Each type of Surgi-Center has different requirements for licensure, administration, and physical construction.

19. For each of the three types, DHSS established a set of physical requirements for new construction that does not apply to facilities already in operation when they were first required to be licensed. Pursuant to “grandfathering” provisions, pre-existing facilities have either been exempted from physical requirements altogether (in the case of general Surgi-Centers) or licensed under a different set of physical requirements designed specifically for pre-existing facilities (in the case of abortion facilities and birthing centers).

20. When the licensing law was first enacted in 1975, DHSS established physical requirements, contained in the regulations governing “General Design and Construction Standards,” for “[a]ll new ambulatory surgical centers,” as well as for future “additions to and remodeling of existing licensed ambulatory surgical centers,” and noted that “[t]hese rules are applicable to ambulatory surgical centers which began operation or construction or renovation of a building to operate an ambulatory surgical center on any date after September 28, 1975.” 13 CSR 50-30 (1975 version). Facilities already in operation when the licensing law was enacted were not required to comply with these physical requirements.

21. The 1990 revisions to the regulations, which are in effect today, exempt Surgi-Centers in existence at the time the regulations were updated from compliance with the amended physical plant requirements unless the facility undertakes remodeling or renovations. 19 CSR 30-30.030(1).

22. Similarly, when birthing centers first became licensed in 1995, DHSS established two sets of physical requirements: one set forth extensive physical requirements for “new birthing center construction,” and the other set forth requirements for “[e]xisting birthing centers,” defined as “those birthing facilities already in operation at the time these rules are adopted.” 19 CSR 30-30.100; 30-30.110.

23. Until now, DHSS took the same two-tiered approach when licensing abortion facilities. In 1987 DHSS promulgated regulations governing abortion facilities and requiring licensure of any facility “in which the number of patients having abortions represents fifty-one percent (51%) or more of the patients treated or seen for any health condition or where fifty-one percent (51%) or more of the revenues of the facility are from abortions or procedures related to abortions.” 19 CSR 30-30.050.

24. DHSS established two sets of physical requirements for abortion facilities: one for “[n]ew abortion facilities,” and a parallel but modified set for “[a]ny abortion facility in operation at the time these rules are adopted.” 19 CSR 30-30.070(2); 30-30.070(3).

25. The facilities that were “grandfathered” into licensure under the modified requirements had not previously been licensed by DHSS. Thus, the facilities licensed under the lesser physical requirements were facilities already in operation providing abortions, but never before required to be licensed.

26. DHSS’s statutory obligation under Missouri’s licensing law is to adopt regulations that “assure quality patient care and patient safety.” Mo. Rev. Stat. § 197.225. Presumably, in establishing its physical requirements for pre-existing abortion facilities, DHSS made the determination that they were adequate to protect maternal health and safety at facilities at which abortions represent fifty-one percent or more of the patients treated or seen.

V. Factual Allegations

A. Safety of first-trimester abortions

27. First-trimester surgical abortion is one of the safest surgical procedures. It requires no incisions and no general anesthesia.

28. First-trimester surgical abortion is as safe as, or safer than, many outpatient surgical procedures routinely performed in physicians' offices, such as non-pregnant dilation and curettage procedures or endometrial biopsies. However, unlike performance of an abortion, performance of other particular procedures does not subject a medical facility to the licensing law unless the facility is operated primarily for the purpose of performing surgical procedures.

29. Any delay in obtaining abortion, however, is significant because gestational age is an important determinant of medical risk. Although abortion is one of the safest surgical procedures, both the morbidity (risk of major complications) and mortality (risk of death) rates for abortion increase as the pregnancy advances. In the case of medication abortion, which is provided only early in the first trimester, if the woman is unable to obtain an abortion until later in pregnancy she loses this non-surgical option completely.

