

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF INDIANA  
FORT WAYNE DIVISION

FORT WAYNE WOMEN’S HEALTH, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 1:10-cv-00192 RLM-RBC
	)	
BOARD OF COMMISSIONERS, ALLEN	)	
COUNTY, INDIANA,	)	
	)	
Defendant.	)	

**Second Amended Complaint for Declaratory and Injunctive Relief**

**Introduction**

1. Effective June 1, 2010, Allen County, Indiana, enacted an ordinance entitled “An Ordinance Concerning Public Safety” that regulated “Itinerate Medical Providers.” Allen County has now amended the ordinance, enacting, “An Ordinance Amending the Patient Safety Ordinance” (“the Amended Ordinance”) that is located in Allen County Code, Title 10, Article 10. (Attached). It was approved on June 25, 2010, and is scheduled to go into effect thirty days after its planned publication. It provides for the Fort Wayne-Allen County Department of Health to regulate the practice of “Itinerant Medical Providers” in Allen County and contains provisions which, among other things: require specific actions regarding patient notice and records, require that providers identify and provide personal information about a “physician designee,” pay a \$250 fee, and authorize review of patient medical records by officials of the defendant. Failure of the provider to comply with the Amended Ordinance may lead to both fines and an injunction action against the provider. The Amended Ordinance exceeds the powers of defendant under Indiana law and is therefore invalid. It is also violates the Indiana and United States Constitutions by subjecting plaintiffs to unreasonable searches and seizures in violation of the

Fourth Amendment to the United States Constitution and Art. 1, § 11 of the Indiana Constitution. Additionally, it violates the right to informational privacy that plaintiffs' patients have in their medical records, protected by the Fourteenth Amendment and the Indiana Constitution, Art. 1 §§ 1, 11, and is irrational in violation of due process. Appropriate declaratory and injunctive relief should therefore issue.

### **Jurisdiction, venue, cause of action**

2. This Court has jurisdiction of this cause pursuant to 28 U.S.C. § 1331.
3. Venue is proper in this district pursuant to 28 U.S.C. § 1391.
4. Declaratory relief is authorized by 28 U.S.C. §§ 2201, 2202 and by Rule 57 of the Federal Rules of Civil Procedure.
5. This action is brought pursuant to 42 U.S.C. § 1983 to redress the deprivation, under color of state law, of rights secured by the Constitution of the United States.
6. This Court has supplemental jurisdiction of the state law claims pursuant to 42 U.S.C. § 1367.

### **Parties**

7. Fort Wayne Women's Health is a health clinic located in Ft. Wayne, Indiana.
8. Dr. Ulrich Klopfer is an Osteopathic Physician licensed by the State of Indiana.
9. The Board of Commissioners, Allen County, Indiana, is the executive authority for Allen County, Indiana, IND. CODE § 36-2-2-2, and is the legal authority over the Fort Wayne-Allen County Department of Health.

### **Factual Allegations**

- 10 The Amended Ordinance was passed on June 25, 2010, by the defendant and is scheduled to become effective thirty days after its formal publication.

11. It applies to Itinerant Medical Providers who are defined as physicians who live outside of Allen County or a contiguous county and who do not have admitting privileges in hospitals in Allen County or contiguous counties. Section 10-10-1.
12. Its requirements are imposed on Itinerant Medical Providers who provide “medical care.” This latter term is defined as “any surgical or other invasive procedures, as defined in Indiana Code 25-22.5-1-1.1.” Section 10-10-1.
13. The Amended Ordinance applies to all Itinerant Medical Providers offering any medical care in Allen County. Section 10-10-2(A).
14. It also applies to “Operators,” defined as “any person who controls, operates, manages, or owns any facility as defined in this chapter.” Section 10-10-1. “Facility” is defined as any location “where Medical Care is provided by an Itinerant Medical Provider.” *Id.*
15. All such persons must provide certain information to the Allen County Department of Health as well as to all Allen County operating hospitals, emergency departments and urgent care providers. Section 10-10-2.
16. Specifically, the Itinerant Medical Provider must provide to his or her patients and the above entities “emergency contact information in order to facilitate sharing of clinical knowledge and arrange disposition in emergency situations. Emergency contact information shall include the Itinerant Medical Provider’s and their Physician Designee’s names, medical license numbers and phone numbers where either may be reached on a twenty four (24) hour a day, seven (7) day a week basis.” Section 10-10-2(A).
17. A “physician designee” is defined by the Amended Ordinance as “a physician who is willing to be designated and who is not an Itinerant Medical Provider.” Section 10-10-1.

