IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI

JACKSON WOMEN'S HEALTH ORGANIZATION, on behalf of itself and its patients, and SACHEEN CARR-ELLIS, M.D., M.P.H., on behalf of herself and her patients, Plaintiffs, vs. MARY CURRIER, M.D., M.P.H., in her official capacity as State Health Officer of the Mississippi Department of Health, and MISSISSIPPI STATE BOARD OF MEDICAL LICENSURE, and KENNETH CLEVELAND, M.D., in his official capacity as Executive Director of the Mississippi State Board of Medical Licensure, Defendants.	Case No. 3:18cv171-CWR-FKB

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

Plaintiffs respectfully seek a temporary restraining order that will preserve the *status quo* so that patients who are after 15 weeks of pregnancy—including one with an appointment Tuesday, March 20 at 2 pm—can exercise their right of choice despite the Governor's signature today on House Bill 1510 ("H.B. 1510" or "the Act"). The Act takes effect immediately and bans abortions after 15 weeks, with only narrow exceptions for medical emergencies or fetal anomalies that are incompatible with life. This ban is in direct violation of decades of U.S. Supreme Court precedent holding that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992). Viability does not occur until well after 15 weeks. This is confirmed by the declaration of Dr. Sacheen Carr-Ellis, one of the Plaintiffs in this case; by the Supreme Court's statement in *Casey* that fetal viability "sometimes" occurs as early as "23 to 24 weeks," *id.* at 860; and by the decisions of federal courts of appeal and state supreme courts striking down various pre-viability bans, including 20 and 22 week bans, and the Supreme Court's refusal to grant review of those decisions. *See, e.g., Isaacson v. Horne*, 716 F.3d 1213, 1217 (9th Cir. 2013) (striking down ban on abortions at 20 weeks with exceptions because it prohibits abortions in "the period between twenty weeks gestation and fetal viability" and therefore deprives women "of the ultimate decision to terminate their pregnancies prior to fetal viability"), *cert. denied*, 134 S. Ct. 905 (2014); *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 773 (8th Cir. 2015) (striking down ban on pre-viability abortions at 6 weeks (with exceptions) in part because plaintiffs' expert declarations "state viability occurs at about 24 weeks" and provide a definition of viability "that is in accordance with the one adopted by the Supreme Court"), *cert. denied*, 136 S. Ct. 981 (2016).[1] No pre-viability ban—whether at 20, 12, or 6 weeks—has

[1] The various federal courts of appeal and state supreme court decisions striking down pre-viability bans are listed later in this memorandum.

survived a constitutional challenge.

Plaintiff Jackson Women's Health Organization ("the Clinic") is the only regular abortion provider in the State. It provides abortions up to 16 weeks.

This litigation is a challenge to Mississippi House Bill 1510, the State's latest attempt to impose an unconstitutional restriction on abortion in Mississippi. The Act became law today and has an immediate effective date. The Act bans all abortions after 15 weeks, with only narrow exceptions for medical emergencies or fetal anomalies that are incompatible with life. (A copy of the bill is attached to the Complaint). As soon as the Governor signed the bill today and announced it, this lawsuit and this request for a temporary restraining order were filed.

For decades, the U.S. Supreme Court has held that states do not have the power to ban abortion before viability because doing so would violate women's constitutional rights to bodily integrity and autonomy, protected by the liberty clause of the Fourteenth Amendment. Viability is not possible at 15 weeks and does not occur in a normally progressing pregnancy until months later. Accordingly, the Act bans pre-viability abortion, in contravention of women's constitutional rights and established Supreme Court precedent.

Without immediate relief from this Court, Plaintiffs will be forced to stop providing abortions to women after 15 weeks, including cancelling an appointment scheduled for 2pm on Tuesday, March 20. Because of the Act's immediate effective date, Plaintiffs respectfully request that the Court issue a temporary restraining order to preserve the *status quo* for women who are expected to seek abortion care after 15 weeks at the Clinic over the next two weeks, and who will experience harms to their health and violations of their constitutional rights without such relief. Plaintiffs further request a preliminary injunction of the Act at such time as the Court has the opportunity to hold a hearing and/or hear argument and/or issue a ruling.