30. Performing first-trimester abortions in a physician's private office setting falls within the applicable standards of care. This opinion is shared by the two major professional organizations in this area, the National Abortion Federation ("NAF") and the American College of Obstetricians and Gynecologists ("ACOG"). Thus, the ACOG Guidelines for Women's Healthcare (2002) recognize that first-trimester abortions are among the procedures that can safely, efficiently and cost-effectively performed in a physician's office. Accordingly, first-trimester abortions are routinely performed in physicians' offices in the United States.

B. Plaintiff-Intervenor's Medical Practice

31. Plaintiff-Intervenor provides a range of gynecological services, include minor surgical procedures, to the patients in his private practice in Bridgeton. These surgical procedures include: cervical biopsy, surgical completion of miscarriage, hysteroscopy, laser of the cervix, and cryo-surgery of the cervix. These surgical procedures also include first-trimester abortions,

up to a gestational age of 14 weeks as measured from the first day of the woman's last menstrual period. He also performs other non-surgical gynecological procedures at WCG, including medication abortions, insertion of intrauterine devices, and pap smears.

32. Plaintiff-Intervenor provides abortion procedures to his patients at WCG approximately three days per week, averaging 10-12 abortions per week.

33. Plaintiff-Intervenor's revenues from abortion services are approximately \$4,000-\$5,000 per week.

34. Approximately one-fourth to one-third of the new patients who come to Plaintiff-Intervenor for abortion services return to him for regular gynecological care (and primary care in some cases). Thus, every time Plaintiff-Intervenor must turn away a patient who seeks an abortion, he is also turning away a woman who may become one of his ongoing gynecology patients.

35. If Plaintiff-Intervenor must deny his existing patients abortions, his professional practice and relationships with his patients will be disrupted and damaged because abortion services are an integral part of his gynecological health care services.

C. Plaintiff-Intervenor's Efforts to Obtain Permission to Continue His Abortion Practice

36. On or before July 26, 2007, Plaintiff-Intervenor submitted an application for an Abortion Facility license for WCG to DHSS.

37. On August 6, 2007, Plaintiff-Intervenor faxed and mailed a letter to DHSS that sought to: (1) provide additional information in support of WCG's application; (2) notify DHSS that WCG would, by August 17, be in compliance with the abortion facility regulations, including the physical plant standards applicable to abortion facilities in operation prior to October 25, 1987,

19 CSR 30-30.070(3); and (3) initiate communications with the appropriate representative of DHSS about arranging an inspection on a timeline that would permit WCG to continue providing health services. In response to this letter, Plaintiff-Intervenor's administrator, Constance Vogler, received a telephone call from Verla Summers, Health Services Coordinator at DHSS, who indicated that WCG's application materials were not complete, and that DHSS was not moving forward with WCG's application.

38. Following this conversation with Ms. Summers, Plaintiff-Intervenor was confused about what additional materials WCG needed to submit in support of its application. This confusion stemmed, in part, from the fact that Plaintiff-Intervenor had received two distinct and separate applications for licensure from the Health Department. One was a packet of materials regarding application to become licensed "under the Medicare program" as a new ambulatory surgical center, and the other was a single page application to obtain a license as an abortion facility. These materials failed to state whether Plaintiff-Intervenor needed to submit one or both of these applications to comply with House Bill 1055.

39. Accordingly, on August 8, 2007, Plaintiff-Intervenor faxed and mailed a letter to Ms. Summers detailing both the information he had submitted in support of WCG's application and the regulatory requirements he understood WCG must meet in order to obtain an Abortion Facility license. The letter also asked for clarification from DHSS of what further information, if any, he needed to submit, and what further requirements, if any, he needed to meet. DHSS has neither acted on Plaintiff-Intervenor's application nor responded to the inquiries he made in the August 8, 2007, letter.

40. On August 10, 2007, Plaintiff-Intervenor faxed an additional letter to Ms. Summers inquiring whether WCG, as the private medical practice of Dr. Palmer, was exempt from

ambulatory surgical center licensing under 19 CSR 30-30.010(1)(B)(2). The letter indicated that if Dr. Palmer's practice was exempt, WCG would withdraw its license application upon the receipt of written confirmation of the exemption from DHSS.

