EXHIBIT D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

PRO-CHOICE MISSISSIPPI, ET AL.

V. CIVIL ACTION NO.

F.E. THOMPSON, JR., ET AL.

BENCH OPINION

The following proceedings were held in Jackson, Mississippi, on September 1996 before the Honorable William H. Barbour, Jr., Chief United States District Judge.

APPEARANCES:

FOR THE PLAINTIFFS:

Deborah Goldberg
Louise Melling
Robert McDuff

FOR THE DEFENDANTS:

Hunt Cole
Mildred Morris
Paul Stephenson

REPORTED BY: DAVID A. SCOTT, C.S.R.
MISSISSIPPI C.S.R. NO. 1113

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BY THE COURT:

This case is before the court on the motion of the plaintiffs for a preliminary injunction enjoining the defendants from the enforcement of section 41-75-1 et seq. of the Mississippi Code as amended and the regulations enacted by the Mississippi State Department of Health thereunder. This statute is an attempt of the state of Mississippi to regulate providers of abortion services within the state.

The plaintiffs are Pro-Choice-Mississippi, an unincorporated association or coalition of citizens supporting the right of women to make choices in regard to whether or not to have abortions. The plaintiff Herbert H. Hicks is a physician practicing in Natchez, Mississippi, who practices family medicine but who also performs abortions. Plaintiff Joseph Booker, Jr., is a physician who is an obstetrician-gynecologist practicing in Gulfport, Mississippi who performs abortions in addition to providing other gynecological services. Gulf Coast Gynecology Clinic, Inc.; Center for Choice, Mississippi, Inc.; and Joseph Booker, Jr., MD, PA, are three corporations recently established by

plaintiff Joseph Booker, Jr., which have purportedly hired him to work as an individual physician for these three corporations so he could continue to provide abortions to the public in the Gulfport area. They obviously were set up by Dr. Booker in an attempt to avoid the recently passed amendments to the statute and the regulations.

The defendants are F.E. Thompson, Jr., the state health officer of the Mississippi State Department of Health; Mike Moore, the Attorney General of the State of Mississippi; and Kirk Fordice, the governor of the State of Mississippi. Essentially the state of Mississippi.

In 1991, the state legislature passed Section 41-75-1 et seq. and thereafter later that year the Mississippi State Department of Health published regulations thereunder which are known as Minimum Standards of Operation for Abortion Facilities. Thereafter, the plaintiff Booker filed a case in the Southern Division of this district known as Booker v. Thompson, Civil Action No. 1:93cv552GR. That case challenged the statute and regulations as they then existed. Judge Walter Gex of this court entered his opinion on April 10, 1995, in which he granted summary judgment for the state

defendants based on qualified immunity and 11th Amendment immunity and denied the plaintiff's cross motion for summary judgment. In so doing at page 16 of that unpublished opinion Judge Gex stated that although the court "need go no further," he went ahead and ruled on the validity and constitutionality of the statute and regulations as they then existed. The defendant in this case argued that at least the plaintiff Booker is either barred by res judicata or is collaterally estopped from questioning the validity of the statute and regulations insofar as they existed at that time. The court has reviewed Judge Gex's opinion and is of the opinion that the alternate ruling in regard to the validity of the statute and regulations was not essential to his judgment, and therefore the doctrine of res judicata and collateral estoppel do not apply to bar in this case Dr. Booker's challenge to the statute and regulations as they existed at that time.

In early 1996, the Mississippi legislature by Senate Bill 2817 amended the statute effective July 1, 1996. The Mississippi State Department of Health, after the statute was amended, amended the minimum standards, or regulations,

effective August 12, 1996. Following those amendments the State Department of Health notified the plaintiff Booker that it would investigate his office to determine whether he need apply for licensure as an abortion facility under the laws and regulations. That notification at least in part prompted this lawsuit.

