IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

COMPREHENSIVE HEALTH OF PLANNED PARENTHOOD GREAT PLAINS, et al.,	)	
Plaintiffs,	)	**CASE NO 1716-CV24109**
vs.	)	
	)	**DIVISION 7**
JOSHUA D. HAWLEY, et al.,	)	
Defendants.	)	

JUDGMENT/ORDER

On the 18th day of October, 2017, this matter came for hearing on Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction. Arthur A. Benson II, Jamie Lansford, Diana O. Salgado,[1] and Gillian R. Wilcox appear for Plaintiffs. D. John Sauer, Julie Marie Blake, Joshua Divine, and Emily Dodge appear for Defendants. Following oral argument, the Court took the matter under advisement. Now on this 23rd day of October, 2017, the Court finds that said Motion should be **DENIED.** In making this determination, the Court finds as follows:

The issue before the Court is quite narrow: Should the newly enacted R.S.Mo. §188.027.6 be prohibited from going into effect as of its current scheduled date of October 24, 2017? This specific statutory provision (referred to by the parties and hereinafter by the Court as the "same-physician requirement") alters the language as to whom must provide limited but specific

[1] Admitted *Pro Hac Vice* following the hearing.

information to a woman considering an abortion prior to the procedure so that informed consent may be given. Previously, this specific section stated as follows:

> 6. No physician shall perform or induce an abortion unless and until the physician has received and signed a copy of the form prescribed in subsection 3 of this section. The physician shall retain a copy of the form in the patient's medical record.

Enacted Senate Committee Substitute for SB 793 during the 95th General Assembly 2010.

However, following a recent special session, the modification of this provision was made as part of Senate Bill 5, 99th General Assembly, 2nd Extraordinary Session (2017 Mo.) (hereinafter "SB 5"). The new statute reads:

> 6. The physician who is to perform or induce the abortion shall, at least seventy-two hours prior to such procedure, inform the woman orally and in person of:
>
> (1) The immediate and long-term medical risks to the woman associated with the proposed abortion method including, but not limited to, infection, hemorrhage, cervical tear or uterine perforation, harm to subsequent pregnancies or the ability to carry a subsequent child to term, and possible adverse psychological effects associated with the abortion; and
>
> (2) The immediate and long-term medical risks to the woman, in light of the anesthesia and medication that is to be administered, the unborn child's gestational age, and the woman's medical history and medical conditions.

As indicated *supra*, the provisions of both versions of subsection 6 are part of a larger statutory scheme, found in R.S.Mo. §188.027 regarding informed consent. In 2010, the General Assembly passed R.S.Mo. §188.027.1(1) which added to the existing statute a laundry list of information to be conveyed to a person contemplating an abortion no later than 24-hours prior to the procedure. Later, in 2014, the General Assembly expanded the 24-hour waiting period to 72-hours.[2] This list of information includes the same medical risks specifically set forth in the new subsection 6 provision. Although R.S.Mo. §188.027.1(1) permits the required information to be

[2] Senate Committee Substitute/House Committee Substitute HBs 1307 and 1313, 97th General Assembly.

given by the "physician who is to perform or induce the abortion or a qualified professional,[3]" the 2017 change to subsection 6 creates the same-physician requirement in that the information regarding the specific medical risks must be given by the same physician who is to perform or induce the abortion.

Both parties agree that the issue before the Court in the pending motion is governed by *State ex rel. Director of Revenue v. Gabbert,* 925 S.W.2d 838 (Mo. 1996). In that case, the Missouri Supreme Court held that when a trial court is considering a motion for preliminary injunction, it must weigh the following factors: 1) the movant's probability of success on the merits, 2) the threat of irreparable harm to the movant absent the injunction, 3) the balance between the harm and the injury the injunction would cause on other interested parties if issued, and 4) the public interest in granting the stay. *Gabbert*, 925 S.W.2d at 839. The moving party must come forward with evidence supporting each of these factors. *Id.* at 840. The Court's consideration should not be made in a rigid manner or with a view to "mathematical precision" but instead with a flexible approach in keeping with the equitable nature of the proceeding and sufficient to encompass the particular circumstances of the case at bar. *Id.* It must be recognized that injunctive relief is an extraordinary remedy and, as a result, the moving party must establish **decidedly** that the probability of success and the irreparable harm outweigh *any* potential harm to the other parties or to the public interest. *Id.* (emphasis added).

