UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI

JACKSON WOMEN'S HEALTH ORGANIZATION, on behalf of itself and its patients, and WILLIE PARKER, M.D., M.P.H., M.Sc., on behalf of himself and his patients, Plaintiffs, v. MARY CURRIER, M.D., M.P.H. in her official capacity as State Health Officer of the Mississippi Department of Health, and ROBERT SHULER SMITH, in his official capacity as District Attorney for Hinds County, Mississippi, Defendants.	)	Case No. 3:12-CV-00436-DPJ-FKB

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

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Plaintiffs respectfully seek emergency injunctive relief that will preserve the *status quo*—namely, their ability to continue providing safe abortion care to women in Mississippi. To the best of Plaintiffs' knowledge, Plaintiff Jackson Women's Health Organization ("the Clinic") is the sole abortion provider in the State. Without relief from the Court, abortion will be effectively banned in Mississippi on July 1, 2012.

This litigation is a constitutional challenge to new, medically-unjustified, requirements in Mississippi House Bill 1390 ("HB 1390" or "the Act"), the State's latest attempt to make Mississippi "abortion-free." On June 25, 2012, the Mississippi Department of Health ("the Department") informed the Clinic that, contrary to the Department's past practices and past assurances, it had decided to enforce those new requirements when the law goes into effect on Sunday, July 1. Further, the Department notified the Clinic that it would not issue it a renewal license until the Department received proof of compliance with the Act. Despite the Clinic's diligent efforts to comply with the new requirement that all physicians associated with it have privileges at a local hospital, Plaintiffs are virtually certain that the hospitals will not have completed their review of the Clinic's physician applications by Sunday, July 1 and that, accordingly, compliance with the Act by that date will be impossible.

There is no legitimate justification for immediate implementation of the Act, and certainly not for the Department's refusal to issue a renewal license until receipt of proof of compliance with the new requirements. Indeed, on May 29, 2012, the Department advised the Clinic that it would be following its normal rulemaking process, which would have delayed enforcement until approximately mid-August 2012, and assured the Clinic that a renewal license could be issued based on the Department's last inspection of the Clinic.

Although there is no justification for the Department's reversal, there is an explanation. In the days and weeks leading up to the decision on June 22, 2012, elected officials subjected the Department to intense pressure, including an open letter dated June 20, 2012 from the new law's sponsor demanding that the Department enforce the new requirements immediately. But elected officials' hostility to abortion providers and patients is not a constitutionally permissible basis for state action and, indeed, will cause serious and irreparable harm to the constitutional rights and health of women seeking abortion care in Mississippi.

Without immediate relief from this Court, Plaintiffs will be forced to stop providing abortion care to women in a few short days. Because of the extremely short timeframe until enforcement, Plaintiffs respectfully request that the Court issue a temporary restraining order immediately, to preserve the *status quo* for the approximately twenty-five to thirty women who are expected to seek abortion care at the Clinic next week, and who will experience harms to their health and violations of their constitutional rights without such relief, until such time as the Court may decide to hold a hearing and/or hear argument and/or issue a ruling on Plaintiffs' motion for preliminary injunction.

I. Facts

A. Plaintiffs and Their Patients

The Clinic has been providing safe, high-quality abortion care and other reproductive health care services to women in Mississippi for almost twenty years. For almost ten years, the Clinic has been the only option for women seeking abortion care in Mississippi. Ex. A ("Brewer-Anderson Decl.") ¶ 3. The Clinic provides abortion services to women who are up to sixteen weeks of pregnancy, as calculated from the first day of a woman's last menstrual period ("lmp"). *Id.* The Clinic has been continuously licensed by the Mississippi Department of Health

since Mississippi law first required health care facilities that provide abortions to obtain licenses. *Id.* ¶ 5. The Clinic provides The Department regularly inspects the Clinic to assess compliance with all applicable laws; during the most recent inspections on April 12, 2012 and June 18, 2012, the Department found the Clinic to be in in full compliance. *Id.*

Currently, two board-certified obstetrician/gynecologists ("ob/gyn") provide the majority of the abortions that women seek at the Clinic: Plaintiff Willie Parker, M.D., MPH, M.Sc.; and John Doe, M.D.[1] Dr. Parker and Dr. Doe are not residents of Mississippi, and travel to the state periodically to provide care to women at the Clinic. Another out-of-state physician has, in the past, traveled to the Clinic when one of the Clinic's regular physicians is unexpectedly unable to make the trip, in order to ensure that women who seek abortion care at the Clinic are able to receive it at their scheduled appointments. A fourth physician has provided extremely limited abortion care at the Clinic; he lives in Mississippi and maintains a busy ob/gyn practice, and has admitting privileges at a local hospital. Brewer-Anderson Decl. ¶ 11.

Legal abortion care is one of the safest medical procedures in the United States. Ex. B ("Parker Decl.") ¶ 12. The risk of a woman experiencing a complication after an abortion is extremely low; less than one percent of the women who obtain abortions experience a serious complication. *Id.* ¶ 14. In the vast majority of cases, the types of complications that may occur following an abortion can be safely handled in an outpatient office setting. *Id.* ¶ 15. Overall, the risk of a woman experiencing a post-abortion complication that requires hospitalization is 0.3 percent; for women obtaining abortions before 16 weeks of pregnancy, that risk is even lower. *Id.* ¶ 14. Dr. Parker's complication rate is even lower than the national average. *Id.* ¶ 16.