The statute as amended defines an abortion facility as a doctor or organization providing abortion services to 10 or more patients in any one-month period of time, or 100 or more abortions during any calendar year. Also an abortion facility is defined as a facility providing the equivalent of 10 abortions per month if the facility operates on a part-time basis of less than 20 days per month, and if the abortions actually performed would create a ratio of 10 abortions per month on a 20 day month as compared with the days it actually operates. Also the statute defines an abortion facility as a facility which holds itself out to the public as an abortion provider by advertising.

The proof has shown that prior to the organization of his three new corporations, that Dr. Booker would have qualified as an abortion provider

under the statute and would have had to have complied with the statute and the regulations because he performed more abortions than 10 per month and 100 per year. The testimony has been that he provided well in excess of the numbers to qualify. In addition, his previous clinic advertised in the Yellow Pages in Gulfport, Mississippi, as providing pregnancy termination and/or abortions, so that this likewise would place him under the requirements of the statute and regulations.

Dr. Hicks, on the other hand, testified that he did not advertise, but did provide abortion services sometimes meeting or exceeding the 10 per month, and accordingly, unless he limited his abortion practice, would be required to comply with the statute and regulations. As stated, plaintiff Booker, in an attempt to avoid the operation of the statute and regulations, has recently organized three separate corporations. He testified that he intended to be an employee of each corporation and to assign patients through each corporation to himself so that none of the corporations would comply with the requirements of the statute by having more than nine patients in any one month so

that he would not reach the 10 level. Dr. Hicks says that he would simply limit his abortion practice to no more than nine in any one month and no more than 99 in any one year in order to avoid the statute.

Dr. Booker's practice is carried out in the same building where he has practiced for the last two or three years, and it is not clear as to how the division of patients is intended to be made among those three corporations. That is not here before the court here today.

Both doctors, on behalf of themselves and their patients, attack the statute and regulation as unconstitutional. Pro-Choice of Mississippi attacks the statute as unconstitutional on behalf of women who may desire to have abortions in the state of Mississippi. Since there is a six-month window for qualifying under the statutes and regulations, and since the regulations were effective August 12, 1996, neither of the doctor plaintiffs are immediately faced with having to qualify under the statute, and, accordingly, the attack made by the plaintiffs on the statute and regulations is a facial attack as opposed to an as applied challenge. Therefore the plaintiffs must prove that

under no circumstances could the statute and/or regulations be held to be constitutional.

Further, since this is a motion for preliminary injunction, the plaintiffs have the burden of proof to show by preponderance of the evidence the four issues recognized in this circuit for preliminary injunction: They must show, 1) a substantial likelihood of success on the merits; 2) that a failure to issue the injunction would be more harmful to the plaintiffs than the issuance of the injunction would be to the defendants; 3) that the issuance of the injunction favors the public interest; and, 4) that the plaintiffs would be caused irreparable harm if the injunction is not granted.

It is clear from several cases, including Planned Parenthood v. Casey, that the state can regulate abortion providers, but only so long as the statute and or regulations are reasonably directed to preserve maternal health, and if so, those statutes and regulations do not constitute a substantial obstacle to a woman's choice of whether or not to have an abortion. The court will first address the issue of whether the plaintiffs have proved by a preponderance of the evidence that there

is a substantial likelihood that they will prevail on the merits.

The court asked the plaintiffs counsel in closing argument to list the specific challenges made by plaintiffs, and she did so. There is a general challenge made to the statute and regulations and then there are specific challenges to parts of the statute and regulations. There are no challenges at this time to some portions of the statute and regulations. There is a challenge to the provision of the statute which prohibits the location of an abortion facility within 1500 feet of a church, school or kindergarten. The defendants have confessed the unconstitutionality of that particular provision. Accordingly, the court finds that that provision is in fact unconstitutional, primarily because there can be no spot zoning under the constitution of the State of Mississippi.

The state defendants have argued that the statute and regulations are subject to severability if the court should find some portions of the statute and/or regulations valid and others not valid. The court agrees with the state defendants that invalid portions of the statute may be severed because under Mississippi law there is a presumption

of severability in the absence of the legislature's stating otherwise in the statute. Authority for this is Wilson v. Jones County Board of Supervisors, 342 So.2d 1294. (Miss. 1977). Accordingly, since the court is going to find that portions of the statute and regulations are valid and constitutional, the court will sever other portions, including this 1500 foot zoning provision, which it finds invalid and unconstitutional.