I. Facts

A. Plaintiffs and Their Patients

The Clinic is the only licensed abortion facility in Mississippi. *See* Ex. 1 to Pls.' Mot. TRO, Decl. Sacheen Carr-Ellis, M.D., M.P.H., Supp. Pls.' Mot. TRO ("Carr-Ellis Decl.") ¶ 4. The Clinic provides abortion services up to 16 weeks 0 days of pregnancy, as calculated from the first day of the patient's last menstrual period ("lmp"). *Id.* ¶ 6. The Clinic performs two types of abortion procedures: medication abortion, up to 10 weeks lmp, and aspiration (surgical) abortions, up to 16 weeks 0 days lmp. *Id.*

Plaintiff Sacheen Carr-Ellis, M.D., M.P.H., is a board-certified obstetrician/gynecologist licensed to practice medicine in Mississippi. *Id.* ¶ 1.[2] Dr. Carr-Ellis has been providing abortion services for nearly twenty years, including both first-trimester abortions and second-trimester abortions after 15 weeks. *Id.* ¶ 2.

In 2014, Dr. Carr-Ellis joined the Clinic, and she became Medical Director in 2015. *Id.* ¶ 4. As Medical Director, she oversees the Clinic's medical practice in addition to providing contraceptive and abortion services as one of the Clinic's clinicians. *Id.* ¶¶ 5-6.

Legal abortion is one of the safest medical procedures in the United States. *Id.* ¶ 12. Complication rates for abortion, including after 15 weeks, are similar to or lower than for other outpatient procedures. *Id.* Additionally, every pregnancy-related complication is more common among women having live births than among those having abortions. *Id.* ¶ 13. In fact, the risk of death for those carrying pregnancies to term is approximately 14 times higher than for those obtaining abortions. *Id.*

[2] Dr. Carr-Ellis received her M.D. from Albany Medical College in 1999. Carr-Ellis Decl. ¶ 1. After her residency in obstetrics and gynecology, Dr. Carr-Ellis completed a fellowship in family planning at Boston University Medical Center in Boston, Massachusetts, which included training in abortion. *Id.* She also received her master's degree in public health at Boston University. *Id.*

Abortion is a very common medical procedure, with approximately one in four American women having one during their lifetime.[3] *Id.* ¶ 10. In 2017, 78 of the Clinic's patients obtained abortions after 14 weeks 6 days lmp. *Id.* ¶ 7.

B. Enactment of H.B. 1510

The Act became law on March 19, 2018. H.B. 1510, 2018 Leg., Reg. Sess. (Miss. 2018). It has an immediate effective date. *Id.* at § 2. A copy is attached to the Complaint in this case.

The Act states that "a person shall not intentionally or knowingly perform, induce, or attempt to perform or induce an abortion," if "the probable gestational age of the unborn human," which the physician is required to determine and document prior to performing the abortion, is "greater than fifteen (15) weeks." *Id.* at § 1.4 ("the ban"). The only exceptions to the ban are if the woman is experiencing a medical emergency or if there is a severe fetal abnormality. *Id*. The Act defines "medical emergency" as a physical condition or illness that makes it necessary to perform an abortion to save a woman's life or to prevent "a serious risk of substantial and irreversible impairment of a major bodily function." *Id.* at § 1.3(j). It defines a "severe fetal abnormality" as "a life-threatening physical condition that, in reasonable medical judgment, regardless of the provision of life-saving medical treatment, is incompatible with life outside the womb." *Id.* at § 1.3(h).

Under the Act, "gestational age" or "probable gestational age" is defined as "the age of an unborn human being as calculated from the first day of the last menstrual period of the

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[3] 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. *Id.* ¶ 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 because they want to pursue educational or work opportunities. *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.*

pregnant woman." *Id.* at § 1.3(f). Accordingly, the Act bans abortions in Mississippi, with very limited exceptions, after 15 weeks lmp, as described in greater detail below.