A. Have Plaintiffs shown the likelihood of success on the merits?

The Plaintiffs raise three claims which they believe establish their probability of success on the merits. The first is the claim that the newly enacted provision violates the Missouri

[3] A "qualified professional" is defined elsewhere in the statute as "a physician, physician assistant, registered nurse, licensed practical nurse, psychologist, licensed professional counselor, or licensed social worker, licensed or registered under chapter 334, 335, or 337, acting under the supervision of the physician performing or inducing the abortion, and acting within the course and scope of his or her authority provided by law." R.S.Mo. §188.027.9.

Constitution in that the right to an abortion is protected as a liberty interest. In reaching this conclusion, Plaintiffs utilize language found in *Doe v. Phillips*, 194 S.W.3d 833, 843 (Mo. 2006), wherein the Supreme Court stated, "Claimed violations of a right to personal privacy, to procreate, and similar rights not specifically set out in the constitution but inherent in the concept of ordered liberty are analyzed under substantive due process principles." (citations omitted). However, neither that case nor any subsequent case affirmatively state that abortion is an inherent right protected by the Missouri Constitution. In *Doe*, the Court declined to expand the Missouri due process clause more broadly than federal constitutional provisions. In fact, the Court pointed out that the doctrine of judicial restraint compels a court to exercise the "utmost care" when asked to break new ground. "As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in the unchartered area are scarce and open-ended." *Id. quoting, Collins v. City of Marker Heights, TX.*, 502 U.S. 115, 125 (1992).

The Court declines to reach the conclusion that the recent same-physician requirement, at best a moderate modification of the informed consent restraints already in place, is unconstitutional.[4] However, Plaintiffs also point out that this small change does, when taken with the cumulative effect of the numerous restrictions enacted in past eight years, create a tipping point due to the scarcity of providers. As a result, Plaintiffs allege that even this small change has created an undue burden on women seeking to have an abortion procedure. "A state may not impose an 'undue burden' on a woman's decision to have an abortion before fetal viability. States may not pass laws that place a substantial obstacle on the path of a woman seeking an abortion." *Planned*

[4] In making this finding, the Court is aware that it is possible that the issue of constitutionality is not squarely before the Court in this motion. However, given the arguments of the parties the Court finds it necessary to briefly address it at this time.

Parenthood of Kan. & Mid-Mo., Inc. v. Nixon, 220 S.W.3d 732, 743 (Mo. 2007), *citing, Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876-77 (1992).

At oral argument, Defendants conceded that the statutory change does not allow for non-medical exigent circumstances thus creating an undue burden in certain limited circumstances.[5] Even so, SB 5 is not what created a provider scarcity or the existing 72-hour waiting period or the lengthy amount of material which must be conveyed so that a person's consent is considered informed. The Court finds that this one change to R.S.Mo. §188.027.6 would not place a substantial obstacle in a woman's decision to obtain an abortion.

Plaintiffs' second claim is that subsection 6's language is vague in that the same-physician requirement conflicts with subsection 1 which allows either the same-physician **or** the referring physician **or** a qualified professional to provide the exact same information. However, the vagueness doctrine tests whether the language of a statute "conveys to a person of ordinary intelligence a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Reproductive Health Services v. Nixon,* 185 S.W.3d 865, 869 (Mo. 2006). Missouri law requires all portions of a statute to be read in harmony whenever possible and unreasonable or absurd statutory construction should be avoided whenever possible. *Aquila Foreign Qualifications Corp. v. Director of Revenue*, 362 S.W.3d 1, 4 (Mo. 2012). In the instant case, the plain language of both subsections 1 and 6 when read together clearly establish that while other identifiable physicians and qualified professionals may give the required information in its entirety to a patient, the specific risks of the medical procedure must be given under the same-physician requirement. There is no conflict and the provisions are not vague.

