

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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PLANNED PARENTHOOD OF WISCONSIN,
INC. and FREDERICK BROEKHUIZEN,

Plaintiffs,

-vs-

Case No. 12-CV-913-BBC

J.B. VAL HOLLEN, ISMAEL OZANNE, Madison, Wisconsin
MARY JO CAPODICE, RODNEY February 5, 2012
ERICKSON, JUDE GENEREAUX, 1:58 p.m.
SURESH MISRA, GENE MUSSER,
SANDRA OSBORN, KENNETH SIMONS,
TIMOTHY SWAN, SRIDHAR VASUDEVAN,
SHELDON WASSERMAN, TIMOTHY
WESTLAKE, GREG COLLINS,
and JAMES BARR,

Defendants.

* * * * *

STENOGRAPHIC TRANSCRIPT OF MOTION HEARING
HELD BEFORE DISTRICT JUDGE BARBARA B. CRABB,

APPEARANCES:

For the Plaintiff: Cullen Weston Pines & Bach, LLP
BY: SUSAN CRAWFORD
122 West Washington Ave., Ste. 900
Madison, Wisconsin 53703

For the Defendant: Wisconsin Dept. of Justice
BY: DANIEL LENNINGTON
17 West Main Street
Madison, Wisconsin 53703

Lynette Swenson, RMR, CRR, CBC
Federal Court Reporter
U.S. District Court 120 N. Henry St., Rm. 520
Madison, WI 53703 (608) 255-3821

1 (Call to order)

2 THE CLERK: Case Number 12-CV-913. *Planned*
3 *Parenthood of Wisconsin and Frederick Broekhuizen, MD*
4 *versus J.B. Van Hollen and others* called for motion
5 hearing. May we have the appearances, please.

6 MS. CRAWFORD: Susan Crawford. Cullin, Weston,
7 Pines & Bach for Planned Parenthood and Dr. Frederick
8 Broekhuizen.

9 THE COURT: Thank you.

10 MR. LENNINGTON: Good afternoon, Your Honor.
11 Dan Lennington from the Wisconsin Department of Justice
12 for all the defendants.

13 THE COURT: Thank you. I want to start out my
14 expressing my disappointment that plaintiffs' counsel
15 could not provide any cases in support of the request
16 for judicial approval of the stipulation. I certainly
17 understand plaintiffs' concern that the revised statutes
18 pose unworkable restraints on physicians and the desire
19 to clarify the statutes so that everyone knows exactly
20 what is required and what's allowed; what's forbidden.
21 But my concern is that in order to proceed on a case in
22 federal court, a plaintiff has to show a federal
23 question. Clearly this is not a diversity suit. And
24 you do that by showing that there is a constitutional
25 violation or a violation of some federal law. Since

1 we're talking about state law, we can only be talking
2 about a constitutional issue.

3 The Complaint suggests that there is a federal
4 question; that it is a serious question of the validity,
5 the constitutional validity of these two statutes. But
6 the parties now are asking for a court order saying
7 we're no longer saying that the laws are
8 unconstitutional, but that they really mean what we've
9 stipulated they mean. My concern is that once you take
10 the constitutional issue off the table, why should this
11 matter remain in federal court? And isn't this a
12 quintessential state court task to interpret the meaning
13 of a state law? So that's where I am.

14 MS. CRAWFORD: All right. If I can respond,
15 Your Honor.

16 THE COURT: Absolutely.

17 MS. CRAWFORD: Thank you. I did submit a
18 written memorandum in response to the Court's questions.

19 THE COURT: I found it lacking.

20 MS. CRAWFORD: Apparently you found it lacking.
21 I guess I'd like to clarify a couple of points. The
22 first is that the plaintiffs are continuing to dispute
23 the constitutionality of these statutory provisions.
24 Under the stipulation, what we are agreeing to is that
25 if the Court adopts a limiting construction of these

1 provisions, that that particular construction would
2 avoid the constitutional issues that the plaintiffs have
3 set forth.

4 THE COURT: And how can I do that without
5 looking at the change, considering whether it's
6 constitutional or not, and eventually ruling on it?
7 This idea of simply adopting what the parties have
8 agreed to, while I think it's a wonderful idea in terms
9 of keeping the cost down, making it easier for the
10 Court, I don't think that I have jurisdiction to act in
11 that case and that's why I'm suggesting that you take an
12 alternate route, which is just if you can work out an
13 agreement among yourselves, fine. If not, use the
14 procedures provided in state law.