The Act includes substantial penalties. It provides that a physician "who intentionally or knowingly" violates the ban "commits an act of unprofessional conduct and his or her license to practice medicine in the State of Mississippi shall be suspended or revoked pursuant to action by the Mississippi State Board of Medical Licensure." *Id.* at § 1.6. Further, the Act permits the Attorney General to enforce its provisions through an action in law or equity on behalf of the Director of the Mississippi State Department of Health or the Mississippi State Board of Medical Licensure. *Id.* at § 1.7.

C. Impact of Immediate Enforcement

As of right now, the Clinic has one patient past 14 weeks 6 days lmp scheduled for an abortion on Tuesday, March 20. Carr-Ellis Decl. ¶ 8. That patient will be turned away, unless a temporary restraining order or preliminary injunction has been issued. Next week, the Clinic is scheduled to provide aspiration procedures on Wednesday, March 28, and Thursday, March 29. Carr-Ellis Decl. ¶ 8. Given that the Clinic provided almost 80 procedures after 14 weeks 6 days lmp in 2017, it is reasonable to expect that, without an injunction, the Clinic will be forced to turn away at least one patient every week.

II. Argument

Temporary injunctive relief is proper when Plaintiffs establish (1) a substantial likelihood of success on the merits; (2) substantial threat of irreparable injury; (3) that 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.*, *Jackson Women's Health Org. v. Currier*, 760 F.3d

448, 452 (5th Cir. 2014); *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 a Substantial Likelihood of Success on the Merits.

Plaintiffs are substantially likely to succeed on the merits of their claim that the Act violates women's liberty rights under the Fourteenth Amendment by banning abortions before viability. It is axiomatic that a State may not ban pre-viability abortion. *See 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 also Roe v. Wade*, 410 U.S. 113, 163–64 (1973). In setting this constitutional standard, the Supreme Court recognized "the urgent claims of the woman to retain the ultimate control over her destiny and her body, claims implicit in the meaning of liberty," *Casey*, 505 U.S. at 869, as well as a woman's fundamental right to the decisional autonomy to shape her own place in society, regardless of the State's vision of her role. *Id.* at 852. The Supreme Court has reaffirmed the constitutional principle that a State may not ban abortion before viability time and again, including just two years ago. *See, e.g.*, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2299 (2016) (reaffirming that a provision of law is constitutionally invalid if it bans abortion "before the fetus attains viability" (quoting *Casey*, 505 U.S. at 878)).

Accordingly, every federal appellate court or state high court faced with a law prohibiting abortions before viability, with or without exceptions, has ruled that it violates the Fourteenth Amendment; the Supreme Court has affirmed or denied *certiorari* in each one of these cases it has been asked to review. *See MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 773 (8th Cir. 2015) (striking down ban on pre-viability abortions at 6 weeks with exceptions), *cert. denied*, 136 S. Ct. 981 (2016); *McCormack v. Herzog*, 788 F.3d 1017, 1029 (9th Cir. 2015) (striking

