IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JACKSON WOMEN'S HEALTH ORGANIZATION, on behalf of itself and its patients, et al. **PLAINTIFFS**

VS. **CIVIL ACTION NO. 3:12-cv-00436-DPJ -FKB**

MARY CURRIER, M.D., M.P.H., in her official capacity as State Health Officer of the Mississippi Department of Health, et al. **DEFENDANTS**

RESPONSE IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

COMES NOW Defendant, Mary Currier, M.D., M.P.H., in her official capacity as State Health Officer of the Mississippi Department of Health, and respectfully submits this, her Response in Opposition to Plaintiffs' Motion for a Preliminary Injunction and/or Temporary Restraining Order.

Two arguments underpin Plaintiffs' petition for emergency relief:

- First, Plaintiffs seek immediate relief from this Court because they believe that the Department of Health plans to revoke the license of the state's lone abortion clinic and close it down because not all of its physicians have admitting privileges at a local hospital. In a sense, Plaintiffs seek an emergency order to keep their doors open for the next 10 days. As more fully set forth below, that relief should be denied because, under state law, the Department of Health cannot revoke their license or shut them down within the next 10 days. As a matter of fact, under state law bars, their license cannot be revoked and their doors cannot be shut until the agency (1) notes the non-compliance, (2) offers the clinic a hearing not less than 30 days after the notice, (3) allows them 30 days after the hearing to appeal before any revocation becomes effective, and (4) even then, stays any revocation order pending the clinic's appeal to the Hinds County Chancery Court and thereafter, unless a judge orders otherwise. Thus, the immediate concern that the clinic may be closed on July 1 is ill-founded.

- After the above procedures and state-law due process protections were explained

> to Plaintiffs' counsel[1], the Plaintiffs advanced a second reason for seeking immediate injunctive relief. Merely providing them notice and an opportunity to be heard 30 days later, counsel argued, is an irreparable harm to a constitutional right to provide abortion services. But providing the Plaintiffs notice and a hearing in no way infringes upon their ability in the next two days, 10 days or 30 days to continue to operate as a licensed facility providing the services they provide. Yet again, there is no impending harm to a constitutional right.

Thus, in the absence of any showing that irreparable harm is impending and for the reasons explained more fully below, the Court should deny the Plaintiffs' motion for injunctive relief.

FACTUAL BACKGROUND

The licenses of "ambulatory surgical facilities," a class of medical service providers that includes abortion clinics, cannot be revoked summarily in Mississippi. Rather, state law establishes a series of hearings and appeals which guarantee that a clinic will be allowed to retain its license and conduct business for at least 60 days, if not longer, after the Department of Health provides initial notice of its plans to seek revocation, suspension or denial of a license.

Specifically, after discovering a "substantial failure to comply with the requirements" that govern a clinic, the State must notify the clinic of the deficiency and hold "a prompt and fair hearing" at least 30 days from the notice date to determine whether its license should be revoked, suspended, or denied. Miss. Code Ann. § 41-75-11. The decision that results from that hearing does not take effect for another 30 days. *Id.* For that time, the clinic enjoys the right to appeal an adverse ruling to state chancery court. *Id.* The decision of the chancery court, in turn, may be appealed to the Mississippi Supreme Court. Miss. Code Ann. § 41-75-23. "Pending final

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[1]Those procedures are explained more fully below and in the Affidavit of Deputy State Health Officer Michael Lucius, which is attached to this Response as Exhibit "1."

disposition of the matter, the status quo of the applicant or licensee shall be preserved, except as the court otherwise orders in the public interest." *Id.*

Plaintiffs, however, believe that the status quo would be disturbed by one provision of a law passed by the Mississippi Legislature and signed by Governor Bryant on April 16. The provision, which Plaintiffs label "the Admitting Privileges Requirement," mandates that all physicians "associated" with an abortion clinic in Mississippi have "admitting privileges at a local hospital and staff privileges to replace local hospital on-staff physicians." Plaintiffs report trying to obtain such privileges for the doctors associated with Mississippi's only abortion clinic, so far without success. Thus, they have asked the Department of Health to delay enforcement of the Admitting Privileges Requirement but allegedly been told that the Department will enforce the provision as soon as it takes effect on July 1.[2]

LEGAL STANDARD

To obtain a temporary restraining order or preliminary injunction, Plaintiffs carry the burden of establishing four elements:

> (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest.

