

IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI
NINETEENTH JUDICIAL CIRCUIT

DR. ALLEN PALMER,

Plaintiff,

v.

DEPARTMENT OF HEALTH AND SENIOR
SERVICES; and
JEREMIAH W. NIXON, Attorney General of Missouri,
in his official capacity,

Defendants.

Case No. _____

PETITION
Declaratory Judgment and Injunctive Relief

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

I. Introductory Statement

1. Plaintiff seeks declaratory and injunctive against Defendants' threatened application of the 2007 Amendment to the Missouri Ambulatory Surgical Center Licensing Law and the Department of Health and Senior Services's regulations governing ambulatory surgical centers in such a manner as to require existing abortion facilities, such as Plaintiff's private medical practice in which he has safely provided abortions for over 30 years, to meet physical construction standards applicable to new or newly renovated facilities.

2. This action is brought relief under Mo. Rev. Stat. §§ 527.010, 526.030, and 536.050 and the equal protection clause of the Missouri Constitution, Mo. Const. art. I, §

II. Parties

A. Plaintiff

3. Plaintiff Allen Palmer, D.O., is a doctor of osteopathy licensed to practice medicine in Missouri. He operates a private gynecological practice in Bridgeton, Missouri, called Women's Care Gynecology ("WCG"). 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.

4. At WCG, Dr. Palmer provides general primary care and reproductive health care services, including family planning services, testing and treatment for sexually transmitted infections, cervical and breast cancer screening, pregnancy testing, and first trimester abortions.

5. Dr. Palmer has provided safe and effective first trimester abortions at WCG for over 30 years, beginning in the mid-1970s. Dr. Palmer regularly provides more than five first trimester abortions per month at WCG, but WCG is not a facility operated primarily for the purpose of performing abortions or other surgical procedures. Accordingly, WCG first became subject to licensure under the 2007 Amendment.

B. Defendants

6. Defendant Department of Health and Senior Services ("DHSS") is the agency responsible for deciding applications for ambulatory surgical center licensure, Mo. Rev. Stat. §§ 197.215, 197.220, as well as for adopting and enforcing the reasonable

rules, regulations, and standards necessary to implement Missouri’s Ambulatory Surgical Center Licensing Law (the “Licensing Law”), Mo. Rev. Stat. § 197.225. DHSS is located at 912 Wildwood, P.O. Box 570, Jefferson City, Missouri, 65102.

7. Defendant Jay Nixon is the Attorney General of the State of Missouri. The Attorney General is charged with enforcing Missouri’s Licensing Law, and has specific authority to seek injunctive and other relief for violations thereof. *See* Mo. Rev. Stat. § 197.235. Attorney General Nixon is sued in his official capacity, as are his agents and successors. The Attorney General’s office is located at 207 W. High Street, Jefferson City, Missouri, 65102.

III. The Statutory And Regulatory Framework

8. Under the Licensing Law, operation of an ambulatory surgical center (an “ASC”) without a license is a Class A misdemeanor, with each day of violation constituting a separate offense. *See* Mo. Rev. Stat. § 197.235.

9. Prior to 2007, licensure as an ASC 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.

10. In 2007, the Licensing Law was amended to require that 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” become licensed as an ASC. H.B. 1055, 94th Gen. Assem., 1st Reg. Sess. (Mo. 2007) (the “2007 Amendment”); *see also* Mo. Rev. Stat. § 197.200(1) (as amended by the 2007 Amendment).

11. Thus, pursuant to the 2007 Amendment, facilities that provide five or more first trimester abortions per month, but do not operate primarily for the purpose of performing surgical procedures, are now required to be licensed as ASCs.

12. In implementing Missouri's Licensing Law, DHSS has established regulations governing three different types of ASCs: general ASCs, abortion facilities, and birthing centers (the "regulatory scheme"). Each type of ASC has different requirements for licensure, administration, and physical construction. The regulations are attached hereto as Exhibit A.