15 MS. CRAWFORD: If I can respond further, Your
16 Honor.

17 THE COURT: Um-hmm.

18 MS. CRAWFORD: Looking at the decisions, both
19 at the district court level and at the Seventh Circuit
20 level in the *Karlin* case, which is cited in our
21 memorandum, the court reached the same result, I think,
22 that the proposed stipulation is proposing here after
23 the case had been fully litigated on a summary judgment
24 motion. In other words, the Court ultimately after, you
25 know, reviewing the arguments of both parties on summary

1 judgment, concluded that some of the provisions that
2 were under challenge on grounds of constitutional
3 vagueness in that case could be narrowly construed to
4 avoid the constitutional issue. And as I understand the
5 case law on vagueness claims, the Court has an
6 obligation to consider whether a statute can be
7 reasonably construed in order to avoid the
8 constitutional infirmities that are the grounds of the
9 challenge.

10 THE COURT: Right.

11 MS. CRAWFORD: I don't believe that the parties
12 are asking the Court to do any more or any less in this
13 case. We are presenting it to the Court, not in the
14 context of a fully litigated summary judgment motion,
15 but in the context of a stipulation that would get us to
16 a judgment that I believe is a likely outcome if the
17 case were to be litigated through summary judgment here.
18 I do think the Court has jurisdiction to resolve the
19 federal constitutional claim that would be resolved in
20 this case.

21 THE COURT: But I wouldn't be resolving it.

22 MS. CRAWFORD: Well --

23 THE COURT: I wouldn't be resolving it at all.
24 I would be saying whatever it is, constitutional or
25 unconstitutional, if you want to follow this

1 interpretation, go ahead.

2 MS. CRAWFORD: Let me just respond to that by
3 saying that I do think that the stipulation that was
4 drafted by the parties was lacking in certain respects.
5 I think it left out a couple of points that are
6 necessary to establish the Court's jurisdiction and the
7 fact that the Court is resolving a justiciable issue.

8 I have drafted an amendment to that stipulation,
9 which it's is my understanding the State will not object
10 to. And with the Court's permission, I would like to
11 give the Court a copy of that proposed amendment and
12 walk through these proposed changes.

13 THE COURT: I'll hear you.

14 MS. CRAWFORD: The changes that we're proposing
15 are in paragraphs 4a., 4j. and 4k., and they appear in
16 bold on this copy. 4a. is simply a statement of the
17 constitutional issue that is before the Court, in a very
18 brief manner, stating that the plaintiffs are alleging
19 that certain provisions of the Wisconsin statutes are so
20 ambiguous that they fail to give plaintiffs fair notice
21 of the conduct required of them and are therefore
22 unconstitutional on grounds of vagueness.

23 4j. then immediately follows the proposed
24 construction of the statute, stating that those
25 constructions -- that the statutes are reasonably

1 susceptible to those constructions. That's language
2 from the Seventh Circuit decision in *Karlin* and all of
3 the cases relied upon in *Karlin* regarding construction,
4 saving construction of state statutes.

5 And then provision or new paragraph 4k. states that
6 those constructions avoid and therefore resolve the
7 plaintiffs' federal constitutional challenges to the
8 statutes on grounds of vagueness. And we believe that
9 the addition of those provisions clarifies and confirms
10 that the Court does have federal jurisdiction over the
11 matter and is resolving a justiciable issue with this
12 declaratory judgment.

13 THE COURT: Well, we still have a problem that
14 to the extent that you're arguing that the statute is
15 susceptible to a narrowing construction, and by
16 definition that's not unconstitutional.

17 MS. CRAWFORD: We're not conceding that the
18 narrowing construction is -- that the statute is
19 reasonably susceptible to that narrowing construction.
20 What we're conceding is that if that narrowing
21 construction is adopted by the Court in declaratory
22 judgment, it would, in fact, resolve the constitutional
23 claims that we are raising.

24 Now if the Court were not to -- were to decline to
25 enter this judgment, we would proceed to summary

1 judgment and would continue to go forward with our
2 claims that the statutes are unconstitutionally vague.

3 THE COURT: What about the problem of issuing a
4 declaratory judgment that does nothing more than
5 interpret a statute but doesn't say whether any rights
6 were violated?

7 MS. CRAWFORD: I think that the new paragraph
8 4k., it certainly could be expanded, but what it is
9 saying is that the plaintiffs' constitutional rights are
10 not violated under those statutory provisions as
11 construed.

