UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI

JACKSON WOMEN'S HEALTH ORGANIZATION, on behalf of itself and its patients, and WILLIE PARKER, M.D., M.P.H., M.Sc., on behalf of himself and his patients, Plaintiffs, v. MARY CURRIER, M.D., M.P.H. in her official capacity as State Health Officer of the Mississippi Department of Health, and ROBERT SHULER SMITH, in his official capacity as District Attorney for Hinds County, Mississippi, Defendants.	)	Case No. 3:12-CV-00436-DPJ-FKB

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

The Court should permanently enjoin the admitting privileges requirement of HB 1390 because it imposes an undue burden on a woman's right to abortion, in violation of the Fourteenth Amendment. The Supreme Court recently struck down a virtually-identical admitting privileges requirement from Texas in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). *See Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 454 & n.5 (5th Cir. 2014) ("The Texas law at issue in *Abbott* and H.B. 1390 are substantively identical.") In *Whole*

Woman's Health, the Supreme Court held that a law restricting abortion imposes an undue burden and is therefore facially unconstitutional unless it demonstrably furthers valid state interests to an extent that outweighs the burdens the law imposes on women. The admitting privileges requirement in HB 1390 fails this test. Just like the Texas law, Mississippi's admitting privileges requirement would impose numerous burdens on Mississippi women seeking a pre-viability abortion with no corresponding evidence of any benefit whatsoever. Accordingly, the Court should declare the requirement to be unconstitutional and permanently enjoin its enforcement statewide.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS AND PROCEDURAL BACKGROUND

In 2012, the Mississippi state legislature enacted HB 1390 ("the Act"). The Act requires, *inter alia*, that "all physicians associated with [a licensed] abortion facility must have admitting privileges at a local hospital and staff privileges to replace local hospital on-staff physicians." HB 1390, § 1, *codified at* Miss. Code Ann. § 41-75-1(f) (the "admitting privileges requirement" or "requirement"). Providing abortions in violation of the requirement subjects a facility and its medical staff to civil, disciplinary, and criminal penalties, including license revocation, misdemeanor liability, and fines of up to $1000 per day. Miss. Code Ann. §§ 41-75-25 (incorporating by reference § 41-7-209), 41-75-26(1).

Jackson Women's Health Organization ("the Clinic") is the only licensed abortion clinic in Mississippi. Order, 1, April 15, 2013, ECF No. 81 ("P.I. Order"). Indeed, for approximately a decade, the Clinic has been the only option for legal abortion services in the state. *See* P.I. Order at 7 (the "State has not identified any willing abortion providers other than the Clinic"); Decl. of Shannon Brewer in Supp. of Pls.' Mot. for Partial Summ. J. ¶ 3, Jan. 5, 2017 ("Brewer S.J. Decl."); Decl. of Shannon Brewer-Anderson in Supp. of Pls.' Mot. for TRO and/or Prelim. Inj. ¶

3, June 27, 2012, ECF No. 5-1 ("Brewer P.I. Decl."). The Clinic performs abortions up to 16 weeks from a woman's last menstrual period and also provides family planning services, such as pregnancy testing and contraception counseling and distribution. Brewer P.I. Decl. ¶ 1.

Before the Act, and in accordance with Mississippi law, the Clinic already had in place a number of emergency protocols to protect women in the very rare circumstance that hospital treatment might be needed following an abortion. The Clinic had a transfer agreement with a local hospital and a written agreement for back-up care with a physician who holds admitting privileges at a local hospital. Brewer P.I. Decl. ¶ 7; Miss. Admin. Code 15-16-1:42.10, 15-16-1:44.12. However, only one of the Clinic's physicians, who provides minimal care at the Clinic, had admitting privileges. P.I. Order at 1; Brewer P.I. Decl. ¶ 11.

Accordingly, before the Act took effect, the Clinic and another of its physicians, Dr. Willie Parker, filed this case seeking permanent declaratory and injunctive relief against the Act on its face, or alternatively as applied. Complaint, June 27, 2012, ECF No. 1. They also requested a temporary restraining order so that the Clinic would not be forced to close for failure to comply with the admitting privileges requirement, thus extinguishing all access to legal abortion in Mississippi.

The Court granted a temporary restraining order and then a partial preliminary injunction, requiring the Clinic's other physicians to apply for privileges at local hospitals but enjoining Defendants from imposing any civil or criminal penalties on the Clinic or its staff during the hospital application process. Order, 1, July 1, 2012, ECF No. 17 ("TRO Order"). In compliance with the Court's Order, Dr. Parker and one of the Clinic's other physicians, Dr. Doe, sought admitting privileges at every local hospital. P.I. Order at 2. "Two hospitals refused to provide applications, and all others rejected the doctors' applications because they perform elective

abortions." *Id.* As the Court previously found, "the record . . . demonstrate[s] that elective abortions are anathema to the policies of the hospitals in the Jackson metropolitan area, which prompted them to reject the doctor's applications out of hand." *Id.* at 7.