[1] Plaintiffs are using a pseudonym to refer to the other physician out of concern for his safety and privacy.

The Clinic gives each of its patients the phone number for the Clinic and for the after-hours nurses, so that they have someone to call at any time if they have questions or experience any complications. Brewer-Anderson Decl. ¶ 6. The Clinic's safety record has been impeccable. *Id.* ¶ 7. Since the current owner took over in 2010, the Clinic has had no major incidents, nor has a single patient required admittance to the emergency room after receiving an abortion procedure at the Clinic. *Id.* ¶ 7. Thus, while the Clinic has a written transfer agreement with a local hospital in compliance with Miss. Admin. Code 15-16-1:44.12, and one of its physicians has admitting privileges at a local hospital in compliance with Miss. Admin. Code 15-16-1:42.9.7, it has never been necessary to use those arrangements. Brewer-Anderson ¶ 7.

Women travel from all over the State of Mississippi, and sometimes from other states, to obtain care at the Clinic. Brewer-Anderson Decl. ¶ 4, 8. In general, women seek abortions for a variety of medical, family, economic, and personal reasons; most are mothers who decide they cannot parent another child at the time. Parker Decl. ¶ 11. Some women seek abortions because they face serious health issues that make it dangerous to carry a pregnancy term. *Id.* Some are young women who do not feel ready to carry a pregnancy to term. *Id.* Others are coping with abusive relationships, or are pregnant as a result of rape, sexual assault, or incest. *Id.* And some have received a diagnosis of fetal anomaly. *Id.* In 2012, to date, the Clinic has provided abortions to approximately 1,100 women. Brewer-Anderson Decl. ¶ 4.

Because of current Mississippi law, women must make two trips to the Clinic, at least twenty-four hours apart; the first visit to receive state-mandated counseling, and the second to obtain their abortions. Brewer-Anderson Decl. ¶ 8. Many of the Clinic's patients are unable to stay the night near the Clinic, and so cannot obtain an abortion the day after counseling, especially if they need to request additional time off from work or make child care arrangements.

Id. Accordingly, most women come back to the Clinic to obtain their abortions at least a week after their initial counseling appointment. *Id.* Based on past experience, the Clinic expects at least twenty-five to thirty of those women would return during the week after July 1, 2012 to obtain their abortions. *Id.* ¶ 9.

B. Enactment of H.B. 1390

On April 5, 2012, the Mississippi Legislature sent H.B. 1390 to Governor Phil Bryant for his signature. In response, Lieutenant Governor Tate Reeves issued a public statement declaring that the Act "should effectively close the only abortion clinic in Mississippi." Joe Sutton and Tom Watkins, *Mississippi Legislature Tightens Restrictions on Abortion Providers*, CNN Politics (Apr. 4 2012). As of this filing, Lieutenant Governor Reeves's website still states, "The Legislature took steps to end abortion in Mississippi by requiring doctors performing abortions to have admitting privileges at a local hospital. This measure not only protects the health of the mother but should close the only abortion clinic in Mississippi." Lt. Governor Tate Reeves Website, ltgovreeves.ms.gov/Pages/About.aspx (last visited June 27, 2012). For his part, Governor Bryant vowed to sign the bill, saying "I will continue to work to make Mississippi abortion-free." James Eng, *Mississippi On Way to Becoming 'Abortion-Free' State?,* msnbc.com. (Apr. 5, 2012, 3:26 PM), usnews.msnbc.msn.com/_news/2012/04/05/11039503-mississippi-on-way-to-becoming-abortion-free-state. Governor Bryant signed H.B. 1390 into law on April 16, 2012.

The Act amends the definition of "abortion facility" in Mississippi's statutory licensure scheme for ambulatory surgical facilities in two ways that are at issue in this litigation.[2] One of the amendments would require that all physicians "associated with the abortion facility must be

board certified or eligible in obstetrics and gynecology." H.B. 1390 § 1, *to be codified at* Miss. Code Ann. § 41-75-1(f). The second amendment is the subject of the instant motion; it requires that all physicians "associated with the abortion facility must have admitting privileges at a local hospital and staff privileges to replace local hospital on-staff physicians" ("the Admitting Privileges Requirement"). *Id.*

C. Plaintiffs' Attempts to Comply With H.B. 1390

Knowing that the process of applying for privileges can be lengthy and unpredictable, Dr. Doe began the process of trying to obtain privileges in April 2012. Brewer-Anderson Decl. ¶ 13. After consulting with others about his most likely avenue for successfully obtaining privileges, Dr. Doe contacted Central Mississippi Medical Center ("CMMC") to get the process started. *Id.* ¶ 14. He received the application from CMMC on April 24, 2012. *Id.* The Clinic's Director, Ms. Shannon Brewer-Anderson, took over the process at that point, so that Dr. Doe—then the sole physician providing abortion care on a regular basis at the Clinic—could focus on proving care to the Clinic's patients. *Id.* ¶ 15. As soon as Dr. Parker joined the Clinic's medical staff on June 18, 2012, the Clinic began to seek privileges for him as well. *Id.*