12 THE COURT: And Mr. Lennington, is there
13 anything that you wish to say this afternoon?

14 MR. LENNINGTON: Your Honor, the defendants'
15 dilemma is that we received this allegation and a
16 complaint that the defendants could potentially
17 prosecute cases in which the defendants never believed
18 they had the power and never believed they had the
19 authority to prosecute cases in that way. And so --

20 THE COURT: Would you explain exactly what you
21 mean by that?

22 MR. LENNINGTON: In other words, the complaint
23 alleges that the defendants could prosecute doctors if
24 an abortion pill is given at the office but then taken
25 at home.

1 THE COURT: So you're saying that you wouldn't
2 have the authority to prosecute in the manner that
3 the --

4 MR. LENNINGTON: Is alleged.

5 THE COURT: -- plaintiffs are suggesting.
6 You're not saying that your office is not interested in
7 prosecuting in this area at all.

8 MR. LENNINGTON: No. It's just that we would
9 never -- the statute does not allow us to prosecute in
10 that way. The statute says that the pill must be given
11 in the presence of a doctor; it doesn't say taken in the
12 presence of a doctor. And so no prosecutor would ever
13 prosecute in that way.

14 THE COURT: Well --

15 MR. LENNINGTON: That's the issue that *Karlin*
16 *v. Foust* raised that you wrote in your decision; that
17 there could be some political motivation for a local
18 prosecutor to bring a case. You said that in 1997, and
19 that was one of the problems that was addressed by your
20 limiting construction of the informed consent provisions
21 in *Karlin v. Foust*, which was upheld by the Seventh
22 Circuit.

23 So this dilemma that the defendants faced is that
24 ultimately when we sat down and talked to plaintiffs and
25 we said at the end of the day what's going to be the

1 result? And the result we agreed was going to be the
2 same: Was that this statute would be interpreted to
3 mean what we thought was the plain language; would mean
4 that a doctor could only be prosecuted if he was not
5 present when the pill was given to the woman or did not
6 actually make a inquiry as to the voluntary consent of
7 the abortion -- voluntary nature of the abortion, and
8 that these other hypothetical prosecutions would never
9 occur. We concede that they would not occur because we
10 don't believe that's what the statute says.

11 So in other words, they claim that the statute is
12 unconstitutionally vague because it's susceptible to
13 multiple interpretations and we disagree with that. So
14 to that extent, there's a real life controversy in front
15 of the Court.

16 Now what happens between now and a final judgment
17 seems like an incredible waste of time and resources if
18 we both agree as to what the end result is going to be.
19 And so this stipulated declaratory judgment or
20 stipulation was seen as a way to avoid a waste of the
21 Court's resources, a waste of the parties' resources,
22 and to get at what we believe is the plain language of
23 the statute and what they believe is a limiting
24 construction of the statute. It's sort of the dilemma
25 that we have, and that's why we agreed to enter into the

1 stipulation.

2 THE COURT: Well, I can see why you would want
3 to enter into the stipulation, as I said. It seems like
4 a good way to resolve the case. And if you can convince
5 me that the problems that I've identified are not truly
6 problems, then I would certainly approve that route.

7 MR. LENNINGTON: One other thing the Seventh
8 Circuit said that might be helpful --

9 THE COURT: This is in *Karlin* again?

10 MR. LENNINGTON: Yes. They wrote that "Before
11 a court can conclude that a challenged statute is void
12 for vagueness," before, "it must first determine whether
13 the statute can be construed so as to avoid
14 constitutional objections."

15 So what they said in that case is that before you
16 even get to the merits, before you can get to the final
17 judgment, the Court's obligation is to say hey, can this
18 statute be read in such as way as to void what the
19 plaintiffs are saying, and that's basically what we're
20 saying with the stipulation.

21 They also concluded that -- they said that your
22 construction was "more or less the articulation of the
23 standard that was already implicit in the statute."
24 It's basically saying well, the district court looked at
25 the statute and said well, more or less this is what it

1 says in other words. And they said that that
2 construction was entirely appropriate and that you did
3 have jurisdiction to make that construction.

4 I went back and looked at your opinion and there's
5 at least five or six different places in which you're
6 construing the statute in such a way as to avoid a
7 constitutional problem.

8 THE COURT: But that was after a real -- very
9 comprehensive attack on the constitutionality of the
10 various provisions of the statute and evidentiary
11 hearing; everything else. It was clearly an instance in
12 which the federal court had jurisdiction because there
13 was a real case or controversy about the
14 constitutionality of this legislation.

