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

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

I. Introduction

Defendants fail to account for the full range of civil, criminal, and disciplinary penalties that Plaintiffs face if they continue to provide abortion care to women after July 1, 2012 without injunctive relief from this Court. Those penalties include fines of up to $2,000 and criminal misdemeanor liability for *each day* that the Clinic's physicians do not have admitting privileges at a local hospital, as well as revocation of the nursing, medical, or other licenses held by the Clinic's staff. The Court should grant a preliminary injunction so that the availability of abortion

services in Mississippi does not depend on Plaintiffs subjecting themselves to such penalties. Preliminary injunctive relief will merely preserve the *status quo* and will not impose any harm whatsoever on Defendants. Indeed, it is precisely for a case like this that such preliminary relief exists.

II. Argument

Defendants misunderstand the legal standards on a challenge to the constitutionality of a state law and have not accurately described the consequences of Mississippi House Bill 1390 ("the Act") taking effect on July 1.

First, the availability of a state administrative process is entirely irrelevant to Plaintiffs' claims. Plaintiffs are not required to exhaust administrative remedies before challenging the constitutionality of a state law, and a state agency does not have the power to resolve their constitutional claims. *Patsy v. Bd. of Regents*, 457 U.S. 496, 515 (1982); *id*. at 504 (examining the legislative intent of § 1 of the Civil Rights Act of 1871, the precursor to § 1983, and finding that Congress intended to provide plaintiffs claiming violations of their federal rights with "immediate access to the federal courts"); *see also Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974) (holding that exhaustion of state or administrative remedies is not required for § 1983 claims due to the "paramount role" of the federal courts in protecting constitutional rights). Defendants concede that Plaintiffs do not need to exhaust administrative remedies to bring substantive claims, but mistakenly contend that exhaustion is required for Plaintiffs' procedural due process claim. They are wrong. Just last month, the Fifth Circuit Court of Appeals squarely held that "exhaustion of state remedies is not required before a plaintiff can bring suit under § 1983 for denial of due process." *Bowlby v. City of Aberdeen*, 681 F.3d 215, 219 (5th Cir. 2012).

Second, the availability of a license revocation process has no bearing on the threat of irreparable injury here. If the Admitting Privileges Requirement goes into effect on July 1, 2012, Plaintiffs cannot continue providing abortion care without exposing themselves to civil, criminal, and licensure penalties. Mississippi law provides civil penalties for "operating an abortion facility or conducting the business of an abortion facility without the required license" as well as criminal penalties including misdemeanor liability and a fine of up to $1,000 for "any violation of any provision of this chapter regarding abortion facilities or of the rules, regulations and standards promulgated in furtherance thereof by intent…." Miss. Code Ann. § 41-75-26(1). Each day of the violation is a separate offense. *Id.* In addition, because the Clinic is governed by the standards applicable to ambulatory surgical facilities, the Clinic, Dr. Parker, and the Clinic's licensed medical staff are also exposed to the risk of civil, disciplinary, and criminal penalties for "violat[ing] any provision of this chapter … or the rules, regulations or standards promulgated in furtherance thereof…" under the statute providing penalties for enforcement of the ambulatory surgical facilities standards. Miss. Code Ann. § 41-75-25 (incorporating by reference Miss. Code Ann. § 41-7-209). Those penalties include criminal misdemeanor liability and fines of up to $1,000, with each day constituting a separate violation, as well as licensure revocation penalties for any licensed person. Miss. Code Ann. § 41-7-209. Therefore, whether or not the Department revokes the Clinic's license for non-compliance with the Admitting Privileges Requirement on July 1, Defendants' enforcement of the Admitting Privileges Requirement as of that date obliges Plaintiffs and their employees to risk fines of up to $2,000 and time in jail for each day that the Clinic's physicians do not have admitting privileges, as well as licensure revocation for the physicians, nurses, and other licensed employees. Plaintiffs' only other option is to close.[1]

[1] The Clinic received its renewal license this morning. Thus, it is the risk that the State will enforce the Admitting

Third, the threat of serious penalties and the impairment of constitutional rights both constitute irreparable injury. Absent injunctive relief from this Court, Dr. Parker, the Clinic, and the Clinic's licensed medical staff will be exposed to civil, criminal and disciplinary penalties under the Mississippi statutory scheme governing licensing of abortion facilities and ambulatory surgical facilities as discussed above. The threat of such sanctions constitutes irreparable injury. *See, e.g.*, *McCormack v. Township of Clinton,* 872 F. Supp. 1320, 1327 (D.N.J.1994) (finding irreparable injury where local ordinance threatened criminal sanctions); *Lysaght v. New Jersey,* 837 F. Supp. 646 (D.N.J.1993) (holding threatened prosecution demonstrated plaintiffs faced irreparable injury).