down ban on pre-viability abortions at 20 weeks with exceptions); *Edwards v. Beck*, 786 F.3d 1113, 1117 (8th Cir. 2015) (striking down ban on pre-viability abortions at 12 weeks with exceptions), *cert. denied*, 136 S. Ct. 895 (2016); *Isaacson v. Horne*, 716 F.3d 1213, 1217 (9th Cir. 2013) (striking down ban on abortions at 20 weeks with exceptions because it prohibits abortions in "the period between twenty weeks gestation and fetal viability" and therefore deprives women "of the ultimate decision to terminate their pregnancies prior to fetal viability"), *cert. denied*, 134 S. Ct. 905 (2014); *Carhart v. Stenberg*, 192 F.3d 1142, 1151 (8th Cir. 1999) (striking down ban on "the most common procedure" used to perform abortions after 13 weeks), *aff'd*, 530 U.S. 914, 922 (2000); *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 201 (6th Cir. 1997) (same), *cert. denied*, 523 U.S. 1036 (1998); *Jane L. v. Bangerter*, 102 F.3d 1112, 1114, 1117−18 (10th Cir. 1996) (striking down ban on pre-viability abortions at 22 weeks with exceptions), *cert. denied*, 520 U.S. 1274 (1997); *Sojourner T. v. Edwards*, 974 F.2d 27, 29, 31 (5th Cir. 1992) (striking down ban on all abortions with exceptions), *cert. denied*, 507 U.S. 972 (1993); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1368−69 (9th Cir. 1992) (same), *cert. denied*, 506 U.S. 1011 (1992); *cf. DesJarlais v. State, Office of Lieutenant Governor*, 300 P.3d 900, 904–05 (Alaska 2013) (invalidating proposed pre-viability ban on all abortions with exception for "necessity"), *reh'g denied*; *In re Initiative Petition No. 395, State Question No. 761*, 286 P.3d 637, 637−38 (Okla. 2012) (invalidating proposed definition of a fertilized egg as a "person" under due process clause), *cert. denied*, 133 S. Ct. 528 (2012); *Wyo. Nat'l Abortion Rights Action League v. Karpan*, 881 P.2d 281, 287 (Wyo. 1994) (ruling proposed ban on abortions would be unconstitutional); *In re Initiative Petition No. 349, State Question No. 642*, 838 P.2d 1, 7 (Okla. 1992) (striking down proposed abortion ban with exceptions), *cert. denied*, 506 U.S. 1071 (1993). In particular, federal appellate courts have

unanimously struck down state laws that prohibit pre-viability abortions after a specific gestational age. *See*, *e.g.*, *MKB Mgmt. Corp.*, 795 F.3d at 773 (6-week ban); *Edwards*, 786 F.3d at 1117 (12-week ban); *Isaacson*, 716 F.3d at 1217, 1231 (20-week ban); *Jane L.*, 102 F.3d at 1114, 1117−18 (22-week ban). In short, no pre-viability ban has survived a court challenge.

Viability is not possible at 15 weeks and does not occur until months later. Carr-Ellis Decl. ¶ 15. In fact, the Mississippi Department of Health's own materials on abortion plainly state that at 14 to 16 weeks, a fetus has "no chance of survival outside the womb." HEALTH FACILITIES LICENSURE AND CERTIFICATION, MISSISSIPPI STATE DEPARTMENT OF HEALTH, INFORMED CONSENT INFORMATION AND RESOURCES 4 (1996 rev. 1991).

Accordingly, the Act bans pre-viability abortion, in violation of established Supreme Court precedent. The narrow exceptions to the ban do not change the constitutional analysis. *See, e.g.*, *Casey*, 505 U.S. at 879 ("Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."); *Isaacson*, 716 F.3d at 1227-1228 (holding that "while a health exception is necessary to save an otherwise constitutional post-viability abortion ban from challenge, it cannot save an unconstitutional prohibition on the exercise of a woman's right to choose to terminate her pregnancy before viability").

B. Plaintiffs and Their Patients Will Experience Irreparable Injury Absent a Temporary Restraining Order.

To establish irreparable injury, "[t]he 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." *Jackson Women's Health Org. v. Currier*, 940 F. Supp. 2d 416, 423 (S.D. Miss. 2013) (quoting *Humana, Inc. v. Avram A. Jacobson, M.D., P.A.*, 804 F.2d 1390,

1394 (5th Cir. 1986)), *aff'd*, 760 F.3d 448 (5th Cir. 2014). Plaintiffs easily meet that standard here.

Immediate enforcement of the ban will cause irreparable harm to Plaintiffs and their patients. The Act will outright ban pre-viability abortions after 15 weeks of pregnancy in Mississippi, but for its extremely narrow exceptions. Miss. H.B. 1510 § 1.4. Thus, virtually every woman seeking a pre-viability abortion after this stage of pregnancy will be prevented from obtaining an abortion in the state.

