

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

FEB 11 2016

TIM RHODES
COURT CLERK

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(1) LARRY A. BURNS, D.O., on behalf of)
himself and his patients,)

Plaintiff,)

vs.)

Case No. CV-2014-1896
(Judge Don Andrews)

(2) TERRY L. CLINE, in his official)
capacity as Oklahoma Commissioner of)
Health, (3) CARL B. PETTIGREW, D.O.,)
in his official capacity as President of the)
Oklahoma State Board of Osteopathic)
Examiners, and (4) GREG MASHBURN, in)
his official capacity as District Attorney for)
Cleveland, Garvin, and McClain Counties;)

Defendants.)

MEMORANDUM ORDER

THIS MATTER comes on for consideration upon Plaintiff’s Motion for Partial Summary Judgment. The Court, on July 9, 2015, heard oral arguments on Plaintiff’s Motion for Partial Summary Judgment, and set this matter for evidentiary hearing scheduled to begin February 16, 2016. Also, now before this Court is Defendants’ Motion for Summary Judgment filed on December 7, 2015. The Court, having taken all matters under advisement,¹ and after considering the arguments, pleadings, including the Joint Stipulations of Facts filed herein on September 29, 2015, and all applicable law, FINDS and ORDERS, as follows:

STANDARD OF REVIEW

Pursuant to Rule 13(e) of the Rules of the District Court, the parties seek a summary adjudication on this present action challenging the constitutional validity of Senate Bill 1848,

¹ Pursuant to Rule 4(h) of the Rules for the District Courts of Oklahoma, an evidentiary hearing is not necessary as all pertinent evidence and records are attached to the parties’ pleadings.

(2014 Okla. Sess. Laws Ch. 370) (hereinafter “S.B. 1848” or “the Act”), which requires, in part, that physicians performing abortions in Oklahoma must have admitting privileges at a general hospital within thirty (30) miles of the facility at which the abortion is performed. Courts must indulge every presumption in favor of a statute’s constitutionality. *Thomas v. Henry*, 2011 OK 53, ¶8, 260 P.3d 1251. For this reason, individuals challenging statutes bear a heavy burden in showing that a statute is “clearly, palpably, and plainly inconsistent” with Oklahoma’s constitution. *Lafalier v. Lead-Impacted Cmty. Relocation Assistance Trust*, 2010 OK 48, ¶ 15, 237 P.3d 181; *Starkey v. Okla. Dep’t of Corrs.*, 2013 OK 43, 305 P.3d 1004. When courts engage in this analysis, they must “scrutinize [the] constitutional attack . . . with great caution and grave responsibility.” *Lafalier*, 2010 OK 45, ¶ 15. And when the issue of a statute’s constitutionality is a close question, it “must be resolved in favor of the constitutionality” of the Legislature’s act, *Dobbs v. Bd. of Cnty. Comm’rs of Okla. Cnty.*, 1953 OK 159, ¶ 16, 257 P.2d 802.

THE SINGLE SUBJECT RULE

Plaintiff asserts that S.B. 1848 violates the single-subject requirement of Article V, §57 of the Oklahoma Constitution. Oklahoma Courts apply a “germaneness” test that requires the subject of the legislation to be “germane, relative, and cognate of a readily apparent common theme and purpose. *Douglas v. Cox Ret. Props., Inc.*, 2013 OK 37, ¶6, 302 P.3d at 793; *Nova Health Sys.*, 2010 OK 21, ¶ 1, 233 P.3d at 382; *In re Initiative Petition No. 382*, 2006 OK 45, ¶ 9, 142 P.3d 400, 405. Violations of this rule occurred in cases containing “90 sections, encompassing a variety of subjects that (did) not reflect a common, closely akin theme or purpose”² or where a certain statute involved a Cultural Center, a Conservation Commission, and

²*Douglas v. Cox Ret. Props., Inc.*, 2013 OK 37, 302 P.3d 789.

a River Parks Authority.³ In those cases, the Oklahoma Supreme Court emphasized that the various acts covered topics as wide-ranging as the liability of firearm manufacturers, school discipline, seat belt use, to livestock activities. Here, however, S.B. 1848 has as its subject “Establishment of certain medical procedure standards.” Each and every section of the bill relates specifically to the regulation of abortion providers and the procedures that must be utilized by these providers at their facilities. This is consistent with the single-subject rule.⁴

Therefore, Plaintiff’s Motion for Partial Summary Judgment as to the violation of the single subject rule is overruled and Defendants’ Motion for Summary Judgment is sustained.

