

IN THE SUPREME COURT OF MISSOURI

No. SC83778

THE STATE OF MISSOURI,

Respondent/Cross-Appellant,

v.

PLANNED PARENTHOOD OF KANSAS AND MID-MISSOURI, and
PLANNED PARENTHOOD OF THE ST. LOUIS REGION,

Appellants/Cross-Respondents.

On Appeal from the Circuit Court of Cole County
Hon. Byron L. Kinder, Circuit Judge

**REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT
THE STATE OF MISSOURI**

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POINT RELIED ON

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42 C.F.R. § 59.5

House Bill No. 10, § 10.705 (1999)

House Bill No. 1110, § 10.710 (2000)

ARGUMENT

I. The Circuit Court Erred in Concluding That the Federal Title X Program Required Planned Parenthood to Perform the Services That Constituted the Direct Referral of Patients to Abortion Providers, the Distribution of Marketing Materials About Abortion Services to Patients, and the Assistance and Counseling of Patients to Have Abortions and, Consequently, in Ruling That Planned Parenthood’s Abortion Referral, Marketing, Assistance, and Counseling Activities Did Not Render Planned Parenthood Ineligible Under the Appropriations to Receive State Family Planning Funds Because the Appropriations Prohibited Such Activities and Nothing in the Federal Title X Program Required Planned Parenthood to Perform Any Activities Prohibited by the Appropriations and, in Any Event, the Title X Regulations Did Not Mandate Planned Parenthood’s Abortion Referral, Marketing, Assistance, and Counseling Activities

House Bill No. 10, § 10.705 (1999) and House Bill No. 1110, § 10.710 (2000) (collectively, the “Appropriations”) appropriated state funds to the Missouri Department of Health “[f]or the purpose of funding family planning services, pregnancy testing and follow up services, provided that none of the funds appropriated herein may be expended to directly or indirectly subsidize abortion services or administrative expenses.” PRLF 16, 39-49, 57; A7-17.¹ Subsection 1 of the Appropriations stated in part:

¹ Citations to “PRLF” are to the Post-Remand Legal File that Planned Parenthood filed in the present appeal. Citations to “LF” and “SLF” are to the Legal File and the

Abortion services include performing, assisting with, or directly referring for abortions, or encouraging or counseling patients to have abortions. . . .

Nondirective counseling is defined as providing patients with a list of health care and social service providers that provide pregnancy, prenatal, delivery, infant care, foster care, adoption, alternative to abortion and abortion services and nondirective, non-marketing information in regard to such providers. Such list may categorize the providers by the service or services they provide. An organization that receives these funds may not directly refer patients who seek abortion services to any organization that provides abortion services, including its own independent affiliate.

Nondirective counseling relating to pregnancy may be provided. None of these funds may be paid or granted to an organization or an affiliate of an organization that provides abortion services. An organization that receives these funds may not display or distribute marketing materials about abortion services to patients. . . .

§ 10.705 (1999) (PRLF 41-42; A9-10); § 10.710 (2000) (PRLF 46; A14). In sum, the Appropriations prohibited recipients of state family planning funds from directly referring patients to abortion providers, including their affiliated abortion providers, distributing marketing materials about abortion services to patients, and assisting or

Supplemental Legal File filed during the previous appeal before this Court (No. SC82226). Citations to “A” are to the Appendix to the State’s initial brief.

counseling patients to have abortions. The Appropriations required that state family planning fund recipients completely comply with each of the eligibility conditions of the Appropriations at all times.

The Appropriations also provided: “Nothing in this subsection requires an organization receiving federal funds pursuant to Title X of the Public Health Service Act to refrain from performing any service that must or shall be provided pursuant to Title X or the Title X Program Guidelines for Project Grants for Family Planning Services as published by the U.S. Department of Health and Human Services as such laws and guidelines are currently in effect.” § 10.705.1 (1999) (PRLF 43; A11); § 10.710.1 (2000) (PRLF 47; A15). As a defense, Defendants Planned Parenthood of Kansas and Mid-Missouri (“PPKM”) and Planned Parenthood of the St. Louis Region (“PPSLR”) (collectively, “Planned Parenthood”) contend that their abortion referral, marketing, assistance, and counseling activities did not violate the Appropriations because, it maintains, these activities were mandated by the federal Title X program, 42 U.S.C. § 300 et seq. (It should be noted that the federal Title X program specifically provides that none of the funds appropriated thereunder “shall be used in programs where abortion is a method of family planning.” 42 U.S.C. § 300a-6.) Planned Parenthood’s contention is legally erroneous and refuted by the undisputed facts and its own concessions.