The court finds that under the authority as stated above of the Casey case, that states can regulate abortion providers, and specifically finds in regard to the statute and regulation passed by the State of Mississippi and the Mississippi Department of Health, that this statute and its regulations as amended in 1996, except as hereinafter set forth, are reasonably directed to preserve the maternal health of those seeking abortions in Mississippi, and, except for the specific declarations which I will set forth, do not constitute a substantial obstacle to a woman's choice to have an abortion. Accordingly, the challenge to the statute and regulations as a whole fails.

The court now will address the specific

issues of challenge by the plaintiffs. Plaintiffs challenge the section of the statute and the corresponding section of the regulations defining those abortion facilities which must comply with the law and the regulations. Other than the general challenge, the plaintiffs raise no specific complaint about the definition which brings those facilities providing 10 or more abortions per month or 100 or more per year within the purview of the statute and regulations. Under Casey, the state can chose to regulate in a proper manner all abortion providers. Here, the State of Mississippi only chose to regulate those abortion providers operating substantially for the purpose of performing abortions and opted to have a bright-line definition of the term "substantially providing abortion services." The court will note at this time that the 1996 amendment to the statute changed this definition from "primarily providing abortion services" to "substantially providing abortion services." The court finds no unconstitutional infirmity with the state's choosing not to regulate those providers who perform fewer than the specified number of abortions.

The plaintiffs challenge the second part

of the definition, which addresses abortion facilities which provide abortions on fewer than 20 days per month-- in other words, part-time facilities-- on the basis that that definition is vague. The court disagrees. The court thinks that the statute is clear enough to show that the intent of the legislature was to regulate those part-time providers to provide the ratio equivalent of 10 per month.

The third definition of abortion facilities covers those facilities which hold themselves out to the public as abortion providers by advertising. The court finds that the challenge to this provision under the Fourteenth Amendment is not well taken, that the definition is reasonably directed to preserve maternal health by attempting to draw into the regulatory scheme those institutions so defined, and that the prohibition on advertising does not constitute a substantial obstacle to a woman's choice.

However, the doctor plaintiffs challenge this provision also on First Amendment free speech grounds. This obviously is a commercial speech issue, and as such must meet the intermediate scrutiny test, which states that the regulation must

directly advance a substantial government interest and that it be no more extensive than necessary. The court finds that although the advertising portion directly advances a substantial government interest, that is the regulating of those substantially engaged in providing abortions, it is more extensive than necessary, particularly regarding those who would choose not to seek a license to operate an abortion facility by limiting the number of abortions that they would provide. Accordingly, because it applies to all abortion providers and because there is this exception under the statute as to certain abortion providers that could operate without complying with the statute and regulations but for this infringement upon their right to free commercial speech, the court believes that this portion of the definition is constitutionally infirm under the First Amendment.

The plaintiffs complain about the requirement in the regulations that a registered nurse be on the premises of abortion facilities when abortions are provided. The court has heard proof which is conflicting. Medical expert, Dr. Helen Barnes, who testified for the plaintiff, testified that a registered nurse was not necessary because

most abortions do not have complications, and that trained personnel, even trained to a lesser degree than licensed practical nurses or certified nurse assistants, can adequately perform the task if the doctor is present on the premises. Dr. Hicks testified that in all events that he performs no more than one abortion at a time before a patient is dismissed from his office, and, accordingly, he is available at all times to attend to his patients, and that when he is not with them that he has an office assistant who he has trained to be there, and in his opinion that the requiring of a registered nurse on his premises would only add to the expense of the abortions and is not medically necessary.

On the other hand, the defendants presented Dr. Harvey Huddleston, a professor of obstetrics and gynecology from Shreveport, Louisiana, who testified that since this is a surgical procedure, that a registered nurse was essential to the proper care of the patient and that even though a doctor may be present on the premises, that a registered nurse was still necessary. The defendants also presented a registered nurse, Rita Wray, who testified that in any case where nursing assistance was given to a person that a registered

nurse should be on the premises, not necessarily to render the specific nursing services, but to plan them and to direct those nursing services, which might be performed by a licensed practical nurse or a nursing assistant.

