IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

COMPREHENSIVE HEALTH OF PLANNED PARENTHOOD GREAT PLAINS, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 16-4313-CV-C-HFS
DR. RANDALL WILLIAMS, et al.,	)	
Defendants.	)	

DEFENDANTS HAWLEY AND WILLIAMS' SUGGESTIONS IN SUPPORT OF THEIR MOTION FOR STAY OF PRELIMINARY INJUNCTION PENDING APPEAL

This Court should stay its preliminary injunction pending appeal. The injunction is not supported by the law or the record. It was entered without jurisdiction, and it overlooks important limits on this Court's Article III jurisdiction. The injunction misapplies the Supreme Court's precedent in *Whole Woman's Health v. Hellerstedt* to the factual record in this case, and it artificially restricts the State Defendants' ability to present evidence in support of their defense of state law and regulations. The injunction prevents the State from enforcing valid and longstanding laws that were duly enacted by the state legislature. And it places at risk the health and safety of women who choose to have an abortion in the State of Missouri.

For these reasons, just as in other important cases in which the constitutionality of state laws has been placed at issue, "a detailed and in depth examination of this serious legal issue is warranted" by the Court of Appeals "before a disruption of a long-standing status quo." *Campaign for S. Equal. v. Bryant*, 773 F.3d 55, 57-58 (5th Cir. 2014) (citation omitted).

BACKGROUND

Last year, in *Whole Woman's Health v. Hellerstedt*, the Supreme Court held, on the specific factual record before it, that Texas had not justified its ambulatory surgical center ("ASC") and admitting-privileges requirements under *Casey*'s undue-burden standard. 136 S. Ct. 2292, 2309 (2016).

In this case, this Court preliminarily sustained a facial challenge to Missouri's ASC and admitting-privileges laws and entered a preliminary injunction against their enforcement in the State of Missouri. Doc. 97; Doc. 93; Doc. 66. After overruling the State Defendants' jurisdictional objections and holding that this dispute was ripe for review, Doc. 66 at 2, 5, this Court enjoined the enforcement of the admitting-privileges requirement as to physicians seeking to perform abortions, and enjoined the physical-plant ASC requirements as to abortion facilities. *See* Doc. 93, Doc. 97. The Court also instructed the parties that it "expects current and future licensing applications to be processed promptly, in light of patient needs, and without effective influence from opponents of abortion." *Id*. at 1-2.

The State Defendants have appealed this preliminary injunction, and they respectfully request that this Court stay the injunction ordered in Doc. 93 and Doc. 97 pending the resolution of the State's appeal. Fed. R. App. P. 8; Fed. R. Civ. P. 62(c).

STANDARD OF REVIEW

Federal courts consider four factors in deciding whether to grant a stay:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987). A stay is granted when the appeal presents "serious" legal issues and the balance of equities favors the stay applicant. *See James River Flood Control Ass'n v. Watt*, 680 F.2d 543, 545 (8th Cir. 1982).

ARGUMENT

A federal court has the "authority to 'hold an order in abeyance pending review' when doing so 'allows an appellate court to act responsibly.'" *Campaign for S. Equal. v. Bryant*, 773 F.3d 55, 57 (5th Cir. 2014) (quoting *Nken v. Holder*, 556 U.S. 418, 427 (2009)).

Here, the responsible course is to preserve the status quo by staying the preliminary injunction pending appeal. The State's appeal raises serious questions about both the justiciability requirements of Article III and the applicability of *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), to challenges to other state laws involving different factual records. Furthermore, the equities support preserving the status quo while the State appeals. Compared to the irreparable harm caused to the State by preventing it from enforcing its democratically enacted laws and the threat to women's health from invalidating the challenged regulations, the harm to the plaintiffs of a brief delay is slight, and the public interest supports maintaining health and safety protections for women.

I. The State Defendants are likely to succeed on appeal.

For the reasons set forth in greater detail in the State Defendants' prior briefing, the State Defendants are likely to succeed on the merits of their appeal. Certain of these reasons are highlighted here, but the State Defendants incorporate by reference all of the reasons proffered in opposing the motion for preliminary injunction.

First, the abortion providers have not satisfied Article III's requirements of ripeness and standing. State law allows for deviations from the law's ambulatory surgical center

requirements. *See* 19 CSR § 30-30.070(1). Yet it is undisputed that no plaintiff in this case ever applied for a deviation from the ASC requirements. Because a reasonable variance procedure is available, yet plaintiffs have never sought a variance, none of the plaintiffs has asserted a ripe challenge to the ASC requirements. *See, e.g.,* Doc. 27, at 8-12. And because their challenges to the ASC requirements are unripe, their challenges to the hospital-relationship requirements are not redressable. *Id.* at 15-16. Moreover, plaintiff Comprehensive Health is plainly entitled to no relief as to the Columbia and Kansas City facilities, because the licensing of these facilities is governed by the 2010 Settlement Agreement. *Id.* at 13-15. *See generally* Docs. 27, 28, 53.

