

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION**

**PLANNED PARENTHOOD MINNESOTA,
NORTH DAKOTA, SOUTH DAKOTA, and
SARAH A. TRAXLER, M.D.;**

Plaintiffs,

v.

**KRISTI NOEM, Governor,
JASON R. RAVNSBORG, Attorney General,
KIM MALSAM-RYSDON, Secretary of Health,
Department of Health, and
PHILLIP MEYER, D.O., President, Board of
Medical and Osteopathic Examiners, in their
official capacities,**

Defendants,

**ALPHA CENTER and BLACK HILLS CRISIS
PREGNANCY CENTER, d/b/a Care Net
Pregnancy Resource Center,**

Intervenors.

CASE NO. 4:11-CV-04071-KES

SIXTH AMENDED COMPLAINT

Plaintiffs Planned Parenthood Minnesota, North Dakota, South Dakota (“Planned Parenthood”), and Sarah A. Traxler, M.D., by and through their undersigned counsel, bring this Fifth Amended Complaint against the above-named Defendants, their employees, agents, and successors in office, and in support thereof state the following:

1. This is a constitutional challenge under 42 U.S.C. § 1983 to South Dakota H.B. 1217, 2011 Leg. Reg. Sess. (S.D. 2011) as amended by South Dakota H.B. 1254, 2012 Leg. Reg.

Sess. (S.D. 2012), codified at South Dakota Codified Laws Chapter §§ 34-23A-53 to 62 (2012), by South Dakota H.B. 1237, 2013 Leg. Reg. Sess. (S.D. 2013), codified at South Dakota Codified Laws Chapter 34-23A-56, and by South Dakota S.B. 110, 2018 Leg. Reg. Sess. (S.D. 2018), codified at South Dakota Codified Laws Chapters 34-23A-59 and 74 to 88 (collectively the “Amended Act”). Under the pretext of ensuring “voluntary, uncoerced, and informed” consent to abortion, S.D. Codified Laws § 34-23A-54 the Amended Act seeks to restrict women's access to abortion services in South Dakota by, among other things, (1) imposing one of the longest and most extreme mandatory delays in the country; (2) forcing every woman who seeks an abortion to disclose and discuss her most private personal and medical information with an unlicensed, non-medical organization (statutorily-defined “pregnancy help center,” or “PHC”) that is opposed to her decision, and receive counseling from the PHC; (3) making legislative findings that the disclosures used by Planned Parenthood physicians and other staff to comply with South Dakota’s so-called “informed consent” requirements fail to comply with those requirements; and (4) forcing every woman who seeks an abortion to receive the PHC’s version of these state-mandated disclosures, be counseled by the PHC about them, and have the PHC “ascertain” that she “understands” the disclosure, before she may have an abortion. A copy of South Dakota Codified Laws Chapter §§ 34-23A-53 to 62, and 74 to 88 is attached hereto as **Exhibit A**.

2. If the Amended Act takes effect, it will deny, among other things, Plaintiffs' patients their constitutional right to decide whether to have a child, as well as their patients' and physicians' First Amendment freedoms and their patients' right to informational privacy, as well as their right to receive health-related information from their chosen provider; and will subject Plaintiffs and their physicians to reputational harm, and significant licensing penalties, including revocation of Planned Parenthood’s license to operate a health care facility in Sioux Falls and its physicians’ licenses to practice medicine, as well as criminal and civil penalties. If in effect, the

Amended Act will additionally injure Plaintiffs subjecting them to legislative prejudgment of issues that may subsequently come before a court. To avoid this irreparable harm, Plaintiffs seek declaratory and injunctive relief against the Amended Act.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this action under 28 U.S.C. §§ 1331, 1343, and 1367.