The plaintiffs have tried to persuade the court that since the abortions are routinely done, since they take only a short period of time to actually perform and since in the overwhelming majority of cases there are no complications, that there is no medical necessity for a registered nurse. The testimony before the court is that practically all abortions performed in Mississippi are suction D&C abortions, at least in the first and early second trimesters. The proof has shown that gynecologists routinely do suction D&Cs on nonpregnant women for other purposes. The defendants' expert, Dr. Huddleston, testified that a woman's body changes during pregnancy by, among other things, having a much greater blood supply to the uterus, and that because of this, that pregnant women are much more susceptible to hemorrhage when they have an abortion by suction D&C than when nonpregnant women have a suction D&C to remove remaining menstrual tissue or the remains of a fetus

which has died or has partially aborted. Dr. Barnes for the plaintiff, on the other hand, equated the procedures as being equal. However, both Dr. Barnes and Dr. Hicks, as well as Dr. Huddleston, stated that suction D&Cs on nonpregnant women are performed in the overwhelming number of instances at hospitals or ambulatory surgical facilities. Primarily because of this, it would appear to the court that there is a reasonable medical rationale for requiring that RNs be present when this type of surgery is performed.

That leads the court, in regard to this issue, to move to the second prong of the test, whether the requiring of the RNs would constitute a substantial obstacle to a woman's choice to have an abortion. The testimony was that salaries for RNs are approximately $40,000 per year in the state of Mississippi and that this is approximately three times greater than the salaries of licensed practical nurses or nursing assistants which are used by the two doctors in this case. The law is clear that simple cost alone, even though it might be passed on to the patient in the form of some increased fees, is not enough to constitute a substantial obstacle to a woman's choice. Here the

plaintiffs have complained that if they are required to staff with an RN that it would make it economically unfeasible for them to continue to provide abortions. The court is not positive that it believes that testimony, and at any rate, finds that this will probably not constitute a substantial obstacle to the woman's right of choice. Accordingly the court finds in regard to the RN situation that the plaintiffs do not meet their burden showing that they are likely to succeed on the merits of this issue when the court finally addresses it. The court will not enjoin the enforcement of this requirement.

The next issue raised by the plaintiffs is the requirement of the regulations that the doctor providing the abortion at an abortion facility must have ob-gyn training through an American Medical Association-approved residency program. The plaintiffs presented proof that Dr. Hicks has been in practice for 22 years and has a gynecological practice, although he does not have residency training in that specialty, and that he had carried on an extensive obstetrics practice for a number of years until he decided to retire from that portion of his practice. The regulations do

not allow any type of grandfathering for those doctors who may not have attained a residency in ob-gyn. There was testimony by Dr. Huddleston, defendants' expert, that he felt that a doctor who had less than an ob-gyn residency could in fact be qualified to perform abortions. He did not think that a person without some specific training in ob-gyn should be allowed to perform abortions. He suggested that if a doctor doing a family practice residency chooses to do one of the three years of that residency in obstetrics and gynecology that that would be sufficient to meet the state's reasonableness and medical necessity guidelines. Based particularly on this, the court believes that the state cannot meet its burden in regard to the first prong by showing that there is a reasonable medical necessity directed to preserve the woman's health in requiring ob-gyn residency training for all physicians performing abortions. Accordingly, the court finds that there is a substantial likelihood that the plaintiffs will prevail on the merits on that portion of their challenge.

