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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

PLANNED PARENTHOOD ASSOCIATION OF UTAH, on behalf of itself and its patients, physicians, and staff,

Plaintiff,

v.

JOSEPH MINER, in his official capacity as Executive Director of the Utah Department of Health; MARK B. STEINAGEL, in his official capacity as Director of the Utah Division of Occupational and Professional Licensing; SIM GILL, in his official capacity as District Attorney for Salt Lake County; SEAN D. REYES, in his official capacity as Attorney General for the State of Utah; and GARY R. HERBERT, in his official capacity as Governor for the State of Utah,

Defendants.

Case No. 2:19-cv-00238-EJF

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Hon. Evelyn J. Furse

Plaintiff Planned Parenthood Association of Utah ("PPAU"), on its own behalf and on behalf of its patients, physicians, and staff, hereby complains and alleges as follows:

INTRODUCTION

1. Plaintiff brings this civil rights action under 42 U.S.C. § 1983 to challenge the constitutionality of recently enacted Utah House Bill 136 (hereinafter "HB 136" or "the Act"), Utah's latest attempt to prevent women from exercising their constitutional right to abortion. *See* HB 136, attached as Exhibit A, *to be codified at* Utah Code Ann. §§ 76-7-301 to 76-7-314. HB 136 bans nearly all abortions beginning at 18 weeks of pregnancy ("the 18-week ban"), threatening the rights, liberty, and wellbeing of Utah women and their families. It is scheduled to take effect on May 14, 2019.

2. No fetus is viable at 18 weeks of pregnancy. Accordingly, the 18-week ban is in flagrant violation of more than four decades of settled Supreme Court precedent, starting with *Roe v. Wade*, 410 U.S. 113 (1973), which held that a woman has a protected right to end a pregnancy. Since *Roe*, no court has upheld a law banning abortion prior to viability. To the contrary, decades of unanimous precedent have made clear that a ban on such abortions violates the Fourteenth Amendment to the U.S. Constitution. In fact, in *Jane L. v. Bangerter*, 102 F.3d 1112 (10th Cir. 1996), the Tenth Circuit already invalidated a Utah law that banned abortion at 22 weeks of gestation. In striking down that statute, the court of appeals faulted Utah for its "deliberate decision to disregard controlling Supreme Court precedent." *Id.* at 1116. Undeterred, Utah has yet again enacted a patently unconstitutional ban on previability abortion.

3. Plaintiff seeks declaratory and injunctive relief preventing enforcement of HB 136 to safeguard its patients from this constitutional violation and to avoid irreparable harm to its patients, its providers, and itself.

JURISDICTION AND VENUE

4. This Court has subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343.

5. Plaintiff's claims for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202, by Rules 57 and 65 of the Federal Rules of Civil Procedure, and by the general legal and equitable powers of this Court.

6. Venue in this judicial district is proper under 28 U.S.C. § 1391 because Defendants reside here and a substantial part of the events giving rise to the claims occurred here.

PARTIES

7. Plaintiff PPAU is a Utah non-profit corporation that provides comprehensive reproductive health care to tens of thousands of individuals each year at eight health centers throughout the state. PPAU provides annual wellness exams, contraception and contraceptive education, pregnancy testing and options counseling, testing for HIV and sexually transmitted infections, and screening for breast and cervical cancer. At one of PPAU's health centers, its Metro Health Center in Salt Lake City, PPAU provides previability abortion services, including after 18 weeks of pregnancy, as measured from the first day of the woman's last menstrual period ("LMP"). This health center is licensed under Utah law as an "abortion clinic" authorized to perform first- and second-trimester abortions. *See* Utah Code Ann. §§ 26-21-6.5; 26-21-2(24). Upon information and belief, PPAU's Metro Health Center is the only clinic providing generally available abortion care in Utah at and after 18 weeks of pregnancy. PPAU sues on its own behalf, on behalf of its

patients seeking previability abortions at and after 18 weeks, and on behalf of its physicians and staff who provide these services.