The threat of such penalties, in turn, will impair Plaintiffs' ability to continue to provide constitutionally protected abortion services. Threatened violation, deprivation, or impairment of a woman's liberty interests to terminate a pregnancy constitutes irreparable injury, with no further showing of injury required. *See, e.g., Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. Unit B 1981) ("We have already determined that the constitutional right of privacy is 'either threatened or in fact being impaired', and this conclusion mandates a finding of irreparable injury."); *accord Women's Med. Ctr. of Nw. Houston v. Bell*, 248 F.3d 411, 422 (5th Cir. 2001) (affirming district court's finding of irreparable harm based on threat to women's constitutional right to privacy); *Causeway Med. Suite v. Foster*, 43 F. Supp. 2d 604, 619 (E.D. La. 1999) (holding that failure to grant an injunction would "result in irreparable injury because the constitutional right to privacy is threatened and impaired"), *aff'd*, 221 F.3d 811 (5th Cir. 2000). Moreover, Plaintiffs *themselves* will suffer irreparable harm without injunctive relief from this Court. Enforcement of the Admitting Privileges Requirement on July 1, 2012, will

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Privileges Requirement that could prevent them from opening after July 1, 2012.

interfere with Plaintiffs' protected property and liberty interests in operating a business and pursuing their chosen profession.

Injury need not be certain to justify injunctive relief. *E.g. Humana, Inc. v. Jacobson*, 804 F.2d 1390, 1394 (5th Cir. 1986) ("it is not necessary to demonstrate that harm is inevitable . . . . The plaintiff need show only a significant threat of injury from the impending action, that the injury is imminent, and that money damages would not fully repair the harm."). Particularly where, as here, constitutional rights are threatened, injunctive relief is proper. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury."); *Shamloo v. Mississippi State Bd. of Trs. of Insts. of Higher Learning*, 620 F.2d 516, 525 (5th Cir. 1980) (holding that district court abused its discretion by failing to enjoin state university regulation that subjected plaintiffs to disciplinary action for exercising their constitutional right to free speech); *City of Jackson, Miss. v. Lakeland Lounge of Jackson, Inc.*, 800 F. Supp. 455, 467 (S.D. Miss. 1992) (finding irreparable harm where city interfered with plaintiff's First Amendment rights by refusing to issue it a building permit), *rev'd on other grounds*, 973 F.2d 1255 (5th Cir. 1992).

Finally, contrary to Defendants' assertions, this litigation is not confined to the issue of Defendants' stated intent to enforce the Act on July 1, 2012. Rather, Plaintiffs have challenged the Act because it is unconstitutionally motivated by a desire to end abortion in the State and, in addition, because enforcement of the Act on July 1, 2012, will impose a *de facto* ban on abortion in the State of Mississippi. The two cases Defendants cite in opposition are not germane here, because in neither of those cases would the admitting privileges law close down the only abortion provider in the state. It is axiomatic that preliminary injunctive relief is intended to

protect against enforcement of a law that has been challenged as unconstitutional where, as here, Plaintiffs show that they have a substantial likelihood of success on the merits.

III. Conclusion

Plaintiffs should not be exposed to penalties for exercising their constitutional rights to operate a business and practice their profession, and women's constitutional right to terminate a pregnancy should not depend on Plaintiffs exposing themselves to such penalties. The Court should grant preliminary injunctive relief to preserve the *status quo* so that Plaintiffs can continue to provide safe abortion services to the women of Mississippi without the threat of criminal, civil, and disciplinary penalties during the pendency of this litigation.

Respectfully submitted this 29th day of June, 2012,

/s/ Robert B. McDuff

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**Pro Hac Vice* Admission Pending

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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 29th day of June, 2012.

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