The plaintiffs have challenged the various requirements of the regulations in regard to the physical setup of doctors' offices which qualify

as abortion facilities. The state has advised the court that in essence it adopted the building requirements for ambulatory surgical facilities as the requirements for abortion facilities. The plaintiff specifically challenged the provisions that require six foot corridors; 44 inch doors; what appears to be a requirement for five separate bathrooms; separate locker rooms for male nurses and female nurses, including a bathroom in each of those locker rooms; supplemental emergency power for exit lights and lighting, in general, and backup lights in operating rooms; suction capability in operating rooms; several specific area designations for such rooms as recovery areas; and an alarm system for calling doctors. The court is of the understanding that most, if not all, ambulatory surgical facilities are designed for use by multiple doctors at any one time, and multiple patients undergoing a variety of procedures. The court does not think that the defendants can meet the showing that all of the specifics set forth in the building requirements of the regulations are reasonably directed to preserve maternal health. It would appear to the court that these building requirements are over-designed and, to the extent of such

over-design, are not necessary, and further, that these building requirements are so expensive that they could possibly place substantial roadblocks in allowing women the choice to have abortions. The court thinks that the state could adopt reasonable requirements for facilities that would pass constitutional muster. Perhaps the regulations could be redrafted in a less elaborate and more reasonable manner, perhaps by tying building requirements to the number of patients being attended to at any one time. The court notes that testimony has been received that Dr. Hicks does not provide but one abortion at a time, whereas at least on one occasion Dr. Booker had 33 women in his office recovering from abortions. Dr. Booker's situation would require more elaborate facilities than one where the doctor performs only one abortion at a time.

The plaintiffs have challenged the requirement in the regulations requiring a written transfer agreement with a hospital within a 30 minute automobile trip of the doctor's office. The court is well aware and takes judicial notice of the fact that there is wide-spread public opposition and protest to abortions in this state. Dr. Booker has

applied to four hospitals in his area for a written transfer agreement and the proof has shown that two hospitals have denied him such an agreement, ostensibly on the basis that he does not have admitting privileges. Two hospitals have not responded. The state has argued that this is a reasonable provision to protect women who happen to have complications and need hospitalization. The court agrees with the defendants that it is reasonable to have hospitalization available to abortion patients who develop complications during or immediately after the abortion. The court feels, however, that requiring a written transfer agreement as opposed to some other agreement will constitute a substantial obstacle to a woman's right to choice, because as a practical matter, local pressure can and will be brought upon hospitals to deny these written transfer agreements to abortion providers. Accordingly, as a practical matter, the hospitals then would have third-party vetoes over whether the abortion providers can obtain a license from the State of Mississippi. Accordingly, the court finds that there is a substantial likelihood that the plaintiffs will succeed on the merits on this issue.

Next, the plaintiffs object to the provision under Part III of the regulations entitled "Patient Care" which states: "For medical safety an abortion facility shall deal only with menstrual extraction, routine dilation and curettage and suction and dilation curettage." The plaintiffs object to the omission of the procedures known as dilation and evacuation and medical abortion from the services that can be performed at an abortion facility.

As the court understands it, dilation and evacuation is very similar to dilation and curettage except that dilation and evacuation, known as D&E, is used where a fetus has developed to a sufficient stage so that it can no longer fit into the suction device and has to be dissected in order to be removed. This procedure is a necessary substitute for D&C in most instances where the fetus has reached the age of 13 weeks. Under the law and the regulations, abortion facilities are prohibited from performing abortions on fetuses ages 16 weeks and over. Accordingly, the plaintiffs' objection to the omission of D&Es would pertain to abortions at abortion facilities by D&E in regard to fetuses of the age of 13 to 16 weeks. At 16 weeks, abortions

must be performed in hospitals or ambulatory surgical facilities.

The testimony is that there are presently existing two types of medical abortion. One is presently approved by the Federal Drug Administration, and the other has approval pending. Dr. Hicks testified that he would like to be able to provide medical abortions if any of his patients should request it, but that he would advise his patients to undergo surgical abortion by suction D&C rather than medical abortion.

The court sees no medical reason for the failure to include these two types of recognized abortion procedures within the regulations, and in fact believes that the state has not presented any proof showing medical necessity for this. Accordingly, failure to list these recognized methods in the regulations means that the plaintiffs have carried their burden of showing there is a substantial likelihood they will succeed on the merits on this issue.