Given the physicians' inability to obtain admitting and staff privileges, the Department of Health stood poised to revoke the Clinic's license for non-compliance with the admitting privileges requirement. P.I. Order at 1, 2. Had the Clinic's license been revoked, Mississippi women would have lost all access to legal abortion in their own state.

Plaintiffs therefore renewed their motion for a full preliminary injunction against the admitting privileges requirement. The Court granted the motion in April 2013, enjoining all enforcement of the requirement as applied to the Clinic and its physicians. *See* P.I. Order.

The preliminary injunction record makes clear that the admitting privileges requirement would not improve Mississippi women's health and safety. As Plaintiffs' medical experts testified and the evidence shows:

- legal abortion is one of the safest medical procedures in the United States, and the risk of a woman experiencing a complication that requires hospitalization following an abortion is much less than 1%;

- it is extremely rare for an abortion patient to experience a serious complication at the clinic that requires immediate hospitalization, and in the rare case when that might occur, the quality of care that the patient would receive at a hospital would not be determined by whether the abortion provider had admitting privileges at that hospital;

- most complications that might require treatment at a hospital occur after the patient has left the clinic, when it is medically advisable for a patient to seek treatment at the hospital closest to her, not the hospital where her provider may have admitting privileges;

- and, physicians, including abortion providers, can be refused admitting privileges for reasons unrelated to their qualifications.

Decl. of Willie Parker in Supp. of Pls.' Mot. for TRO and/or Prelim. Inj. ¶¶ 12-22, ¶¶ 26-27, June 27, 2012, ECF No. 5-2 ("Parker Decl."); Rebuttal Decl. of Daniel A. Grossman, M.D. in Supp. of Pls.' Mot. for Prelim. Inj. ¶¶ 3-13, July 9, 2012, ECF No. 23-2 ("Grossman Decl."); Rebuttal Decl. of Heddy Matthias, M.D. in Supp. of Pls.' Mot. for Prelim. Inj. ¶¶ 7-17, July 9, 2012, ECF No. 23-3 ("Matthias Decl."); P.I. Order at 2, 7 (discussing hospital letters denying admitting privileges to Clinic's physicians for reasons unrelated to their qualifications). The admitting privileges requirement is simply inconsistent with current standards of medical care for outpatient procedures. *See id.*

Indeed, Mississippi law does not require any other type of physician performing outpatient procedures to hold admitting privileges at a local hospital. Mississippi physicians who provide similar or less safe surgical procedures in their offices, such as colonoscopy, hernia repair, hemorrhoidectomy, and dilation and curettage, Grossman Decl. ¶¶ 8-9, do not need admitting privileges. Miss. Admin. Code 30-17-2635:2.5. Mississippi physicians can even provide surgery with general anesthesia in their offices without having admitting privileges. Miss. Admin. Code 30-17-2635:2.6.

Despite its lack of medical benefit, the admitting privileges requirement would impose a severe burden on Mississippi women by eliminating all access to legal abortion in the state. Indeed, today, just as in 2013, the Clinic would be forced to close if the requirement were enforced. Brewer S.J. Decl. ¶¶ 5-6.

Following the Court's grant of the preliminary injunction, Defendants moved to clarify. The Court then issued a further order, concluding that "the record fails to show that the Act is so necessary as to overcome the undue-burden Plaintiffs established." Order, 4, August 13, 2013, ECF No. 131.

Defendants then appealed the preliminary injunction to the U.S. Court of Appeals for the Fifth Circuit. On July 29, 2014, the Fifth Circuit affirmed. *See Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 450 (5th Cir. 2014). It upheld the preliminary injunction against the admitting privileges requirement, finding that Plaintiffs had shown a substantial likelihood of success in demonstrating that the requirement was unconstitutional as applied to them. *Id.* In so holding, the Fifth Circuit "look[ed] to the entire record and factual context in which the law operates." *Id.* at 458. The Fifth Circuit denied Defendants' petition for rehearing *en banc* on November 20, 2014.

Following the Fifth Circuit's decision, Defendants filed a petition for certiorari with the U.S. Supreme Court. The Supreme Court denied their petition on June 28, 2016. *See* 136 S. Ct. 2536 (2016) (mem.). The Supreme Court's order came one day after it struck down the nearly-identical Texas admitting privileges requirement in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

Plaintiffs have now filed this motion for summary judgment seeking permanent relief against the admitting privileges requirement. They seek summary judgment in this motion solely on their undue burden claim.

