UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

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.	)	Case 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,	)	
and	)	
ROBERT SHULER SMITH, in his official capacity as District Attorney for Hinds County, Mississippi,	)	
Defendants.	)	

SUPPLEMENTAL MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I. Introduction

Absent a preliminary injunction from this Court, Plaintiffs will either have to close or operate in clear violation of the Admitting Privileges Requirement[1] in Mississippi House Bill 1390 ("the Act") when this Court's temporary restraining order expires. The balance of equities clearly favors granting a preliminary injunction to relieve the urgency of the problem created by

[1] The Admitting Privileges Requirement provides that all physicians associated with an abortion facility must have "admitting privileges and staff privileges to replace local hospital on-staff physicians." Miss. H.B. 1390 § 1, *to be codified at* Miss. Code Ann. § 41-75-1(f).

the Mississippi Department of Health's decision to immediately enforce the Act, before any of the local hospitals have completed their review of the applications submitted by the Clinic's physicians. If one of the local hospitals grants privileges to the Clinic's physicians during the period that the Act is preliminarily enjoined, that urgency will be relieved pending final resolution on the merits. If all of the local hospitals deny privileges, it will then be even more clear that the Act has not only the purpose, but the effect, of denying reproductive freedom to the women of Mississippi. In the interim, the State will suffer no harm.

Although the State argues that an injunction should be denied so that the administrative procedure can go forward, that procedure serves no useful function in light of the current situation. This is not a scenario where there is room for debate through the administrative process about whether a licensee is in compliance with a law or regulation. It is undisputed that the doctors do not have admitting privileges and cannot receive them unless a third-party—a local hospital—chooses to grant them. Unless a hospital grants the applications, the Clinic's license will be revoked at the end of the administrative process, if not sooner. In the meantime, Plaintiffs will be required to choose between closing down or knowingly violating state law in order to stay open, while incurring the burden and expense of defending against charges of misconduct in an administrative proceeding. Further, if they choose to stay open, Plaintiffs would run the additional risks that the State might choose to impose further penalties at some later point in time for Plaintiffs' conduct now, with a state court interpreting the term "status quo" in Miss. Code Ann. § 41-75-23 to permit such penalties. These uncertainties can easily be avoided by a preliminary injunction pending resolution of the merits, or at least until one of the hospitals has granted the Clinic physicians' applications for admitting privileges.

II. Immediate Enforcement of the Admitting Privileges Requirement Will Cause Irreparable Harm to Plaintiffs and their Patients.

In its order granting emergency relief against enforcement of the Act, the Court directed the parties to submit supplemental briefing regarding: (1) the change in circumstances resulting from the Clinic's receipt of a renewal license; and (2) the extent to which the threat of commencing administrative proceedings due to Plaintiffs' current state of non-compliance with the Act constitutes irreparable harm. Order dated July 1, 2012, Dkt. No. [17].

A. The Department's Commitment to Immediately Enforce the Admitting Privileges Requirement Forces Plaintiffs into An Untenable Position.

Renewal of the Clinic's license resolves one of the two insurmountable problems prompting Plaintiffs to file this litigation: the Department's demand, on June 25, 2012, that the Clinic provide written proof of compliance with the new law on or before July 1, 2012 as a condition of license renewal. Absent a license, the Clinic could not operate. The Clinic's receipt of a renewal license from the Department, the day after this litigation was filed, removed this obstacle.[2]

The second problem persists. The Department's last-minute decision, on June 22, 2012, to enforce Mississippi House Bill 1390 ("the Act") immediately—rather than after promulgating amended rules that would take effect in mid-August—means that Plaintiffs cannot operate in compliance with the laws as of July 1, but for this Court's order restraining enforcement of the

[2] Plaintiffs' procedural due process claim is not affected by the Department's renewal of the Clinic's license. That claim stemmed from the Department's abrupt reversal, on June 22, 2012, of its earlier decision to promulgate rules to implement the Act, which would have delayed its effective date until mid-August and given Plaintiffs a more reasonable amount of time to obtain privileges – a process involving third parties over which they have no control. Because the Department's decision to immediately enforce the Admitting Privileges Requirement will substantially interfere with Plaintiffs' protected property interests in continued operation, it violates Plaintiffs' procedural due process rights. *See* Pls.' Mem. of L. in Supp. of Pls.' Mot. for TRO and/or Prelim. Inj., Dkt. No. [6] at 19-21. Plaintiffs are not required to exhaust their administrative remedies prior to bringing a procedural due process claim under 42 U.S.C. § 1983, particularly because such remedies would not cure the procedural due process violation. *See Bowlby v. City of Aberdeen*, 681 F.3d 215, 220-22 (5th Cir. 2012) (squarely holding that exhaustion of administrative remedies is not required prior to a procedural due process claim).