Finally, the plaintiffs complain about the first sentence at the conclusion of the regulations at Section 404.1, which states: "Conditions which have not been covered in the

standards shall be enforced in accordance with the best practices as interpreted by the licensing agency." This challenge is on the basis that the provision is so vague as to not give the plaintiff doctors due process in understanding the criminal liability with which they might be faced. The statute imposes a $1,000 per day fine for failure to comply with the statute and regulations and states that each day's failure to comply constitutes a separate offense. Here the court cannot understand what this sentence means. Specifically, "conditions which have not been covered in the standards" is completely open, and subjects any abortion provider to whatever interpretation the State Department of Health might place on that phrase. Also, "best practices" is completely undefined and leaves that open matter to be interpreted by the licensing agency. Theoretically here, the State Department of Health could exclude a doctor for practically any reason from obtaining a license, and the court finds that indeed that provision is vague and, accordingly, improper. There is a substantial likelihood that the plaintiffs will prevail on the merits on this issue.

The end result of this recitation is that

the plaintiffs have shown that there is substantial likelihood of success on the merits in regard to all of the specific challenges made by them except as to the requirements that an RN be on the doctor's staff. The court finds that in regard to the RN issue that injunction should not be granted.

The court omitted a discussion of another issue raised by the plaintiffs, and that is the provision which requires abortion facilities to make available all patient records to the State Department of Health. That provision makes no provision for the redaction of names and addresses from those records. It further allows those records to be made public in matters involving the licensing of those abortion facilities.

The doctor-patient confidentiality privilege is one of the strongest noted in our laws. It goes to the heart of the doctor-patient relationship. Patients tell doctors things in confidentiality and expect them to remain confidential. The state law recognizes this confidentiality in specific statutes and also in case rulings. This regulation, for practical purposes, almost does away with doctor-patient confidentiality in regard not only to the patients

present presenting themselves to abortion facilities for abortions but also to those patients presenting themselves to abortion facilities for any other type of medical care and assistance. The testimony is that Dr. Hicks, for instance, has an active family and gynecological practice in addition to his abortion practice. This provision subjects all of his patients to an opening of their records to the public in any instance where his facility may be undergoing a licensing hearing. The court realizes that the purpose of this provision is to allow the health department the ability to investigate a doctor's office through his records in order to determine whether the doctor is falsely reporting the number of abortions he is performing in order to avoid regulation under the statute and regulations. However, because the provisions are so invasive of the doctor-patient privilege, the court thinks that it cannot stand constitutional muster and that there is a substantial likelihood that plaintiffs would prevail on the merits.

Accordingly, in regard to all of the issues on which the court has found that the plaintiffs would likely succeed on the merits, the court must further address the other essential

elements for the granting of a preliminary injunction. Would the failure to grant this injunction be more harmful to the plaintiffs than to the defendants if the injunction is issued? The court finds that the answer is yes. We are dealing here with substantial constitutional rights of women who under Roe v. Wade and its progeny have the right to obtain an abortion if that is their choice. There is a substantial disagreement in the public about that right, but it is the law of the land. Individual judges may disagree with that law; but that law is to be applied. Recently the Casey decision from the Supreme Court has upheld that right in the face of a substantial effort to reverse Roe v. Wade.

Is it in the public interest to issue the injunction? Where you have probable violations of constitutional rights, it is always in the public interest to grant the injunction. It is also recognized that violations of constitutional rights constitute irreparable harm. Accordingly, the plaintiffs have carried their burden of proving that the court should grant a preliminary injunction prohibiting the state defendants from enforcing the statute and the regulations insofar as set forth in

its opinion. An injunction does not issue in regard to the challenges to the statutory and regulatory scheme as a whole, in regard to the provisions regarding the necessity for a registered nurse or in regard to the definition of an abortion facility as set forth in the statute and regulations, except for the provision regarding advertising.

That completes this bench opinion containing findings of fact and conclusions of law. In the event this bench opinion is later transcribed for appeal or other purposes, the court will reserve the right to edit or amend the opinion. However, the substance of this opinion will not be changed. Are there any requests for clarification or requests for additional rulings by the plaintiffs?