Janvey v. Alguire, 628 F.3d 164, 174 (5th Cir.2010) (citation omitted). "A preliminary injunction is an extraordinary remedy. It should only be granted if the movant has clearly carried the burden of persuasion on all four prerequisites. The decision to grant a preliminary injunction is to be treated as the exception rather than the rule." *Cherokee Pump & Equipment Inc. v.*

[2]Notably, the clinic's existing license was renewed today.

Aurora Pump, 38 F.3d 246, 249 (5th Cir. 1994) (citing *Mississippi Power & Light v. United Gas Pipe Line Co.*, 760 F.2d 618 (5th Cir.1985)).

ARGUMENT

I. The Plaintiffs have not satisfied the requirements for injunctive relief.

A. Plaintiffs have not demonstrated the prospect of "irreparable harm."

Plaintiffs' anticipation of irreparable harm is founded upon a plain misunderstanding of how long state law requires the Mississippi Department of Health to wait before revoking, suspending, or denying an abortion clinic's license. In briefing, the Plaintiffs suggest that a Mississippi abortion clinic currently out of compliance with the Admitting Privileges Requirement would be forced to close its doors immediately upon the mandate's July 1 effective date. Allowing the Admitting Privileges Requirement to take effect, they say, will "shut down Plaintiffs' provision of abortion care" and leave "nowhere to turn for an abortion in the State of Mississippi." [Doc. No. 6, at 22-23].

This is simply inaccurate. Statutory requirements preclude shuttering the facility for at least 60 days after the clinic receives notice that it is not complying with any licensure requirement. *See* Miss. Code Ann. § 41-75-11; -23. Specifically, the Department would have to provide the clinic with notice of non-compliance and hold a "prompt and fair hearing" regarding the notice "not less than thirty (30) days" from service of the notice. Miss. Code Ann. § 41-75-11. If the hearing resulted in an unfavorable ruling for the clinic, it could not take effect for another 30 days. *Id.* But the clinic's operations could survive even past that period, for Section 41-75-23 of the Code provides for appeals from the hearing to state chancery court and from the chancery court to the Mississippi Supreme Court. Miss. Code Ann. § 41-75-23. While the

appeal is pending, "the status quo of the applicant or licensee shall be preserved" barring an affirmative ruling otherwise from the state court. *Id.* In sum, the Plaintiffs will have *at least* 60 days from the effective date of the Admitting Privileges Requirement to achieve compliance with it–in addition to the 11 weeks that will have already elapsed since Governor Bryant signed the bill that contains the provision. Therefore, neither the clinic's operations nor abortion in general would be forced to end as a result of allowing the Admitting Privileges Requirement to take effect on July 1. The "irreparable harm" forecast by Plaintiffs is illusory.

The risk of irreparable harm is absent and injunctive relief inappropriate absent a showing that existing statutes and regulations are insufficient to protect the rights of plaintiffs. *Warren v. Rodriguez-Hernandez*, 2010 WL 3668063, at *5 (N.D.W.Va. 2010). State law already provides the relief (indeed, more relief) than Plaintiffs could obtain through a temporary restraining order. As discussed above, state law protects their license from revocation, suspension, or denial for at least 60 days, and possibly longer pending appeal. Injunctive relief is not necessary to foreclose an "irreparable harm" that state law already forecloses.

B. The public interest would be disserved by the injunctive relief requested.

Through the statutory scheme described above, the State has set up a mechanism to detect and address failure to adhere to licensing requirements by abortion clinics and other ambulatory surgical facilities while preserving those facilities' interests in continued operation. The public interest would be disserved by short-circuiting the administrative procedures already established by the State in order to issue redundant injunctive relief.

C. The "injury" threatened to Plaintiffs does not "substantially outweigh" the harm that injunctive relief would impose upon Defendant.

The injury predicted by Plaintiffs is non-existent, as demonstrated by the above discussion. The Plaintiffs seek to "preserve the status quo" beyond the effective date of the Admitting Privileges Requirement. State law makes clear that the status quo will be preserved, at one point using that very language. Miss. Code Ann. § 41-75-23. Plaintiffs accordingly face the prospect of no injury, and certainly not one that "substantially outweighs" the burden an injunction would place upon the public's interest in having state administrative procedures followed.

D. Plaintiffs are Unlikely to Succeed on the Merits

1. Immediate enforcement of the admitting privileges requirement would not result in closure of the State's lone abortion clinic for months, if ever.