Act. Plaintiffs do not know when, if ever, they will be able to comply with the Admitting Privileges Requirement. If it is permitted to take effect, Plaintiffs cannot operate without risking penalties for knowingly violating that section of the statutes, regulations, and standards governing abortion facilities and ambulatory surgical facilities. *See* Miss. Code Ann. §§ 41-75-25, 41-75-26(1) (imposing penalties including misdemeanor liability, fines, and license revocation for any licensed health care professional); *see also* Reply in Supp. of Pls.' Mot. for TRO and/or Prelim. Inj., Dkt. No. [12] ("Pls.' Reply Br.") at 3. Thus, immediate enforcement forces Plaintiffs to choose between two untenable options: continuing to provide abortion care, violating a law they have challenged as unconstitutional and risking penalties; or ceasing to provide lawful medical procedures. The Admitting Privileges Requirement will accordingly have a "chilling" effect that threatens the availability of abortion care in Mississippi and so creates an unconstitutional *de facto* ban. *See* Pls. Mem. L. in Supp. of Pls' Mot. for TRO and/ or Prelim. Inj., Dkt. No. [6] ("Pls.' PI Br."). *Cf., e.g., Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1465 (8th Cir. 1995) (striking a statute creating strict civil liability for abortion providers because of the "chilling" effect it would have on providers).

B. Plaintiffs Have Shown they Will Experience Irreparable Injury without Preliminary Injunctive Relief.

In order to show irreparable harm justifying injunctive relief, Plaintiffs "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." *Humana, Inc. v. Jacobson*, 804 F.2d 1390, 1394 (5th Cir. 1986) (footnotes and citations omitted). Plaintiffs clearly meet this standard.

1. Plaintiffs Have Shown a Significant Threat of Injury.

As discussed below, the administrative proceedings that the Department has promised to initiate immediately upon the Act's taking effect are not the only penalties that Plaintiffs face.

Combined with the prospect of criminal and disciplinary penalties, enforcement of the Admitting Privileges Requirement will have a "chilling" effect on the provision of abortion care in Mississippi. Courts have repeatedly held that such a *threat* of a constitutional rights violation is irreparable injury justifying preliminary injunctive relief. *E.g., Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996) (finding irreparable injury because a statute posed a substantial threat to the plaintiff's constitutional rights); *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981) (same); *Pro-Choice Miss. v. Thompson*, Case No. 3:96CV596BN, Bench Op. at 27 (annexed as Ex. D to Pls.' PI Br.); *see* Pls.' Reply Br. at 4-5 (collecting cases); Pls.' PI Br. at 21-22 (same).

Defendants have repeatedly insisted that Plaintiffs do not risk irreparable harm from immediate enforcement of the Act because at least sixty days will pass before the Clinic is *ordered* to close.[3] *See* Defs.' Resp. in Opp. to Mot. for Prelim. Inj., Dkt. No. [10]. But it does not take a formal order to force the Clinic to close; the prospect of criminal and disciplinary liability for violating the Admitting Privileges Requirement will accomplish the same result. Further, whether the Department revokes the Clinic's license next week or in sixty days, the risk to Plaintiffs exists *now* because the Clinic and its staff will be in violation of the Admitting

[3] Even though Defendants have assured Plaintiffs and this Court that they would not seek to initiate any criminal prosecutions during the pendency of the licensure revocation process, they have made no such commitments about what they will do at the end of that process about conduct in the interim. *See* Def. Smith's Resp. in Opp. to Pls.' Mot. for Prelim. Inj. and/or TRO, Dkt. No. [15], at 2 (committing not to prosecute "while [the Clinic's] compliance with licensure requirements is being reviewed by the state Department of Health"); Def. Currier's Resp. to Pls.' Reply to Resp. in Opp. to Pl.'s Mot. for Prelim. Inj. and/or TRO, Dkt. No. [16], at 1 (stating that the Department "has no intention to request that any other entity press criminal charges … until the administrative process … is completed"). These assurances are "no solace" to Plaintiffs. *Cf. Women's Med. Ctr of Nw. Houston v. Bell*, 248 F.3d 411, 422 (5th Cir. 2001) (fact that penalties for violation of challenged law had not yet been imposed did not protect against future imposition). A commitment to delay prosecution is not the same as a commitment to forego it. *See Richmond Med. Ctr. for Women v. Gilmore*, 11 F. Supp. 2d 795, 809 (E.D. Va. 1998) ("The defendants argue that the plaintiffs cannot, as a matter of law, sustain any irreparable injury because the Commonwealth Attorneys have sworn they will not prosecute [the plaintiff physicians for performing a particular type of abortion procedure]. Those affidavits are a statement of current intent, and are not binding on the Commonwealth Attorneys….").