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

5. Venue is appropriate under 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurs in this judicial district.

PARTIES

6. Plaintiff Planned Parenthood Minnesota, North Dakota, South Dakota is a not-for-profit Minnesota corporation registered as a foreign corporation doing business in South Dakota. Planned Parenthood operates a health center in Sioux Falls, South Dakota, which is licensed by the South Dakota Department of Health. The Sioux Falls health center provides a broad range of reproductive health services, including physical exams, pregnancy testing and options education, contraception and contraceptive education, testing for HIV and sexually transmitted infections ("STI") and STI treatment, screening for cervical and breast cancer, and abortion. Planned Parenthood's physicians who perform abortions at the Sioux Falls health center, including Dr. Traxler, are licensed to practice medicine in South Dakota by the South Dakota Board of Medical and Osteopathic Examiners. Plaintiffs sue on their own behalf and on behalf of Planned Parenthood's current and future physicians, employees, staff, servants, officers, and agents who participate in abortions, and on behalf of their current and future

patients seeking abortion services.

7. Plaintiff Sarah A. Traxler, M.D., is a Board Certified obstetrician and gynecologist licensed to practice medicine in Minnesota, North Dakota, South Dakota, Connecticut, Iowa, Maine, Nebraska, and Rhode Island. She is the Medical Director of Planned Parenthood. As part of her responsibilities as Medical Director, Dr. Traxler provides medical services at Planned Parenthood's Sioux Falls health center, including abortion. Dr. Traxler sues on behalf of herself and her current and future patients seeking abortion services.

8. Defendant Kristi Noem is the Governor of the State of South Dakota. She is responsible, under South Dakota law, to "supervise the official conduct of all executive and ministerial officers" and to "see that the laws of the state are faithfully and impartially executed." S.D. Codified Laws § 1-7-1(1) to (2); see also S.D. Const. art. IV, § 3. Defendant Noem is sued in her official capacity as Governor of the State of South Dakota.

9. Defendant Jason R. Ravensborg is the Attorney General of the State of South Dakota. He is the chief law enforcement officer of the State of South Dakota and is charged by law with prosecuting and defending the interests of the State in any court, any cause or matter, civil or criminal, "[w]hen requested by the Governor or either branch of the Legislature, or whenever in his judgment the welfare of the state demands." S.D. Codified Laws § 1-11-1(2). He also exercises supervision over the state's attorneys. *Id.* § 1-11-1(5). Defendant Ravensborg, his employees, agents, and successors in office, are sued in their official capacities.

10. Defendant Kim Malsam-Rysdon is the Secretary of Health for the State of South Dakota. She is the "head of the Department of Health." *Id.* § 1-43-2. Under South Dakota law, the Department of Health is responsible for the licensing of abortion facilities. *Id.* § 34-23A-51. The Department of Health "may suspend or revoke a license issued under SDCL chapter 34-23A"—the chapter of South Dakota law governing the performance of abortions—on account of

the licensee's "[v]iolation of any of the provisions SDCL chapter 34-23A." S.D. Admin. R. 44:67:01:05(1); S.D. Codified Laws § 34-23A-51 (directing the Department of Health to "adopt rules . . . for the . . . suspension . . . and revocation of a license to operate an abortion facility"). Defendant Malsam-Rysdon, her employees, agents, and successors in office, are sued in their official capacities.

11. Defendant Phillip Meyer, D.O., is the President of the South Dakota Board of Medical and Osteopathic Examiners ("Board"), the agency responsible for the licensure of Planned Parenthood's physicians, including Dr. Traxler. Under South Dakota law, the Board may "cancel, revoke, suspend, or limit the license . . . of any physician . . . upon satisfactory proof . . . of . . . unprofessional or dishonorable conduct." S.D. Codified Laws § 36-4-29. The Eighth Circuit has held that violation of an abortion statute could be grounds for action by the Board as conduct "unbecoming a person's license to practice medicine." *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1467 (8th Cir. 1995) (citing S.D. Codified Laws § 36-4-30(22)). Defendant Meyer is sued in his official capacity as President of the Board.