The process quickly proved so burdensome that the Clinic was required to call on outside assistance, and hired the Clinic's former Director, Ms. Betty Thompson, to assist in the project of seeking privileges from the remaining eleven hospitals in the area. *Id.* ¶ 16. Ms. Thompson determined that five of the hospitals in the area would not be potential sources of privileges: four of the hospitals provide limited services, and the fifth hospital is a Catholic hospital that requires potential applicants for privileges to sign the Catholic Ethical and Religious Directives, which explicitly prohibit abortion and discourage association with abortion providers, as a

[2] Abortion facilities, such as the Clinic, that provide abortion care to women who are past the end of their first trimester are required to comply with the standards for ambulatory surgical facilities in addition to the statutes and

condition of receiving an application. Ex. C ("Thompson Decl.") ¶¶ 8-16. By the end of the first week in May, Ms. Thompson had attempted to contact the appropriate staff member at each of the remaining six hospitals, in some cases making multiple attempts simply to get someone on the phone. *Id.* ¶ 17-29. For example, after speaking with and leaving messages for multiple people at University Medical Center, Ms. Thompson was advised that she could not obtain an appointment to discuss receiving an application for privileges until May 31, 2012. Thompson Decl. ¶ 23. Pursuant to the instructions she was given during the May 31 call, Ms. Thompson ensured that Dr. Doe sent a letter to UMC requesting an application immediately thereafter. *Id.* ¶ 25. Despite the efforts that she and Dr. Doe have made to obtain an application, they have not received one from UMC to date. *Id.*

With the exception of UMC and Madison County Medical Center, which did not send its application to Ms. Thompson until quite recently, Dr. Doe has sent an application or pre-application to each of the possible hospitals. Thompson Decl. ¶ 10. Ms. Thompson and Ms. Brewer-Anderson have made several attempts to follow up on the submissions, explaining the urgency of the situation, but no hospital has granted privileges to Dr. Doe as of this filing. Brewer-Anderson ¶ 20-21; Thompson ¶ 8, 30. For example, Ms. Brewer-Anderson personally delivered CMMC's application for privileges on May 30, 2012, in an effort to ensure that the hospital board would consider it at its June 19, 2012 meeting. Brewer-Anderson Decl. ¶ 18. After submitting the application, Ms. Brewer-Anderson made several attempts to contact CMMC staff to ensure that it was complete. *Id.* ¶ 20. On June 19, 2012, CMMC staff advised her that, despite having had the application in its possession for three weeks, hospital staff had not completed the tasks required for submission of the application to the board for consideration and

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regulations applicable to abortion facilities. *See* Miss. Code Ann. § 41-75-1; Miss. Admin. Code 15-16-1:44.2.

that the application was not considered at the June 19 meeting. *Id.* As of this filing, no hospital has granted privileges to Dr. Doe or to Dr. Parker. *Id.*

D. Contact With the Department of Health

While the lengthy and laborious process of applying for privileges was underway, on May 15, 2012, the Clinic's owner wrote to the Department to request a "grace period" before enforcement of the Admitting Privileges Requirement so that the Clinic could complete the process of applying for privileges. Brewer-Anderson Decl. (Letter from Derzis to Miss. Dep't of Health dated May 15, 2012). The Department responded by letter dated May 29, 2012, refusing to grant a grace period but indicating that it would be following its normal rulemaking procedures to implement the new law. *Id.* (Letter from Miss. Dep't of Health to Derzis dated May 29, 2012).

On Friday, June 22, 2012, however, the Clinic became aware of an open letter sent by HB 1390's sponsor to the Department of Health. The letter, dated June 20, 2012, demanded that the Department implement the Act immediately upon its effective date: July 1, 2012. *Id.* ¶ 26. Ms. Brewer-Anderson promptly contacted the Department, seeking assurances that they would follow their normal rulemaking process, as the Department had previously stated. *Id.* Department staff advised her that, instead, the Department would begin enforcing the law immediately upon its July 1 effective date. *Id.* ¶ 27.

On June 25, 2012, the Clinic received a letter from the Department stating that, in order to "remain licensed and operate an abortion facility in the State of Mississippi" the Clinic was required to produce written proof of compliance with the Act "on or before July 1, 2012." *Id.* (Letter from Miss. Dep't of Health to Derzis dated June 25, 2012).

E. Impact of Immediate Enforcement

As a general matter, the Admitting Privileges Requirement will not benefit the Clinic's patients—or public health, generally—because it is cumulative, at best, of the Clinic's arrangements with a local hospital and with the local physician who has admitting privileges nearby. *See* Parker Decl. ¶ 19. Moreover, it is not consistent with the way an emergency patient transfer would occur: in the extremely unlikely event that a patient at the Clinic experienced a serious complication requiring hospitalization, an ambulance would be called to transport the patient. *Id.* ¶ 20. Whether or not a physician has privileges at a hospital, the customary practice is for a facility that accepts a patient in emergency situations to remain in contact with the physician who made the decision to transfer the patient. *Id.* ¶ 19.

The Department's decision to immediately enforce the Admitting Privileges Requirement and to refuse to issue a renewal license to the Clinic without proof of compliance with the Act will force the Clinic to close, for no legitimate purpose. As of the date of this filing, it appears virtually certain that neither Dr. Parker nor Dr. Doe will have privileges at a local hospital and, further, that the Clinic will not receive the renewal license it applied for in May 2012. Thus, because of the risk of criminal liability as well as the risk to the Clinic's license, Plaintiffs cannot provide abortion care to women after July 1, 2012. This will have serious consequences for the twenty-five to thirty women expected to seek abortion care at the Clinic next week. Unless this Court acts quickly to preserve the *status quo*, those patients will not be able to obtain their abortions during the week of July 1, 2012, and they will have nowhere else in Mississippi to turn.