[5] At oral argument, the Court inquired as to the hypothetical situation of a woman obtaining her mandatory 72-hour medical risk information from her abortion-providing physician, only to have the physician die the day before the abortion is to be performed. The Defendants admitted that, in that scenario or one similar, the woman would be forced to start over, delaying her abortion and prolonging her pregnancy for days or weeks.

Of concern to the Court, however, are representations made by Defendants which expands the language of subsection 6 beyond its written words. In their brief and at oral argument, Defendants assert that when multiple physicians work together to perform or induce an abortion procedure, then anyone of them may give the required medical risk information. While this is a reasonable interpretation of subsection 6, it does not ensure that all entities entrusted with the enforcement of subsection 6 will likewise reach the same conclusion. Moreover, if Defendants' interpretation expansion is correct, it would also follow that when multiple doctors are involved in the continuum of care before, during, and after a procedure that anyone of those physicians could provide the required information. At argument, defense counsel did not provide an explanation as to why the latter could not be recognized.

Finally, Plaintiffs argue that SB 5 violates Article III, Section 21 of the Missouri Constitution which dictates that "no bill shall be so amended in its passage through either house as to change its original purpose." This section prohibits the "introduction of a matter that is not germane to the object of the legislation or that is unrelated to its original subject." *LeBeau v. Commissioner of Franklin County, Mo.*, 422 S.W.3d 284, 289 (Mo. 2014), *quoting, Legends Bank v. State,* 361 S.W.3d 383, 386 (MO. 2012). SB 5 was part of an extraordinary legislative session called by the Governor specifically to address abortion matters. SB 5 does that and expands the authority of the Attorney General to include enforcement of the laws related to abortion. The Court declines to find that SB 5 exceeds its original purpose.

Therefore, the Court finds that, having weighed the evidence submitted thus far by Plaintiffs, there has not been a sufficient showing that Plaintiffs will succeed on the merits of these particular claims.

B. Is there a threat of irreparable harm to Plaintiffs absent the injunction?

Plaintiffs argue that women will be irreparably harmed by the same-physician requirement in that a women seeking an abortion will now have to make a second trip to their abortion provider which may, in some cases, mean an additional trip of several hundred miles. Prior to SB 5, women were able to schedule their 72-hour informed consent meetings with a medical provider located near them. For women not living near one of the two (2) abortion facilities currently active in Missouri, this allowed the patient to make a single trip to an abortion facility. With the introduction of SB 5, women seeking an abortion will now have to make an additional trip to the abortion provider to obtain the medical risk information from the doctor who is to perform the abortion. Plaintiffs argue that, in light of the fact that abortions are inherently time-sensitive, SB 5 will cause irreparable harm to women seeking to have an abortion in that women who are in the early stages of pregnancy may now be forced to wait for their abortion provider to be available for the 72-hour medical risk information meeting. In these cases, the woman seeking an abortion may be delayed substantially enough that she is pushed into the second trimester of her pregnancy, necessitating a more invasive, complicated abortion procedure. At oral argument, even Defendants conceded that the matter at hand is time-sensitive and, as discussed *supra,* the lack of any provision for non-medical exigent circumstances will result in irreparable harm to some. Even so, this factor is just one of four that the Court must weigh in consideration with the other *Gabbert* elements.

C. Is the balance of the harm to Plaintiffs greater than that cause to other interested parties if the injunction is issued?

