IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

WEST ALABAMA WOMEN'S CENTER and WILLIAM J. PARKER, M.D., on behalf of themselves and their patients, Plaintiffs, v. DONALD E. WILLIAMSON, M.D., in his official capacity as State Health Officer, Defendant.	CIVIL ACTION Case No. 2:15-CV-497-MHT

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO LIFT STAY AND TO FILE A SUPPLEMENTAL COMPLAINT

Prior to the entry of this Court's August 4, 2015 temporary restraining order ("TRO"), enforcement of the regulation challenged in this case had forced Plaintiff West Alabama Women's Center ("WAWC") to cease providing abortion services, which inflicted irreparable harm on Alabama women. The challenged regulation, Ala. Admin. Code r. 420-5-1-.03(6)(b) (the "Regulation"), required that abortion providers have staff privileges at a local hospital, or that the abortion clinic have a written agreement with a physician who holds such privileges to serve as the clinic's covering physician ("covering physician requirement"). Shortly after the entry of the TRO, the parties stipulated to a stay of this litigation to afford the Alabama Department of Public Health ("ADPH") the opportunity to amend the Regulation through the Department's formal rulemaking process. After an initial failed attempt at rulemaking, ADPH approved an Amended Regulation, which became effective June 2, 2016.

The Amended Regulation replaces one constitutional defect with another by imposing a medically unnecessary requirement that every woman who obtains an abortion at WAWC

receive a copy of her medical records prior to leaving the facility (the "medical records requirement")—a requirement that jeopardizes the privacy and safety of WAWC's patients.[1] *See* Ala. Admin. Code r. 420-5-1-.03(6)(c)(4). Meanwhile, less than two weeks after ADPH adopted the Amended Regulation, but before it took effect, the Alabama Legislature redoubled its efforts to restrict abortion access by enacting two new laws that target and restrict access to abortion: one that prohibits licensed abortion clinics from operating within 2,000 feet of K-8 public schools, Alabama Senate Bill 205, Reg. Sess. 2016 ("SB 205" or the "clinic closure law"), and one that bans the safest and most common method of second-trimester abortions, dilation and evacuation ("D&E"), Alabama Senate Bill 363, Reg. Sess. 2016 ("SB 363" or the "D&E ban").

Together, the Amended Regulation and the two new statutes will effectively nullify the relief this Court granted in its TRO, which was necessary to prevent "profound" harm to women. *W. Ala. Women's Ctr. v. Williamson*, 120 F. Supp. 3d 1296, 1312 (M.D. Ala. 2015). In fact, as set forth in greater detail in the proposed Supplemental Complaint, these new restrictions will together inflict even *greater* harm on women, and impose an undue burden, in three ways: (1) the medical records requirement will jeopardize the privacy and safety of women seeking abortions without advancing the state's interest in woman's health, *see* Suppl. Compl. ¶¶ 67-90, 128-29; (2) the clinic closure law will permanently close WAWC, as well as the only abortion clinic in Huntsville (the Alabama Women's Center, or "AWC"), which together provide well over half of the abortions in the state, *see id.* at ¶¶ 49, 91-98; and (3) the D&E ban will severely restrict abortion access for women needing second-trimester abortions, *see id.* at ¶¶ 111-26, 133, "an especially vulnerable group," *W. Ala. Women's Ctr.*, 120 F. Supp. 3d at 1317.

[1] As explained more fully below and in the Supplemental Complaint, the medical records requirement affects patients only at WAWC, which has a waiver from the requirement through August 24, 2016.

In order to promote the interests of judicial economy and to obtain complete relief for Plaintiffs and their patients without piecemeal litigation, Plaintiffs move to supplement their complaint to challenge all three restrictions on behalf of themselves and two additional proposed plaintiffs against Defendant and additional proposed defendants.[2] Plaintiffs' motion falls well within the liberal policy favoring motions to supplement and should be granted. In addition, because the challenged statutes' effective date is August 1, 2016, in order to prevent irreparable harm from befalling Plaintiffs and their patients, Plaintiffs must seek injunctive relief before that date, and so Plaintiffs respectfully request that the Court consider the instant motion on an expedited basis.