8. Defendant Joseph Miner is the Executive Director of the Utah Department of Health ("UDOH"), the state agency responsible for enforcing health care facility rules applicable to "abortion clinics" operating in Utah. *Id.* §§ 26-21-6; 26-21-11. He is the chief administrative officer of the agency. *Id.* § 26-1-8. Mr. Miner is sued in his official capacity.

9. Defendant Mark B. Steinagel is the Director of the Utah Division of Occupational and Professional Licensing ("UDOPL"), the state agency responsible for licensing physicians and enforcing disciplinary sanctions against physicians. *Id.* § 58-1-106. He performs all duties, functions, and responsibilities of UDOPL. *Id.* § 58-1-104(2). Mr. Steinagel is sued in his official capacity.

10. Defendant Sim Gill is the District Attorney for Salt Lake County, the county in which PPAU offers abortion care at and after 18 weeks. He has authority to prosecute criminal violations of the 18-week ban. *Id.* §§ 17-18a-203; 17-18a-401(a). Mr. Gill is sued in his official capacity.

11. Defendant Sean D. Reyes is the Attorney General of Utah, the state's chief legal officer. He exercises supervisory power over District Attorney Gill "in all matters pertaining to the duties of [his] office[]," and, "when required by the public service or directed by the governor," he assists District Attorney Gill in the discharge of his duties. Utah Code Ann. § 67-5-1(6), (8). The Attorney General also prosecutes and defends all causes to which a state officer is a party. *Id.* § 67-5-1(2). Mr. Reyes is sued in his official capacity.

12. Defendant Gary R. Herbert is the Governor of Utah. He may require the Attorney General to aid District Attorney Gill in the discharge of his prosecutorial duties. Utah Code Ann. § 67-1-1(7); *accord id.* § 67-5-1(8). Mr. Herbert is sued in his official capacity.

FACTUAL ALLEGATIONS

Utah's Earlier Abortion Ban and Lawsuit

13. In 1991, the Utah Legislature adopted a law that banned nearly all abortions in the state, subject to very limited exceptions, such as to save the life of a pregnant woman. One portion of the law applied to abortions before 22 weeks LMP of pregnancy, and another—which further narrowed applicable exceptions to permit abortion—applied to those after 22 weeks LMP.[1]

14. In a case brought by Plaintiff PPAU against the Attorney General and Governor of Utah, this Court held that the provision banning abortions before 22 weeks violated the substantive due process rights of women seeking abortions before fetal viability. *See Jane L.*, 102 F.3d at 1113 & n.3. The state defendants did not appeal that ruling, *id.* at 1113–14, after conceding in district court that the provision "appear[ed] to be unconstitutional," *Jane L. v. Bangerter*, 809 F. Supp. 865, 870 (D. Utah 1992), *rev'd in part on other grounds*, 61 F.3d 1493 (10th Cir. 1995), *rev'd on other grounds sub nom. Leavitt v. Jane L.*, 518 U.S. 137 (1996).

15. The Tenth Circuit held that the ban on previability abortions occurring *after* 22 weeks of pregnancy also violated the Fourteenth Amendment's substantive due process protections. *Jane L.*, 102 F.3d at 1114. It concluded that the Utah Legislature, in adopting the law,

[1] Although the text of this earlier Utah law actually distinguished between abortions before and after 20 weeks of pregnancy, the law at that time dated pregnancy from conception as opposed to LMP. Because the latter calculation is how pregnancies are dated in the medical context, Plaintiff gives gestational age by LMP throughout. *See Jane L.*,102 F.3d at 1114 n.3.

had "made a deliberate decision to disregard controlling Supreme Court precedent." *Id.* at 1116. That precedent makes clear that, "until [fetal] viability is actually present[,] the State may not prevent a woman from choosing to abort." *Id.* at 1118. The U.S. Supreme Court denied review of the Tenth Circuit's decision. *Leavitt v. Jane L.*, 520 U.S. 1274 (1997).