A. Title X Did Not Require Any Abortion Referral, Marketing, Assistance, and Counseling Activities That the Appropriations Prohibited

Recent letters from the United States Department of Health and Human Services and the Missouri Department of Health make clear that the Title X program requirements are not inconsistent with the types of restrictions found in the Appropriations and that state family planning fund recipients “are not required to perform any services under Title X that are prohibited under the state family planning appropriation.” A61-63 (August 2, 2001 letter from United States Department of Health and Human Services to Missouri Family Health Council, Inc.); A64 (August 8, 2001 letter from Missouri Department of Health to Missouri Family Health Council, Inc.). Specifically, Title X did not require abortion referral, marketing, assistance, and counseling activities prohibited by the Appropriations.

Planned Parenthood argues that its “admitted practices are not direct referrals, counseling to have an abortion, or marketing abortion.” Planned Parenthood’s Response Br., p. 50. To the contrary, as the Circuit Court correctly found, the undisputed evidence reflects numerous abortion referral, marketing, assistance, and counseling activities by Planned Parenthood that violated the Appropriations. See State’s Initial Br., pp. 36-38, 40-41, 78-82.

The Appropriations prohibited direct referrals for abortion and only allowed “nondirective counseling” for pregnant patients, which was “defined as providing patients with a list of health care and social service providers that provide pregnancy,

prenatal, delivery, infant care, foster care, adoption, alternative to abortion and abortion services and nondirective, non-marketing information in regard to such providers.”

§ 10.705 (1999) (PRLF 41; A9); § 10.710 (2000) (PRLF 46; A14). Planned Parenthood concedes that it made referrals for abortions and that it did not provide patients with a list of providers for all options for managing a pregnancy, but instead only gave patients a list of providers for a particular option (such as abortion). Planned Parenthood’s Response Br., p. 43; see also PRLF 23, 62; LF 1804, 1807. Providing patients with a list of providers for only one particular option (such as abortion) was clearly a direct referral for that particular option and was not the “nondirective counseling” permitted under the Appropriations.

Planned Parenthood does not dispute that PPSLR’s automated telephone referral system, called a “referral line” by Planned Parenthood, provides referrals to Reproductive Health Services of Planned Parenthood of the St. Louis Region (“Reproductive Health”) (PPSLR’s affiliated abortion provider) for abortion services as the first option a caller hears when she calls the “referral line” and contains no options for receiving information, counseling, or referrals for prenatal care or adoption. PRLF 191, 254.² Planned

² Planned Parenthood’s claim that its advertisement of PPSLR’s telephone number as a “referral line” was eliminated in subsequent directories published after the enactment of the Appropriations is false. See PRLF 23, 63, 222; LF 355, 649, 832-35, 1796. The 2001-2002 telephone directory for St. Louis continues to list PPSLR’s main telephone number for the Forest Park Facility (314-531-7526), which is the same telephone number

Parenthood protests that it has no way of knowing which callers to its “referral line” are pregnant. Planned Parenthood’s Br., p. 52. That is irrelevant. Planned Parenthood cannot create an automated telephone system that provides direct referrals to its affiliated abortion providers and then disclaim responsibility for that system simply because both persons who are pregnant and persons who are not pregnant call that system. Planned Parenthood surely knows that a substantial percentage of the callers to its automated telephone system are pregnant since Planned Parenthood holds itself out to the public as a provider of abortion and family planning services. Planned Parenthood also surely knows that a substantial percentage of the callers to its automated telephone system will accept the direct referral to Reproductive Health for abortion services since Planned Parenthood makes such a referral the first option that the caller hears. Planned Parenthood’s “referral line” is not “nondirective counseling” allowed under the Appropriations.

