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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Paul A. Isaacson, M.D.; William Clewell, M.D.; Hugh Miller, M.D.,

Plaintiffs,

vs.

Tom Horne, Attorney General of Arizona, in his official capacity; William (Bill) Montgomery, County Attorney for Maricopa County, in his official capacity; Barbara LaWall, County Attorney for Pima County, in her official capacity; Arizona Medical Board; and Lisa Wynn, Executive Director of the Arizona Medical Board, in her official capacity,

Defendants.

Case No.

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 a provision within recently enacted Arizona House Bill 2036 (hereinafter "HB 2036" or "the Act") that bans abortions beginning at 20 weeks of pregnancy. HB 2036, 50th Leg., 2d Reg. Sess. § 7 (Ariz. 2012) (creating A.R.S. § 36-2159). This provision is scheduled to take effect August 2, 2012. A copy of HB 2036 is attached hereto as Exhibit A.

2. The ban on abortions beginning at 20 weeks ("20 week ban" or "ban") violates the substantive due process rights of women seeking abortions. Under clearly established United States Supreme Court precedent, the State of Arizona cannot ban abortions prior to viability. With its narrowly defined medical emergency exception, the ban also unconstitutionally endangers women's health.

3. Plaintiffs seek a declaration that the 20 week ban is unconstitutional and preliminary and permanent injunctive relief prohibiting its 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 the Defendants are located in this district.

III. PARTIES

A. Plaintiffs

7. Plaintiff Paul A. Isaacson, M.D., is a board-certified obstetrician and gynecologist. He is licensed to practice in Arizona and provides services at Family Planning Associates, a private medical practice located in Phoenix. Dr. Isaacson provides a wide range of reproductive health care services, including abortions. Dr. Isaacson regularly provides abortions before fetal viability ("previability abortions") at and after 20 weeks gestational age. Dr. Isaacson sues on his own behalf and on behalf of his patients seeking previability abortions at and after 20 weeks.

8. Plaintiff William Clewell, M.D., is a board-certified obstetrician and gynecologist with a subspecialty in maternal-fetal medicine. He is licensed to practice in Arizona, where he provides a wide range of prenatal care, high-risk pregnancy management care, and labor and delivery services for women with high-risk pregnancies at Banner Good Samaritan Hospital in Phoenix. In particular situations, where the pregnancy threatens the woman's life or health; where she is experiencing pregnancy failure; and/or where the fetus has a severe or lethal anomaly, he performs a previability pregnancy termination at or after 20 weeks. Dr. Clewell sues on his own behalf and on behalf of his patients seeking previability pregnancy terminations at and after 20 weeks.

9. Plaintiff Hugh Miller, M.D., is a board-certified obstetrician and gynecologist with a subspecialty in maternal-fetal medicine. He is licensed to practice in Arizona, where he provides a wide range of prenatal care, high-risk pregnancy management care, and labor and delivery services for women with high-risk pregnancies

at Tucson Medical Center in Tucson. In particular situations, where the pregnancy threatens the woman's life or health; where she is experiencing pregnancy failure; and/or where the fetus has a severe or lethal anomaly, he performs a previability pregnancy termination at or after 20 weeks. Dr. Miller sues on his own behalf and on behalf of his patients seeking previability pregnancy terminations at and after 20 weeks.

B. Defendants

10. Defendant Tom Horne is the Attorney General of Arizona. The Attorney General provides the Arizona Medical Board with legal counsel, including providing assistance to the Board to interpret its obligations and enforcement responsibilities under new legislation. *See* A.R.S. § 41-192. The Attorney General also represents the Board as its legal counsel and defends its decisions to revoke or suspend physicians' licenses in appeals before the state courts. *Id.*; *see also id.* §193. Mr. Horne is sued in his official capacity.

11. Defendant William (Bill) Montgomery is the County Attorney for Maricopa County, which encompasses the City of Phoenix. He has authority to prosecute criminal violations of the 20 week ban. *See* A.R.S. § 11-532(A). Mr. Montgomery is sued in his official capacity.