MS. GOLDBERG: No, Your Honor.

THE COURT: From the defendant?

MR. COLE: No, Your Honor.

THE COURT: All right. That will conclude these proceedings. While you all are here, I don't know whether you're prepared at this time to advise the court as to what will be necessary before we hear the case on the merits. Perhaps the best thing to do would be to simply ask you to contact the magistrate judge and have a case management

conference which will determine the scheduling order to govern further proceedings in the case. Is that a satisfactory proceeding or suggestion? Does anybody have a contrary suggestion?

MR. COLE: No, Your Honor.

MS. GOLDBERG: No, Your Honor, that will be fine.

THE COURT: All right. Ms. Goldberg, just for our guidance and Mr. McDuff, will you be attending case management conferences or other conferences? Have you discussed it with your co-counsel or will local counsel do that?

MS. GOLDBERG: We haven't discussed the matter yet.

THE COURT: All right. Let me ask you this then. Let me ask you then on or before October 11th to confer and contact Judge Nicols for the purpose of setting up a case management conference. I am not directing that the case management conference be held by that date, but I would like for you to contact Judge Nicols in order to get a date set for a case management conference that would be convenient to him and to the parties. All right. If there is nothing further in regard to this matter this afternoon, let me ask the

plaintiffs since-- I don't know who thinks they won today. I don't know whether the plaintiffs think they did or defendants think they did. I need the parties to confer about an order to be entered on the preliminary injunction, and would you volunteer to do that?

MS. GOLDBERG: I will volunteer to draft the order, Your Honor.

THE COURT: If you will draft an order and present it to counsel for the defendants for suggestion, if you can get together on an appropriate order-- just as to form; I don't expect you to agree with my rulings necessarily-- but if you get together on the form of an order and present it to me within 10 days as the local rules require. So if you can do that. If you have a problem with it I will be happy to have a telephone conference with you or have you come over and talk to you about it sometime next week.

If there is nothing further then the court will stand in recess.

[RECESS]

* * * *

CERTIFICATE

I, David A. Scott, Official Court Reporter, United States District Court, Southern District of Mississippi, do hereby certify that the above and foregoing 30 pages contain a full, true, and correct transcript of the proceedings had in the aforenamed case at the time and place indicated, which proceedings were recorded by me to the best of my skill and ability.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

This the 28th day of September, 1996.

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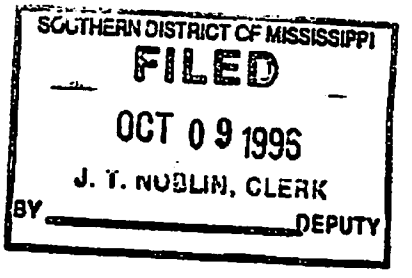
David A. Scott
CSR #1113

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION



PRO-CHOICE MISSISSIPPI, on its own behalf and on behalf of its members; and HERBERT H. HICKS, M.D., JOSEPH BOOKER, JR., M.D., GULF COAST GYNECOLOGY CLINIC, INC.; CENTER FOR CHOICE - MISSISSIPPI, INC.; and JOSEPH BOOKER, JR., M.D., P.A., on their own behalf and on behalf of their patients,

PLAINTIFFS

v.

CIVIL ACTION NO. 3:96CV596BN

F.E. THOMPSON, JR., M.D., M.P.H., in his official capacity as State Health Officer of the Mississippi State Department of Health; MIKE MOORE, in his official capacity as Attorney General of the State of Mississippi; and KIRK FORDICE, in his official capacity as Governor of the State of Mississippi,

DEFENDANTS

ORDER ON PLAINTIFFS'
MOTION FOR A PRELIMINARY INJUNCTION

This case having come before the Court on Plaintiffs' motion for a preliminary injunction pursuant to Federal Rule of Civil Procedure 65(a); the Court having considered the oral and written evidence introduced by the parties at the hearing conducted on September 26-27, 1996, oral argument on the motion, and the authorities cited in the parties' memoranda of law; and the Court having rendered a bench opinion, which is incorporated by reference herein; and