Planned Parenthood also assisted patients to have abortions. It does not dispute that PPKM sometimes distributed to patients who are pregnant an informed consent form that is required to be received 24 hours before an abortion under Kansas state law. LF 983-84, 1000, 1269-71; A53-55. This form, printed with the name of Comprehensive Health Services of Planned Parenthood of Kansas and Mid-Missouri (“Comprehensive Health”) (PPKM’s affiliated abortion provider) at the top, is a direct referral to

used by Reproductive Health, as a “referral line.” See State’s Supplemental Legal File 1-2; PRLF 223-24 (copies included in the appendix to this brief).

Comprehensive Health. Id. By providing patients with the informed consent form, PPKM eliminated the need for women to make two separate trips to the abortion provider and assisted and helped them to obtain abortions faster at its affiliated abortion provider, Comprehensive Health.

Planned Parenthood also displayed and distributed marketing materials about abortion services to patients. Planned Parenthood admitted in its responses to the State's requests for admission that it "furnishes patients with" and "'makes available' to patients brochures, advertisements, pamphlets or other information regarding abortion services, including but not limited to services available at [its affiliated abortion providers]." LF 1125, 1133, 1150, 1152-53; A56-60 (emphasis added). Contrary to Planned Parenthood's contention, the Circuit Court did not "refuse" or "decline to admit" Planned Parenthood's admissions (or any other evidence cited by the State in support of its motion for summary judgment). The transcript from the October 29, 1999 hearing on the parties' summary judgment motions as to the State's First Amended Petition reflects no such ruling. The State filed Planned Parenthood's admissions and properly cited to them in the State's Motion for Summary Judgment as to the State's Second Amended Petition. PRLF 192, 195. Rule 59.01(c) provides: "Any matter admitted under this Rule 59.01 is conclusively established unless the court on motion permits withdrawal or amendment of the admission." Planned Parenthood never sought and the Circuit Court never permitted Planned Parenthood to withdraw or amend its admissions. Planned Parenthood's admissions are conclusive and binding and cannot be disregarded. See Felton v. Hulser, 957 S.W.2d 394 (Mo. App. 1997).

Planned Parenthood further claims that it discontinued a number of practices in October 1999 that, it implicitly concedes, involved the direct referral of patients for abortions or the distribution of marketing materials about abortion to patients. These practices included:

- (1) the distribution of PPSLR's "Pregnancy Testing Protocol" to its employees, which stated that when a PPSLR patient sought an abortion, the PPSLR employee should "[o]ffer her PPSLR/RHS [Reproductive Health] first," LF 860; A48, and was purportedly revised in October 1999 "to clarify that PPSLR was not to provide direct referrals for or to 'market' abortion services," LF 1827;
- (2) the distribution to patients who are pregnant a brochure from Reproductive Health entitled "Options Counseling and Abortion Services," which contained information on abortion services and fees and stated that "PPSLR offers [abortion] procedures up to 22 weeks Last Menstrual Period (LMP) and will make a referral after that point," LF 686-87, 863-66, 1804-05; A49-52;
- (3) the inclusion on PPSLR's Internet website of information about abortion services (including appointments and fees) available at Reproductive Health, LF 666, 836-55, 1803, 1828, even while the website contained no information from any adoption provider or detailed information on the option of parenthood, LF 836-55, 1853-1905; and

- (4) the distribution by PPSLR of information cards (business cards that PPSLR circulated for a variety of purposes) that contained information about both PPSLR and Reproductive Health, including information about Reproductive Health's abortion services, LF 711-12, 891.

Those practices demonstrated that PPSLR was directly referring patients for abortions and distributing marketing materials about abortion to patients. The alleged changes in PPSLR's practices were not implemented until October 1999, over three months after § 10.705 (1999) had been in effect and Planned Parenthood had been receiving funds under that statute. To be eligible under § 10.705 (1999) to receive state family planning funds, Planned Parenthood was required to comply with § 10.705 (1999) at all times. By changing its practices, PPSLR implicitly conceded that it was not in compliance with § 10.705 (1999) while it was receiving state family planning funds.

