IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

JUNE MEDICAL SERVICES, LLC *et al.*, Plaintiffs, v. REBEKAH GEE, *et al.*, Defendants.	CASE NO: 3:17-cv-00404-BAJ-RLB

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR INTERLOCUTORY APPEAL

On this motion, Defendants seek to relitigate their motion to dismiss and inappropriately argue matters that the parties should resolve in the ordinary course of discovery. Nothing in their filings supports the extraordinary and disfavored remedy of granting an interlocutory appeal. This Court's ruling properly applied settled law, including the Supreme Court's decision in *Whole Woman's Health v. Hellerstedt,* 136 S. Ct. 2292 (2016). Defendants cannot point to a circuit split, or to a novel or difficult issue of first impression necessitating imminent appellate review. Nor can Defendants demonstrate that immediate appeal would materially advance termination of the litigation, given ongoing discovery on Plaintiffs' other claims and in the related case challenging abortion restrictions passed in 2016. Defendants' contention that interlocutory review will "materially advance" the litigation is a thinly veiled plea to avoid discovery. If such an argument justified interlocutory appeal, every denial of a motion to dismiss would be grounds for this rare exception to the final judgment rule. Accordingly, Defendants' motion should be denied.

ARGUMENT

I. This Court's Denial of Defendants' Motion to Dismiss Does Not Meet the "Exceptional" Circumstances Allowing for Interlocutory Appeal

"Interlocutory appeals are generally disfavored, and statutes permitting them must be strictly construed." *Allen v. Okam Holdings, Inc.*, 116 F.3d 153, 154 (5th Cir. 1997) (per curiam). Accordingly, "[p]ermission to appeal under § 1292(b) is sparingly granted and the Fifth Circuit . . . allows certification only in 'exceptional' cases." *Odle v. Wal-Mart Stores Inc.*, No. 3:11-cv-2954-O, 2013 WL 66035, at *2 (N.D. Tex. Jan. 7, 2013). The moving party bears the burden of "demonstrating the necessity of an interlocutory appeal." *Complaint of LLP&D Marine, Inc.*, Nos. Civ.A. 97-1668, 97-2992, 97-3349, 1998 WL 66100, at *1 (E.D. La. Feb. 13, 1998).

Before certifying a ruling for interlocutory review, "a court must find that its ruling '[1] involves a controlling question of law as to which [2] there is a substantial ground for difference of opinion and [3] that an immediate appeal from the order may materially advance the ultimate termination of the litigation.'" *June Med. Servs. LLC v. Gee*, No.: CV 16-00444-BAJ-RLB, 2018 WL 1041301, at *1 (M.D. La. Feb. 23, 2018) (quoting 28 U.S.C. § 1292(b)). "[A]ll three criteria must be met before the court may certify an interlocutory appeal," *id.*, and even when these criteria are met, "district court judges have unfettered discretion to deny certification," *Sec. & Exch. Comm'n v. Sethi Petroleum, LLC*, No. 4:15-CV-338, 2016 WL 4400064, at *2 (E.D. Tex. Aug. 18, 2016) (internal quotation marks and citation omitted).

This is not an exceptional case requiring interlocutory appeal. Defendants have not shown a substantial ground for difference of opinion regarding a controlling question of law, nor have they shown that an intermediate appeal would materially advance the termination of the litigation. Instead, Defendants seek only to relitigate this Court's straightforward application of governing law as to part of Count 1 of Plaintiffs' Complaint. But their continued disagreement with this Court does not justify interlocutory appeal where they can point to no opinion adopting their view of the law within or outside the Fifth Circuit. Moreover, in seeking interlocutory appeal, Defendants ignore that "[t]he basic rule of appellate jurisdiction restricts review to final judgments, avoiding the delay and extra effort of piecemeal appeals." *Clark-Dietz & Assocs.-Eng'rs, Inc. v. Basic Constr. Co.,* 702 F.2d 67, 69 (5th Cir. 1983). Granting Defendants' motion would result in a drawn-out, piecemeal process that would add to—and not detract from—the burdens of this case. Accordingly, the Court should deny Defendants' motion.

II. Defendants Have Not Shown a Substantial Ground for Difference of Opinion on Any Controlling Question of Law

Defendants cannot show a substantial ground for difference of opinion on any controlling question of law because the Court applied clear and well-settled law in denying Defendants' motion to dismiss, including the Supreme Court's recent decision in *Whole Woman's Health v. Hellerstedt*. Defendants point to no contrary authority—because there is none. Instead, they attempt to lower the high bar for showing a substantial difference of opinion and then claim to have cleared it by rehashing the same arguments this Court rejected in deciding the motion to dismiss. Defendants' dissatisfaction with the Court's application of controlling law to the well-pled allegations in this case does not create a substantial ground for difference of opinion.