THE AMENDED ACT

12. The Amended Act imposes one of the longest and most extreme mandatory delays in the country and dramatically expands existing (and unprecedented) so-called "informed consent" requirements.

13. Under the Amended Act, no abortion may be "scheduled" until at least "seventy-two hours" after the same physician who is to perform the abortion conducts a "consultation and assessment" in person with the patient (hereinafter "mandatory delay"). S.D. Codified Laws § 34-23A-563. Weekends and holidays are excluded from the 72 hour period. *Id.*

14. In addition, as a condition to having an abortion, every woman must comply with the wholly unprecedented and indefensible requirement of disclosing to and discussing with a

“pregnancy help center” her most private personal and medical information, and receiving “counseling” and certain disclosures from the PHC, as further described below (hereinafter “PHC mandate”). PHCs must, by statutory definition, be opposed to abortion; they are not subject to any regulation or oversight; and the Amended Act places virtually no standards or restrictions on PHCs. Indeed, the Amended Act expressly states “[n]othing in [this Act] may be construed to impose *any liability* upon a pregnancy help center.” *Id.* § 34-23A-59 (emphasis added).

15. The Amended Act codifies fifteen legislative findings, S.D. Codified Laws §§ 34-23A-74 to 88, that purport to find that certain written disclosures given by Plaintiffs in order to comply with South Dakota’s so-called “informed consent” requirements “do[] not comply” with applicable law and thus are “contrary to the interests” of Plaintiffs’ patients,” and are “not in keeping with the spirit and purpose” of the applicable sections of the Code, the Eighth Circuit’s decisions in *Planned Parenthood v. Rounds*, 686 F.3d 889 (8th Cir. 2012) (en banc) and *Planned Parenthood v. Rounds*, 530 F.3d 724 (8th Cir. 2008) (en banc); or the final amended judgments entered by this Court on December 28, 2012 and August 20, 2009. *See, e.g.*, S.D. Codified Laws §§ 34-23A-77 to 78, 80–82, 84–85, 87–88. The Amended Act legislatively determines Planned Parenthood physicians and other staff in South Dakota to be “unreliable providers and counselors,” S.D. Codified Laws § 34-23A-88, whose practices violate South Dakota informed consent law, both attempting impermissibly to override federal court decisions in the *Rounds* litigations and impermissibly prejudging factual and legal questions about Planned Parenthood’s compliance with the law that may in the future come before a court of law.

16. The PHC Mandate also forces every woman, as a condition to having an abortion, to receive the PHC’s version of these state-mandated disclosures. S.D. Codified Laws § 34-23A-59(1)(b), (d), (e). The Amended Act invests the PHC with broad discretion to explain the disclosure “in lay terms” when counseling the woman, S.D. Codified Laws § 34-23A-59(1)(d),

(e), and to “ascertain” that she “understands” its interpretation, S.D. Codified Laws § 34- 23A-59(1)(d), before she may have an abortion.

17. The Amended Act creates a new civil action by the woman or her survivors for damages against Plaintiffs if they fail to comply with any of its requirements, in addition to any damages that the woman or her survivors may be entitled to under any common law or statutory provisions. S.D. Codified Laws § 34-23A-60. The Amended Act creates a presumption that the woman would not have had the abortion if the physician had complied with the Amended Act's requirements. *Id.* § 34-23A-61.

18. A health care facility where abortions are performed in violation of the Amended Act faces licensing penalties, including suspension or revocation of its facility license. S.D. Admin. R. 44:67:01:05(1); S.D. Codified Laws § 34-23A-51.

19. A physician who performs an abortion in violation of the Amended Act faces professional discipline, including license suspension or revocation. S.D. Codified Laws § 36-4-29.

20. Failure to comply with section 34-23A-10.1 is a criminal violation. *Id.* § 34-23A-10.

FACTUAL ALLEGATIONS

A. The Amended Act's Improper Purpose

21. The legislature intended to impose severe restrictions on and drastically limit access to abortion in South Dakota. The Amended Act follows in an unrelenting series of efforts by the legislature to ban abortion and impose the most significant impediments to abortion in the country. The legislative record demonstrates that the Amended Act is specifically aimed at making it harder for women to access abortions in the state and for Planned Parenthood, the only provider in the state, to operate.