15 MR. LENNINGTON: The previous case was a facial
16 and as-applied challenge, and you took a lot of
17 testimony as to the effect on women, the effect on
18 doctors, how it would really work in the real world.
19 This is more of a pure facial challenge where two
20 parties are looking at a statute in the abstract and
21 saying what does this statute mean. And so I think it's
22 less likely that there would be the type of hour after
23 hour of testimony explaining how this is hurting women
24 or becoming an undue burden or that sort of thing. I'm
25 sure Ms. Crawford would want to put on some testimony

1 and we would not dispute that. But this is not the type
2 of factual case that would lend itself that you would
3 need a lot of testimony in order to make an
4 interpretation of a statute.

5 So I think that's why the two cases would be
6 different. And I'm not sure, you know, considering that
7 it's a court's duty to evaluate *sua sponte* its subject
8 matter jurisdiction at all times in the case, if you're
9 evaluating your subject matter jurisdiction now, whether
10 you have it, I'm not sure that if you conclude you don't
11 have jurisdiction now to enter this stipulation, why you
12 would have it in six months from now after discovery.
13 I'm not sure that we're going to create jurisdiction for
14 the Court just by matters of going through discovery.
15 Either the Court has it now or it doesn't. If the Court
16 can't enter this stipulation, perhaps you're correct
17 that the case should be dismissed and the plaintiff
18 should pursue this in state court. But I'm not sure I
19 see an in between.

20 It's sort of a binary. The Court either has
21 jurisdiction and can enter the declaratory judgment or
22 it doesn't. I think it's sort of an on-or-off type of
23 jurisdictional issue at this point.

24 THE COURT: That would be my first inclination.
25 But --

1 MS. CRAWFORD: If I can respond briefly to
2 that, Your Honor.

3 THE COURT: Certainly.

4 MS. CRAWFORD: Just on the last point raised by
5 the Assistant Attorney General about the sort of binary
6 nature of the finding of jurisdiction, while I agree
7 with the assertion that either there is jurisdiction in
8 this case or there is not, we would strongly contend
9 that there is jurisdiction in this case exactly as there
10 was in the *Karlin* case and in many other cases that
11 challenge the constitutionality of state statutes
12 regulating abortion under the federal constitution. And
13 if this court were to decline the parties' proposal to
14 enter a declaratory judgment at this point, the
15 plaintiffs' intent would be to go forward with this
16 litigation. There is a pending motion for a preliminary
17 injunction currently before the Court that has not yet
18 been briefed by the State. We do think that this is an
19 appropriate case for summary judgment and would intend
20 to file a motion for summary judgment and brief that
21 following the Court's determination of the preliminary
22 injunction.

23 So I think that federal jurisdiction over the
24 constitutional's claim here could really not be any
25 clearer. There is jurisdiction over this case. And I

1 understand the Court's concern having -- you know, since
2 we received your order and reviewed the stipulation that
3 the parties entered, I certainly understand where the
4 Court's concerns arose. I think that the stipulation
5 was inadequate in terms of laying out exactly what we
6 were proposing to the Court to do. But I do believe
7 that the Court has jurisdiction to enter a judgment that
8 would apply a reasonable construction of the statute;
9 resolve the constitutional issue that is presented.

10 THE COURT: And Mr. Lennington, have you had a
11 -- I'm not sure of this. Have you had a chance to look
12 over this amended proposal?

13 MR. LENNINGTON: Yes. We did not object to the
14 amendment at all. It does attempt to more clearly
15 define that there is a case of controversy between the
16 parties, and as long as the Court did determine that
17 there is a live case for controversy, I think that the
18 plaintiffs thought that would make the Court more
19 comfortable in issuing a limiting construction of the
20 statute.

21 THE COURT: Do either of you wish to say
22 anything further?

23 MS. CRAWFORD: No, Your Honor.

24 MR. LENNINGTON: No, Your Honor.

25 THE COURT: Well, thank you very much and I

1 will make a decision promptly.

2 MS. CRAWFORD: Thank you.

3 THE COURT: I'm not ready to make it right now,
4 but I will try to get it out.

5 MR. LENNINGTON: Thank you.

6 THE COURT: Thank you very much for your help.

7 (Proceedings concluded at 2:20 p.m.)

8

9 * * * * *

10 I, LYNETTE SWENSON, Certified Realtime and Merit
11 Reporter in and for the State of Wisconsin, certify that
12 the foregoing is a true and accurate record of the
13 proceedings held on the 5th day of February 2013 before
14 the Honorable Barbara B. Crabb, District Judge for the
Western District of Wisconsin, in my presence and
reduced to writing in accordance with my stenographic
notes made at said time and place.
Dated this 24th day of March 2013.

15

16

17 /s/_____

18 Lynette Swenson, CRR, RMR, CBC
19 Federal Court Reporter

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