II. Argument

Temporary and preliminary injunctive relief is proper when Plaintiffs establish (1) a substantial likelihood of success on the merits; (2) substantial threat of irreparable injury to them;

(3) the injury to them outweighs any harm the injunction might cause Defendants; and (4) granting the injunction will not disserve the public interest. *See, e.g.*, *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011). Each factor weighs heavily in Plaintiffs' favor here, as discussed below.

A. Plaintiffs Have Shown A Substantial Likelihood of Success on the Merits.

1. Immediate Enforcement Of The Admitting Privileges Requirement Will Effectively and Unconstitutionally Ban Abortion In Mississippi.

Plaintiffs have established a substantial likelihood of success on the merits of their claim that, absent emergency relief, Defendants will violate the constitutionally-protected privacy and liberty interests of Mississippi women by imposing a *de facto* ban on pre-viability abortion as of July 1, 2012. The complete unavailability of abortion will endanger the health of Mississippi women by delaying or preventing them from being able to access safe and needed medical care. Thus, the Department's decision to immediately enforce the Act and its refusal to renew the Clinic's license without written proof of compliance with the Act has the effect of placing a substantial obstacle – in fact, an insurmountable one – in the path of women seeking pre-viability abortions in Mississippi.

It is axiomatic that a State may not ban pre-viability abortion. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992) (holding that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."); *see id.* at 878 (a restriction on abortion is an unconstitutional undue burden if "its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."). Here, the Department's actions will shut down the only remaining abortion clinic in Mississippi, even though the Department found that the Clinic was in compliance with all of the State's licensure requirements at its last two inspections of the Clinic, and even though the

Department indicated it would issue the Clinic's renewal license. Brewer-Anderson Decl., Ex. B (Letter dated May 29, 2012 from Dep't of Health to Diane Derzis). Despite the Clinic's best efforts, it has not been able to obtain admitting privileges at a local hospital for all physicians associated with it and does not reasonably expect to have such privileges in place by the Act's July 1, 2012 effective date or even by the end of July. Without such privileges or relief from the Court, Plaintiffs will need to cease operations to avoid licensure and criminal penalties. Thus, there will be a complete ban on abortion in Mississippi.

Under the *Casey* standard, 505 U.S. at 877, Plaintiffs are likely to succeed on the merits of their claim that the Department's implementation of the Act has unduly burdened their patients' right to choose an abortion by eliminating abortion services in Mississippi. Numerous courts have found an undue burden when faced with similar facts. Federal courts around the country have held that laws that ban all, or nearly all, abortions prior to viability are unconstitutional. *See Okpalobi v. Foster*, 190 F.3d 337, 357 (5th Cir. 1999) ("A measure that has the effect of forcing all or a substantial portion of a state's abortion providers to stop offering such procedures creates a substantial obstacle to a woman's right to have a pre-viability abortion, thus constituting an undue burden under *Casey*."), *rev'd on other grounds*, 244 F.3d 405 (5th Cir. 2001); *Jane L. v. Bangerter*, 102 F.3d 1112, 1117-18 (10th Cir. 1996) (striking near ban on abortions after twenty weeks gestation, regardless of viability, as undue burden); *Women's Med. Prof'l. Corp. v. Voinovich*, 130 F.3d 187, 201 (6th Cir. 1997) ("An abortion regulation that inhibits the vast majority of second trimester abortions would clearly have the effect of placing a substantial obstacle in the path of a woman seeking a pre-viability abortion."); *Planned Parenthood, Sioux Falls Clinic v. Miller,* 63 F.3d 1452, 1465 (8th Cir. 1995) (holding that abortion restriction constituted an unconstitutional "substantial obstacle to a woman's right to

have a pre-viability abortion" because measure would unconstitutionally chill physicians' willingness to provide abortions), *cert. denied sub nom. Janklow v. Planned Parenthood, Sioux Falls Clinic,* 517 U.S. 1174 (1996).

Further, it is clear that the Constitution prohibits states from imposing *de facto* bans on abortion, just as it prohibits states from imposing *de jure* bans. Courts have held that states cannot impose a *de facto* ban by, for example, permitting abortion care only in compliance with requirements that the State then makes impossible to satisfy. *See, e.g.*, *Zbaraz v. Hartigan*, 763 F.2d 1532, 1541 (7th Cir. 1985), *aff'd mem. by an equally divided court*, 484 U.S. 171 (1987) (enjoining new law requiring parental consent for minors' abortions where no rules had been promulgated to implement statutorily required judicial bypass procedure); *see also Michigan Injured Workers v. Blanchard*, 647 F. Supp. 571 (S.D. Mich. 1986) (enjoining new worker's compensation scheme because, in part, the state had not hired any magistrates to hear the claims).

