UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL ABORTION FEDERATION; MARK I. EVANS, M..D.; CAROLYN WESTHOFF, M.D., M.Sc; CASSING HAMMOND, M.D.; MARC HELLER, M.D.;: TIMOTHY R.B. JOHNSON, M..D.; STEPHEN CHASEN, M.D.; GERSON WEISS, M.D., on behalf of themselves and their patients,

Plaintiffs,

- against -

JOHN ASHCROFT, in his capacity as Attorney General of the United States, along with his officers, agents, servants, employees, and successors in office,

Defendant.

03 Civ. 8695 (RCC)

DEFENDANT'S MEMORANDUM IN RESPONSE TO THE COURT'S NOVEMBER 6, 2003 DIRECTIVE

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GOVERNMENT'S MEMORANDUM IN RESPONSE TO THE COURT'S NOVEMBER 6, 2003 DIRECTIVE

Preliminary Statement

In accord with the Court's November 6, 2003 Memorandum and Order (the "Order") granting plaintiffs' application for an order temporarily restraining the enforcement as to plaintiffs of the Partial Birth Abortion Ban Act of 2003 (the "Act"), defendant, Attorney General John Ashcroft ("the government"), respectfully submits this memorandum to address those issues raised by the Court in paragraph 3 of the Order. As discussed below, given the parties' fundamental disagreement on the issues, this Court should hold an evidentiary hearing to determine whether Congress' findings are reasonable. Morever, in order to expedite the disposition of this action, this Court should consolidate resolution of plaintiffs' application for a preliminary injunction with trial on the merits under Rule 65(a)(2) of the Federal Rules of Civil Procedure and set a hearing date within 120 days in order to permit the parties to take discovery and develop a full record. If this Court is amenable to proceeding in this manner, the government would be willing to accede to an extension of the restraining order against enforcement of the Act for this limited period of time. In addition, because (1) Congress' findings are owed substantial deference, (2) the applicable scope of review of the Act is whether Congress' legislative conclusion is reasonable and supported by substantial evidence, and (3) the parties are likely to offer additional evidence bearing upon the issue of medical necessity, including expert testimony, the government does not believe there is any need for the Court to retain its own medical experts.

Argument

1. THE COURT SHOULD CONSOLIDATE RESOLUTION OF PLAINTIFFS' PRELIMINARY INJUNCTION MOTION WITH TRIAL ON THE MERITS

On November 6th, 2003, this Court enjoined the government from enforcing the Act as against plaintiffs on the ground that they have made an adequate showing of harm, and a likelihood of success on the merits of their claim that the Act is unconstitutional because it does not contain an exception to protect women's health. See Order at 1. The Court's decision on the likelihood of success on the merits rested on a finding that there remains a disagreement in the medical community as to whether the abortion procedures covered by the Act are ever necessary to protect a woman's health. Id.

It is apparent at this initial stage of proceedings that the parties are in fundamental disagreement as to the medical necessity of partial-birth abortion and that this issue is one of medical evidence, not merely of law. See Stenberg v. Carhart, 530 U.S. 914, 937 (2000). The resolution of this question is central to this lawsuit. Thus, consolidated resolution of this matter in a single proceeding will further the interests of judicial efficiency, and will permit the parties to develop an adequate record for this Court's consideration of the important constitutional issue presented by this case.[1]

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[1] This Court's Temporary Restraining Order rested on two statements made by counsel for the government at argument that there is some dispute in the medical community regarding the need for a health exception with respect to partial birth abortion. While the Stenberg court acknowledged such a dispute, *Congress* has found a "moral, medical and ethical consensus" that the procedure "is never medically necessary . . . ." Act, § 2, (1) (emphasis supplied); see also Def. Opp. to TRO at 7. Thus, as government counsel contended at oral argument, "[t]his Court's [role] is to determine whether the legislative conclusion [that the procedure is never medically necessary] was reasonable and supported by substantial evidence. . . ." (Tr. at 67); see also Def's Opp. to TRO at 20 (citing Turner Broadcasting System, Inc. et al. v. Federal Communications Commission, 520 U.S. 180, 211 (1997)).