Here, Plaintiffs posit that the harm to Defendants is minimal, arguing that blocking the enforcement of SB 5 will mean that "Defendants only stand to lose the ability temporarily to enforce a law that is likely to be held unconstitutional." However, Defendants argue that the state of Missouri is not the only "other" that will be harmed by a temporary restraining order in this

matter, arguing that blocking the enactment of SB 5 will impose a significant harm on women seeking abortions by continuing the "substandard practice of allowing non-physicians to advise women of the medical risks of their abortion procedures." While this Court has doubts as whether or not the current abortion regulations result in "substandard"[6] care, Defendants are correct in that blocking the enforcement of S.B. 5 will harm Defendants by preventing the execution of duly enacted legislation.

Additionally, Plaintiffs argue that the scarcity of abortion doctors in Missouri weighs heavily on harm to Plaintiffs, in that said scarcity would make the same-physician requirement extremely difficult or, in cases of induction abortion, nearly impossible to comply with. However, as Defendants correctly argue, the issue of abortion provider scarcity is not one of the state's making and, therefore, should not be considered by this Court in its consideration of the undue-burden analysis. *Harris v. McRae,* 448 U.S. 297, 316 (1980). Indeed, absent the issue of abortion provider scarcity, the crux of nearly every one of Plaintiffs' arguments would be moot. Additionally, as indicated *supra*, this Court is unconvinced that SB 5 creates a substantially higher burden on a woman seeking an abortion than the already rigorous, current 72-hour waiting period provision that has been the law of Missouri since it was enacted in 2014. *See* Mo. Rev. Stat. § 188.027, 188.039. The Court finds that, particularly in light of *Harris v. McRae*, the balance of harm to Plaintiffs is not greater than that caused to other interested parties if the injunction is not issued.

[6] In making this argument, Defendants rely upon the affidavit of Dr. Randall Williams who, in turn, relies heavily upon both the 1987 and 2017 editions of Comprehensive Gynecology in making his claim that allowing non-physicians to advise women of medical risks of their abortion procedure is "substandard practice." Williams Aff., ¶ 11-24. The Court is compelled to note that Dr. Williams' affidavit is directly rebutted by the *primary editor* of the 2017 edition of Comprehensive Gynecology, Dr. Rogerio Lobo, who presented affidavit testimony that Dr. Williams "misapplied the language in both the 1987 and 2017 editions" and that "nothing in the book I edited supports that the same physician who is to provide gynecological treatment must be the person who conducts the informed consent dialogue." Lobo Aff., ¶ 7.

D. What is the public interest in granting the injunction?

Here, Defendants argue that preventing the state from enforcing a duly enacted law is heavily disfavored and inflicts *per se* irreparable injury on the state. *1-800-411-Pain Referral Serv., LLC v. Otto* 744 F.3d 1045, 1053 (8th Cir. 2014). Plaintiffs, therefore, must meet "a more rigorous threshold showing that th[e] ordinary preliminary injunction test." *Reproductive Health Servs.* 185 S.W.3d at 688. Where the party opposing equitable relief is the government, consideration of the public interest merges with consideration of harm to the government. *Nken v. Holder,* 556 U.S. 418, 435 (2009). Here, harm to the government would be prohibiting the enforcement of a duly enacted legislation, drafted and passed by members of the Missouri General Assembly, elected by the citizens of Missouri. A state's presumptively reasonable democratic process must be given appropriately deferential analysis. *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 733 (8th Cir. 2008). Tellingly, Plaintiffs provide very little argument in this regard and, as a result, the Court finds that Plaintiffs have failed to provide sufficient evidence supporting this factor.

Therefore, having considered the evidence submitted by Plaintiffs, the Court finds that they have failed to carry their burden to establish sufficient facts on all of the elements as set forth in *Gabbert* which would permit this Court to provide injunctive relief in this matter and, as a result, the Motion for Temporary Restraining Order and Preliminary Injunction is hereby **DENIED.**

IT IS SO ORDERED.

October 23, 2017
DATE

S Margene Burnett
S. MARGENE BURNETT, JUDGE