18. The Amended Ordinance further provides that the Itinerant Medical Providers must notify each patient “orally and in writing, prior to providing his or her Medical Care, of the Itinerant Medical Provider’s and their Physician Designee’s emergency contact information for use in the event complications arise.” Section 10-10-2(A)(3). The Itinerant Medical Provider must “[k]eep on file as a permanent record a copy of such written notification signed by the Patient to whom it was provided.” *Id.*

19. The Ordinance requires that the Itinerant Medical Provider pay a \$250 filing fee to the Fort Wayne-Allen County Department of Health, although there is no explanation in the Ordinance what this fee is for. Section 10-10-2(A)(1).

20. The operator of the location where the medical care is provided by the Itinerant Medical Provider must display a certificate demonstrating compliance with the Ordinance and provide materials provided or approved by the Department explaining the rights of patients under the Ordinance. Section 10-10-3.

21. The operator is also to develop a written policy in compliance with the Amended Ordinance. Section 10-10-4(A).

22. The Amended Ordinance provides that the Allen County Health Department “shall annually inspect its own records of emergency contact information and the Itinerant Medical Provider’s and Operator’s displayed certification requirements and patients rights notifications. Violations noted by the Department shall be corrected immediately.” Section 10-10-5(A).

23. The Amended Ordinance provides that it is violated if, among other things, the Itinerant Medical Provider fails to notify his or her patients, local operating hospitals, emergency departments, and urgent care providers, of the emergency contact information for both the Itinerant Medical Provider as well as the physician designee. Section 10-10-6(A)(a).

24. The Amended Ordinance states that:

[u]pon a credible complaint by a Patient, local operating hospital, emergency department or urgent care provider (as identified by the Department) or Physician Designee that the Facility providing Medical Care, the Operator or the Itinerant medical Provider is in violation of any provision of this ordinance, the health Officer shall conduct a review of the Department's own records, the Itinerant Medical Provider's written patient notifications of emergency contact information, the Itinerant Medical Provider's and Operator's displayed certification requirements and patients rights notifications, and documentation of emergency contact information . . .

Section 10-10-6(B). The "Health Officer" is the employee of the Allen County Department of Health who is in charge of enforcing the Amended Ordinance. Section 10-10-1.

25. The Amended Ordinance provides that any documents containing patient information that are in the possession of the Health Officer or the Allen County Department of Health, are not to be disclosed to the public "if otherwise prohibited by law." Section 10-10-13(A). However, the Amended Ordinance states that the Allen County Health Department may, in complaint reports to the Indiana State Medical Licensing Board, disclose patient-identifying information such as the patients' names, addresses, birth dates, and social security numbers. *Id.* Moreover, any such documents may be disclosed, however, if patient-identifying information is redacted. *Id.*

26. The Amended Ordinance also notes that information in the custody of the Department concerning the Itinerant medical Provider or his or her Physician Designee "shall not be disclosed to the public as otherwise prohibited by law." Section 10-10-13(B). If disclosure is made to the general public, certain information must be redacted. *Id.* However, emergency contact information for the Itinerant Medical Provider and Physician Designees is to be given to the Allen County operating hospitals, emergency departments and urgent care provider and the Amended Ordinance does not require those entities to keep information confidential. *Id.*

27. Any person violating any provision of the Amended Ordinance is subject to a fine of up to \$1,000 for each violation. Section 10-10-10. Additionally, an injunction may be sought to prevent violations of the Amended Ordinance. *Id.*
28. Any person violating the Ordinance is also liable to the Allen County Health Department for any losses or damages caused the Department, as well as its reasonable attorney's fees and costs. Section 10-10-12.
29. If during the review of records allowed by Section 10-10-6 of the Amended Ordinance violations of the Amended Ordinance are confirmed, the Allen County Health Department's Health Officer will issue a report. Section 10-10-6(C). The Itinerant Medical Provider or the Operator has the right to seek administrative review with an appeal to the Fort Wayne-AlLEN County Board of Health. Sections 10-10-7, 8.
30. Dr. Ulrich Klopfer, D.O., has been granted an unlimited license to practice medicine by the Indiana State Medical Licensing Board (Indiana License No. 02000628).
31. Dr. Klopfer owns and operates Fort Wayne's Women's Health in Ft. Wayne. It was formerly named Fort Wayne Women's Health Organization. When Dr. Klopfer became the sole owner he changed the name to Fort Wayne Women's Health ("the Clinic"). He has informed the Indiana State Department of Health of this change of name.
32. The Clinic is an abortion clinic under Indiana law and is regulated, and licensed by, the Indiana State Department of Health under the corporate name, National Women's Health Organization.
33. Abortion is considered to be one of the safest surgical procedures.
34. Dr. Klopfer has performed abortions at Fort Wayne Women's Health for many years.