16. After this ruling, the Utah Legislature amended its abortion statute to ban only those abortions occurring after fetal viability. Accordingly, under Utah law as it exists now, unaltered by HB 136, an abortion may be performed in the following circumstances: (a) the fetus is not viable, Utah Code Ann. § 76-7-302(3)(a), or (b) the fetus is viable and abortion is necessary (1) to save a patient's life, (2) to prevent "a serious risk" to the patient "of substantial and irreversible impairment of a major bodily function," (3) to end a pregnancy resulting from rape or incest, but only where the physician "verifies" that the crimes have "been reported to law enforcement," and (4) to end a pregnancy involving a "uniformly diagnosable" and "uniformly lethal" fetal defect, *id.* § 76-7-302(3)(b).

17. Utah law defines viability to mean that the fetus "is potentially able to live outside the womb, as determined by the attending physician to a reasonable degree of medical certainty." *Id.* § 76-7-302.

18. Although the point at which an individual fetus may attain viability varies, no fetus is viable at 18 weeks.

The Challenged Act

19. In March 2019, the Utah Legislature passed HB 136, which amends Utah's abortion code to provide that, "[n]otwithstanding" other state statutory provisions on the availability of

abortion, "a person may not perform or attempt to perform an abortion after" a fetus "reaches 18 weeks gestational age." HB 136, § 3 (creating Utah Code Ann. § 76-7-302.5).

20. HB 136 measures "gestational age … from the first day of the last menstrual period of the pregnant woman." *Id.* § 1 (amending Utah Code Ann. § 76-7-301(5)).

21. The 18-week ban is subject only to the exceptions applicable to the previous prohibition on postviability abortions, *see supra* ¶ 16, plus a new exception added by HB 136 for postviability and post-18-week abortions in the case of a "severe [fetal] brain abnormality that is uniformly diagnosable," HB 136, § 2 (amending Utah Code Ann. § 76-7-302(3)).

22. HB 136 imposes new reporting mandates to ensure compliance with the 18-week ban. It requires physicians who perform abortions to certify to UDOH whether the fetus "was older than 18 weeks gestational age at the time of the abortion." As existing law already does for postviability abortions, Utah Code Ann. § 76-7-313(2), HB 136 also requires physicians performing abortions after 18 weeks to report to UDOH "the reason for [each such] abortion," HB 136, § 4.

23. HB 136 provides that violation of the 18-week ban is punishable as a second-degree felony, which carries a minimum one-year and maximum fifteen-year prison term. HB 136, § 5 (amending Utah Code Ann. § 76-7-314); Utah Code Ann. § 76-3-203. A second-degree felony also carries a potential $10,000 fine for individuals, and a $20,000 fine for corporations. Utah Code Ann. §§ 76-3-301(1)(a), 76-3-302(1).

24. HB 136 mandates that UDOH report a doctor who violates the 18-week ban to Utah's Physician and Surgeon Licensing Board. HB 136, § 5 (amending Utah Code Ann. § 76-7-314(5)). That board in turn recommends licensing actions to UDOPL, Utah Code Ann. § 58-1-

202(1)(d), which is authorized to revoke a physician's license for "unprofessional conduct," *id.* §§ 58-1-401(2), 58-1-501(2).

25. The Act also authorizes UDOH to take action against a facility licensed as an "abortion clinic" if a violation of the 18-week ban occurs onsite. *Id.* § 76-7-314(7). Such action includes license revocation where the clinic "permit[s], aid[s], or abet[s] the commission of any illegal act in the … facility." *Id.* § 26-21-11.

26. HB 136 and the Utah law at issue in the *Jane L.* litigation both ban nearly all previability abortions at or after 18 weeks of pregnancy. *See* Utah Code Ann. § 76-7-302 (repealed 2009); HB 136, § 3 (adding § 76-7-302.5). Whether such a ban violates the substantive due process rights of patients under the Fourteenth Amendment has already been fully litigated in this Court and the Tenth Circuit. The Defendants are therefore collaterally estopped from defending the constitutionality of HB 136 on the ground that the ban on previability abortions at or after 18 weeks is consistent with the Fourteenth Amendment.