The Plaintiffs argue that immediate enforcement of the Admitting Privileges Requirement would force the state's only abortion clinic to close and thereby infringe upon the constitutional right to a pre-viability abortion. At the risk of repetition, the Defendant hereby re-asserts that state law prohibits the Department from closing the clinic on the Admitting Privileges Requirement's effective date. Section 41-75-11 of the Mississippi Code requires the State to hold a hearing not less than 30 days after notifying a clinic of a substantial deficiency that might result in revocation, suspension or denial of its license. Miss. Code Ann. § 41-75-11. The ruling that emerges from that hearing cannot become final for 30 days. *Id.* In any event, then, immediate enforcement of the Admitting Privileges Requirement could not conceivably result in closure of a clinic for 60 days. But the Plaintiffs would then also have an opportunity to prolong the process by appealing an adverse ruling to state chancery court. Miss. Code Ann. § 41-75-23. The chancery court's ruling would be subject to appeal to the state Supreme Court. *Id.* And,

throughout the appeals process, "the status quo of the applicant or licensee shall be preserved" absent a court ruling that the public interest requires otherwise. *Id.* Thus, state law expressly contradicts Plaintiffs' assumption that the right to abortion would disappear in Mississippi given immediate enforcement of the Admitting Privileges Requirement. The Plaintiffs therefore could not conceivably show that abortion would be unconstitutionally burdened in Mississippi simply by virtue of the timing of that provision's implementation.

2. Plaintiff's procedural due process claim is deficient as a matter of law.

Plaintiffs' procedural due process claim is legally barred because the Plaintiffs have yet to utilize the due process procedures available to them under state law when it voluntarily dismissed its state court appeal. While as a general rule an aggrieved person need not exhaust state remedies before filing suit in federal court to vindicate a state deprivation of constitutional rights, there is "an exception to this rule that applies when the alleged constitutional deprivation is the denial of procedural due process." *Vicari v. Ysleta Indep. Sch. Dist.*, No. 08-50224, 2008 WL 4111407, at * 2 (5th Cir. Aug. 28, 2008) (plaintiff "complains of an absence of process, but she did not use the sufficient process provided")); *see Rathjen v. Litchfield*, 878 F.2d 836, 840 (5th Cir.1989) ("[N]o denial of procedural due process occurs where a person has failed to utilize the state procedures available to him."); *Galloway v. Louisiana*, 817 F.2d 1154, 1158 (5th Cir.1987) ("An employee cannot ignore the process duly extended to him and later complain that he was not accorded due process."). The procedures set up by Miss. Code Ann. §§ 41-75-11 and 41-75-23 to regulate revocation, denial and suspension of licenses provide procedures meant to vindicate the due process requirements of the Constitution. Consistent with the cases cited above, the Plaintiffs may not challenge their adequacy without exhausting them.

3. Plaintiffs have not shown a "substantial likelihood" that they will successfully challenge the Admitting Privileges Requirement itself.

Defendant understands this proceeding to concern the constitutionality of immediate implementation of the Admitting Privileges Requirement, not the merits of the requirement itself. From an abundance of caution, however, Defendant will briefly address Plaintiffs' failure to convincingly demonstrate a substantial likelihood of success on a challenge to the requirement's own cosntitutionality. A similar requirement that abortion clinic physicians hold admitting privileges at local hospitals survived a facial constitutional challenge in the Fourth Circuit. *Greenville Women's Clinic v. Commissioner*, 317 F.3d 357, 371 (4th Cir. 2002). Also, the Eighth Circuit has upheld a statute requiring abortion physicians to have surgical privileges at a hospital. *Women's Health Center of West County, Inc. v. Webster*, 871 F.2d 1377, 1382 (8th Cir. 1989). The Plaintiffs have not shown that the Plaintiffs *cannot* comply with the Admitting Privileges Requirement, merely that their applications have been delayed. In the absence of such a showing and in light of the above precedents, Defendant submits that Plaintiffs have not demonstrated the substantial likelihood of success on the merits required for success on the merits.

WHEREFORE, PREMISES CONSIDERED, Defendant, Mary Currier, respectfully requests that the Plaintiffs' motion be denied and the Complaint be dismissed.

RESPECTFULLY SUBMITTED this, the 28th day of June, 2012.

MARY CURRIER, M.D., M.P.H., in her official capacity as State Health Officer of the Mississippi Department of Health, Defendant

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CERTIFICATE OF SERVICE

I, Benjamin Bryant, Special Assistant Attorney General for the State of Mississippi, do hereby certify that on this date I electronically filed the foregoing document with the Clerk of this Court using the ECF system, which sent notification of this filing to:

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THIS, the 28th day of June, 2012.

/s/ Benjamin Bryant
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