In sum, the Appropriations prohibited state family planning fund recipients from directly referring patients to abortion providers, distributing marketing materials about abortion services to patients, or assisting or counseling patients to have abortions. As the recent letters from the United States Department of Health and Human Services and the Missouri Department of Health make clear, the federal Title X program has not required Title X fund recipients (such as Planned Parenthood) to engage in such activities because the Appropriations prohibited them. A61-64. Accordingly, Planned Parenthood's abortion referral, marketing, assistance, and counseling activities did not fall within the Appropriations' exception for activities required under the federal Title X program.

B. The Title X Regulations Did Not Mandate Planned Parenthood’s Abortion Referral, Marketing, Assistance, and Counseling Activities and the Evidence Demonstrates That Planned Parenthood Failed to Comply With the Requirements of Title X

Even so, contrary to Planned Parenthood’s contention, the Title X regulations did not mandate Planned Parenthood’s abortion referral, marketing, and assistance activities. Planned Parenthood states: “Title X requires that a pregnant woman be offered the opportunity to be counseled about all of her options. 42 C.F.R. § 59.5(a)(5). If she requests that counseling, then she is to be given factual information and nondirective counseling about all of her options, id., and she is to be given a referral if she requests, id., but she is not to be given counseling or referral on options as to which she indicates she does not wish to receive information and counseling.” Planned Parenthood’s Response Br., p. 49.

Planned Parenthood cites no evidence in the record that it: (1) offered information and counseling on all options to every pregnant woman who used its services; or (2) provided a pregnant woman with information and nondirective counseling on all options unless the woman affirmatively indicated that she did not wish to receive information and counseling about a particular option or options. All of the evidence that Planned Parenthood cites only states that, in some instances, Planned Parenthood provides a pregnant woman with information and counseling only about those options in which she expresses an interest. (Planned Parenthood’s automated telephone referral system only provides direct referrals for abortion even if the caller wants information and

counseling about parenthood or adoption.) A patient's expression of interest in one particular option, however, does not constitute an affirmative indication by the patient that she does not wish to receive information and counseling about other options. For example, a woman who expresses an interest in obtaining an abortion may still be receptive to receiving information and counseling about parenthood or adoption. Her inclination to have an abortion may be tentative. If given information and counseling about parenthood or adoption, as required under 42 C.F.R. § 59.5(a), she might change her mind and choose an alternative to abortion.

The purpose of the requirement in § 59.5(a) that a woman be offered information and nondirective counseling on all options is to ensure that she makes a fully-informed choice as to her pregnancy (whether it be parenthood, adoption, or abortion). A person obviously cannot make a fully-informed choice unless she is aware of all her options. Yet, Planned Parenthood admittedly does not ensure that its patients are aware of all their options, but purportedly provides them with information and counseling only about the options in which they express an interest, even though many of its patients may not be aware of the options in which they do not express an interest.

Planned Parenthood admits that once a woman indicated that she may choose to have an abortion, it did not offer or provide any information or counseling on parenthood or adoption. Planned Parenthood cites no evidence that the women in such circumstances affirmatively indicated to it that they did not wish to receive information and counseling about the other options of parenthood and adoption. Absent such evidence, Planned Parenthood failed to satisfy the requirements of the Title X regulations.

Additionally, as discussed above, Planned Parenthood’s automated telephone referral system (“referral line”) and informed consent form violated the eligibility conditions of the Appropriations. Planned Parenthood concedes that neither its automated telephone referral system nor the informed consent form was required by Title X. Planned Parenthood’s Response Br., p. 52 (“Planned Parenthood does not contend that this telephone answering system is required by Title X. . . . Planned Parenthood does not contend that this practice [in distributing informed consent forms to patients] is mandated by Title X.”). Planned Parenthood’s concession destroys its Title X defense.

