



Written by [Joe Wolverton, II, J.D.](#) on December 22, 2011

## Federal Appeals Court Upholds Injunction Against Nebraska Abortion Law

Last Friday, the Eighth Circuit Court of Appeals upheld an injunction issued by a lower federal court which blocks the enforcement against an abortion statute recently enacted by the state of Nebraska. In July of last year, the U.S. District Court for the District of Nebraska handed down a preliminary injunction against the law known as the Women's Health Protection Act.



Judge Kermit Bye (left) wrote for the panel, holding that:

The record demonstrates the district court considered the proper factors, including the fact the litigation was terminated procedurally, NuLife failed to justify its delay in light of its prior knowledge of the case, and the parties would be prejudiced because final judgment on their settlement had already been entered.

The act ([LB 594](#)) would mandate that doctors in the Cornhusker State evaluate each individual case of a request for an abortion to determine if the choice is voluntary. Further, physicians would be required to inform patients of the various risks and complications which studies published within a one-year period prior to the abortion have shown to be associated with the administration of the procedure.

Lawmakers in Nebraska write in the text of the bill that their passage of LB 594 was "motivated by the legislative intrusion of the United States Supreme Court by virtue of its decision removing the protection afforded the unborn."

Furthermore, the members of the state legislature declare in the bill that they "expressly deplore the destruction of the unborn human lives which has and will occur in Nebraska as a consequence of the United States Supreme Court's decision" in *Roe v. Wade*.

Finally, the introductory material contained in the final version of the bill declares that: "it is in the interest of the people of the State of Nebraska that every precaution be taken to insure the protection of every viable unborn child being aborted, and every precaution be taken to provide life-supportive procedures to insure the unborn."

Accordingly, LB 594 was passed into law, the relevant portions of which read:

No abortion shall be performed except with the voluntary and informed consent of the woman upon whom the abortion is to be performed. Except in the case of an emergency situation, consent



to an abortion is voluntary and informed only if:

The woman is told the following by the physician who is to perform the abortion, by the referring physician, or by a physician assistant or registered nurse licensed under the Uniform Credentialing Act who is an agent of either physician, at least twenty-four hours before the abortion: The particular medical risks associated with the particular abortion procedure to be employed including, when medically accurate, the risks of infection, hemorrhage, perforated uterus, danger to subsequent pregnancies, and infertility; The probable gestational age of the unborn child at the time the abortion is to be performed; The medical risks associated with carrying her child to term; and That she cannot be forced or required by anyone to have an abortion and is free to withhold or withdraw her consent for an abortion.

The person providing the information specified in this subdivision to the person upon whom the abortion is to be performed shall be deemed qualified to so advise and provide such information only if, at a minimum, he or she has had training in each of the following subjects: Sexual and reproductive health; abortion technology; contraceptive technology; short-term counseling skills; community resources and referral; and informed consent. The physician or the physician's agent may provide this information by telephone without conducting a physical examination or tests of the patient, in which case the information required to be supplied may be based on facts supplied by the patient and whatever other relevant information is reasonably available to the physician or the physician's agent; The woman is informed by telephone or in person, by the physician who is to perform the abortion, by the referring physician, or by an agent of either physician, at least twenty-four hours before the abortion....

Governor Dave Heineman signed the bill into law in April, 2010.

Suit was filed forthwith by Planned Parenthood of the Heartland, complaining that the law violated the Constitution and unlawfully infringed upon the already enacted federal abortion law.

Specifically, the plaintiffs claimed that if the law was enforced as scheduled:

Planned Parenthood and its staff will be subject to licensing penalties, including revocation of Planned Parenthood's license to operate a health care facility in Lincoln and its staff's professional licenses, and significant civil penalties, including damages for wrongful death and professional negligence, and its patients will be denied their constitutionally guaranteed right to choose to end a pregnancy.

And:

By requiring the disclosure of untruthful, misleading, not relevant, and/or not reasonable information to patients, the Act violates the right against compelled speech protected by the First Amendment to the United States Constitution and imposes 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.

The district court found in favor of Planned Parenthood and declared that the act was likely to irreparably harm Planned Parenthood and that its consent and disclosure provisions were indeed unlawful violations of the First Amendment rights of medical care providers.

Judge Laurie Smith Camp wrote that she believed the lawsuit would likely succeed on the merits



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because several of the requirements may be impracticable to perform and it would create "substantial, likely insurmountable, obstacles in the path of women seeking abortions in Nebraska."

With regard to the constitutional issue, the court held:

Plaintiffs [Planned Parenthood] have presented substantial evidence that the disclosures mandated by LB 594, if applied literally, will require medical providers to give untruthful, misleading and irrelevant information to patients. Accordingly, the First Amendment rights of medical providers are implicated by the bill's mandates, and the Plaintiffs have demonstrated a likelihood of success of the merits of their First Amendment claim.

After the district court's decision, Nebraskans United for Life (NuLife) filed a motion to reconsider. That motion was denied by the district court and that decision was appealed to the Eighth Circuit.

Subsequently, the judges of the Eighth Circuit Court of Appeals denied the motion to reconsider, holding that, "[t]he record demonstrates the district court considered the proper factors, including the fact the litigation was terminated procedurally, NuLife failed to justify its delay in light of its prior knowledge of the case, and the parties would be prejudiced because final judgment of their settlement had already been entered."

By issuing a ruling that solely addressed the issue of timeliness of the appeal, the Eighth Circuit avoided ruling on the other challenges to the district court's ruling contained in the appellate motion.

A month after the announcement of the district court's issuing of the temporary restraining order and preliminary injunction in the case filed by Planned Parenthood against the state government of Nebraska, the state Attorney General, Jon Bruning, released a statement signaling his intent to abide by the terms of the court's decision. He based this decision on his belief that the law ultimately would be successfully challenged in court.

Neither Planned Parenthood of the Heartland nor NuLife has commented on the decision of the Eighth Circuit Court in the case.



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