41. On August 17, 2007, in response to a telephone call initiated by Plaintiff-Intervenor's Administrator and Bonnie Scott Jones, a lawyer with whom Plaintiff-Intervenor had consulted on this matter, Dean Linneman, Director of Section for Standards and Licensure Services & Regulation at DHSS, returned the call by contacting Ms. Jones and telling her that DHSS had no answers to any of Plaintiff-Intervenor's inquiries at that time, but would be back in contact when he did.

42. On August 21, 2007, in light of the impending effective date of House Bill 1055 (i.e., August 28, 2007), and the lack of any response to Plaintiff-Intervenor's inquiries, Ms. Jones sent Mr. Linneman a letter requesting assurances from DHSS that it would give Dr. Palmer and WCG a reasonable opportunity to pursue any necessary licensing. Specifically, the letter asked for Mr. Linneman's assurance that the DHSS: "(1) will permit [WCG] to continue providing abortion services without an ambulatory surgical center or abortion facility license until such time as WCG has received a response to the written inquiries it has made to DHSS regarding the licensing requirements applicable to it, and has completed its good faith efforts to become licensed (if licensing is required of it), including its efforts to obtain any necessary waivers; and (2) will not take any enforcement action against Dr. Palmer, WCG, or WCG's employees for continuing to provide abortion as provided in (1)." The letter requested these assurances by noon on August 23, 2007.

43. On the afternoon of August 28, 2007, after counsel for Defendant Jay Nixon was contacted regarding consent to Plaintiff-Intervenor's planned Motion to Intervene and Motion for

Temporary Restraining Order, Mr. Linneman faxed a letter to Dr. Palmer's counsel stating that: 1) all establishments providing five or more first trimester abortions per month "must comply with 19 CSR 30-30.010 through 19 CSR 30-30.040; 2) that private physicians' offices were not exempt from the licensing requirement; and 3) that no grandfather provisions would be applied to existing facilities. (Attached hereto as Exhibit A.) The letter stated that DHSS would work with Plaintiff-Intervenor on a timeline for compliance, so long as he contacted DHSS no later than 4:00 pm on August 29, 2007 to begin the compliance process.

44. The letter fails to state affirmatively that Dr. Palmer is permitted to continue to perform five or more first trimester abortions per month during his efforts to come into compliance, or provide any description of the process by which Dr. Palmer's application for licensure would be handled. The letter does affirmatively assert DHSS's unbridled discretion to "take appropriate action to protect the health and safety [sic] Missouri's women," "[i]f the Department detects a lack of commitment to assertively move toward compliance."

45. Although the August 28 letter from DHSS asserts that Dr. Palmer must meet the requirements of 19 CSR 30-30.010-040, this position appears inconsistent with earlier statements made by DHSS to Planned Parenthood. In response to a July 18, 2007 letter, (attached hereto as Exhibit B), in which Planned Parenthood made clear that it was submitting a license application for its Columbia facility in response to HB 1055, Dean Linneman, Administrator of DHSS Section for Health Standards and Licensure, listed provisions of 19 CSR 30-30.070, governing Physical Standards for Abortion Facilities, that the Columbia Clinic would have to meet. (Attached hereto as Exhibit C.)

D. Impact Of The Act and Regulatory Scheme On Women In Missouri

46. The Act and the regulatory scheme, as applied to Plaintiff-Intervenor, have the purpose and effect either to eliminate or to make more difficult and expensive the provision of abortions by Plaintiff-Intervenor. The Act and the regulatory scheme, as applied to Plaintiff-Intervenor, have no medical justification. Moreover, the regulatory scheme, as DHSS currently proposes to apply it to Plaintiff-Intervenor, singles out Plaintiff-Intervenor for treatment under these regulations that is different from all other private physicians' practices.