Not only are Planned Parenthood’s automated telephone referral system and its informed consent not required by Title X, they violate Title X. By offering a quick and direct referral for an abortion, but no options for receiving information, counseling, or referrals for prenatal care or adoption, PPSLR’s automated telephone referral system violates the requirement of § 59.5(a)(5) that every pregnant woman be offered an opportunity to receive information and counseling on all three options so that she can make an “informed choice.” Moreover, by distributing the informed consent form to patients, PPKM went beyond merely providing a patient with the name, address, and/or telephone number of an abortion provider and affirmatively helped its patients to secure abortions services at its affiliated abortion provider (Comprehensive Health) by eliminating the need for the women to make two separate trips to the abortion provider (Comprehensive Health). The Title X regulations have never allowed this. Brief of *Amicus Curiae* Missouri Family Health Council, Inc., p. 16 and Appendix, pp. 42-43

(“Actions prohibited in a Title X project include ... explaining and obtaining signed abortion consent forms from clients interested in abortions.”).

* * *

The Appropriations required Planned Parenthood to comply with their conditions in all instances in order to be eligible to receive state family planning funds. The Appropriations provided that “[n]one of these funds may be paid or granted to an organization or an affiliate of an organization that provides abortion services” and defined “abortion services” as “performing, assisting with, or directly referring for abortions, or encouraging or counseling patients to have abortions.” § 10.705 (1999) (PRLF 41-42; A9-10); § 10.710 (2000) (PRLF 46; A14). Under the Appropriations, “[a]n organization that receives [state family planning] funds may not directly refer patients who seek abortion services to any organization that provides abortion services, including its own independent affiliate” and “may not display or distribute marketing materials about abortion services to patients.” *Id.* The conditions in the Appropriations were absolute and did not permit partial compliance.

Planned Parenthood engaged in at least some abortion referral, marketing, assistance, and counseling activities that the Appropriations prohibited and the federal Title X program did not require. Indeed, Planned Parenthood failed to follow the Title X regulations in at least some instances. This Court, therefore, should reverse the Circuit Court’s finding that Title X mandated Planned Parenthood’s abortion referral, marketing, assistance, and counseling activities and declare that—in addition to being ineligible under the Appropriations for state family planning funds because it shared a similar

name, facilities, expenses, employee wages and salaries, and equipment with its affiliated abortion providers—Planned Parenthood was also ineligible to receive such funds because it impermissibly referred patients directly to abortion providers, distributed marketing materials about abortion services to patients, and assisted and counseled patients to have abortions.

CONCLUSION

For these reasons and the reasons set forth in the State's initial brief, the Court should:

- (1) reverse the Circuit Court's ruling on the Title X issue and enter judgment declaring (a) that the federal Title X program did not mandate Planned Parenthood's abortion referral, marketing, assistance, and counseling activities, and (b) that Planned Parenthood was ineligible under the Appropriations to receive state family planning funds because it directly referred patients to abortion providers, distributed marketing materials about abortion services to patients, and assisted and counseled patients to have abortions;
- (2) affirm all other aspects of the Circuit Court's Judgment; and
- (3) grant all other relief to which the State is entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing brief in paper form and one copy of the foregoing brief on disk have been sent via Federal Express on January 2, 2001 to: Curtis E. Woods, Sonnenschein, Nath & Rosenthal, 4520 Main Street, Suite 1100, Kansas City, MO 64111; Roger K. Evans, Planned Parenthood Federation of America, Inc., 810 Seventh Avenue, New York, NY 10019; Arthur A. Benson II, Jamie Kathryn Lansford, Arthur Benson & Associates, 4006 Central Avenue, Kansas City, MO 64111; and Joel E. Anderson, Assistant Attorney General, 7th Floor, Broadway Building, P.O. Box 899, Jefferson City, MO 65102.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Rules 55.03 and 84.06, is proportionately spaced, using Times New Roman, 13 point type, and contains 3,750 words, excluding the cover, the certificate of service, the certificate of compliance required by Rule 84.06(c), signature block, and appendix.

I also certify that the computer diskettes that I am providing have been scanned for viruses and have been found to be virus-free.