III. ARGUMENT

A. The Summary Judgment Standard

Summary judgment is warranted when there is no genuine dispute of material fact and judgment is appropriate as a matter of law. *See* Fed. R. Civ. P. 56(a); *see also, e.g.*, *Diaz v. Kaplan Higher Educ. L.L.C.*, 820 F.3d 172, 175 (5th Cir. 2016). Once Plaintiffs introduce competent evidence into the record regarding the material facts, it is Defendants' burden to demonstrate a genuine dispute about those facts. *See Diaz*, 820 F.3d at 176 (affirming grant of

summary judgment when party opposing motion failed to articulate specific evidence in record that would create genuine dispute). Here, there can be no genuine dispute about the material facts related to the constitutionality of the admitting privileges requirement, and the Court should grant Plaintiffs summary judgment on their undue burden claim.

B. The Admitting Privileges Requirement Imposes an Unconstitutional Undue Burden on the Right to Abortion Because It Imposes Numerous Burdens on Women and Has No Medical Benefits

1. The Supreme Court's Undue Burden Standard

"[F]or more than 40 years, it has been settled constitutional law that the Fourteenth Amendment protects a woman's basic right to choose an abortion." *Jackson Women's Health Org.*, 760 F.3d at 453 (citing *Roe*, 410 U.S. at 153). Accordingly, a state may regulate abortion only if it does not impose an "undue burden" on the woman's decision. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 877-78 (1992) (plurality opinion). "A finding of an undue burden is shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877.

In its recent decision in *Whole Woman's Health*, the Supreme Court clarified how courts should apply the undue burden standard in evaluating state restrictions on abortion. The decision sets out a number of principles that are critical to the Court's analysis of the admitting privileges requirement in the Act.

First, *Whole Woman's Health* confirms that abortion restrictions must be subjected to meaningful scrutiny by the courts. The Supreme Court decisively rejected the contention that rational basis review has any role to play in the undue burden standard. As the Supreme Court held, it "is wrong to equate the judicial review applicable to the regulation of a constitutionally

protected personal liberty with the less strict review applicable where, for example, economic legislation is at issue." *Whole Woman's Health*, 136 S. Ct. at 2309.

Second, in conducting the undue burden analysis, courts should "consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Id.* (citing *Casey*, 505 U.S. at 887). This balancing of benefits and burdens is central to addressing the question of whether "any burden imposed on abortion access is 'undue.'" *Id.* at 2310.

Third, a court's evaluation of the burdens and benefits of an abortion restriction must be based on credible evidence in the record of the case before it. A court should not simply defer to the State's assertions about benefits and burdens because such deference would be inconsistent with the status of abortion as a "constitutionally protected personal liberty." *Id.* at 2309. Instead, a court must "place[] considerable weight upon evidence and argument presented in judicial proceedings." *Id.* at 2310 (affirming that district court correctly placed "significant weight" on record evidence, and properly "weighed the asserted benefits against the burdens," in striking down Texas's admitting privileges requirement).

The Supreme Court then went on to apply this clarified standard to the Texas admitting privileges requirement.[1] It evaluated the State's assertions that the requirement would "help ensure that women have easy access to a hospital should complications arise during an abortion procedure," *id.* at 2311, and that it would serve a credentialing function for abortion providers. *Id.* at 2313. In examining those assertions, the Supreme Court considered evidence in the record establishing that:

[1] The Texas admitting privileges requirement at issue in *Whole Woman's Health* provided that "a physician performing or inducing an abortion . . . must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that . . . is located not further than 30 miles from the location at which the abortion is performed or induced." 136 S. Ct. at 2310 (citing Tex. Health & Safety Code Ann. § 171.0031(a)).

- first and second-trimester abortion in the United States has an extremely low overall complication rate, and the hospitalization rate is much less than 1%;

- it is extremely rare that an abortion patient will experience a serious complication at the clinic that requires emergent hospitalization, and in the rare case when that may be necessary, the quality of care that the patient would receive in the hospital would not be affected by whether the abortion provider had admitting privileges at that particular hospital;

- most complications that might require treatment at a hospital occur in the days or week after the abortion procedure, when it is medically advisable for a patient to seek treatment at the hospital closest to her, not the hospital where her provider may have admitting privileges;

- and, physicians, including abortion providers, can be refused admitting privileges for reasons not related to clinical competence.

Id. at 2311, 2313.