The State of Mississippi has repeatedly employed a *de facto* ban strategy in its attempt to make abortion entirely unavailable in the state, in all circumstances; the Act is simply the latest such effort. Less than ten years ago, this Court issued injunctive relief against the State's attempt to ban second-trimester abortions by making it impossible to obtain a license to provide them. *Jackson Women's Health Org. v. Amy*, 330 F. Supp.2d 820 (S.D. Miss. 2004). In that case, the plaintiffs challenged a 2004 law that permitted second-trimester abortions to be performed only in facilities licensed as ambulatory surgical facilities. *See id.* at 821. The Department then refused to allow the Clinic to apply for licensure as an ambulatory surgical facility, regardless of whether the Clinic met the applicable standards for such licensure, on the argument that the Clinic was required to obtain a Certificate of Need in order to file such an

application even though, as a "single-specialty" facility, a Certificate of Need was not available by law. *See id.* at 824-25. Thus, while the new law did not, on its face, ban second-trimester abortions, the State's application of the new law effectively did.

This Court rejected the State's attempt to justify its 2004 effective ban by claiming it was motivated by a concern for women's health, explaining:

> it would hardly be reasonable to conclude that the State's effective decision to ban early second-trimester abortions by this plaintiff, without reference to whether it meets the relevant health and safety criteria, does anything to further the State's professed desire to protect the health and safety of women who choose abortion.

Id. at 825. Accordingly, the Court issued injunctive relief. *Id.* at 827.

Similarly, in 1996, this Court enjoined the State's attempt to allow abortion providers to obtain licenses to operate only if they satisfied certain requirements, some of which were impossible to meet, when the State could not show that the requirements were necessary to any legitimate purpose. *Pro-Choice Mississippi v. Thompson*, CV No. 3:96CV596BN, Tr. of Hr'g and Bench Op. at 18 ln.14-19 (Sept. 28, 1996) (attached to Plaintiffs' Motion as Exhibit D). Of particular relevance here, the Court specifically rejected a requirement that abortion providers obtain a written transfer agreement from a nearby hospital. *Id.* Taking "judicial notice of the fact that there is wide-spread public opposition and protest to abortions in this state," the Court recognized that "local pressure can and will be brought upon hospitals to deny these written transfer agreements to abortion providers." *Id.* Because this would effectively give hospitals "third-party vetoes over whether the abortion providers can obtain a license," the Court issued an injunction to prevent that requirement from effectively banning abortion care in the state. *Id.*

Here, too, injunctive relief is proper and should issue to prevent the State's enforcement of the Admitting Privileges Requirement from operating as an unconstitutional *de facto* ban on abortion care in Mississippi. Just as, in 2004, the State imposed a seemingly-neutral requirement

for provision of abortion care, but then made it impossible in practice to comply, the Department's eleventh-hour decision to enforce the Admitting Privileges Requirement and require proof of compliance as a condition of licensure renewal, without even giving Plaintiffs a reasonable opportunity to seek privileges makes compliance impossible in practice. Further, just as, in 1996, the State made abortion providers' licenses subject to veto by decision makers at local hospitals, the Department's actions here put Plaintiffs' ability to operate at the mercy of these same third parties who will be subject to the same political pressure recognized by the Court in 1996 to exercise veto power over the provision of abortion services in the State.

Indeed, Plaintiffs cannot even influence the hospitals' timeframe for making a decision on Plaintiffs' applications for privileges. Although some hospitals refused to estimate the length of their process for considering applications for privileges, others estimated that the process would take approximately three months. One hospital had indicated that, at a meeting on June 19, 2012, it would be considering the application for privileges submitted by the Clinic in April – but when a Clinic staff member contacted that hospital to ask about the outcome of its meeting, she learned that the hospital had decided not to consider the application after all.

There is no legitimate purpose for the Department's actions. Plaintiffs have been providing safe abortion care for years, and their current backup arrangements are more than adequate to ensure patient health in the extraordinarily unlikely event of a need to hospitalize a patient. The Department undoubtedly recognized the lack of urgency for implementing the Admitting Privileges Requirement when it indicated, in the May 29, 2012 letter, that it intended to follow its normal rulemaking process, which would have given Plaintiffs another six weeks to attempt to comply. It was only after blatantly anti-abortion political pressure was brought to bear on the Department, most notably through the open letter sent by the sponsor of the Admitting

Privileges Requirement to demand its immediate enforcement, that the Department reversed course and decided to require immediate compliance. The bare goal of banning abortion is not a legitimate state interest and cannot justify the Department's actions.

Accordingly, because immediate enforcement of the Admitting Privileges Requirement will effectively ban abortion in Mississippi, Plaintiffs are likely to succeed on the merits of their claim that the Department's actions impose a substantial obstacle in the path of women seeking pre-viability abortions in Mississippi and thereby violate the rights of Plaintiffs' patients under the Due Process Clause of the Fourteenth Amendment.

2. The Purpose of the Admitting Privileges Requirement is To Prevent Women From Obtaining Pre-Viability Abortions.

Plaintiffs are also likely to succeed on the merits of their claim that the Admitting Privileges Requirement is unconstitutional because the proponents of this requirement have been clear that its purpose is to end abortion in Mississippi.