Defendants' having conceded constitutional problems with Miss. Code Ann. § 41-75-1(h), as amended in 1996 to prohibit the location of an abortion facility within 1500 feet of a church,

school, or kindergarten; and the Court having found said provision to be impermissible spot zoning;

IT IS HEREBY ORDERED that Miss. Code Ann. § 41-75-1(h), as amended in 1996 to state:

> Any abortion facility that begins operation after June 30, 1996, shall not be located within fifteen hundred (1500) feet from the property on which any church, school or kindergarten is located. An abortion facility shall not be in violation of this paragraph if it is in compliance with this paragraph on the date it begins operation and the property on which a church, school or kindergarten is located is subsequently within fifteen hundred (1500) feet from the facility.

and Section 403.1(A) of the Mississippi State Department of Health's "Minimum Standards of Operation for Abortion Facilities," effective August 12, 1996 (the "Minimum Standards"), which implements the foregoing paragraph, are hereby PERMANENTLY ENJOINED; and

IT IS FURTHER ORDERED that Plaintiffs' motion for a preliminary injunction against enforcement of Miss. Code Ann. § 41-75-1(f)(iii), as amended in 1996 to define an abortion facility that operates "substantially for the purpose of performing abortions" as one that "holds itself out to the public as an abortion provider by advertising by any public means, such as newspaper, telephone directory, magazine or electronic media, that it performs abortions," and Minimum Standards § 102.3(iii), which implements the foregoing definition, is hereby GRANTED; and

IT IS FURTHER ORDERED that Plaintiffs' motion for a preliminary injunction against enforcement of the following provisions of the Minimum Standards is hereby GRANTED:

a. Section 102.19, defining a "physician," insofar as the definition provides: "He/She must have completed a residency in OB/GYN," and Section 204.1, insofar as that section requires that physicians performing procedures in an abortion facility must "have successfully completed an American Medical Association residency in obstetrical/gynecology;"

b. Section 205.1, insofar as it requires an abortion facility to have a "written agreement with one or more acute general hospitals;"

c. The introductory paragraph of Part III, "Patient Care," insofar as it provides: "For medical safety, an Abortion Facility shall deal only with menstrual extraction, routine Dilatation and Curettage, and suction Dilatation and Curettage," thereby prohibiting the performance of medical abortions or dilatation and evacuation abortions in abortion facilities;

d. The following provisions of Part IV, Environment:

(i) Section A - Patient Areas, specifying requirements for multiple patient care and service areas;

(ii) Section 401.2, which, together with Section A, requires five separate toilets;

(iii) Section 403.14, which, together with Section A, requires special lighting, including emergency lighting, and an isolated power system;

(iv) Sections 403.9 and 403.16(A), which require doors at least 44 inches wide to all rooms needing access for stretchers and for exits;

(v) Section 403.10(A), which requires that corridors used by patients be at least six feet wide; and

(vi) Section 403.14, which requires an emergency power generator and emergency failure outlets in all patient care areas;

e. Section 404.1, insofar as it provides: "Conditions which have not been covered in the standards shall be enforced in accordance with the best practices as interpreted by the licensing agency;" and

f. Section 404.1(C), insofar as it permits information obtained by the licensing agency to be disclosed publicly in proceedings involving the questions of licensure in such manner as to identify individuals or institutions; and

IT IS FURTHER ORDERED that, except as to the foregoing enumerated provisions, which are hereby severed, Plaintiffs' motion for a preliminary injunction against enforcement of the

amended definition of "abortion facility" set forth in Miss. Code Ann. § 41-75-1(f)(i)-(ii) and Minimum Standards § 102.3(i)-(ii), and against enforcement of the Minimum Standards as a whole, including Section 204.2 and Part III, Section A, requiring a licensed registered nurse at an abortion facility when abortion patients are present, is hereby DENIED.

SO ORDERED this 9th day of October, 1996.

William H. Barbour, Jr.

CHIEF JUDGE
SOUTHERN DISTRICT OF MISSISSIPPI