12. Defendant Barbara LaWall is the County Attorney for Pima County, which encompasses the City of Tucson. She has authority to prosecute criminal violations of the 20 week ban. *See id*. Ms. LaWall is sued in her official capacity

13. Defendant Arizona Medical Board is the entity responsible for enforcing disciplinary sanctions against physicians who violate the challenged provisions.

14. Defendant Lisa Wynn is the Executive Director of the Arizona Medical Board. The Board may delegate much of its disciplinary authority to the Executive Director. *See* A.R.S. § 32-1405. Ms. Wynn is sued in her official capacity.

IV. THE CHALLENGED PROVISIONS

15. HB 2036, which contains 12 distinct sections, imposes a number of restrictions on the provision of abortion services. Several of these provisions do not take effect, however, until the Department of Health Services completes rulemaking. The 20 week ban is not subject to rulemaking and is scheduled to take effect on August 2, 2012.

16. The ban provides:

> A. Except in a medical emergency, a person shall not perform, induce or attempt to perform or induce an abortion unless the physician or the referring physician has first made a determination of the probable gestational age of the unborn child. . . . .
>
> B. Except in a medical emergency, a person shall not knowingly perform, induce or attempt to perform or induce an abortion on a pregnant woman if the probable gestational age of her unborn child has been determined to be at least twenty weeks.

HB 2036 § 7 (creating A.R.S. § 36-2159).

17. "Gestational age" is defined as "the age of the unborn child as calculated from the first day of the last menstrual period of the pregnant woman." A.R.S. § 36-2151(4) (set forth as existing law in HB 2036 § 3).

18. The only exception to the 20 week ban is for a "medical emergency" defined as:

> a condition that, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.

A.R.S. § 36-2151(6) (set forth as existing law in HB 2036 § 3).

19. Violation of the 20 week ban is a Class 1 misdemeanor, punishable by up to six months imprisonment. HB 2036 § 7 (creating A.R.S. § 36-2159(C)); A.R.S. § 13-

707(A)(1). A knowing violation of the 20 week ban also subjects a physician to discipline for unprofessional conduct, which can result in license suspension or revocation. HB 2036 § 7 (creating A.R.S. § 36-2159(D)).

V. STATEMENT OF FACTS

20. Under current Arizona law, "[a] physician shall not knowingly perform an abortion of a viable fetus unless: . . . the abortion is necessary to preserve the life or health of the woman." A.R.S. § 36-2301.01(A)(1). "'Viable fetus' means the unborn offspring of human beings that has reached a stage of fetal development so that, in the judgment of the attending physician on the particular facts of the case, there is a reasonable probability of the fetus' sustained survival outside the uterus, with or without artificial support." *Id.* § 2301.01(C)(3).

21. Although the point at which an individual fetus may attain viability varies, no fetus is viable at 20 weeks.

22. An abortion ban that takes effect at 20 weeks will prohibit some previability abortions.

23. The vast majority of abortions performed in the United States and in Arizona occur in the first trimester of pregnancy. Only a small fraction of abortions are performed at or after 20 weeks.

24. Women obtain abortions at or after 20 weeks for a variety of reasons, including that continuation of the pregnancy poses a threat to their health, that the fetus has been diagnosed with a medical condition or anomaly, or that they are losing the pregnancy ("miscarrying").

25. For women who seek abortions because continuation of the pregnancy poses a risk to their health, these risks can come from exacerbation of a pre-existing medical condition or can be caused by a condition related to or brought on by the pregnancy itself.

26. In many instances, although the threat to the woman's health is serious, and may become more so over time, it does not pose an immediate or severely time-sensitive threat, such that it constitutes a medical emergency for purposes of the exception to the 20 week ban.

27. The definition of medical emergency applicable to the 20 week ban comes from existing Arizona law which permits physicians to waive a mandatory 24 hour delay for women seeking abortions if the woman is experiencing a medical emergency. A.R.S. §§ 36-2151(6) (definition of medical emergency), 2153 (requiring, except in medical emergencies, a 24 hour delay between receipt of state-mandated information and an abortion), and 2156(A)(1) (requiring, except in medical emergencies, a delay between the performance of an ultrasound and an abortion).