THE NON-DELEGATION DOCTRINE

Plaintiff maintains that S.B. 1848 violates Oklahoma non-delegation doctrine since the Legislature abdicates its responsibility to hospitals. Defendants contend that the Act is directed at abortion facilities, requiring those facilities to ensure that a physician with admitting privileges is on the premises during a procedure; that the admitting privileges provision of S.B. 1848 is not a delegation of authority, but an articulation of policy, including but not limited to improvement of patient safety through better communication between hospitals and physicians who perform abortions.

The non-delegation doctrine arises from two separate sources: Article 4, §1 of the Oklahoma Constitution (mandating the separation of powers) and Article 5, §1 of the Oklahoma Constitution (vesting the Legislature with policymaking authority for the State). Under this doctrine, the Legislature cannot “abdicate its responsibility to resolve fundamental policy making by delegating that function to others or by failing to provide adequate directions for the

³*Fent v. State ex. rel. Okla. Capitol Improvement Auth.*, 2009 OK 15, 214 P.3d 799.

⁴When the legislation encompasses the single-subject rule, there can be no “logrolling” or the practice of assuring the passage of a law by creating one choice in which a legislator could be forced to assent to an unfavorable provision to secure passage of a favorable one; or conversely, forced to vote against a favorable provision to ensure that an unfavorable provision is not enacted. If allowed, one could assert any provision of any act violated the single-subject rule.

implementation of its declared policy.” *Democratic Party of Okla. V. Estep*, 1985 OK 106, ¶16 n. 23, 652 P.2d 271. The Oklahoma Constitution also requires that statutes set forth a legislative policy and create clear standard and safeguards for execution of that policy. *Democratic Party of Okla. V. Estep, Id.*, at n.25; *Okla. City v. State ex rel. Dep’t of Labor*, 1995 OK 107, 918 P.2d 26, 29-30.

In *Planned Parenthood of Greater Tex. Surgical Health Services v. Abbott*, 748 F.3d 583, 600 (5th Cir. 2014), the Court rejected the unlawful delegation argument for the same reasons set forth in *Women’s Health Center of West County, Inc. v. Webster*, 871 F.2d 1377, 1382 (8th Cir. 1989), which held:

The requirement that physicians performing abortions obtain surgical privileges, which involves the independent action of a public or private hospital, poses no more significant threat to plaintiffs’ due process rights than the requirement that those performing abortions be licensed physicians, which involves the independent action of a medical licensing board.

Hospitals are not the sole determiner of whether a physician is able to obtain admitting privileges. Equal, if not more, importance is placed on each physician based upon their own credentials and qualifications as to whether they receive admitting privileges at a hospital. S.B. 1848 does not expressly delegate authority to separate entities (i.e., hospitals). In fact, standards are set forth with the Act, which specify the credentials for hospitals to follow when considering whether to grant admitting privileges. *See* 63 O.S. 2011 §1-707b. Accordingly, Plaintiff’s non-delegation claim is denied.

Therefore, Plaintiff’s Motion for Partial Summary Judgment as to the violation of the non-delegation doctrine is overruled and Defendants’ Motion for Summary Judgment is sustained.

SPECIAL LAW CLAIM

Article V, §59 of the Oklahoma Constitution provides 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.” The purpose of this provision is to ensure that “legislative favors to the few should not be tolerated, but that all citizens should have equal rights, and none should have special privileges.” *Kerley v. Uniroyal Goodrich Tire company/Michelin North American, Inc.*, 200 OK 62, ¶8, 10 P.3d 230. In analyzing this policy, the Court must ask three questions: “(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?” *Id.* at ¶6, citing *Reynolds v. Porter*, 1988 OK 88 ¶13, 760 P.2d 816.