13. For each of the three types of ASCs, DHSS has consistently established a set of physical standards for newly constructed or renovated facilities that do not apply to facilities already in operation when they are first required to be licensed. Pursuant to these "grandfathering" provisions, existing facilities have either been exempted from physical construction standards altogether (in the case of general ASCs) or licensed under a different set of physical construction standards designed specifically for existing facilities (in the case of abortion facilities and birthing centers).

14. For example, when the Licensing Law was first enacted in 1975, DHSS established physical 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.

15. In the same way, when the regulations governing general ASCs were revised in 1990, general ASCs in existence at the time of the revisions were exempted from compliance with the amended physical construction standards unless the facility subsequently undertook remodeling or renovations. *See* 19 CSR 30-30.030(1). These revised regulations are still in effect today.

16. Similarly, when birthing centers were first required to become licensed in 1995, DHSS established two sets of physical construction standards: one set forth extensive physical standards for “new birthing center construction” and the other set forth standards 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.

17. DHSS took the same two-tiered approach when licensing abortion facilities. When it promulgated regulations for abortion facilities in 1987, DHSS established two sets of physical construction standards for abortion facilities: one more stringent set of standards for facilities newly constructed or renovated after the adoption of the regulatory scheme, *i.e.*, after October 1987, 19 C.S.R. 30-30.70(2); and one modified and more flexible set of standards for facilities in operation at the time the regulatory scheme was adopted, *i.e.*, facilities in operation in October 1987. 19 CSR 30-30.070(3).

18. Accordingly, when applying the regulatory scheme to existing abortion facilities seeking licensure for the first time in 1987, DHSS “grandfathered” them in under the modified physical requirements. Since 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, DHSS presumably made the determination in

establishing the physical construction standards for existing abortion facilities that such standards were adequate to protect maternal health and safety at facilities in operation in 1987.

IV. Jurisdiction And Venue

19. Plaintiff's action for declaratory and injunctive relief is authorized by Mo. Rev. Stat. §§ 527.010, 526.030, and 536.050.

20. Venue is proper in this Court pursuant to Mo. Rev. Stat. §§ 536.050(1) and 508.010 because Defendant DHSS and Defendant Nixon reside in Cole County.

V. The Safety Of First-Trimester Abortions

21. First trimester abortion, which involves neither incisions nor general anesthesia, is one of the safest surgical procedures performed in this country.

22. First trimester surgical abortion is as safe as, or safer than, the procedures performed at the other types of facilities licensed as ASCs by the State of Missouri.

23. There is no difference between first trimester abortion procedures and the surgical procedures performed at all of the other medical facilities subject to licensure that could justify excluding existing abortion providers from the "grandfathering" for existing facilities that has been consistently granted by the State to those other medical facilities with respect to physical construction standards.

VI. DHSS's Interpretation And Threatened Application Of The Regulatory Scheme To Abortion Providers

24. Contrary to the plain language of the regulatory scheme and the entirety of the regulations which establishes Defendants' consistent pattern of "grandfathering" existing facilities newly subject to regulation for the purposes of physician construction standards, DHSS has taken the position that existing abortion facilities newly subject to

licensing pursuant to the 2007 Amendment must meet the physical construction standards for new facilities.

25. Defendants have taken this position even with respect to facilities, such as Dr. Palmer's practice, that have been in operation since prior to 1987, when the abortion facility regulations first took effect.

26. Thus, despite the fact that Dr. Palmer has notified DHSS that WCG can comply with the physical construction standards applicable to abortion facilities in operation as of October 1987, DHSS has made it clear that under its application of the regulatory scheme, the "grandfather" provision applicable to "[a]ny abortion facility in operation at the time these rules are adopted" does not apply to abortion providers seeking licensure for the first time under the 2007 Amendment. This action and a related federal action followed.