When a statute's purpose is to place a substantial obstacle in the path of a woman seeking a pre-viability abortion, the statute "is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it." *Casey*, 505 U.S. at 877. Although a legislature's articulation of the purpose of a statute is typically afforded significant deference, a court must not accept a proffered purpose if it is a mere "sham." *Okpalobi*, 190 F.3d at 354 (quoting *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987)); *accord Hope Med. Grp. for Women v. LeBlanc*, 2012 WL 701174, at *2-3 (holding that a statute creating unlimited civil liability for any abortion was motivated by improper purpose because it made it impossible for any physician to provide abortions); *cf. Jane L. v. Bangerter*, 102 F.3d 1112, 1116-17 (10th Cir. 1996), *cert. denied sub nom. Leavitt v. Jane L.*, 520 U.S. 1274 (1997); *Planned Parenthood of the Heartland v. Heineman*, 724 F. Supp. 2d 1025, 1043-46 (D.

Neb. 2010) (holding that a statute creating nearly insurmountable informed consent requirements was motivated by an unconstitutional purpose). In conducting an improper purpose inquiry, a court should examine the social and historical context of the legislation, other legislation concerning the same subject matter, the language of the challenged statute, and its legislative history.[3] *Okpalobi*, 190 F.3d at 354-55 (collecting cases); *Hope Med. Grp. for Women v. LeBlanc*, 2012 WL 701174, at *2-3 (adopting *Okpalobi* analysis and holding).

First, the social and historical context of the Act, and specifically the Admitting Privileges Requirement, makes it abundantly clear that the new law is intended to make abortion inaccessible in Mississippi. Countless statements by elected officials about the Act make that plain. *See e.g. supra* Section I(B) (examples of such statements). One legislator's discussion of the Admitting Privileges Requirement in a speech to a local political party was particularly vivid:

> We have literally stopped abortion in the state of Mississippi. [APPLAUSE.] Three blocks from the Capitol sits the only abortion clinic in the state of Mississippi. A bill was drafted. It said, if you would perform an abortion in the state of Mississippi, you must be a certified OB/GYN and you must have admitting privileges to a hospital. *Anybody here in the medical field knows how hard it is to get admitting privileges to a hospital*…. [he went on to provide specific information about the physicians who provide abortions at the Clinic.] It's going to be challenged, of course, in the Supreme Court and all - but literally, we stopped abortion in the state of Mississippi, legally, without having to – Roe vs. Wade. So we've done that. I was proud of it. The governor signed it into law. And of course, there you have the other side. They're like, "Well, the poor pitiful women that can't afford to go out of state are just going to start doing them at home with a coat hanger. That's what we've learned over and over and over. But hey, you have to have moral values. You have to start somewhere, and that's what we've decided to do. This became law and the governor signed it, and I think for one time, we were first in the nation in the state of Mississippi."

See Alcorn County G.O.P., Rep. Bubba Carpenter: We Have Literally Stopped Abortion in the State of Mississippi, YouTube, http://www.youtube.com/watch?v=N3LOm2iXa4U&no

[3] Unfortunately, reports of floor debate and other customary components of legislative history appear to be unavailable; Mississippi does not collect or publish such information. State of Mississippi Judiciary State Library Frequently Asked Questions, courts.ms.gov/faq/library_faqs.pdf (last visited June 27, 2012).

redirect=1 (last visited June 26, 2012). Anti-abortion state officials have made repeated and consistent efforts to restrict abortion care in Mississippi to the maximum extent possible. As discussed above, Mississippi's previous efforts included its attempt to effectively ban second-trimester abortion in 2004, and its 1996 attempt to give hospitals "third party vetoes over whether the abortion providers can obtain a license," *Pro-Choice Mississippi v. Thompson*, No. 3:96-cv-596BN (S.D. Miss. 1996) (Bench Opinion). Mississippi has also enacted numerous laws restricting access to abortion care that remain in force. *See* Miss. Code Ann. §§ 41-41-45 (criminal ban on abortion, enacted in 2007 with an effective date ten days after the Mississippi Attorney General determines *Roe v. Wade* is overruled); 41-41-53 (requiring two parents to consent to a minor's abortion, with some exceptions); 41-41-73 (criminal ban on a method of abortion); 41-41-91 (prohibition on use of public funds "in any way for, to assist in, or to provide facilities for abortion" with limited exceptions); 41-75-1 *et seq.* (requiring licensure by the Department in order to operate an abortion facility, directing rulemaking, and establishing extensive standards); 41-79-5(3) (prohibiting school nurses from providing students with any counseling or referral services concerning abortions); 41-41-99 (prohibiting inclusion of abortion coverage in health insurance plans); 93-21-309 (prohibiting certain funds from being used to provide any counseling or other services associated with abortion); 97-3-3 (criminal ban on performance of abortion by anyone other than a physician); 97-3-37 (defining "human being" to include "an unborn child at every stage of gestation from conception until live birth" for certain crimes). All of these laws are in force, as are the comprehensive regulations implementing certain of the laws.

Currently, and consistently since it opened, the Clinic has been a target for ongoing harassment and violence; some of the activity reached such a fever pitch that the United States

Department of Justice repeatedly prosecuted the offender. *See, e.g.*, *United States v. McMillan*, 53 F. Supp. 2d 895 (S.D. Miss. 1999) (prosecution of anti-abortion extremist who shouted "Where is the pipe-bomber when you need him?" every time he saw the Clinic's physician); *see also* Mot. for Order to Show Cause Why Deft. Should Not Be Held in Civil Contempt, *United States v. McMillan*, No. 2:95-cv-633 HTW JCS (S.D. Miss. 2008) (prosecution of same anti-abortion extremist for ongoing threats and violence). In addition to this criminal activity, protestors are at the Clinic daily to harass and threaten the physicians, staff and patients. *Id.* Brewer-Anderson Decl. ¶ 10.