Special laws are those that “[arbitrarily] . . . confer [] particular privileges or impose [] peculiar disabilities or burdensome conditions” on a subclass, although the class as a whole exercises common right. *Wall v. Marouk*, 2013 OK 36, ¶5, 302 P.3d 775. A special law, therefore, is one that does not embrace all the classes it should naturally embrace. *Reynolds v. Porter*, 1988 OK 88, ¶18, 760 P.2d 816 and *City of Enid v. Pub. Employees Rel. Bd.*, 2006 OK 16, ¶13, 133 P.3d 281. A general law, on the other hand, “relates to persons or things as a class rather than relating to particular personas or things.” *City of Enid*, 2006 OK 16, ¶8 quoting *Grant v. Goodyear Tire & Rubber Co.*, 2000 OK 41, ¶2, 5 P.3d 594.

Abortion facilities are uniquely situated under Oklahoma’s current statutory scheme inasmuch as Oklahoma law treats abortion facilities similarly to outpatient surgical facilities in many respects, not the least of which is the current law, enacted as early as 1992, relating to

patients' emergency care.⁵ The Act does not create an impermissible class of treating abortion facilities differently from ambulatory surgery centers. Consequently, S.B. 1848 is general law, which renders analysis of the second prong of the *Reynolds* test unnecessary.

Next, the Court must consider "if the statute is reasonably and substantially related to a valid legislative objective." *Lafalier*, 2010 OK 48, ¶35, 237 P.3d 181, 195 and *Reynolds*, 198 OK 88, ¶16, 760 P.2d at 822.

The State has a legitimate, constitutionally recognized interest in protecting women's health. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). Requiring physicians to maintain admitting privileges at a hospital furthers that interest inasmuch as the physician must demonstrate competency in the surgical procedures that they perform.⁶ It is rational for the Legislature to conclude that this requirement would advance the State's compelling interest in patient care and safety.⁷ Oklahoma's Constitution does not forbid the Legislature from taking rational, reasonable steps toward improved patient care and safety.

Accordingly, Defendants are entitled to judgment as a matter of law on Plaintiff's special law claim.

PROCEDURAL DUE PROCESS CLAIM

Article II, §7 of the Oklahoma Constitution provides that "[n]o person shall be deprived of life, liberty, or property, without due process of the law. The effective date of S.B. 1848 did not fall within the prohibited time frame of Article V, §58 of the Oklahoma Constitution, which

⁵OKLA. ADMIN. CODE §310:615-5-1 (requiring for ambulatory surgical centers a "formal transfer agreement" or that all physicians have admitting privileges with a twenty-minute travel distance); OKLA. ADMIN. CODE §310:616-3-1 (requiring for birthing centers a transfer agreement with a specific hospital and that the medical director have obstetrical admitting privileges at a hospital within thirty-minute travel distance.

⁶Exhibit A to Defendants' Motion for Summary Judgment.

⁷Oklahoma has an interest in health care and safety of its citizens, including an obligation to ensure the highest quality and safe medical care for women seeking abortions in Oklahoma. Moreover, Oklahoma has a legitimate concern for and purview over maternal and fetal safety, and the quality of care provided at abortion facilities or thereafter.

related to passing “emergency measures”. Plaintiff had essentially 155 days from the passing of S.B. 1848 until its enactment to comply with the ‘admitting privilege requirement’.⁸ Moreover, the Plaintiff’s failure to receive admitting privileges⁹ is unrelated to the Legislature’s proscribed period of time to comply. It is based solely on the hospital’s determination that the Plaintiff does not meet their requirements for obtaining admitting privileges at their respective facilities. Notwithstanding Plaintiff’s inability to individually satisfy the requirements of S.B. 1848, it may be met in other ways, such as hiring another physician, merging his practice or making some other change to the way he has traditionally practiced. Plaintiff has failed to show that 155 days was a constitutionally inadequate amount of time to comply with S.B. 1828.

Plaintiff also asserts that he is prevented from seeking review of the hospital’s decision not to grant admitting privileges. However, since hospitals are private entities, Plaintiff is not entitled to due process regarding their decisions. See *Helphinstine v. Martin*, 1977 OK 42, ¶42, 561 P.2d 951.