BACKGROUND

On July 1, 2015, Plaintiffs filed this challenge to the enforcement of the covering physician requirement. For reasons unrelated to the quality of care provided by Plaintiffs, they had been unable to comply with the requirement and had been forced to cease providing abortions starting December 31, 2014. *W. Ala. Women's Ctr.*, 120 F. Supp. 3d at 1309.

On August 4, 2015, this Court temporarily enjoined enforcement of the covering physician requirement as to Plaintiffs. TRO Order, Aug. 4, 2015 (doc. no. 20); Order Extending TRO, Aug. 17, 2015 (doc. no. 26). In its opinion, the Court observed that the closure of WAWC—the highest volume abortion provider in the state—had already had "profound" effects on women seeking abortions at that clinic. *W. Ala. Women's Ctr.*, 120 F. Supp. 3d at 1312. Specifically, based on the record before it, the Court found that first, women who currently live

[2] The additional proposed plaintiffs are Alabama Women's Center ("AWC") in Huntsville and Dr. Yashica Robinson White (collectively, "Proposed Plaintiffs"). The additional proposed defendants are Luther Strange, Attorney General of Alabama; Lyn Head, District Attorney for Tuscaloosa County; Robert L. Broussard, District Attorney for Madison County; H. Joseph Falgout, Chairman of the Alabama Board of Medical Examiners; and James E. West, Chairman of the Medical Licensure Commission of Alabama (collectively, "Proposed Defendants").

in Tuscaloosa (where WAWC is located) had no option but to travel outside the city to obtain an abortion, causing them to delay their procedures and suffer financial and psychological hardship, and some had been prevented from obtaining abortions at all. *Id.* at 1309-10. Second, because of the large proportion of abortions provided by WAWC (more than 40% of the abortions in the state), its closure had strained the capacity at the state's remaining clinics, threatening longer wait times at those clinics. *Id.* at 1310-11. And finally, this reduced access to safe abortion at licensed clinics had increased the risk that women would resort to unsafe methods of abortion. *Id.* at 1311-12.

Following the TRO, the parties stipulated to a stay of the litigation to permit ADPH to initiate the rulemaking process to amend the covering physician requirement in a manner that would satisfy ADPH's goal of ensuring the health and safety of patients without creating an undue burden, as explained in this Court's August 13, 2015 TRO opinion. Stay Order ¶ 3 (doc. no. 31). Pursuant to the Court's stipulated order, within "30 days from the effective date of the final rule," Plaintiffs could move to "lift the stay, amend the complaint, or seek other appropriate relief." *Id.* ¶ 5.

On April 14, 2016, ADPH adopted the Amended Regulation, which provided clinics that are unable to satisfy the covering physician requirement with an alternative means of complying with the regulations. The Amended Regulation was filed with the Legislative Reference Service on April 18, 2016, and under Alabama law, it became effective 45 days after that filing date, on June 2, 2016. *See* Ala. Code § 41-22-6(c). Pursuant to the Amended Regulation, a clinic that is unable to satisfy the staff privileges and/or covering physician requirement must comply with a series of detailed requirements concerning, *inter alia*, staff training, complication management, medical provider availability, and follow-up care—requirements to which Plaintiffs do not

object. In addition, however, the Amended Regulation requires clinics to give copies of medical records to all patients, even if the patient does not want the records and even if forcing the records upon the patient would compromise her ability to maintain her confidentiality and her safety. This medically unnecessary requirement runs contrary to how medicine is practiced today and how medical records with highly sensitive information are handled. As set forth in the proposed Supplemental Complaint, the amended regulation will jeopardize the privacy and safety of women who have had abortions at WAWC.