The Clinic has one patient who is past 14 weeks 6 days who is scheduled for a procedure on Tuesday, March 20. Carr-Ellis Decl. ¶ 8. Given that the Clinic provided almost 80 procedures to women who were past 14 weeks 6 days lmp in 2017, *id.* ¶ 7, it is reasonable to expect that, without an injunction, the Clinic will be forced to continue to turn away at least one patient every week because of the ban.

The U.S. Court of Appeals for the Fifth Circuit recently upheld a preliminary injunction against a different Mississippi abortion restriction, affirming this Court's ruling that preventing women from obtaining a pre-viability abortion constitutes irreparable harm. *See Jackson Women's Health Org.*, 760 F.3d at 451, 459. Indeed, there is no question that the physical and emotional consequences women face by being forced to remain pregnant against their will constitutes irreparable injury. *See, e.g.*, *Doe v. Charleston Area Med. Ctr., Inc.*, 529 F.2d 638, 644 (4th Cir. 1975) (stating that*, inter alia,* distress, psychological harm, poor mental and physical health constitutes irreparable injury). Additionally, where, as here, there is a threatened violation of constitutional rights, that threat alone constitutes irreparable harm. *See, e.g.*, *Elrod v. Burns*, 427 U.S. 347 (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); *Jackson Women's Health Org.*, 940 F. Supp. 2d at 423 n.6, *aff'd*, 760 F.3d 448 (5th Cir. 2014).

C. The Injuries to Plaintiffs and Their Patients Far Outweigh Any Harm to Defendants.

Although Plaintiffs and their patients will suffer numerous irreparable harms absent a temporary restraining order, Defendants will suffer no injury whatsoever, because such relief will simply preserve the *status quo*. *See Jackson Women's Health Org.*, 940 F. Supp. 2d at 424 (because preliminary injunction order would "essentially continue[] the status quo," balance of equities tips in favor of preliminary relief), *aff'd*, 760 F.3d 448 (5th Cir. 2014). The State has no legitimate 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. Thus, the balance of hardships tips decidedly in favor of granting the relief Plaintiffs seek.

D. Granting Emergency Injunctive Relief Will Serve the Public Interest.

A temporary restraining order preventing immediate enforcement of the Act would plainly serve the public interest. Indeed, the public interest is served "when an injunction is designed to avoid constitutional deprivations." *Jackson Women's Health Org.*, 940 F. Supp. 2d at 424, *aff'd*, 760 F.3d 448 (5th Cir. 2014); *see also Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996) ("public interest [is] not disserved by an injunction preventing [the] implementation" of law that violates constitutional rights). Further, the public interest is well-served by "maintaining the status quo pending a full trial on the merits." *United States v. State of Tex.*, 508 F.2d 98, 101 (5th Cir. 1975).

Here, immediate injunctive relief would protect women's constitutional right to access abortion care. On Tuesday, March 20, one patient is scheduled to obtain an abortion procedure at the Clinic who is past 14 weeks 6 days. Carr-Ellis Decl. ¶ 8. Without relief from the Court,

this patient will either be forced to carry her pregnancy to term against her will or have to leave the state to obtain an abortion. *Id.* ¶ 9. Further, restraining Defendants from enforcing the Act will maintain the *status quo*. Accordingly, a temporary restraining order serves the public interest.

III. Conclusion

For all these reasons, Plaintiffs respectfully request that the Court issue a temporary restraining order prohibiting Defendants from enforcing the Act as applied to all pre-viability abortions after 15 weeks.

Respectfully submitted this 19th day of March, 2018.

_/s/ Robert B. McDuff__________
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**Pro Hac Vice* Application to be Filed

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing is being served through the Court's ECF system on counsel for the Defendants:

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This the 19th day of March, 2018.

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