47. If Plaintiff-Intervenor must cease performing abortions in his private practice, his patients will suffer immediate and irreparable harms. His patients who seek abortions will be harmed in at least three different ways. First, they will be delayed and inconvenienced by his inability to provide them abortion services at WCG because they will need to schedule and make arrangements to obtain those services elsewhere. Second, those of his abortion patients who have already been patients in his gynecological practice may be deprived of the opportunity to have their usual physician perform their abortion procedure. Most patients prefer going to their own physician for such a procedure rather than going to a new facility and/or new doctor. This gives the patient not only continuity of care, but a more comfortable, familiar experience. Third, both his existing patients and new patients will be deprived of the opportunity to have their abortions in a private office setting rather than in a clinic. Many abortion patients prefer the office setting because it feels more private, comfortable and familiar to them. Any of these harms -- increased delays, having to go to a new doctor, having to go to an unknown clinic -- risks creating unnecessary stress and/or emotional distress for women seeking abortions.

E. Impact of the Act on Plaintiff-Intervenor

48. Plaintiff-Intervenor faces immediate, irreparable, financial harm, in the form of loss of revenues from abortion procedures and in the form of lost future regular patients, if he must stop performing abortions for fear of the Act's criminal penalties.

F. Lack of Harm to Women from Status Quo

49. Delaying enforcement of House Bill 1055 will not create any risk of harm to women in the State because forcing abortion providers to become licensed as ambulatory surgical centers is not designed to, and will not, improve abortion services for women.

50. Requiring such licensing is plainly inconsistent with the professional standards in the field, which recognize that first-trimester abortions can be safely performed in physician's offices. Abortion providers in Missouri, including Plaintiff-Intervenor, are already providing abortions safely in their existing facilities. Depriving women of the option of obtaining an abortion in a private office, and closing down long-practicing abortion providers who have evidenced no safety problems, will do nothing to improve abortion safety or maternal health in this State.

FIRST CLAIM FOR RELIEF

51. Plaintiff-Intervenor hereby re-alleges and incorporates by reference paragraphs 1 through 50 above.

52. Application of the Act and regulatory scheme by the Defendants to Plaintiff-Intervenor violates his right to due process of law under the Fourteenth Amendment to the United States Constitution by: (1) failing to provide him with notice of how to comply with the criminal law governing the performance of abortions in Missouri and subjecting him to possible arbitrary enforcement of the licensing and regulatory scheme; (2) depriving him of property without due process by forcing him to forgo income from abortion services and from future patients he

secures from among women who come to him for abortion services; and (3) depriving him of liberty without due process of law by impairing and interfering with his right to practice his profession, all without serving any compelling, substantial, or legitimate state interest.

SECOND CLAIM FOR RELIEF

53. Plaintiff-Intervenor hereby re-alleges and incorporates by reference paragraphs 1 through 52 above.

54. Application of the Act and regulatory scheme to Plaintiff-Intervenor by the Defendants violates his right to equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution by treating him differently than all other private physicians' practices in Missouri at which surgery is performed and by failing to "grandfather" his practice.

THIRD CLAIM FOR RELIEF

55. Plaintiff-Intervenor hereby re-alleges and incorporates by reference paragraphs 1 through 54 above.

56. The Act and regulatory scheme, as DHSS currently proposes to apply them to Plaintiff-Intervenor, violates Plaintiff-Intervenor's patients' rights to liberty and privacy under the Fourteenth Amendment to the United States Constitution.

WHEREFORE Plaintiff-Intervenor requests that this Court:

1. Issue a declaratory judgment that the Act as applied by the Defendants violates the rights of Plaintiff-Intervenor and his patients as protected by the fourteenth amendment to the United States Constitution;
2. Issue preliminary and permanent injunctive relief, without bond, restraining the enforcement, operation, and execution of the Act against Plaintiff-Intervenor;

3. Grant Plaintiff-Intervenor attorneys' fees, costs and expenses pursuant to 42 U.S.C. § 1988; and
4. Grant such other and further relief as this Court deems just and proper.

Respectfully submitted, this 7th day of September, 2007,

The Woody Law Firm PC

/s/Teresa A. Woody

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*Application for admission *pro hac vice*
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CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of this filing to the following:

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