Based on the record as a whole, the Supreme Court concluded that there was simply no evidence that the admitting privileges requirement would advance women's health and safety, as the State asserted. *Id.* It further noted that numerous federal trial courts around the country had reached the same conclusion about the lack of medical benefit of a local admitting privileges requirement for abortion providers. *Id.* at 2312 (citing *Planned Parenthood of Wis. Inc. v. Van Hollen*, 94 F. Supp.3d 949, 953 (W.D.Wis. 2015), *aff'd sub nom*. *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 2545 (2016); *Planned Parenthood Southeast, Inc. v. Strange*, 33 F. Supp.3d 1330, 1378 (M.D. Ala. 2014)).

Although the Supreme Court concluded that the Texas admitting privileges requirement would offer no medical benefits to women, it found that it would impose numerous burdens on abortion access. It held that the restriction "vastly increase[d] the obstacles confronting women seeking abortions in Texas" in a variety of ways. *Id.*, 136 S. Ct. at 2319. The requirement decreased the number and geographic locations of legal abortion providers, thereby increasing the distances that women would need to travel to access care, delaying that care, forcing women

to seek care in facilities that are overtaxed and pushed beyond their capacity, and preventing some women from accessing legal abortion at all. *See id.* at 2313, 2315-18.

The Supreme Court was clear that the various burdens imposed by a restriction must be considered as a whole when evaluating the overall burden on abortion access. Thus, a court must consider not only the reduction in the number of available providers in the state or an increase in driving distances, for example, but also *all* the "additional burden[s]" imposed on women when weighing burdens against alleged benefits. *Id.* at 2313. As the Supreme Court explained:

> In our view, the record contains sufficient evidence that the admitting-privileges requirement led to the closure of half of Texas' clinics, or thereabouts. Those closures meant fewer doctors, longer waiting times, and increased crowding. Record evidence also supports the finding that after the admitting-privileges provision went into effect, the "number of women of reproductive age living in a county . . . more than 150 miles from a provider increased from approximately 86,000 to 400,000 . . . and the number of women living in a county more than 200 miles from a provider from approximately 10,000 to 290,000." We recognize that increased driving distances do not always constitute an "undue burden." But here, those increases are but one additional burden, which, when taken together with others that the closings brought about, and when viewed in light of the virtual absence of any health benefit, lead us to conclude that the record adequately supports the District Court's "undue burden" conclusion.

Id. at 2313 (citations omitted).

In sum, because the burdens of the Texas admitting privileges requirement outweighed any benefits, the Supreme Court held that the requirement was unconstitutional under *Casey*. *See id*.

2. The Admitting Privileges Requirement in the Act Fails the Undue Burden Standard

There is no legally significant distinction between this case and *Whole Woman's Health*, and the Court is bound by the Supreme Court's decision to strike down the admitting privileges requirement in the Act. Just like in the Texas case, the evidence before the Court shows that the

requirement will not actually produce any health and safety benefits but will instead impose severe burdens on women.

Like the State of Texas, Defendants here have claimed that the admitting privileges requirement would promote two health-related benefits: continuity of care and credentialing of physicians. *See* Defs.' Resp. in Opp'n to Pls.' Second Mot. for Prelim. Inj. at 6-7, Jan. 11, 2013, ECF No. 54; *see also Jackson Women's Health*, 760 F.3d at 454 (finding no basis for distinguishing state interest analysis of Mississippi's admitting privileges requirement as compared to Texas requirement, given similarity of requirements and fact that interests were not "state specific"). But Defendants have no credible evidence that the requirement will actually produce these two benefits – they have withdrawn the experts that offered testimony about these alleged benefits at the preliminary injunction stage. Amendment to Case Management Order ¶ 5, Nov. 18, 2016, ECF No. 169 ("Defendants are withdrawing their previously-designated experts . . . and may not rely upon any opinions from these experts . . . in their defense against any of Plaintiffs' claims."). Nor could Defendants introduce new evidence that would create a genuine dispute with Plaintiffs' evidence. As Plaintiffs have demonstrated: abortion is extremely safe, the hospitalization rate is extremely low (much less than 1%), and most abortion complications that require treatment at a hospital arise after the patient has left the clinic, when it is medically advisable for the patient to go to the hospital closest to her, not to the hospital where her physician may have admitting privileges. *See supra* at 3-4. Thus, the admitting privileges requirement will not improve the quality or continuity of care that a woman receives. Parker Decl. ¶¶ 12-22, ¶¶ 26-27; Grossman Decl. ¶¶ 3-19; Matthias Decl. ¶¶ 7, 10-14.