Plaintiff alleges no disputed material facts regarding his procedural due process claim. Accordingly, Defendants’ are entitled to judgment as a matter of law on Plaintiff’s violation of procedural due process claim.

RIGHT TO ABORTION UNDER DUE PROCESS CLAUSE

Plaintiff further claims that there is a right to abortion under the Due Process Clause of the Oklahoma Constitution. See Article II, § 7 above, and Article 2, § 2’s grant of a “right to life, liberty, the pursuit of happiness and [] enjoyment of the gains of [a person’s] own industry.”¹⁰ As

⁸Exhibit B to Defendants’ Motion for Summary Judgment

⁹Exhibit #4 to Plaintiff’s Motion for Partial Summary Judgment.

¹⁰The Court acknowledges Plaintiff’s argument regarding the applicability of a strict scrutiny standard towards restrictions on fundamental rights in Oklahoma. *In re Guardianship of S.M.*, 2007 OK CIV APP 110, ¶14, 172 P.3d 244, 247, However, the Court rejects the applicability of the ‘strict scrutiny’ standard and applies the ‘rational basis’ standard since abortion-providing physicians or women receiving abortions are not a suspect class. See *Greenville Women’s Clinic v. Bryant*, 222 F.3d 157, 173 (4th Cir. 2000).

set forth herein, S.B. 1848 does further Oklahoma’s interest in the administration of health care and safety of its citizens, including an obligation to ensure the highest quality and safe medical care for women seeking abortions in Oklahoma. As long as S.B. 1848’s “classifications rationally further(s) a legitimate state interest”, then it is valid. *Butler v. Jones*, 2013 OK 105, ¶12, 321 P.3d 161.

Importantly, the Oklahoma Supreme Court has declined to find a state constitutional right to abortion, and has instead relied on federal law. See *Nova Health Sys. v. Pruitt*, 2012 OK 13, ¶1, 292 P.3d 28 (affirming the district court’s holding under federal law only and stating that the matter is “controlled by the United State Supreme Court decision in *Planned Parenthood v. Casey*”); *Okla. Coal. For Reproductive Justice v. Cline*, 2012 OK 102, ¶2-3, 292 P.3d 27 (stating that the case was “controlled by *Casey*, that the mandate of *Casey* was binding on the Court, and that they were “duty bound” to follow federal constitutional law). And in *In re Initiative Petition 349, State Question No. 642*, the Oklahoma Supreme Court refused to “speculate concerning the scope of individual liberty under the Okla. Const. art. 2, §2 or under the Okla. Const. due process clause, art. 2, §7” as it relates to abortion. 1998 OK 122, ¶35 n.29, 838 P.2d 1, 12.¹¹

Since the Oklahoma Supreme Court does not recognize a constitutional right to an abortion under Oklahoma’s Constitution, Plaintiff’s claims of violation of due process may only be ruled upon under the federal law. When a citizen seeks to vindicate his federal constitutional rights, his claim must be ruled upon under the United States Constitution. *Daffin v. State*, 2011 OK 22, ¶16, 251 P.3d 741. Following ‘strict scrutiny’ analysis under federal standards, S.B.

¹¹Plaintiff’s relies on *Oklahoma Coalition for Reproductive Justice v. Cline*, 2012 OK 102, 292P.3d 27 in support of its argument that the Oklahoma Supreme Court recognized a right to abortion within the Oklahoma Constitution. However, the Oklahoma Supreme Court relied on federal law in making its decision (despite only state law claims raised and the district court finding there was a state constitutional right to abortion), by determining it “was not free to impose its own view of the law” (as it would be under the state constitution), and that the U.S. Supreme Court’s decision “remains binding on this court” (with respect to federal law, not state law). *Id.*, at ¶1-3.

1848 is permissible because it does not place an “undue burden”¹² on a woman’s ability to have an abortion, but advances the State’s legitimate interest in promoting patient health and safety.

Plaintiff speculates that if S.B. 1848 is upheld as constitutional, then potentially one of only two remaining abortions facilities in Oklahoma may be forced to close, and that the remaining facility would not be able to meet the statewide demand for abortion services.¹³ The purpose of S.B. 1848 is not to place an obstacle between a woman and her ability to receive an abortion. Rather, it is a protection mechanism to ensure that she receives prompt and efficient health care, when necessary. Accordingly, Defendants’ Motion for Summary Judgment asserting that there is no state constitutional right to abortion in Oklahoma is sustained.