VII. Prior Proceedings In Federal Court

27. The 2007 Amendment took effect on August 28, 2007. On August 20, 2007, Planned Parenthood of Kansas and Mid-Missouri, Inc. ("PPKM") brought suit in the U.S. District Court for the Western District of Missouri seeking a declaration that the 2007 Amendment violates the United States Constitution and seeking a preliminary and permanent injunction barring Defendants from enforcing the 2007 Amendment against PPKM and any of its clinics. See Planned Parenthood of Kansas and Mid-Missouri, Inc. v. Drummond, No. 07-4164 (W.D. Mo. Filed August 20, 2007) (the "federal action").

28. On August 29, 2007, Dr. Palmer filed a motion to intervene in the federal action. He simultaneously filed a complaint seeking a declaration that the 2007 Amendment violates his rights and the rights of his patients as protected by the

Fourteenth Amendment to the United States Constitution and seeking preliminary and permanent injunctive relief restraining the enforcement, operation, and execution of the 2007 Amendment against him. *See* Intervenor Complaint of Dr. Allen Palmer (attached hereto as Exhibit B).

29. On September 6, 2007, the District Court granted Dr. Palmer's motion to intervene in the federal action. On September 24, 2007, the District Court entered a preliminary injunction enjoining enforcement of the 2007 Amendment against PPKM and Dr. Palmer. *See* 9/24/07 Order (attached hereto as Exhibit C). In granting the preliminary injunction, the District Court held that requiring Dr. Palmer to meet all of the physical standards for new construction facilities would likely violate his federal constitutional rights and those of his patients. *See* Exhibit C at p. 11–13.

30. Since the United States District Court for the Western District of Missouri cannot authoritatively construe state law, Dr. Palmer brings this action to allow this Missouri Court to resolve the issue of which physical construction standards apply to existing abortion providers such as WCG, to enable this Court to construe this newly-enacted Missouri statute in accordance with Missouri law and the Missouri Constitution, and to determine whether DHSS's threatened application of the regulatory scheme to existing abortion providers violates the Missouri Constitution.

31. Dr. Palmer hereby reserves his right to litigate his federal constitutional claims in federal court, and notifies this Court of the nature of those claims so that they may be taken into account in construing the regulatory scheme. *See England v. Louisiana State Bd. Of Medical Examiners*, 375 U.S. 421 (1964). Dr. Palmer's federal constitutional claims are: (a) application of the 2007 Amendment and regulatory scheme

by DHSS to Dr. Palmer violates his right to due process of the law under the Fourteenth Amendment by failing to provide him with notice of how to comply with the criminal law, depriving him of property without due process, and depriving him of liberty without due process of law; (b) application of the 2007 Amendment and the regulatory scheme to Dr. Palmer by DHSS violates his right to equal protection of law guaranteed by the Fourteenth Amendment by treating him differently than all other private physicians' practices in Missouri at which surgery is performed and by failing to "grandfather" his practice; and (c) the 2007 Amendment and regulatory scheme, as DHSS currently proposes to apply them to Dr. Palmer, violates his patients' rights to liberty and privacy under the Fourteenth Amendment.

VIII. The Impact Of DHSS's Interpretation And Threatened Application Of The Regulatory Scheme To Abortion Providers

32. DHSS's interpretation of the regulatory scheme is contrary to the plain and ordinary language of the regulations, is inconsistent with the entirety of the regulatory scheme and its purpose, and creates an unjust, absurd, unreasonable, confiscatory, and oppressive result by singling out existing abortion facilities newly subject to licensure pursuant to the 2007 Amendment for onerous treatment that other facilities in operation at the time they became subject to licensure are not subject to.

33. DHSS's threatened application of the regulatory scheme to abortion providers is not rationally related to furthering maternal health because it imposes onerous requirements on existing abortion providers who are required to be licensed for first time under the 2007 Amendment, despite the fact that that DHSS already has determined that the modified physical construction standards for existing abortion facilities are sufficient to protect maternal health and safety at facilities that were in

operation and licensed in 1987. As a result, DHSS's threatened application of the regulatory scheme to existing abortion providers will deprive such providers of equal protection by creating impermissible classifications which are unrelated to the achievement of the objective of the regulations and which amount to invidious discrimination against abortion providers in violation of Article I, Section 2 of the Missouri Constitution.