35. Dr. Klopfer resides outside of Allen County and its contiguous counties and does not have admitting privileges in any hospital in Allen County or its contiguous counties. He therefore is an Itinerant Medical Provider as defined in the Ordinance.

36. Fort Wayne Women's Health is an abortion clinic, as that term is defined by Indiana Code § 16-18-2-1.5.

37. Dr. Klopfer and Fort Wayne Women's Health are regulated by various requirements imposed by Indiana law which requires, among other things, that the Indiana Department of Health :

adopt rules under IC 4-22-2 to do the following concerning birthing centers and abortion clinics:

(1) Establish minimum license qualifications.

(2) Establish the following requirements:

(A) Sanitation standards.

(B) Staff qualifications.

(C) Necessary emergency equipment.

(D) Procedures to provide emergency care.

(E) Quality assurance standards.

(F) Infection control.

(3) Prescribe the operating policies, supervision, and maintenance of medical records.

(4) Establish procedures for the issuance, renewal, denial, and revocation of licenses under this chapter. The rules adopted under this subsection must address the following:

(A) The form and content of the license.

(B) The collection of an annual license fee.

(5) Prescribe the procedures and standards for inspections.

IND. CODE § 16-21-2-1.

38. Pursuant to this statutory mandate, the Indiana Department of Health has promulgated specific standards regulating abortion clinics at 410 IAC 26-1-1, *et seq.*

39. Among other things, the regulations provide:

- a. that the clinic must have written procedures for emergencies. 410 IAC 26-5-2(a)(2)(A)
- b. that the clinic must have written procedures concerning communicating with physicians concerning patient emergencies. 410 IAC 26-4-1(c)(8)A)
- c. that the clinic must ensure confidentiality of records and they can be released “only to authorized individuals in accordance with federal and state laws.” 410 IAC 26-7-1(b)(7)(A)
- d. what is to be contained in the medial record of someone receiving a surgical abortion. 410 IAC 26-7-2
- e. explicit requirements as to what information is to be given to the patient or the patient’s legal representative concerning follow-up care including clinic emergency phone numbers. 410 IAC 26-10-1(b)(2).
- f. that the clinic must have a written protocol for managing medical emergencies which must “ensure physician coverage and provide for a timely response for emergencies.” 410 IAC 26-12-1.

40. Plaintiffs abide by all requirements imposed by Indiana law and regulations.

41. The Amended Ordinance allows the designee of the defendant to examine “written patient notifications of emergency contact information” which will allow the defendant to identify the names of patients receiving abortion services from plaintiffs.

42. For patients seeking abortion services, confidence that their identity and their private and personal information will remain confidential is crucial to their decision to seek these medical services.



43. The threat that the Health Officer of the Fort Wayne-Allen County Department of Health, or his or her designee, can seek to review information that identifies the persons receiving abortion services is extremely disruptive to the on-going work of plaintiffs in Fort Wayne. It compromises the ability of plaintiffs to maintain the privacy of their patients and therefore compromises the ability of plaintiffs to serve their patients and impinges upon the privacy interests of their patients and harms the many patients who depend on plaintiffs for reproductive health care.

44. Additionally, the Amended Ordinance allows for disclosure of patient's names to unnamed personnel at the Indiana State Medical Licensing Board, further compromising the privacy interests of the patients and further impinging on plaintiffs' regulatory obligation to maintain the confidentiality of medical records.

45. Physicians who perform abortions are often subjected to violence and harassment.

46. Dr. Klopfer has been shot at.

47. Consequently, plaintiff Klopfer does not publicize his address and how he may be contacted. Although the Amended Ordinance provides that his address is not to be publicly disclosed, it also provides that his emergency contact information is to be shared with all Allen County operating hospitals, emergency departments and urgent care providers.

48. Plaintiff Klopfer does not want his private number, which he gives to patients as an emergency contact, to become known. If the number becomes known it can be used to harass and threaten him.

49. Plaintiff Klopfer has been unable to find a physician to serve as his "physician designee" as required by the Ordinance. He believes that physicians are unwilling to serve in this capacity because of the risk that their name and/or contact information will be publicized.