On May 4, 2016, in the evening of the very last day of the legislative session, the Alabama Legislature also passed two more abortion restrictions that will severely curtail access to abortion in the state. The D&E ban would criminalize the safest and most common second-trimester abortion procedure, severely restricting access to second-trimester abortion in Alabama. *See* Suppl. Compl. ¶¶ 111-26, 133. As if that were not devastating enough, the clinic closure law would force WAWC and AWC—the abortion providers that provide well over half the abortion services in the state and the only two clinics that provide abortion throughout the second trimester—to permanently close. *See id.* at ¶¶ 49, 91-98. These two laws go into effect on August 1, 2016, and will only compound and exacerbate the harms the Court identified in its August 13, 2015 TRO opinion.

To promote judicial efficiency and more completely resolve the dispute between the parties, Plaintiffs seek leave to supplement their complaint to challenge all three restrictions in this action.

ARGUMENT

Federal Rule of Civil Procedure 15(d) provides that a court "may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that

happened after the date of the pleading to be supplemented." The Eleventh Circuit, like its sister circuits, has a "liberal" policy concerning supplemental pleadings. *United States v. One Piece of Real Property at 5800 SW 74th Ave.*, 182 F. App'x 921, 924-25 (11th Cir. 2006) (citing *Harris v. Garner*, 216 F.3d 970, 984 (11th Cir. 2000)); *see also United States ex rel. Gadbois v. PharMerica Corp.*, 809 F.3d 1, 7 (1st Cir. 2015) ("courts customarily have treated requests to supplement under Rule 15(d) liberally"); *Predator Int'l, Inc. v. Gamo Outdoor USA, Inc.*, 793 F.3d 1177, 1186 (10th Cir. 2015) (same); *Hall v. C.I.A.*, 437 F.3d 94, 101 (D.C. Cir. 2006) ("motions for supplemental pleadings . . . are to be freely granted"); *Quaratino v. Tiffany & Co.*, 71 F.3d 58, 66 (2d Cir. 1995) (same); *Keith v. Volpe*, 858 F.2d 467, 473 (9th Cir. 1988) (supplemental pleadings are "favored"); *Ramsey v. Georgia-Pacific Corp.*, 597 F.2d 890, 892 (5th Cir. 1979) (noting "liberal application of Rule 15. . . which freely permits supplemental amended pleadings"); *New Amsterdam Cas. Co. v. Waller*, 323 F.2d 20, 28-29 (3d Cir. 1963) (supplemental pleadings "ought to be allowed as of course").

It is well established that a supplemental complaint can include new claims based on new events and transactions. *See Gadbois*, 809 F.3d at 4 ("[T]he Rule helps courts and litigants to avoid pointless formality: although causes of action accruing after the institution of a lawsuit usually can be filed as separate actions, supplementation under Rule 15(d) is often a more efficient mechanism for litigating such claims." (citing *Predator Int'l*, 793 F.3d at 1186–87)); *William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co.*, 668 F.2d 1014, 1057 (9th Cir. 1981) ("The purpose of Rule 15(d) is to promote as complete an adjudication of the dispute between the parties as possible by allowing the addition of claims which arise after the initial pleadings are filed." (internal citation omitted)); *Keith*, 858 F.2d at 474 (noting the "absence of a transactional test" under Rule 15(d)); 6A Charles A. Wright et al., Federal Practice and

Procedure § 1506 (3d. ed.) ("[A] party should be given every opportunity to join in one lawsuit all grievances against another party regardless of when they arose."). It is equally well established that a supplemental complaint can include new parties. *See Griffin v. Cty. Sch. Bd.*, 377 U.S. 218, 227 (1964) ("Rule 15(d) of the Federal Rules of Civil Procedure plainly permits supplemental amendments to cover events happening after suit, and it follows, of course, that persons participating in these new events may be added if necessary. Such amendments are well within the basic aim of the rules to make pleadings a means to achieve an orderly and fair administration of justice."); *Keith*, 858 F.2d at 476 ("[T]here is ample authority for adding new defendants in a supplemental complaint."); *Lofton v. Tillman*, No. CV-05-721, 2006 WL 2052522, at *2 (S.D. Ala. July 21, 2006) (granting plaintiff leave to amend her complaint to add twenty-three defendants); 6A Charles A. Wright et al., Federal Practice & Procedure § 1507 (3d ed.) ("a supplemental pleading may seek to bring in additional parties").