34. Moreover, DHSS's requirement that existing abortion providers meet the physical construction standards for new facilities is both medically unnecessary and physically impossible for some abortion providers. As a result, without this Court's intervention, several of the already limited number of abortion providers in Missouri, including Dr. Palmer, will be forced to cease performing abortions. It is impossible for WCG to be brought into compliance with the physical construction standards for new facilities, even though it can meet all the physical requirements for existing facilities. Accordingly, if WCG is required to meet the new construction standards in order to be licensed, Dr. Palmer will be forced to cease all abortion services at WCG, thereby causing him to suffer loss of income, loss of future patients, and causing 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. Additionally, it appears that WCG is not the only existing abortion facility that will be required to cease performing abortion if the regulatory scheme is not interpreted to allow such facilities to avail themselves of the "grandfathering" provision. Further limiting women's access to abortion by forcing abortion facilities that have been

providing safe and effective abortion services for over 20 years to cease providing does not promote or protect the health and safety of women in the State of Missouri.

COUNT ONE

35. Plaintiff hereby realleges and incorporates by reference paragraphs 1 through 34 above.

36. There is presently a controversy between Plaintiff and Defendants as to the meaning and the application of the regulatory scheme to existing abortion providers.

37. Plaintiff requests that the Court interpret the regulatory scheme in accordance with its plain and ordinary meaning, consistently with the entirety of the scheme and its purpose, in a constitutional manner, and in such a way as to avoid an unjust, absurd, unreasonable, confiscatory, and oppressive result, and declare that abortion facilities in operation since prior to the adoption of the regulatory scheme are required to meet the physical construction standards for existing facilities set forth in 19 CSR 30-30.070(3) in order to be licensed.

COUNT TWO

38. Plaintiff hereby realleges and incorporates by reference paragraphs 1 through 37 above.

39. Defendants' interpretation and threatened application of the regulatory scheme to abortion providers violates Plaintiff's rights to equal protection of the laws guaranteed by Article I, Section 2 of the Missouri Constitution by singling out existing abortion providers newly subject to licensure for burdens that are not rationally related to the purported purpose of the regulatory scheme and that are not imposed on other medical facility already in operation when they are first required to be licensed.

WHEREFORE Plaintiff requests that this Court:

1. Issue a declaratory judgment that abortion facilities in operation prior to the adoption of the regulatory scheme are required meet the physical standards for existing facilities set forth in 19 CSR 30-30.070(3) in order to be licensed; and

2. Issue permanent injunctive relief, without bond, restraining Defendants from the enforcement, operation, and execution of the regulatory scheme's physical construction requirements for "[n]ew abortion facilities" against Plaintiff; and

3. Alternatively, if this Court determines that the regulatory scheme requires existing abortion facilities to meet the physical standards for new construction facilities, issue a declaratory judgment that Defendants' threatened application of the regulatory scheme to abortion providers violates the rights of Plaintiff as protected by Article I, Section 2 of the Missouri Constitution; and

4. Issue permanent injunctive relief, without bond restraining Defendants from the enforcement, operation, and execution of the regulatory scheme against Plaintiff; and

5. Grant Plaintiff's attorneys' fees, costs, and expenses pursuant to Mo. Rev. Stat. §§ 527.100 and 536.050; and

6. Grant such other and further relief as this Court deems just and proper.

Respectfully submitted,

THE WOODY LAW FIRM PC

By: _____

Teresa A. Woody, Mo Bar # 35358
1044 Main Street, Suite 500
Kansas City, MO 64105
(816) 421-4246
(816) 221-8449 (facsimile)
teresa@woodylawfirm.com

Suzanne L. Stolz
Bonnie Scott Jones
Center for Reproductive Rights
120 Wall Street
14th Floor
New York, NY 10005
(917) 637-3600
(917) 637-3666 (facsimile)
sstolz@reprorights.org

Attorneys for Plaintiff