

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION ONE

FILED BY CLERK
KS. DISTRICT COURT
THIRD JUDICIAL DIST.
TOPEKA, KS. *pr*

2013 JUN 28 P 3:59

HODES & NAUSER, MDS, P.A.;
HERBERT C. HODES, M.D.; and
TRACI LYNN NAUSER M.D.,
Plaintiffs,

v.

Case No. 13C705

DEREK SCHMIDT, in his official capacity
as Attorney General of the State of Kansas;
ROBERT MOSER, M.D., in his official
capacity as Kansas Secretary of Health and
Environment; and NICK JORDAN, in his
official capacity as Kansas Secretary of
Revenue
Defendants.

MEMORANDUM DECISION AND ORDER

The above matter comes before the Court on Plaintiffs' Motion for Temporary Restraining Order and Temporary Injunction to enjoin the Defendants, their agents, and their successors in office from enforcing Kansas House Bill 2253 (2013). After careful consideration of the evidence, the relevant law, and the arguments of the parties, the Court finds and concludes as follows.

NATURE OF THE CASE

This case arises out of Plaintiffs' petition seeking declaratory and injunctive relief from Kansas House Bill 2253 (2013) ("the Act"), which was signed into law on April 19, 2013. The Act is scheduled to take effect July 1, 2013. Plaintiffs assert that the Act imposes punitive and discriminatory requirements on women seeking abortions and abortion providers, which Plaintiffs allege to be in violation of the Kansas Constitution.

STANDARD OF REVIEW

A preliminary injunction is an extraordinary remedy that is not awarded as a matter of right. *Winter v. National Resources Defense Council, Inc.*, 555 U.S. 7, 24, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). Granting temporary injunctive relief is appropriate when four prerequisites are met: (1) substantial likelihood exists that the movant will eventually prevail on the merits; (2) the Court is satisfied the movant will suffer irreparable injury unless the injunction issues; (3) the movant proves the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing parties; and (4) the movant makes a showing that the injunction, if issued, would not be adverse to the public interest. *Wichita Wire, Inc. v. Lenox*, 11 Kan. App. 2d 459, 462, 726 P.2d 287 (1986). The main purpose of a temporary injunction is to maintain the status quo until such time that the court can render a meaningful decision. *Waste Connections of Kansas, Inc. v. City of Bel Aire, Kan.*, 191 F. Supp. 2d 1238, 1241 (D. Kan. 2002). It is not to determine any controverted right, but merely to prevent injury to a claimed right pending final determination of the controversy on its merits. *Steffes v. City of Lawrence*, 284 Kan. 380, 394, 160 P.3d 843 (2007).

DISCUSSION AND CONCLUSION OF LAW

Plaintiffs have not met their burden to establish the four required elements for granting a temporary injunction in respect to the Act in its entirety. Rather, due to the severability clause contained in section 23 of the Act, this Court must review each individual provision of the Act challenged and determine individually if any of the challenges substantiate injunctive relief.

Defendants admit, and this Court agrees, that the State has a vested interest in preserving human life. The U.S. Supreme Court has reviewed the States' power to regulate abortion and has held the States possess certain power to regulate abortions so long as the law contains

exceptions for pregnancies that endanger the woman's life or health. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). Without an adequate medical emergency provision, the health and lives of pregnant women are endangered. Plaintiffs are board-certified physicians in the field of Obstetrics and Gynecology. They have asserted and supported that provisions of the Act effectively eliminate any meaningful exception for medical emergencies from the requirement that women seeking abortions observe a 24-hour waiting period. The Kansas Supreme Court has not taken the occasion to recognize the Due Process considerations of *Casey* as applied to the Kansas Constitution. However, it indicated, "we customarily interpret its provisions to echo federal standards." *Alpha Med. Clinic v. Anderson*, 280 Kan. 903, 920, 128 P.3d 364, 377 (2006). Further, Defendants have failed to cite any instance of a state refusing to recognize the *Casey* standard.

In *Agency for International Development v. Alliance for Open Society International, Inc.*, 570 U.S. ____, 133 S. Ct. 2321 (2013), the U.S. Supreme Court recently addressed compelled speech. In analyzing a policy statement that was required for obtaining federal funding, the Supreme Court held that compelling speech as a condition for receiving funds was unacceptable. In authoring the majority opinion, Chief Justice Roberts remarked, "Were it enacted as a direct regulation of speech, the Policy Requirement would plainly violate the First Amendment." *Agcy. for Int'l. Dev.* 570 U.S. ____, 133 S. Ct. 2321 (2013). Here, the State attempts to mandate that the Plaintiffs certify the material found on a state-maintained website as "objective, nonjudgmental, [and] scientifically accurate." The Plaintiffs have established a substantial likelihood that this certification is a direct regulation of speech, in violation of the First Amendment of the U.S. Constitution. The Kansas Constitution protects freedom of speech in a

manner coextensive with the U.S. Constitution through Section 11 of the Kansas Bill of Rights. *State v. Russell*, 227 Kan. 897, 899, 610 P.2d 1122, 1126 (1980).

Absent injunctive relief, the Act will take effect on July 1, 2013. The Court finds that the threatened harm to Plaintiffs and their patients outweighs any potential harm to Defendants because the injunction imposes no affirmative obligation, administrative burden, or cost upon Defendants and will merely maintain the status quo pending further hearings on the merits of the case. The Court further finds that absent injunctive relief, irreparable harm to Plaintiffs and their patients will occur and monetary damages would be inadequate to compensate them. Further, granting injunctive relief is not adverse to the public interest in that: it will protect the Plaintiffs' current practice, it will protect patients' access to the health services provided in that practice, and in that Plaintiffs' practice is already subject to government regulation and oversight by the Kansas state agencies referenced above.

The Court does not grant injunctive relief only as an adjudication on the merits; rather, it is only necessary that plaintiffs establish a reasonable probability of success, and not an overwhelming likelihood of success, in order for a preliminary injunction to issue. *Atchison, T. & S. F. Ry. Co. v. Lennen*, 640 F.2d 255, 261 (10th Cir. 1981). Therefore, the Court determines, for the issues involving the medical emergency exception and compelled speech, there is a substantial likelihood of success and enjoins section 12(g), and any other relevant provisions pertaining to medical emergencies, and section 14(l) of the Act.

In respect to the remaining challenges to the Act, the Plaintiffs have not met the burden of proving the four elements to establish that injunctive relief is appropriate at this time. The Court, therefore, denies temporary injunction in respect to the remaining portions not specifically

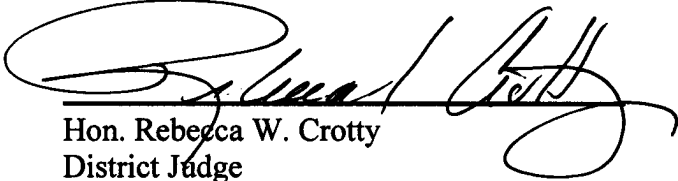
addressed herein. The Court, however, grants a temporary injunction to the sections and provisions as described above.

CONCLUSION

For the reasons stated above, Plaintiffs' Motion for Temporary Injunction is GRANTED in part and DENIED in part. This Memorandum Decision and Order shall serve as the journal entry of judgment. No further journal entry is required.

IT IS SO ORDERED.

Dated this 28 day of June, 2013.


Hon. Rebecca W. Crotty
District Judge

CERTIFICATE OF MAILING

I hereby certify that a copy of the above and foregoing **MEMORANDUM DECISION AND ORDER** was mailed, hand delivered, or placed in the pick-up bin this 15th day of July, 2013, to the following:

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