Privileges Requirement as soon as it takes effect. This risk constitutes irreparable harm to Plaintiffs and their patients and is sufficient to warrant injunctive relief.

Defendants have argued that the time allowed for a hearing and a final Department of Health decision in Miss. Code Ann. § 41-75-11, and the words "status quo" in Miss. Code Ann. § 41-75-23, obviate the need for a preliminary injunction. This is not accurate. Section 41-75-11 provides for a hearing and a final determination by the Department of Health. It does not say that the status quo shall be maintained during that process. Section 41-75-23 addresses the availability of an appeal to Chancery Court from a licensure revocation order issued by the Department of Health. It states that "[p]ending final decision of the matter, the status quo of the applicant or licensee shall be preserved, unless a court orders otherwise in the public interest." Miss. Code Ann. § 41-75-23. Indeed, some might argue that because the phrase "status quo" is not in § 41-75-11, the Clinic cannot operate during the administrative process, and that "status quo" in § 41-75-23 refers to the situation in place after the Department of Health renders a final decision revoking the clinic's license. Even if these two sections of law allow the Clinic to continue to operate through the administrative process and pending a final disposition in the state courts, they do not guarantee that the Clinic, its physicians and its staff would be free from all risk of liability for their conduct during the period in which the administrative process and any appeal progress. The Department will continue to be pressured to close the Clinic during the administrative process, and even if that is not done, arguments by various *amicus curiae* may well be made to the state courts that the public interest requires closing the Clinic before the case is concluded.

Moreover, in light of the particular circumstances here, where state officials have made no secret of their desire to close the Clinic and have actively exerted pressure to accomplish that

result, neither §§ 41-75-11 nor 41-75-23 eliminates the uncertainty that surrounds this case, and neither prevents the distinct possibility of irreparable harm to the Plaintiffs. Indeed, in enjoining a Department of Health regulation requiring a written transfer agreement with a local hospital, Judge Barbour did not even mention these sections, and the administrative procedures they establish, though they were in place, let alone consider them as a reason to deny preliminary injunctive relief. *See Pro-Choice Mississippi*, Case No. 3:96CV596BN, Bench Op. at 20-21 (annexed as Ex. D to Pls.' PI Br.) (holding that "there is widespread public opposition and protest to abortions in this state," that "as a practical matter, local pressure can and will be brought upon hospitals to deny these written transfer agreements to abortion providers, " and "the hospitals then would have third-party vetoes over whether the abortion providers can obtain a license from the State of Mississippi.").

Further, even if the Clinic is allowed to stay open, and whether or not admitting privileges are ultimately obtained, arguments may be made at the conclusion of the process that penalties can be imposed on the Plaintiffs retroactively. While the words "status quo" in § 41-75-23 would seem to preclude that sort of retroactive imposition, with no Mississippi case law construing the statute and given the controversy surrounding this case, that risk cannot be discounted. Moreover, even if it could be guaranteed that the clinic could stay open without suffering any potential penalties pending completion of the process described in § 41-75-11 and § 41-75-23, the Plaintiffs are still placed in the difficult position of knowingly violating state law in order to stay open. Even though there is an administrative process, they are still violating a state criminal law *unless that state law is enjoined*. Citizens should not be required to disobey a statute in order to exercise their rights under the United States Constitution. Given that the Admitting Privileges Requirement likely is unconstitutional, it should be enjoined so that the

Plaintiffs are not in the position of either having to close or having to knowingly disobey the statute as the price for staying open.