22. The Amended Act is not a reasonable measure to inform the woman’s free choice or to protect her health. First, there is no evidence whatsoever that tripling the 24-hour waiting period considered in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and requiring that the *same* physician who is to perform the abortion conduct the “initial consultation” are reasonable measures to ensure that the woman’s decision is informed.

23. Second, the PHC mandate violates the standard of care by forcing every woman to go to a PHC for so-called “counseling” prior to an abortion, without imposing any safeguards or restrictions to ensure that she receives accurate and non-misleading information, and by forcing every woman, as a condition to having an abortion, to receive the PHC’s version of state- mandated disclosures and counseling about the meaning of those disclosures, and requiring the PHC to “ascertain” that she “understands” its interpretation before she may obtain an abortion.

24. The Amended Act is based on stereotypical and paternalistic views of women.

B. Plaintiffs and Abortion Services in South Dakota

25. Planned Parenthood’s Sioux Falls health center is the only generally available abortion provider in the state of South Dakota. Planned Parenthood schedules surgical abortions through 13.6 weeks of pregnancy as measured from the first day of the woman’s last menstrual period (“LMP”). It provides medication abortions through 77 days LMP. For calendar year 2017, there were 492 abortions performed at the Sioux Falls health center. For calendar year 2019, 404 abortions were performed at the Sioux Falls health center.

26. Women travel to the Sioux Falls health center from all over South Dakota as well as several surrounding states in order to obtain an abortion. At the time of Plaintiffs’ initial Complaint, many of Plaintiffs’ patients—close to 30 percent—traveled more than 150 miles each way to get to the Sioux Falls health center. Approximately 15 percent traveled more than 300 miles each way to have an abortion.

27. Many of Plaintiffs' patients are poor. For example, for calendar year 2017 half had incomes that are 100 percent or less than the federal poverty level (“FPL”) and almost 80 percent live at or below 200 percent of the FPL.

28. Many of the women who seek abortions in Sioux Falls are already mothers, including many single mothers. Many have jobs. Some go to school. Plaintiffs' patients include women who are victims of sexual assault and women who are victims of domestic abuse.

29. Many of the women who seek abortions in Sioux Falls are concerned about their confidentiality and are trying to keep their abortions secret from someone in their lives, sometimes because they fear that if those people found out, it would result in harm to the woman.

C. Additional Facts

30. The mandatory delay imposes on Plaintiffs and their patients, as part of the informed consent process, and as a condition to abortion, requirements that are not imposed on physicians or patients in any other medical context.

31. The PHC mandate imposes on Plaintiffs and their patients, as part of the informed consent process, and as a condition to abortion, requirements that are not imposed on physicians or patients in any other medical context.

32. Upon information and belief, many PHCs in South Dakota are religiously affiliated. The Amended Act furthers PHCs' non-secular agendas and entangles the State with religion by inserting such religious entities in the middle of the state-regulated physician-patient relationship.

FIRST CLAIM FOR RELIEF (Amended Act — Right to Liberty and Privacy)

33. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 32.

34. Because the legislature intended to restrict access to abortion and the Amended Act's restrictions are not reasonably related to any legitimate state interest, the Amended Act violates women's right to liberty and privacy guaranteed by the Fourteenth Amendment to the United States Constitution.

**SECOND CLAIM FOR RELIEF
(PHC Mandate — Freedom of Speech)**

35. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 32.

36. By compelling women seeking abortions to discuss their decision to have an abortion and the circumstances surrounding that decision with a PHC, and provide sufficient information for the PHC to ascertain their “understanding” of the PHC’s version of state-mandated disclosures, the PHC mandate violates women's right against compelled speech guaranteed by the First Amendment to the United States Constitution.

