

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

PLANNED PARENTHOOD OF DELAWARE            )  
and JANICE TILDON-BURTON,                    )  
  )  
  Plaintiffs,                    )  
  )  
  v.                                ) Civil Action No. 03-153-SLR  
  )  
M. JANE BRADY and                                )  
GAYLE FRANZOLINO,                             )  
  )  
  Defendants.                    )

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Joseph A. Rosenthal, Esquire and Jeffery S. Goddess, Esquire of Rosenthal, Monhait, Gross & Goddess, P.A., Wilmington, Delaware. Counsel for Plaintiffs. Of Counsel: Eve C. Gartner, Esquire and Carrie Y. Flaxman, Esquire of Planned Parenthood Federation of America, New York, New York.

Marc. P. Niedzielkski, Esquire and A. Ann Woolfolk, Esquire of State of Delaware, Wilmington, Delaware. Counsel for Defendants.

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**OPINION**

Dated: June 9, 2003  
Wilmington, Delaware

**ROBINSON, Chief Judge**

**I. INTRODUCTION**

On January 30, 2003, plaintiffs filed this action challenging the constitutionality of 24 Del. C. § 1794(b). The next day, the court entered a temporary restraining order preventing enforcement of the act. On March 14, 2003, the court granted plaintiffs' motion for a preliminary injunction. Planned Parenthood of Delaware v. Brady, 250 F. Supp. 2d 405 (D. Del. 2003). Currently before the court is plaintiffs' motion for judgment and motion to convert the preliminary injunction into a permanent injunction. (D.I. 44) For the following reasons, the court shall grant plaintiffs' motion.

**II. BACKGROUND**

Plaintiffs Planned Parenthood of Delaware ("Planned Parenthood") and Dr. Janice Tildon-Burton ("Dr. Tildon-Burton") provide abortion services within the State of Delaware. (D.I. 29 at ¶ 9, 10) Defendants M. Jane Brady and Gayle Franzolino are the Attorney General of the State of Delaware and the Executive Director of the Board of Medical Practice, respectively. During the week of January 27, 2003, the Board of Medical Practice notified licensed medical practitioners that it would begin investigating and assisting in prosecuting violations of 24 Del. C. § 1794(b) - the 24-hour waiting period requirement. (D.I. 15,

Ex. A-6) The statute had been considered unenforceable for the past twenty (20) years.<sup>1</sup>

In issuing the preliminary injunction against enforcement of the statute, the court held that:

By choosing to use language that does not specifically address dangers to a woman's health, the legislature has run afoul of a constitutional mandate. The language of § 1794(b) is clear and unambiguous. Defendants' arguments notwithstanding, the record is devoid of a single example where the word "life" has been judicially interpreted to include concerns for the "health" of a mother. The court cannot construe the ordinary meaning of the statute broadly enough to be constitutional without impermissibly rewriting § 1794(b), nor can the court add a health exception to the statute.

Planned Parenthood of Delaware, 250 F. Supp. 2d at 410 (internal citation omitted).

### **III. DISCUSSION**

Plaintiffs assert that no relevant factual issues are in dispute and that the court's preliminary injunction opinion resolves all legal issues, thus, entry of judgment and a permanent injunction is appropriate. Defendants request an evidentiary hearing. According to defendants, an evidentiary hearing is required to resolve two issues. "The first is whether

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<sup>1</sup>In 1983, the Delaware Attorney General opined that the 24-hour waiting period mandate was unconstitutional and, therefore, unenforceable in light of the Supreme Court's opinion in City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983). Akron was later overruled by the Supreme Court in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

. . . there is any medical emergency that constitutes a serious risk of substantial and irreversible impairment of a major bodily function but does not pose a substantial danger to the life of the pregnant woman. The second is whether, if there is any such condition, it will operate as a substantial obstacle to a large fraction of the women required to delay their abortion by 24 hours.” (D.I. 46 at 1)

Neither of the identified issues requires an evidentiary hearing to resolve. The fact that defendants may be able to present evidence in the form of doctors’ opinions regarding possible medical conditions in pregnant woman that all pose a risk to the life of the woman (not just her health) does not change the court’s legal analysis. The court’s opinion granting the preliminary injunction concluded that the Supreme Court has required an express “health” exception for an abortion statute to be constitutional. See Planned Parenthood of Delaware, 250 F. Supp. 2d at 409-10 (citing Stenberg v. Carhart, 530 U.S. 914, 931 (2000)). The Delaware statute does not contain an express “health” exception. As a matter of law, the Delaware statute at issue is unconstitutional on its face. No set of medical facts will alter this legal conclusion.

Furthermore, even if the court were convinced that defendants currently hold the opinion that the possible medical complications involved in pregnancy all pose a substantial danger

to the life of the pregnant woman (making a specific health exception unnecessary), the court cannot be assured that defendants' opinion will not change. The representations currently made by the State of Delaware are not binding. Given that the statute is facially unconstitutional, defendants' medical opinions are irrelevant.

Similarly, whether the statute poses an obstacle to one Delaware woman or thousands does not change the constitutional analysis. As the Tenth Circuit Court of Appeals noted, "the Stenberg Court implicitly concluded that the 'undue burden' test [or 'large fraction' test] does not apply to the determination of whether a health exception is required, and that the lack of a health exception is a separate, independent ground upon which a state abortion regulation may be invalidated." Planned Parenthood of Rocky Mountains Services, Corp. v. Owens, 287 F.3d 910, 918 n.7 (10th Cir. 2002) (citing Stenberg, 530 U.S. at 930). Thus, it is unnecessary for the court to determine whether a large fraction of women are affected by the statute. A pregnant woman has a constitutional right to an abortion if her continued pregnancy creates a serious risk of substantial and irreversible impairment of a major bodily function. Even if the Delaware statute may only deny one pregnant woman this right, the statute is unconstitutional. It would be perverse for any court to hold that there is a minimum number of women who must

potentially suffer a substantial and irreversible impairment of a major bodily function before the Constitution will protect them.

#### **IV. CONCLUSION**

For the reasons stated, the court concludes that Delaware's 24-hour waiting period mandate, 24 Del. C. § 1794(b), is unconstitutional as written. Therefore, defendants are permanently enjoined from enforcing the mandate in accordance with the order issued this day. Judgment shall be entered in favor of plaintiffs.

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M. JANE BRADY and )  
GAYLE FRANZOLINO, )  
 )  
Defendants. )

**O R D E R**

At Wilmington this 9th day of June, 2003, for the reasons stated in the memorandum opinion issued this same date, IT IS ORDERED that:

1) Plaintiffs' motion for judgment and a permanent injunction (D.I. 44) is granted. Defendants are hereby enjoined from enforcing the 24-hour waiting period to obtain an abortion pursuant to 24 Del. C. § 1794(b).

2) The clerk is directed to enter judgment in favor of plaintiffs.

Sue L. Robinson  
United States District Judge