And, the record in this case confirms that local admitting privileges requirements simply do not serve a credentialing function because of the variety of reasons that hospitals may choose

to deny privileges to physicians. The hospitals in the Jackson area did not even consider the credentials of Dr. Parker and Dr. Doe but simply rejected their applications "out of hand" because they provide abortions. P.I. Order at 7; Second Suppl. Decl. of Shannon Brewer-Anderson in Supp. of Pls.' Second Mot. for Prelim. Inj., Nov. 28, 2012, ECF No. 46-2 (attaching letters from local hospitals refusing to grant privileges to Dr. Parker and Dr. Doe). In short, the admitting privileges requirement will not actually improve women's health and safety.

The burdens of the requirement, however, are stark. The requirement would force the only licensed abortion provider in the state to close. *See* P.I. Order at 2. Women would be forced to travel out of state to access legal abortion services. *Id.* at 7 (stating that "even the State seems to concede the 'practical effect' of closing the Clinic is women in Central Mississippi may have to travel to another state to obtain abortions."); *see also* Brewer S.J. Decl. ¶¶ 5-6. When women are forced to travel long distances for care, many will delay obtaining an abortion until they can find the money for travel or arrange transportation. Grossman Decl. ¶ 15. Delaying abortions until later in pregnancy drives up risks of complications and death. *Id.* Additionally, when legal abortion is unavailable or difficult to access, some women turn to illegal or less safe methods to end a pregnancy. *Id.* ¶ 16. Other women will be denied their right to obtain an abortion altogether and will be forced to carry to term. *Id.* ¶ 17; *see also* Parker Decl. ¶ 26. And even if the requirement did not close the only abortion provider in Mississippi, it would forever limit the pool of qualified abortion providers in the state with a restriction that has no medical benefit to women. Grossman Decl. ¶ 19. Accordingly, just like the Texas requirement, the admitting privileges requirement in the Act will decrease the number and geographic locations of legal abortion providers in Mississippi, thereby increasing the distances that women would need

to travel to access care, delaying that care, and preventing some women from accessing abortion at all. *See Whole Woman's Health*, 136 S. Ct. at 2313, 2317-18.

There can be no genuine dispute of material fact in this case, and Plaintiffs are therefore entitled to summary judgment. Like the Texas law, the Mississippi admitting privileges requirement "does not benefit patients and is not necessary." *Whole Woman's Health*, 136 S. Ct. at 2315.

C. The Appropriate Remedy Is to Declare the Admitting Privileges Requirement Unconstitutional and Enjoin All of Its Applications

As Plaintiffs have established, the admitting privileges requirement imposes an unconstitutional undue burden on women's access to abortion. Although this Court and the Fifth Circuit held that only as-applied relief against the requirement was appropriate at the preliminary injunction stage, in light of the Supreme Court's holding in *Whole Woman's Health,* the Court should declare the requirement unconstitutional and grant a permanent injunction against its enforcement statewide.

In their pleadings, Plaintiffs requested full injunctive and declaratory relief against the admitting privileges requirement. *See, e.g.*, Am. Compl., Aug. 8, 2012, ECF No. 30. A "final judgment should grant the relief to which each party is entitled," based on the evidence presented to the court. Fed. R. Civ. P. 54(c). As the Supreme Court just reiterated, "if the arguments and evidence show that a statutory provision is unconstitutional on its face," facial relief is appropriate. *Whole Woman's Health*, 136 S. Ct. at 2307 (internal citations omitted).

The Supreme Court granted facial relief against the Texas admitting privileges requirement. As it explained, the two restrictions challenged in *Whole Woman's Health* "close most of the abortion facilities in Texas and place added stress on those facilities able to remain open. They vastly increase the obstacles confronting women seeking abortions in Texas without

providing any benefit to women's health capable of withstanding any meaningful scrutiny. The provisions are [therefore] unconstitutional on their face . . . ." *Id.* at 2319.

The admitting privileges requirement in the Act is just as pernicious as the Texas admitting privileges requirement: it will "vastly increase the obstacles confronting women seeking abortions" in Mississippi without offering any medical benefit to women. Accordingly, the Court should grant facial relief against the requirement.

In order to avoid ongoing harm to women by delaying or limiting their access to needed medical care and violating their constitutional rights under the Fourteenth Amendment, the Court should enter a statewide permanent injunction against the admitting privileges requirement.

IV. CONCLUSION

The Court should grant summary judgment to Plaintiffs on their undue burden claim against the admitting privileges requirement, declare the requirement unconstitutional and void, and permanently enjoin Defendants from enforcing the requirement statewide.

Dated: February 16, 2017

Respectfully submitted,

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