The Act's Impact on Patients

27. Legal abortion is one of the safest procedures in contemporary medical practice and is far safer than childbirth.

28. Patients decide to end a pregnancy for a variety of reasons, including familial, medical, financial, and personal reasons. Some patients end a pregnancy because they conclude it is not the right time in their lives to have a child; some do so because they already have one or more children and decide they cannot add to their families; some do so to preserve their life, health, or safety; some do so because they receive a diagnosis of a fetal anomaly; some do so because they have become pregnant as a result of rape or incest; and some do so because they choose not to

have biological children. Approximately one in four women in this country will have an abortion by age forty-five.

29. Roughly nine out of ten abortions in the United States and in Utah take place in the first twelve weeks of pregnancy. Only a small fraction of abortions are performed at or after 18 weeks.

30. Patients obtain abortions at or after 18 weeks for a variety of reasons. Some are delayed in accessing abortion care because of barriers encountered during pregnancy. Women, particularly those living in poverty or without insurance, may not be able to confirm their pregnancies, obtain options counseling, schedule an appointment, and make the logistical and financial arrangements (including time off work and childcare) to obtain an abortion for many weeks after they realize that they may be pregnant and decide to end the pregnancy. Other patients obtain an abortion for medical reasons that do not arise until at or after 18 weeks, or because they are suffering from post-traumatic issues following rape or incest.

31. Under Utah law, patients seeking an abortion must first complete a biased "information" module created by the state and certify their completion. They must then have an initial consultation with a licensed provider to, again, receive biased, state-mandated disclosures. *See* Utah Code Ann. § 76-7-305. Patients must travel to Salt Lake City, the only city where abortions are generally available in Utah, and their abortions may not take place until after the expiration of a mandatory 72-hour waiting period following the initial consultation. *Id.* Women seeking abortions must also find financial resources to pay the substantial cost of an abortion, often made higher by travel costs.

32. Under HB 136, women wishing to have a previability abortion at or after 18 weeks will be unable to do so in Utah unless they are covered by one of the exceptions applicable under the Act. Those exceptions to the 18-week ban would not cover many of PPAU's patients who seek abortions at or after 18 weeks, even though many of these patients are facing very challenging circumstances. They include women who have a health condition that does not clearly fit within the exceptions to save a patient's life or prevent certain irreversible impairments; women who have a compromised pregnancy and learn that their fetus is likely to suffer medical complications (unless the physician determines that the fetus has a "lethal" anomaly or "severe brain abnormality" that is "uniformly diagnosable"); women who were raped but did not report that rape or who are uncertain whether their pregnancy is the result of the rape they reported; and women who suffered incest but did not report that incest or who are uncertain whether their pregnancy is the result of the incest.

33. Absent an injunction, the overwhelming majority of PPAU's patients seeking abortions at or after 18 weeks LMP will not be able to obtain them in Utah. Some will be forced to attempt to travel hundreds of miles to out-of-state providers to obtain abortions and will experience resulting expenses, delays, and other harms. For many patients, however, reaching an out-of-state abortion provider will simply be impossible. Some patients will be forced to carry unwanted pregnancies to term. Some may even turn to self-induced abortion. Each of these harms constitutes irreparable harm to Plaintiff's patients.

34. The Act presents PPAU and its providers with an untenable choice: face criminal sanction and license revocation for continuing to provide abortion care in accordance with their best medical judgment, or stop providing the critical care on which patients across Utah rely.

CLAIM FOR RELIEF

35. Plaintiff realleges and incorporates by reference the allegations contained in paragraphs 1 through 34 above.

36. By banning previability abortion care starting at 18 weeks, the Act violates the substantive due process rights of Plaintiff's patients, as guaranteed by the Fourteenth Amendment to the U.S. Constitution.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff requests that this Court:

37. Declare that HB 136's ban on previability abortion at or after 18 weeks' gestation is unconstitutional under the Fourteenth Amendment to the U.S. Constitution and in violation of 42 U.S.C. § 1983;

38. Issue preliminary and permanent injunctive relief, without bond, enjoining Defendants, their employees, agents, and successors from enforcing HB 136, §§ 3 through 5;

39. Award Plaintiff its attorneys' fees and costs pursuant to 42 U.S.C. § 1988; and

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

Respectfully submitted,

/s/ Leah Farrell

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