28. In the context of a mandatory delay, the definition of "medical emergency" delineates when an abortion does not have to be *delayed* by an otherwise mandated 24-hour waiting period. In the context of the abortion ban in HB 2036, however, the definition of "medical emergency" delineates whether an abortion may be obtained *at all*—even a previability abortion needed to preserve a woman's health. Limiting the reason that a woman may obtain a previability abortion to narrowly defined medical emergencies places significant burdens on the health of some women seeking abortion care.

29. As a result, under HB 2036, a woman seeking abortion care at or after 20 weeks due to a medical condition that threatens her health may either be prohibited from doing so altogether, or may have to delay the procedure until her condition worsens to the point where immediate action is necessary, and the abortion therefore meets the medical emergency exception's temporal requirements.

30. For these and other reasons, HB 2036 endangers women's health.

31. Many women undergo prenatal testing at approximately 18 to 20 weeks gestational age.

32. As a result of this testing, some women will learn that their fetus has a medical condition or anomaly that is incompatible with life or that will cause serious, lifelong disabilities. Some of these women will choose to terminate the pregnancy.

33. Under HB 2036, however, women wishing to have a previability abortion for these reasons at or after 20 weeks will be unable to do so.

34. Although House Bill 2036 sets forth legislative findings and purposes asserting that the 20 week ban is supported by "the documented risks to women's health and the strong medical evidence that unborn children feel pain during an abortion at that gestational age," HB 2036 § 9(B)(1), neither of these assertions – even if true – nor any other asserted justification could support a ban on previability abortions.

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

35. By prohibiting all abortions beginning at 20 weeks except those that come within the Act's narrow definition of medical emergency, HB 2036 will harm Plaintiffs' patients by denying or delaying access to abortions, including abortions they seek to preserve their health.

36. As a result of the 20 week ban, some women who find out about fetal conditions or anomalies close to or after the 20 week cutoff may have inadequate time to obtain additional information and to weigh their options of carrying to term or seeking a previability abortion before they are foreclosed from obtaining an abortion.

37. Each of these harms constitutes irreparable harm to Plaintiffs' patients.

38. The Act presents physicians with an untenable choice: to face criminal prosecution for continuing to provide abortion care in accordance with their best medical judgment, or to stop providing the critical care their patients seek.

FIRST CLAIM FOR RELIEF

(Substantive Due Process)

39. Plaintiffs reallege and hereby incorporate by reference Paragraphs 1 through 38 above.

40. The ban on previability abortions at or after 20 weeks, except in narrowly defined medical emergencies, violates the substantive due process rights of Plaintiffs' patients, guaranteed by the Fourteenth Amendment, by banning previability abortions and endangering women's health.

INJUNCTIVE RELIEF

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

42. Plaintiffs' claim meets the standard for injunctive relief. Plaintiffs and their patients do not have an adequate remedy at law and they will suffer immediate and irreparable injury if the 20 week ban is permitted to go into effect. Moreover, Plaintiffs have established a strong likelihood of success on the merits, the balance of equities tips strongly in favor of Plaintiffs and their patients, and the public interest will be served if Defendants are enjoined from enforcing the 20 week ban.

ATTORNEY'S FEES

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

44. Plaintiffs are entitled to an award of reasonable attorney's fees and expenses pursuant to 42 U.S.C. § 1988.

REQUEST FOR RELIEF

Wherefore, Plaintiffs respectfully request that this Court:

1. Issue a declaratory judgment that the 20 week ban, to be codified as A.R.S. § 35-2159, is unconstitutional as applied to previability abortions, under the Fourteenth Amendment to the United States Constitution and in violation of 42 U.S.C. § 1983;

2. Issue a preliminary and permanent injunction restraining Defendants, their employees, agents, and successors from enforcing the 20 week ban as to previability abortions.

3. Issue an order prohibiting Defendants, their employees, agents, and successors from bringing enforcement actions for previability abortions performed while a Temporary Restraining Order, Preliminary Injunction, or Permanent Injunction are in effect against the 20 week ban;

4. Award Plaintiffs their reasonable costs and attorney's fees pursuant to 42 U.S.C. § 1988; and

5. Grant such other or further relief as the Court deems just, proper and equitable.

RESPECTFULLY SUBMITTED this 12th day of July, 2012.

LAVOY & CHERNOFF, PC

By /s/ Christopher A. LaVoy

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