This preference for supplementation ensures that the court can grant "more nearly complete relief, in one action, and to avoid the cost, delay and waste of separate actions which must be separately tried and prosecuted." *New Amsterdam Cas. Co.*, 323 F.2d at 28; *see also Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 598 (5th Cir. 1981) ("it is appropriate for the court to consider judicial economy and the most expeditious way to dispose of the merits of the litigation"); *Gadbois*, 809 F.3d at 4 (Rule 15(d) "shares the core objective of the Civil Rules: 'to make pleadings a means to achieve an orderly and fair administration of justice.' . . . [and] facilitates this objective by 'promoting as complete an adjudication of the dispute between the parties as is possible.'" (first quoting *Griffin*, 377 U.S. at 227; then quoting 6A Charles A. Wright et al., Federal Practice and Procedure § 1504 (3d ed.))); *Dillard v. Crenshaw Cty.*, 640 F. Supp. 1347, 1368 (M.D. Ala. 1986) (Thompson, J.) ("Under the Federal Rules of Civil

Procedure, 'joinder of claims, parties and remedies is strongly encouraged.'" (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 724 (1966)).

Indeed, supplemental pleadings are so favored that the Eleventh Circuit has said that "leave shall be granted unless there is a substantial reason to deny it." *Halliburton & Assocs., Inc. v. Henderson, Few & Co.*, 774 F.2d 441, 443 (11th Cir. 1985) (citing *Epsey v. Wainwright*, 734 F.2d 748 (11th Cir. 1984)).[3] Such reasons may include "undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, and futility of amendment." *Perez v. Wells Fargo N.A.*, 774 F.3d 1329, 1340 (11th Cir. 2014) (quotation marks and modifications omitted) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)); *see also Halliburton*, 774 F.2d at 443.

As argued below, Plaintiffs' proposed Supplemental Complaint will promote judicial efficiency and there are no substantial reasons that justify denial of the motion. Plaintiffs' motion should therefore be granted.

I. Supplementation Will Promote Judicial Efficiency and Completely Resolve the Parties' Dispute.

Granting the instant motion will further the interests underlying Rule 15(d) in multiple respects. First, there is substantial legal and factual overlap between the claims in the original Complaint and the additional claims in the proposed Supplemental Complaint, and as a result of earlier proceedings in this case, the Court is familiar with the pertinent subject matter. In

[3] Although *Halliburton* concerned leave to amend pleadings under Rule 15(a), courts apply the same standard to amended pleadings as they do to supplemental pleadings under Rule 15(d). *See, e.g., Alabama v. U.S. Army Corps of Eng'rs*, 382 F. Supp. 2d 1301, 1309 (N.D. Ala. 2005) (citing cases and authorities) ("Regardless of whether the motions are to amend or supplement, the standard of review is the same . . ."); *Davis v. Day & Zimmermann NPS, Inc.*, No. CV-11-S-3738, 2012 WL 1885165, at *2 (N.D. Ala. May 17, 2012) (discussing standard for "amended and supplemental pleadings" under Rule 15); 6A Charles A. Wright et al., Federal Practice and Procedure § 1504 (3d ed.) ("the distinction between amended and supplemental pleadings is sometimes ignored completely" and both are addressed to the court's discretion).

particular, both pleadings focus on claims arising under the undue burden standard. And, as a result of the earlier proceedings in this case, the Court has significant familiarity with many of the facts relevant to the application of that standard to the claims in Plaintiffs' Supplemental Complaint. These include facts about the availability of abortion services in Alabama; the effects of diminished access to abortion in Alabama (including, in particular, the impact of the closure of WAWC); the harms caused by delaying or preventing women's access to abortion (including the increased risk of self-induced abortion); the safety of abortion; and the prevalence of anti-abortion stigma in the state. The Complaint and the proposed Supplemental Complaint thus share the same "focal point"—restricted access to abortion in Alabama and the effect of that restriction on women. *Keith*, 858 F.3d at 474 (allowing plaintiffs to supplement their complaint 13 years after the initial complaint because the original complaint and supplemental complaint shared the same "concern . . . the availability of replacement housing for persons displaced by the Century Freeway"); *see also Griffin*, 377 U.S. at 226. As a result of the Court's "familiarity with the subject matter," supplementation would "serv[e] the efficient administration of justice." *Ohio Valley Env't Coal. v. U.S. Army Corps of Eng'rs*, 243 F.R.D. 253, 257 (S.D. W. Va. 2007).