The third *Okpalobi* factor, likewise, reflects the improper purpose at work. At best, the Admitting Privileges Requirement is cumulative of the existing regulation that requires a Level I abortion facility—such as the Clinic—to have on its medical staff a physician with admitting privileges at a local hospital. Miss. Admin. Code 15-16-1:42.g. This regulation specifically differentiates between ambulatory surgical facilities, whose physicians must all have admitting privileges, and abortion facilities, which are required only to have one physician with such privileges. Such differentiation reflects the Department's recognition that a requirement for *all* physicians at an abortion facility is simply not necessary because of the extraordinarily safe nature of abortion care. In other words, until Friday, June 22, 2012, the Department did not believe that admitting privileges were necessary to provide safe care at a licensed abortion facility, such as the Clinic.

Finally, an improper purpose need not be the *only* reason a law was passed or a regulation was enacted in order to make it unconstitutional – merely the "predominant" one. *Miller v. Johnson*, 515 U.S. 900, 916 (1995). The sponsor of the Act has stated publicly that the Admitting Privileges Requirement is motivated, variously, by a belief "that the physician [who

provides a woman's abortion] ought to be able to follow that patient to a hospital if something goes wrong,"[4] and by a desire "to cause fewer abortions."[5] But the language of the new law makes plain that only the latter of these is the actual purpose at work here. For example, the Admitting Privileges Requirement is an obligation imposed on physicians to obtain privileges – it is not a requirement that hospitals allow physicians who provide abortions to follow their patients in the event of a serious complication.

Taken together, all of these factors demonstrate that the Admitting Privileges Requirement has nothing to do with patient safety or any other legitimate state interest. Rather, it is the latest in a long series of attempts by the Mississippi Legislature to make it impossible for women to obtain abortion care. *Cf. Hope Med. Grp. for Women*, 2012 WL 701174, at *3-4 (granting permanent injunctive relief on a purpose claim where the challenged act's "structure and language put the lie to the State's insistence that the legislation is designed merely to enhance the information furnished to women seeking abortions"). Accordingly, Plaintiffs have demonstrated a substantial likelihood of success on this claim.

3. Immediate Enforcement Of The Admitting Privileges Requirement Will Violate Plaintiffs' Procedural Due Process Rights.

Plaintiffs have established a substantial likelihood of success on the merits of their claim that the Department's eleventh-hour decision to immediately enforce the Admitting Privileges Requirement will violate Plaintiffs' procedural due process rights.

Plaintiffs have protected property and liberty interests in continuing their provision of safe abortion and other reproductive health care services to women in Mississippi. *See United*

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[4] Vershal Hogan, *Bill Could End Miss. Abortions,* NatchezDemocrat.com (Apr. 7, 2012, 12:10 AM), http://www.natchezdemocrat.com/2012/04/07/bill-could-end-miss-abortions/

[5] MJ Lee, *Bill Dooms Only Miss. Abortion Clinic,* Politico (Apr. 6, 2012, 6:38 AM), http://www.politico.com/news/stories/0412/74871.html

States v. Tropiano, 418 F.2d 1069, 1076 (2d Cir. 1969) ("The right to pursue a lawful business . . . has long been recognized as a property right within the protection of the Fifth and Fourteenth Amendments of the Constitution."); *see also Women's Health Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 612 (6th Cir. 2006) ("[T]he Constitution protects a person's choice of careers and occupations."). The Clinic has been in continuous operation for seventeen years and serves thousands of women who seek care every year. Dr. Parker decided to provide abortions to women at the Clinic at the end of last year, and for that exclusive purpose applied for and received a Mississippi medical license in May. The Constitution forbids the State to interfere with these protected interests without first providing constitutionally adequate procedures. *See Bell v. Burson*, 402 U.S. 535, 542-43 (1971).

Earlier this year, the Fifth Circuit held that the procedural due process rights of a business owner were violated when the zoning board that had granted her permits to operate in July 2009 revoked them, without notice, in mid-September, 2009. *Bowlby v. City of Aberdeen*, 681 F. 3d 215 (5th Cir. 2012). The business owner was not invited to the zoning board's discussion of her permits in mid-September, and she was given no opportunity to be heard prior to its decision. *Id.* Rather, the day after the zoning board met and decided to revoke her permits, she was presented with a list of putative reasons for the board's decision and instructed to immediately cease operation. *Id.* Affirming the lower court's holding, the Fifth Circuit held that in such circumstances, "due process demands more than no hearing at all." *Id.* at *4 (applying the *Mathews* factors).