Second, the orders granting the injunction are unlikely to survive appellate review because they rely almost exclusively on *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), but they ignore both the material differences between Missouri's laws and those invalidated in *Hellerstedt*, and the different factual records in each case. Unlike in the Texas case, the "record evidence" in this case, 136 S. Ct. at 2311, demonstrates that Missouri's laws and regulations substantially advance the State's critical interest in safeguarding women's health, while imposing no significant burden on access to abortion. *See* Doc. 28, 56, 65, 84. The record evidence in this case includes compelling evidence—never considered by the Supreme Court in *Hellerstedt*—that abortion procedures in Missouri involve very serious health risks, that the challenged regulations substantially advance women's health and safety, and that the regulations impose no significant burden on access to abortion. *See id.* On the contrary, in *Hellerstedt*, both the district court and the Supreme Court categorically discounted the credibility of Texas's expert witnesses, leaving the plaintiffs' expert testimony effectively unrebutted and creating a uniquely one-sided factual record. *Hellerstedt*, 136 S. Ct. at 2317 (giving credence to the testimony of plaintiffs' experts because "Texas provided no credible experts to rebut it").

In granting the preliminary injunction, this Court ruled that *Hellerstedt* bars the Court from considering the State Defendants' evidence regarding these disputed factual issues, indicating that the State Defendants are bound by the factual record created by the State of Texas in *Hellerstedt*. Doc. 93, at 5 (citing *MKB Management Corp. v. Stenehjem*, 795 F.3d 768 (8th Cir. 2015)). This determination is unlikely to survive appellate review. The Court's reliance on *MKB Management* is misplaced, because that case held that the Eighth Circuit could not disregard the *legal standard* set forth by the Supreme Court for determining fetal viability, not that the Eighth Circuit could not consider new evidence relevant to underlying *factual* determinations. *See MKB Management*, 795 F.3d at 772-73. This Court's conclusion that the State Defendants, who were non-parties to the *Hellerstedt* litigation, are not entitled to make their own *factual* record to defend their own statutes and regulations lacks support in case law and violates both principles of res judicata and fundamental fairness.

For these and the other reasons stated in the State Defendants' prior briefing, the State Defendants are likely to prevail on appeal from this Court's preliminary injunction orders, Docs. 93 and 97.

II. The balance of the equities weighs in favor of a stay.

Moreover, the equities support staying the preliminary injunction and preserving the status quo pending the appeal. *See San Diegans For Mt. Soledad Nat. War Mem'l v. Paulson*, 548 U.S. 1301, 1303-04 (2006) (Kennedy, J., in chambers).

A. The preliminary injunction imposes a *per se* irreparable injury on the State of Missouri by invading the State's sovereign authority to enact and enforce a legal code. Indeed, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of

its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 133 S. Ct. 1, 3, (2012) (Roberts, C.J., in chambers) (quotation omitted)).

B. Preserving the status quo until all appeals are exhausted will benefit the parties by providing certainty and stability in the law. If the State wins on appeal, the plaintiffs will have not incurred any transition costs based on a temporary change in the law. But if the State does not prevail on appeal, the plaintiffs will not be prejudiced because they will still be able to receive the entirety of the relief they seek at that time.

Furthermore, a court is not required to "delay enforcement of a state law that the court has determined is likely to withstand constitutional challenge solely because the law might injure third parties." *Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott*, 134 S. Ct. 506, 507 (2013) (Scalia, J., concurring in denial of application to vacate stay). To the contrary, the public has a strong interest in the enforcement of duly enacted laws. *Peterson v. Village of Downers Grove*, No. 14-C-09851, 2016 WL 427566, at *5 (N.D. Ill. Feb. 4, 2016).

C. Plaintiffs do not and cannot show that the challenged regulations impose any significant burden on access to abortion. Nor can they rebut the fact that enjoining these laws will at best modestly reduce the driving distance to abortion facilities. In contrast, exempting abortion facilities from a large portion of the State's health-and-safety regulations, from the need to have appropriate medical facilities, and from having reasonable hospital relationships in place to coordinate follow-up care in the case of complications, endangers the health and safety of women seeking abortions.

In fact, Plaintiffs' reports of abortion-related complications at the St. Louis and Columbia facilities over the last five years (2012-2016) illustrate the significant health risks associated with abortion procedures performed in Missouri. Plaintiff RHS reports that 84 patients have required

hospital treatment after abortion procedures at its St. Louis facility during the last five years, including at least 21 emergency transfers to the hospital. *See* Doc. 65, at 1-4. These 21 emergency transfers include very serious complications, such as a perforated uterus after surgical abortion that resulted in hysterectomy, *id*. at 2; an infection following medication abortion that resulted in hysterectomy, *id*.; several hemorrhage incidents that required emergency medical treatment, *id*.; and additional uterine perforations requiring emergency medical treatment, *id*. It is precisely emergencies like these that caused the State of Missouri to place basic health and safety requirements on abortion providers. Moreover, this evidence does not include three additional categories of complications from abortion—those that go unreported by plaintiffs and other abortion providers, those that abortion providers never find out about because the patients seek follow-up care elsewhere, and those that never occur because Missouri requires abortion facilities to satisfy the ASC and hospital-relationship requirements.

Deference to the Missouri General Assembly and the laws and regulations adopted by the people's elected representatives justifies a short delay in the implementation of the preliminary injunction pending a final disposition by the Court of Appeals. *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497 (2001).

CONCLUSION

This Court should stay the preliminary injunction pending appeal and temporarily stay the preliminary injunction pending the consideration of this motion. In addition, given that the State is the appellant, no bond should be required.

Respectfully submitted,

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May 4, 2017

CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notification to the following:

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