Second, it is not only the case that the Court is familiar with the overlapping subject matter, but the recent enactments challenged in the proposed Supplemental Complaint would, if enforced, nullify outright the relief the Court granted at the outset of this case by forcing WAWC to close and decimating access to abortion services—including second-trimester abortion services—in Alabama. Supplementation is therefore appropriate to "prevent [an] end-run by the State," *United States v. Ohio*, No. 2:08-CV-00475, 2014 WL 1308718, at *4 (S.D. Ohio Mar. 28, 2014), which would "circumvent" the relief ordered by the Court earlier in this litigation, *Griffin*, 377 U.S. at 226.

Third, supplementation will prevent unnecessary duplication of efforts, and conserve judicial resources, by consolidating many of the same plaintiffs and defendants addressing many of the same facts, issues, and claims in a single lawsuit. *See, e.g.*, *Ohio*, 2014 WL 1308718, at *7 (granting motion to file supplemental complaint to avoid "piecemeal litigation and needless waste of judicial resources"). As alleged in the proposed Supplemental Complaint, WAWC and its patients will be harmed by all three restrictions at issue here, *see* Suppl. Compl. ¶¶ 11, 67, 111-29, and AWC and its patients will be harmed by the clinic closure law and the D&E ban, *see id.* at ¶¶ 13, 111-29. Similarly, there is overlap in Defendant's and the Proposed Defendants' authority to enforce the challenged laws. *See id.* at ¶¶ 16-21. For example, Defendant Miller, as State Health Officer, has enforcement authority for all three requirements. *See id.* at ¶ 16. It will "promote the economic and speedy disposition of the entire controversy between the parties" for the three measures to be litigated in one action. *Katzman v. Sessions*, 156 F.R.D. 35, 39 (E.D.N.Y. 1994).

Accordingly, under the Eleventh Circuit's liberal standard for allowing supplementation, Plaintiffs' motion should be granted.

II. There Are No Substantial Reasons to Deny Supplementation.

Because Plaintiffs are filing this motion on the earliest possible date, and the parties have not undertaken any discovery in this case, no substantial reasons such as "undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies . . . undue prejudice . . . [or] futility" counsel against granting Plaintiffs' motion. *Perez*, 774 F.3d at 1340. Plaintiffs' motion is timely and filed in good faith. The medical records requirement went into effect on June 2, 2016, (although WAWC has a waiver from its requirements until August 24, 2016). Before June 2, the rule had not gone into effect and was subject to possible disapproval or amendment by the Joint

Committee on Administrative Regulation Review, *see* Ala. Code § 41-22-6(c)(4), meaning that Plaintiffs' challenge may not have been ripe prior to June 2. In addition, Plaintiffs filed this motion within the 30 days of the medical records requirement's effective date, in accordance with the stay order. Stay Order ¶ 5 (doc. no. 31). *See Canal Indem. Co. v. Regency Club Condo. Owners Ass'n, Inc.*, No. 3:11-cv-400, 2011 WL 5557379, at *2 (M.D. Ala. Nov. 15, 2011) (finding no bad faith or dilatory motive when Plaintiff filed its motion to amend "within the deadline set by this Court for such amendments"); *Diaz-Gomez v. Capitol Farmer's Market, Inc.*, No. 2:10-cv-1038, 2011 WL 5190802 (M.D. Ala. Nov. 1, 2011) (same). And, critically, this Court retained jurisdiction over the case, expressly authorizing Plaintiffs to amend the complaint or seek other appropriate relief. *See* Stay Order ¶ 5 (doc. no. 31); *see also Keith*, 858 F.2d at 474 ("Since the court expressly reserved its jurisdiction over later developments, an even stronger case is presented here for permitting a supplemental complaint than in *Griffin v. County School Board*, 377 U.S. 218 (1964), where the Supreme Court approved a supplemental complaint after the district court had entered a final judgment.").