The relevant judicial inquiry regarding plaintiffs' challenge to the constitutionality of the Act for lack of a health exception is not whether there is a dispute in the medical community about whether a health exception is necessary. Indeed, as the Court's Order implicitly recognized, Stenberg v. Carhart, 530 U.S. 914, 937 (2000), stands for the proposition that a health exception is constitutionally required only "[w]here a significant body of medical opinion believes a procedure may bring with it greater safety for some patients and explains the medical reasons supporting the view." Id. at 2 (emphasis supplied). Here, Congress has found, upon weighing the medical evidence, that no such "significant body of medical opinion" exists. Indeed, Congress explicitly found to the contrary that a "medical . . . consensus exists . . . that [partial-birth abortion] is never medically necessary and should be prohibited." Act § 2, (1) (emphasis supplied); see also Def. Opp. to TRO at 7. In evaluating the evidence before it, Congress rested its conclusion, in part, on the following:

- Partial-birth abortion "remains a disfavored procedure;" Act § 2, (2).
- The "overwhelming evidence" shows that it "is outside the standard of medical care;" Id. at § 2, (5).
- "There is no credible evidence that partial-birth abortions are safe or are safer than other abortion procedures;" Id. at § 2, (14)(B); and
- "No controlled studies of partial-birth abortions have been conducted nor have any comparative studies been conducted to demonstrate its safety and efficacy compared to other abortion methods." Id.

See also Defendant's Br. in Opposition to TRO at 7-9. These Congressional findings are entitled to substantial deference by this Court. See Def. Opp. to TRO at 19-21.

Plaintiffs quite plainly dispute these findings. They have proffered declarations from three "professors of Obstetrics and Gynecology at leading hospitals," coupled with statements

made by the American College of Obstetricians and Gynecologists ("ACOG"), to contradict Congress' conclusion that partial-birth abortion is never necessary. See Plfs. Memo in Support of TRO at 19-20. Plaintiffs acknowledge that deference is due Congress' findings, but urge this Court to look beyond those findings to determine whether the Act is constitutional. Id. at 18 (citations omitted).

Plaintiffs' untested medical evidence is not at all adequate to trump the findings of Congress, however. In evaluating the medical evidence issue, "[t]his Court's [role] is to determine whether the legislative conclusion [that the procedure is never medically necessary] was reasonable and supported by substantial evidence. . . ." (Tr. at 67); see also Def's Opp. to TRO at 20 (citing Turner Broadcasting System, Inc. et al. v. Federal Communications Commission, 520 U.S. 180, 211 (1997) ("Turner II"). As the Supreme Court has counseled, "[t]his obligation to exercise independent judgment when [constitutional] rights are implicated is not a license to re-weigh the evidence de novo, or to replace Congress' factual prediction with our own. Yet the law also "does not foreclose [this Court's] independent judgment of the facts bearing on an issue of constitutional law." Turner Broadcasting System, Inc. et al. v. Federal Communications Commission, 512 U.S. 622, 666 (1994) ("Turner I") (internal quotations and citation omitted). Rather, the role of the Court is "to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." Id. (internal quotation and citation omitted).

The fundamental disagreement between the parties indicates that further factual development will be necessary to resolve this case. Indeed, in Turner I itself, the Supreme Court remanded plaintiffs' action challenging on First Amendment grounds the "must carry" provisions

of the Cable Television Consumer Protection Act of 1992 in order to permit the parties to develop a more thorough factual record where there were unresolved factual questions, significant constitutional issues at play, and conflicting conclusions that the parties contended could be drawn from the legislative record. Id. at 668. The Court also remanded for the further purpose of ensuring that the trial court could "resolve any factual disputes remaining, before the passing upon the constitutional validity of the challenged provisions." Id.