Additionally, even if the administrative licensure revocation proceeding were the only penalty Plaintiffs would face upon the Admitting Privileges Requirement taking effect, such a proceeding constitutes a "significant threat of irreparable injury." In evaluating irreparable injury, courts have focused on the *consequences* of enforcement of a law challenged as unconstitutional, and have been less concerned about the *nature* of enforcement as administrative, civil, or criminal. For example, in *Shamloo v. Mississippi State Board of Trustees of Institutes of Higher Learning*, 620 F.2d 516 (5th Cir. 1980), the Fifth Circuit held that preliminary injunctive relief should issue to halt ongoing disciplinary proceedings against the students who were challenging the statute. *Id.* at 525. Notably, the court's analysis was not affected by the fact that the penalties imposed on the students were exclusively administrative; rather, the court focused on the impact that enforcement had on their constitutional rights. Similarly, in *Ingebretsen v. Jackson Public School District*, 88 F.3d 274, the Fifth Circuit found irreparable injury where the challenged statute would have infringed on students' First Amendment rights, even though the only apparent enforcement of the statute would have been disciplinary. *Id.* at 278.

Likewise, a district court in Louisiana held that the threat that the defendant administrative agency would initiate administrative proceedings to decertify the plaintiff nursing home was irreparable injury. *Rayford v. Bowen*, 715 F. Supp. 1347, 1350-51 (W.D. La. 1989). That court specifically rejected the defendant federal agency's argument that no irreparable injury existed because no nursing home had yet been decertified. *Id*. at 1350-51. The court explained that the *threat* of decertification constituted irreparable injury:

> If the plaintiffs had to wait until they were prosecuted in order to obtain a preliminary injunction, no one could ever enjoin the Government. The plaintiffs would have to wait until they were prosecuted and then use the illegality of the Government's actions as a shield rather than as a sword. . . . The plaintiffs do not need to wait until it is too late to test the constitutionality of [the challenged statute]. . . . The defendants have made it abundantly clear that the sword of decertification hangs over the plaintiffs' heads.

Id. at 1351. Accordingly, the court granted preliminary injunctive relief.

Whether Defendants initiate administrative proceedings alone or in addition to criminal and disciplinary penalties, Plaintiffs and their patients face irreparable injury. *Cf. Shamloo*, 620 F.2d at 525; *Rayford*, 715 F. Supp. at 1351. Further, because the end result of licensure proceedings is revocation of the Clinic's license, the administrative proceedings threaten the constitutional rights of women in Mississippi to obtain abortion care, justifying preliminary injunctive relief. *Cf. Deerfield Med. Ctr.*, 661 F.2d at 338; *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).

Further, administrative proceedings will force the Clinic to endure the burden and expense of defending itself from charges that it is engaged in conduct that jeopardizes its patients' health. When the Admitting Privileges Requirement takes effect, Dr. Parker will, likewise, be exposed to reputational harms associated with the same charges. Even if these harms might be remedied by monetary relief in the ordinary case, they are not remediable here because of the Eleventh Amendment bar discussed below. *Cf. DFW Metro Line Serv. v. Sw. Bell Tel. Co.*, 901 F.2d 1267, 1269 (5th Cir. 1990).

Finally, Defendants' last-minute insistence on immediately instituting administrative proceedings should be considered in context. The Department of Health's initial response to the Act was to begin the process of promulgating amended rules to implement the new law, which

would have taken effect in mid-August. *See* Pls.' PI Br. at 8. However, the Act's sponsor—one of several elected officials who have openly stated a desire to end abortion through the Act—publicly pressured the Department to enforce the new law immediately upon its effective date. It was only after that pressure that the Department reversed its position and began seeking immediate enforcement. *Id.* This is a strong indication that immediate enforcement—at a time when compliance is practically impossible—is a crucial component of the purpose animating the Admitting Privileges Requirement. In other words, the immediate implementation of administrative proceedings will operationalize the constitutional violations at issue here; it is a part and parcel of the attempted closure of the Clinic and subsequent elimination of abortion access in Mississippi, in violation of the Constitution.

Thus, Plaintiffs have demonstrated that enforcement of the Admitting Privileges Requirement presents a "significant threat of injury." *Cf. Humana, Inc.*, 804 F.2d at 1394.

2. Injury to Plaintiffs and Their Patients Is Imminent.

Injury need not be immediate to be "imminent"; indeed, the timing of the injury is less important than the certainty of its occurrence. Here, too, courts have focused on the impact of the threatened injury, without regard to whether the injury would arise from civil, criminal and/or administrative enforcement. For example, the Fifth Circuit has held that the certainty that the federal Department of Health and Human Services would enforce regulations allowing withdrawal of all Medicare funding was sufficiently "imminent" to justify preliminary injunctive relief. *Humana, Inc.*, 804 F.2d at 1394 (holding that Humana was not required to go through administrative enforcement proceedings before obtaining preliminary injunction); *accord Women's Med. Ctr. of Nw. Houston*, 248 F.3d at 422; *Ingebretsen*, 88 F.3d at 278 (plaintiff was not required to delay his constitutional challenge until after his constitutional rights were violated