Further, neither Defendant nor the Proposed Defendants would be prejudiced by the filing of the Supplemental Complaint. This litigation commenced in July 2015 and was stayed the following month. As noted above, the parties have not engaged in any discovery. Indeed, a discovery schedule has not even been set. At this stage in the litigation, no party would be prejudiced by supplementation. *See Phelps v. McClellan*, 30 F.3d 658, 662-63 (6th Cir. 1994) ("In determining what constitutes prejudice, the court considers whether the assertion of the new claim or defense would: require the opponent to expend significant additional resources to conduct discovery and prepare for trial; significantly delay the resolution of the dispute; or prevent the plaintiff from bringing a timely action in another jurisdiction."); *Sims v. Montgomery*

Cty. Comm'n, 873 F. Supp. 585, 610 (M.D. Ala. 1994) (finding defendants would suffer no prejudice from amendment when, *inter alia*, they would not be subject to any additional discovery or trial preparation); *Ohio*, 2014 WL 1308718, at *7 (same).

Finally, supplementation would not be futile. As described above and set forth more fully in the attached proposed Supplemental Complaint, the three new restrictions will inflict substantial harm on women seeking abortion care in Alabama, and each is unconstitutional. The medical records requirement would threaten the privacy and safety of WAWC's patients and burden their access to abortion at WAWC, *see* Suppl. Compl. ¶¶ 67-90, 128-29; the clinic closure law would close the two highest-volume providers in the state, reducing the state's overall capacity to provide abortion by more than half *see id.* at ¶¶ 49, 130-32, 140-41; and the D&E ban would severely curtail second-trimester abortion access throughout Alabama, *see id.* ¶¶ 111-26, 133. Plaintiffs' proposed Supplemental Complaint clearly "states a claim for relief" and "sufficiently gives [Defendants] fair notice of" Plaintiffs' allegations and claims. *Travelers Prop. Cas. Co. v. The Lamar Co., LLC*, No. 07-CV-0704, 2009 WL 661906, at *2 (S.D. Ala. Mar. 10, 2009).

Thus, no substantial reasons weigh against supplementation and Plaintiffs' motion should be granted.

CONCLUSION

For all these reasons, supplementation will promote judicial economy and Defendant and Proposed Defendants will not be prejudiced; indeed, supplementation will save resources and time for all parties and the Court. This Court should grant Plaintiffs' motion to lift the stay and to file the proposed Supplemental Complaint.

Date: June 2, 2016

Respectfully submitted,

s/ Andrew Beck
Andrew Beck*
New York State Bar No. 4740114
Alexa Kolbi-Molinas*
New York State Bar No. 4477519
Jennifer Lee*
New York State Bar No. 4876272
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
abeck@aclu.org
akolbi-molinas@aclu.org
jlee@aclu.org
(212) 549-2633

Randall C. Marshall
ASB-3023-A56M
ACLU FOUNDATION OF ALABAMA, INC.
P.O. Box 6179
Montgomery, AL 36106-0179
rmarshall@aclualabama.org
(334) 265-2754

Attorneys for Plaintiffs

** Admitted pro hac vice*

CERTIFICATE OF SERVICE

I, Andrew Beck, do hereby certify that a true and correct copy of the foregoing will be filed with the Clerk of Court using the CM/ECF system, which will serve a copy of the same upon the following counsel of record, on this 2nd day of June, 2016:

P. Brian Hale
Bethany L. Bolger
Carol R. Gerard
Alabama Department of Public Health
P.O. Box 303017
Montgomery, AL 36130

s/ Andrew Beck
Andrew Beck
New York State Bar No. 4740114
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
abeck@aclu.org
(212) 549-2633