Similarly, just last year, a federal district court in Kansas issued preliminary injunctive relief against enforcement of incredibly onerous regulations of abortion facilities that made compliance practically impossible. Transcript of Temporary Restraining Order Hearing at 40,

45-46, *Hodes & Nauser, MD's, PA v. Moser,* 2011 WL 4553061 (D. Kansas July 1, 2011) (No. 11-2365) (transcript attached as Exhibit E). The regulations required extensive renovations and, potentially, new construction; nevertheless, the Department decided to give abortion facilities only nine days to comply. *Id.* Recognizing that the Department's decision effectively forced the affected facilities to close, at great harm to their patients, without giving the facilities any opportunity to be heard, the district court temporarily enjoined enforcement. *Id.*

Here, too, Plaintiffs will be forced to stop operating without having had any meaningful opportunity to be heard, in violation of their procedural due process rights. Under these circumstances, as in *Bowlby* and *Hodes & Nauser*, injunctive relief is proper. *Cf. Baird*, 438 F.3d at 611-13 (holding that state health department denied physician's right to due process by denying the physician's request for a waiver from a regulatory requirement without granting the physician a pre-deprivation opportunity to be heard).[6] Therefore, Plaintiffs have demonstrated a substantial likelihood of success on the merits of this claim.

B. Plaintiffs And Their Patients Will Experience Irreparable Injury Absent Preliminary Injunctive Relief.[7]

Enforcement of the Admitting Privileges Requirement before Plaintiffs even know whether they can comply with it will cause irreparable harms to Plaintiffs, their patients, and public health. It will shut down Plaintiffs' provision of abortion care, exposing Plaintiffs' patients to unnecessary delays in obtaining their abortions and leaving women with nowhere to

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[6] While "summary administrative action may be justified in emergency situations," *Hodel v. Va. Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264, 300 (1981), no evidence of any such emergency exists here, given the Department's initial decision to follow its normal rulemaking process before enforcing the Admitting Privileges Requirement.

[7] While it is plain that Plaintiffs and their patients will suffer irreparable injury if the Department's decision is allowed to stand, no showing of injury is necessary to prevail on Plaintiffs' procedural due process claim: "the right to procedural due process is 'absolute' in the sense that it does not depend on the merits of a claimant's substantive assertions and because of the importance to organized society that procedural due process be observed." *Bowlby*, at *5 (quoting and citing *Carey,* 435 U.S. at 266).

turn for an abortion in the State of Mississippi. These harms constitute irreparable injury. *See, e.g.*, *Chalk v. Court*, 840 F.2d 701, 709-10 (9th Cir. 1988) (emotional and psychological injury constitutes irreparable harm); *Amer. Med. Ass'n v. Weinberger*, 522 F.2d 921, 925-26 (7th Cir. 1975) (irreparable harm exists where regulations undermine patient confidence in physicians and prevent physicians from treating patients effectively). Moreover, where, as here, there is a threatened violation of constitutional rights, that threat alone constitutes irreparable injury. *See, e.g.*, *Elrod v. Burns*, 427 U.S. 346 (1976); *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981) (alleged violation of women's right to privacy); *Adams v. Baker*, 919 F. Supp. 1496, 1505 (D. Kan. 1996) (alleged violation of Fourteenth Amendment rights).

C. The Injury To Plaintiffs And Their Patients Far Outweighs Any Harm To Defendants.

Plaintiffs and their patients will suffer serious injury absent injunctive relief that will allow continued provision of safe abortion care after July 1, 2012. Defendants, on the other hand, will suffer no injury whatsoever, because such relief will simply preserve the *status quo*. The State has no interest in violating the federal Constitution and therefore cannot be harmed by being prevented from doing so. *See Deerfield Med. Ctr.*, 661 F.2d at 338-39. Moreover, Mississippi law expressly provides for abortion facilities and ambulatory surgical facilities to be granted a "grace period"—which the Department inexplicably refused to apply here—for coming into compliance with new licensure regulations. *See* Miss. Code Ann. § 41-75-16. The importance of such a "grace period" is particularly obvious where, as here, Plaintiffs cannot control hospitals' process and timeline for making decisions concerning privileges applications. Thus, the balance of hardships tips decidedly in favor of granting the immediate injunctive relief Plaintiffs seek.

D. Granting Injunctive Relief Will Serve the Public Interest.

An injunction against immediate enforcement of the Admitting Privileges Requirement would plainly serve the public interest. Indeed, "[t]he public interest … requires obedience to the Constitution …." *Carey v. Klutznick*, 637 F.2d 558, 568 (2d Cir. 1980); *see Reinert v. Haas*, 585 F. Supp. 477, 481 (S.D. Iowa 1984) (holding that the public interest "is always well served by protecting the constitutional rights of all its members."). It is a well-established principle that the "public interest [is] not disserved by an injunction preventing [the] implementation" of a law that violates constitutional rights. *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996). Further, the public interest is well-served by preserving the *status quo* "until the merits of a serious controversy can be fully considered by a trial court." *Blackwelder Furniture Co. v. Selig Mfg. Co.*, 550 F.2d 189, 197 (4th Cir. 1977). Here, immediate injunctive relief would protect women's ability to access abortion care in a timely way. Between twenty-five and thirty women are expected to obtain their procedures next week alone. Brewer-Anderson Decl. ¶ 9. Without injunctive relief, those women will have nowhere else to turn. Even if some women are able to travel out of state to obtain an abortion, the resulting delay is detrimental to patient health and therefore not in the public interest. Thus, restraining Defendants from enforcing the Admitting Privileges Requirement will serve the public interest.

III. Conclusion

For all of these reasons, Plaintiffs respectfully request that the Court grant their motion for temporary restraining order and preliminary injunction.

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**Pro Hac Vice* Admission To Be Filed

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been served by delivery to the following counsel through the Court's ECF system, or by email or hand delivery:

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This the 27th day of June, 2012.

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