by enforcement of the challenged statute); *Rayford*, 715 F. Supp. at 1351; *see also Doe v. Bolton*, 410 U.S. 179, 188 (1973) (holding that i) plaintiff physicians had standing to challenge the constitutionality of state abortion statutes "despite the fact that the record does not disclose that any one of them has been prosecuted, or threatened with prosecution;" and ii) plaintiff physicians "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief"). Here, without injunctive relief, penalties for violating the Admitting Privileges Requirement will hang, like a sword of Damocles, over Plaintiffs from the moment that the Act takes effect. This is true of the administrative proceedings that Defendants have repeatedly committed to implement the moment the Admitting Privileges Requirement takes effect, just as it is of the other penalties discussed above. Thus, Plaintiffs have shown that injury is "imminent."

3. Plaintiffs and their Patients Have No Adequate Remedy at Law.

Threatened injury is "irreparable" if it cannot be compensated by monetary relief. *Deerfield Med. Ctr.*, 661 F.2d at 338. The two categories of injury Plaintiffs face cannot be remedied by money damages. First, as to the reputational and economic harms flowing from charges of violating the law, Plaintiffs and their patients cannot be compensated with monetary relief because the Eleventh Amendment prohibits recovery of damages from state officials. *Edelman v. Jordan*, 415 U.S. 651, 667-68 (1974). Thus, the financial expenses Plaintiffs would incur in defending against enforcement of the Admitting Privileges Requirement, as well as their reputational injury from wrongful accusations of conduct jeopardizing patient health, could not be recovered if Plaintiffs ultimately prevail in their challenge to the Act's constitutionality. Second, as to the harms to the constitutional rights of themselves and their patients, it is well-settled that money damages are no remedy. *See, e.g.*, *Deerfield Med. Ctr.*, 661 F.2d at 338 ("the right of privacy must be carefully guarded for once an infringement has occurred it cannot be

undone by monetary relief"). Plaintiffs' injuries, accordingly, are not compensable by monetary damages and are properly deemed "irreparable."

III. Plaintiffs Have Shown that the Balance of Hardships Tips In Their Favor and that Injunctive Relief Is In the Public Interest.

While Plaintiffs will suffer irreparable harms if the Admitting Privileges Requirement is allowed to take effect, Defendants will suffer no harm at all. *See* Pls.' PI Br. at 22-23. The balance of hardships thus weighs heavily in favor of preliminary injunctive relief.

The public interest would be served by an injunction against enforcement of the Act, as it is always served by restraints against unconstitutional laws. *See* Pls.' PI Br. at 23. In addition, by allowing Plaintiffs to press those claims before they are forced to defend against charges of non-compliance in administrative proceedings, injunctive relief would serve the important policy interests motivating the passage of 42 U.S.C. § 1983. Among other things, that statute was intended to ensure that the federal judiciary plays the "paramount role" in protecting constitutional rights, and to protect plaintiffs against being forced to raise their constitutional claims in a defensive posture as part of administrative and/or state proceedings. *Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974); *see also Patsy v. Bd. of Regents*, 457 U.S. 496, 504, 515 (1982).

Preliminary injunctive relief against the Act would also serve the public interest because of the specific circumstances here. There is strong evidence that the Admitting Privileges Requirement is motivated by a desire to close down the Clinic and end abortion in the State, in defiance of the Constitution and with a disregard for the rights of individuals. There is, correspondingly, a strong public interest in defending individual rights and the structure of federalism against the assault launched by the Act. The reasoning of a district court in Nebraska

that enjoined a law it determined was motivated by a comparably unconstitutional purpose is particularly apt:

> The public interest in preserving the separation of powers, the supremacy of the United States Constitution, concepts of federalism, and the liberty and privacy interests of individuals in exercising responsible stewardship and personal dominion of their own bodies, all weigh heavily in favor of the granting of injunctive relief.

Planned Parenthood of the Heartland v. Heineman, 724 F. Supp. 2d 1025, 1049 (D. Neb. 2010).

IV. Conclusion

For the foregoing reasons, and for the reasons set forth in Plaintiffs' prior briefing in this case, preliminary injunctive relief is proper and should issue to prevent enforcement of the Act.

Respectfully submitted this 6th day of July, 2012,

/s/ Michelle Movahed

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*Admitted *pro hac vice* by Order dated June 29, 2012

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been served on the following counsel through the Court's ECF system:

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