EQUAL PROTECTION CLAUSE

In addition to arguing that the Oklahoma Constitution recognizes a right to an abortion, Plaintiff asserts that S.B. 1848 creates an arbitrary classification by singling out abortion providers and their patients that is not adequately related to a legitimate government purpose, which violates the equal protection clause under both the United States and Oklahoma Constitution.

The Oklahoma Supreme Court has recognized a “functional equivalent” to the federal Equal Protection Clause within Article II, §7 of Oklahoma’s Constitution. *Hendricks v. Jones ex.rel. Okla. Dept. of Corr.*, 2013 OK 71, 349 P.3d 531. The purpose of the Equal Protection Clause is “not an absolute guarantee of equality of operation or application of state legislation,” but is rather “to safeguard against arbitrary discrimination.” *Id.*, ¶8. Thus, “legislation may draw certain classifications about individuals or groups, as long as those classifications are not

¹²An “undue burden” exists “if a regulation’s purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.” *Gonzales v. Carhart*, 550 U.S. 124, at 146. 127 S.Ct. 1610, 167 L.Ed.2d 480 [citing *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992)].

¹³Exhibit #4 to Plaintiff’s Motion for Partial Summary Judgment.

“arbitrary and capricious and bear some reasonable or rational relationship to a permissible public policy or goal.” *Rivas v. Parkland Manor*, 2000 OK 68, ¶8, 12 P.3d 452, 456. Courts give Legislatures “a wide range of discretion when passing laws which have the effect of treating some differently from others.” *Hatch v. State*, 1996 OK CR 37, ¶20, 924 P.2d 284. Generally, “there is a presumption that a state legislature acted within its constitutional power despite the fact that, in practice, laws result in some inequality.” *Collins v. State ex.rel. Dept. of Pub. Safety*, 1999 OK CIV APP 107, ¶10, 991 P.2d 557 [citing *McGowan v. State of Maryland*, 366 U.S. 420, 425-26 (1961)].

Physicians who provide abortions and women receiving them are not a suspect class, and therefore, a rational basis review applies to this case. *Greenville Women’s Clinic v. Bryant*, 222 F.3d 157, 173 (4th Cir. 2000). The Oklahoma Legislature has a rational basis for treating abortion facilities and their providers differently from other medical facilities performing outpatient procedures, and the classification is neither arbitrary nor capricious.¹⁴ Since there are facts that “reasonably may be conceived to justify” the Legislature’s classification, then S.B. 1848 survives rational basis review.¹⁵ Defendants are entitled to judgment as a matter of law on Plaintiff’s equal protection claim.

CONCLUSION

Plaintiff’s Motion for Partial Summary Judgment is overruled and Defendants’ Motion for Summary Judgment is sustained. The Memorandum Opinion entered by the Oklahoma Supreme Court on November 4, 2014 in *Burns v. Cline*, Case No. 113,342, temporarily enjoining the enforcement of S.B. 1848 shall remain in effect until further order of the Oklahoma Supreme

¹⁴See *Bryant*, 222 O.3d at 171-72, 174 and *Abbott*, 748 P.3d at 594.

¹⁵*Hatch v. State*, 1996 OK CR 37, ¶27, 924 P.2d 284

Court. Counsel for Defendants is directed to prepare a Journal Entry of Judgment encompassing the Court's ruling set forth herein.

IT IS SO ORDERED this 11th day of February, 2016.



JUDGE OF THE DISTRICT COURT

Certificate of Delivery

This is to certify that on the 11th day of February, 2016, a copy of the above Memorandum Order was mailed, postage pre-paid, to:

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Bailiff to Judge

I, JIM RHODES, Court Clerk for Oklahoma County, Okla. certify that the foregoing is true, correct and complete copy of the instrument as appears of record in the District Court Clerk's Office of Oklahoma County, Okla. this 11 day of February, 2016.
By L. Beadman JIM RHODES, Court Clerk Deputy