Thus, while the parties agree that the Congressional findings and the conclusions to be drawn from them are at issue, development of a further evidentiary record under Turner I is necessary before the Court can rule upon the constitutional validity of the Act. This is especially so where plaintiffs' declarations and the ACOG statements remain untested. See also Turner II, 520 U.S. at 200-04 (finding that the reasonableness of Congress' conclusion was borne out by the evidence developed at the hearing on remand). The issue of whether "a significant body of medical evidence" requires a health exception is not a mere legal one, but will turn on the Court's evaluation of the evidence, starting with the Congressional findings and further evidence to bridge a genuine dispute of fact as to the reasonable basis of the findings. Accordingly, the Court cannot invalidate the Act without evaluating the findings, and plaintiffs' disagreement with them requires, in this context, the development of further evidence as to the basis of the findings. Under these circumstances, it makes the most sense to develop this record in one consolidated proceeding.

For these reasons, the government respectfully submits that the most efficient manner in which to address these issues would be to consolidate a hearing on plaintiffs' application for a preliminary injunction with trial on the merits, as Fed. R. Civ. P. 65(a)(2) provides. See, e.g.,

Able v. United States, 44 F.3d 128, 132 (2d Cir. 1995) (Rule 65(a)(2) "provides a means of ensuring prompt consideration of the full merits of plaintiffs' claims rather than the 'likelihood' of their success"); Glen-Arden Commodities, Inc. v. Costantino, 493 F.2d 1027, 1030 n.2 (2d Cir. 1974) (Rule 65(a)(2) is "often salutary and time-saving practice"); Packard Instrument Co. v. ANS, Inc., 416 F.2d 943, 945 (2d Cir. 1969) (finding it was in best interest of parties and efficient administration of justice to permit injunction against defendant to stand provided defendant be given an early trial on the merits). If this Court is amenable to proceeding in this manner on an expedited basis, the government would be willing to accede to an extension of the restraining order against enforcement of the Act for a period of 120 days in order to permit the parties to take discovery and develop a full record for a hearing on the merits within that time-frame. Normal pre-trial proceedings would commence, albeit on an expedited basis, and the right of the parties to bring motions based on the discovery record would not be foreclosed.

The government stresses, however, that its agreement to this approach is contingent on the scheduling of a trial within that 120-day time frame, so that temporary injunctive relief is not in place indefinitely. This schedule would permit normal pre-trial proceedings, and it would also establish an expedited schedule for resolution of plaintiffs' claims on the merits.

2. THERE IS NO NEED FOR THE COURT TO RETAIN EXPERTS

As discussed above, Congress' factual findings are entitled to substantial deference by this Court, and the governing standard of review is whether Congress' conclusion that partial-birth abortion is never medically necessary is reasonable and based on substantial evidence in the record. There is already extensive medical evidence in the record that this Court must evaluate. Moreover, the parties' fundamental disagreement on this issue will require the development of

evidence bearing on Congress' conclusion. Given these circumstances, and given the applicable standard of review, the government respectfully submits that there is no need for this Court to retain its own experts.[2]

Conclusion

The Court should schedule an evidentiary hearing and consolidate that hearing with a trial on the merits to be held within 120 days.

Dated: New York, New York
November 10 , 2003

Respectfully submitted,

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[2] Indeed, it is the rare case where a court retains its own experts. See, e.g., Civil Trial Practice Standard 11 (A.B.A. 1998) (Comment) ("appointment of experts by court is rare, among other reasons, because of: (1) cost involved; (2) the difficulty of finding truly neutral experts; (3) the concern that testimony from the court-appointed expert . . . may be perceived as the court taking sides in the controversy; (4) the potential delay involved; and (5) the recurring problem that, by the time the need is known, the appointment may entail significant delay in the proceedings") (reprinted in Imwinkelried & Schlueter, Federal Evidence Tactics (Matthew Bender) (cited in Weinstein's Federal Evidence, § 706.02[1], n.9 (noting that court appointment of experts is a "rarity").