**THIRD CLAIM FOR RELIEF
(PHC Mandate — Informational Privacy)**

37. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 32.

38. By requiring women to disclose their identities, pregnancy, and decision to seek an abortion to a PHC, the PHC mandate violates women’s right to informational privacy guaranteed by the Fourteenth Amendment to the United States Constitution.

**FOURTH CLAIM FOR RELIEF
(PHC Mandate — Right to Liberty and Privacy)**

39. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 32.

40. The PHC mandate has the effect of imposing an undue burden on women's right to choose abortion in violation of their right to liberty and privacy guaranteed by the Fourteenth

Amendment to the United States Constitution.

**FIFTH CLAIM FOR RELIEF
(PHC Mandate — Establishment Clause)**

41. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 32.

42. Because the PHC mandate has the effect of advancing religion, and fosters excessive entanglement with religion, it violates the Establishment Clause of the First Amendment to the United States Constitution.

**SIXTH CLAIM FOR RELIEF
(PHC Mandate — Equal Protection)**

43. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 32.

44. By treating informed consent for abortion differently than for any other medical service or procedure, singling out abortion for onerous regulation, and imposing requirements on women based on outdated sex stereotypes, the PHC mandate violates Plaintiffs' and their patients' rights to equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

**SEVENTH CLAIM FOR RELIEF
(PHC Mandate — Freedom of Speech)**

45. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 32.

46. By defining “pregnancy help center” only to include organizations that “routinely consult[] with women for the purpose of helping them keep their relationship with their unborn children,” and do not perform, refer for, or associate with any entity that performs abortion, the PHC mandate discriminates on the basis of viewpoint on abortion in violation of Plaintiffs' right

to freedom of speech guaranteed by the First Amendment to the United States Constitution.

EIGHTH CLAIM FOR RELIEF
(Amended Act — Separation of Powers)

47. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 32.

48. By legislatively determining that the disclosures used by Planned Parenthood physicians and other staff in South Dakota violate South Dakota informed consent requirements, the Amended Act impermissibly attempts to both override federal court decisions in the *Rounds* litigations and prejudge factual and legal questions about Planned Parenthood's compliance with the law that may in the future come before a court of law, in violation of the Separation of Powers Doctrine of the South Dakota State Constitution, Article III, Section 1 and Article V, Section 1.

INJUNCTIVE RELIEF

49. If the Amended Act is allowed to take effect, Plaintiffs and their patients will be subject to irreparable harm for which no adequate remedy at law exists. Enforcement of the Amended Act will cause irreparable harm by, among other violations of their constitutionally-protected rights as outlined in the claims for relief above, depriving Plaintiffs' patients of their constitutional right to decide whether to have a child, as well as their patients' and physicians' First Amendment freedoms and their patients' right to informational privacy, and subjecting Plaintiffs and their physicians to significant licensing penalties, including revocation of Planned Parenthood's license to operate a health care facility in Sioux Falls and its physicians' licenses to practice medicine, as well as criminal and civil penalties.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs ask this Court:

A. To enter a judgment declaring that the challenged sections of the Amended Act

violate the United States Constitution on their face and/or as applied to Plaintiffs and their patients.

B. To issue such interim injunctive relief as may be necessary to maintain the status quo pending award of a final judgment, and a permanent injunction restraining Defendants, their employees, agents, and successors in office from enforcing the challenged sections of the Amended Act on their face and/or as applied to Plaintiffs and their patients.

C. To award Plaintiffs their attorneys' fees and costs pursuant to 42 U.S.C. § 1988.

D. To grant such other and further relief as the Court deems just and proper.

Dated: July 1, 2021

/s/ Stephen D. Bell

Stephen D. Bell (SD Bar #3488)

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*Motion for admission *pro hac vice* granted

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of July 2021, I caused the foregoing to be filed electronically with the Clerk of the Court for the United States District Court for the Southern Division by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Stephen D. Bell
Stephen D. Bell