50. Plaintiffs are the only provider of surgical abortions services in Allen County, Indiana, home to Fort Wayne, Indiana's second largest city. At least 30%-40% of the women seeking abortion services from plaintiffs reside outside of Allen County.

51. If plaintiffs are not available to provide abortion services, women who want them will have to travel great distances to obtain them.

52. Prior to the June 1, 2010, scheduled effective date of the original ordinance, Dr. Klopfer attempted to comply with the earlier version of the ordinance by completing an application form and paying the \$250 fee.

53. He objects to having to provide any of the information required by the Ordinance to the Allen County Health Department and the other entities required by the Amended Ordinance. He also objects to complying with the other requirements of the Amended Ordinance. However, he applied for the certificate under the earlier version of the ordinance because, given the terms of the earlier ordinance, he believed that he might not be able to operate if he did not seek the certificate. He wished to continue in operation so he could serve his patients.

54. Because Dr. Klopfer could not obtain a physician designee, he left that portion of the application blank, although he did indicate the telephone number where he can be contacted 24 hours a day, 7 days a week, 365 days a year.

55. Although the \$250 fee was accepted by the Allen County Health Department, Fort Wayne Women's Health was later contacted by the Department and was informed that the application could not be approved because no physician designee was named.

56. Dr. Klopfer subsequently contacted the Allen County Health Department and explained that inasmuch as he had given the Department his phone number where he can be reached at any and all times he did not need a physician designee. He was then awarded a certificate.

57. However, the Amended Ordinance requires a Physician Designee and he does not have one.

58. Dr. Klopfer has not sent the information required by the Amended Ordinance to the Allen County operating hospitals, emergency departments and urgent care providers.

59. At all times defendant has acted under color of state law.

60. The actions of defendant are causing plaintiffs irreparable harm for which there is no adequate remedy at law.

#### Legal claims

61. The Amended Ordinance exceeds defendant's powers under Indiana law, Indiana Code § 36-1-3-8. Specifically, the Ordinance improperly regulates conduct that is regulated by state agencies, without statutory authorization for such regulation by ordinance.

63. The Amended Ordinance authorizes searches and seizures of private information in plaintiffs' office – records containing the names of persons receiving abortion services – without lawful cause in violation of the Fourth Amendment to the United States Constitution and Art. 1, 11 of the Indiana Constitution.

64. The Amended Ordinance allows access to patients' confidential medical records in violation of the right to informational privacy protected by the due process clause of the Fourteenth Amendment to the United States Constitution as well as by Art. 1, §§1, 11 of the Indiana Constitution.

65. As applied to plaintiffs, the Amended Ordinance is irrational in violation of the due process clause of the United States Constitution.

#### **Request for relief**

WHEREFORE, plaintiffs request that this Court:

1. Accept jurisdiction of this case and set it for hearing.
2. Declare that the Amended Ordinance is unlawful and unconstitutional for the reasons noted above.
3. Enter a preliminary injunction, later to be made permanent, enjoining the enforcement of the Amended Ordinance.
4. Award plaintiffs their reasonable costs and attorneys' fees pursuant to 42 U.S.C. § 1988.
5. Award all other proper relief.

Kenneth J. Falk  
Kenneth J. Falk  
No. 6777-49  
ACLU of Indiana  
1031 E. Washington St.  
Indianapolis, IN 46202  
317/635-4059  
fax: 317/635-4105  
kfalk@aclu-in.org

Suzanne Novak  
Suzanne Novak  
*Pro Hac Vice*  
*Member of the New York Bar*  
Senior Staff Attorney  
Center for Reproductive Rights  
120 Wall St.  
New York, NY 10005  
917/637-3600  
fax: 917/637-3666  
snovak@reprorights.org

Attorney for Plaintiffs

### **Certificate of Service**

I hereby certify that on July 26, 2010, a copy of the foregoing was filed electronically with the Clerk of this Court. The parties may access this filing through the Court's system. This filing was served on the following parties by operation of the Court's electronic system:

G. William Fishing  
BEERS MALLERS BACKS & SALIN, LLP  
gwfishing@beersmallers.com

Laura L. Maser  
BEERS MALLERS BACKS & SALIN, LLP  
llmaser@beersmallers.com

Steven H. Aden  
Alliance Defense Fund  
saden@telladf.org

Matthew S. Bowman  
Alliance Defense Fund  
mbowman@telladf.org

*Kenneth J. Falk*  
Kenneth J. Falk  
Attorney at Law