The threshold for showing a substantial ground for a difference of opinion is high—it "usually only arises out of a genuine doubt as to the correct applicable legal standard relied on in

the order." *United States v. Louisiana Generating LLC*, No. CIV.A. 09-100-JJB, 2012 WL 4588437, at *2 (M.D. La. Oct. 2, 2012) (emphasis added). It does not arise where an opinion applies "established legal principles to factual allegations in the lawsuit." *In re Cobalt Int'l Energy, Inc. Sec. Litig.*, No. H-14-3428, 2016 WL 949065, at *3 (S.D. Tex. Mar. 14, 2016). Indeed, this Court has previously held that mere "[d]isagreement with the Court's ruling is insufficient to establish a substantial ground for a difference of opinion." *June Med. Servs.*, 2018 WL 1041301, at *2; *see also Coates v. Brazoria Cty., Tex.*, 919 F. Supp. 2d 863, 868 (S.D. Tex. 2013) ("The threshold for establishing a 'substantial ground for difference of opinion' is higher than mere disagreement or even the existence of some contrary authority."). Rather, to establish a substantial ground for disagreement, there usually must be some conflict within or outside of the circuit. *See June Med. Servs.*, 2018 WL 1041301, at *2 ("Courts traditionally will find that a substantial ground for difference of opinion exists where the circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point . . . ."); *Havel v. Dentsu Mcgarry Bowen UK Ltd.*, No. CV H-13-1291, 2014 WL 12599406, at *4 (S.D. Tex. Dec. 24, 2014) (finding no substantial disagreement where defendants "have not identified a case in which a district court . . . or an appellate court" reached the opposite conclusion).[1]

[1] Defendants' reliance on *Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393 (5th Cir. 2010) is misplaced. In *Castellanos-Contreras*, the en banc court expressed its doubt that interlocutory appeal was proper "at this stage," but decided to exercise its discretion given that multiple panels had issued opinions following substantial briefing. That case is inapposite. Other cases cited in Defendants' brief confirm the applicable standard. *E.g. Jackson v. La. Dep't of Pub. Safety & Corr.*, No. CV 15-490-JJB-RLB, 2016 WL 6136592, at *1 (M.D. La. May 2, 2016) (finding a substantial difference where circuit courts struggled to implement a Supreme Court opinion and the Fifth Circuit had not spoken on the issue); *Scott v. Ruston La. Hosp. Co., LLC*, No. CV-16-0376, 2017 WL 1364219, at *5 (W.D. La. Apr. 12, 2017) (finding a substantial difference where district courts within the Fifth Circuit reached differing conclusions on the same issue of law).

Defendants cannot clear this high threshold because the Court properly applied well-settled law, and they point to no contrary authority or disagreement. In fact, this Court applied the clear and incontrovertible holding of *Whole Woman's Health* that courts must consider abortion restrictions, and their effects, in connection with the existing regulatory scheme. In *Whole Woman's Health*, the plaintiffs sought declaratory and injunctive relief from statutes regulating abortion providers and facilities—including one that required the health department to promulgate regulations mandating that abortion facilities meet surgical center requirements. 136 S. Ct. 2992. The agency, in turn, issued a series of "lengthy and detailed" and "numerous" implementing regulations. *Id*. at 2350, 2352 (Alito, J., dissenting). Plaintiffs challenged the scheme as a whole and did not seek "to parse out specific aspects . . . that they f[ou]nd onerous or otherwise infirm." *Id.* at 2342 (citing *Whole Woman's Health v. Cole*, 790 F.3d 563, 582 (5th Cir. 2015)). The Supreme Court struck the entire regulatory scheme, rejecting the defendants' request that it invalidate only those specific regulations that unduly burdened the provision of abortion while leaving in place other regulations. In so doing, the Supreme Court explained that "[t]he statute was meant to require abortion facilities to meet the integrated surgical-center standards—not some subset thereof." *Id.* at 2319. The Court recognized that courts need not preserve unconstitutional statutory schemes "piecemeal," particularly when the regulations are meant to operate together as a scheme. *See id*.

Just like the *Whole Woman's Health* plaintiffs, Plaintiffs here challenge specific statutes that allow the Louisiana Department of Health to promulgate overly burdensome regulations and rules on abortion providers, thus creating an undue burden on a woman's right to an abortion. The Supreme Court has made clear that Plaintiffs need not plead that every single aspect of a scheme creates an undue burden, much as a court need not "go through the individual

components of the . . . statute, let alone the individual *regulations* . . . to see whether those requirements are severable from each other as applied to abortion facilities." *Id.* at 2319–20 (emphasis in original). This extends to seemingly innocuous requirements like the ones Defendants repeatedly mention, which were squarely before the Supreme Court. *Compare* Mot. for Appeal at 3 (arguing that "Plaintiffs surely would not challenge . . . the regulation requiring use of sterile instruments") *with Whole Woman's Health*, 136 S. Ct. at 2319 (Br. of Resp. at 52–53) (arguing that many of the requirements, including that facilities shall be clean and maintained, "cannot possibly be regarded as undue burdens on abortion access").

Courts in this circuit also routinely allow as-applied challenges to statutes as implemented and enforced through regulation and regulatory action. *See, e.g.*, *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013); *Carico Invs., Inc. v. Texas Alcoholic Bev. Comm'n*, 439 F. Supp. 2d 733 (S.D. Tex. 2006). Defendants have cited to no law or logic permitting such challenges in every case *but* one challenging abortion statutes. For that reason alone, they fail to show a substantial difference of opinion on a controlling question of law.

Defendants' attempt to distinguish this case from *Whole Woman's Health* on the ground that the plaintiffs there raised a facial challenge fails. First, contrary to Defendants' suggestion, the *Whole Woman's Health* plaintiffs mounted both a facial and as-applied challenge to the Texas statutes, *see* Compl., *Whole Woman's Health*, No. 14-cv-284 ¶¶ 10–11; 154–55, and the district court found as-applied constitutional violations as to two clinics. *Whole Woman's Health*, 136 S. Ct. at 2303. Moreover, the Supreme Court clearly articulated that this distinction matters only as a question of remedy. *See id.* at 2307 ("Nothing prevents this Court from awarding facial relief as the appropriate remedy for petitioners' as-applied claims."); *id.* ("[I]f

the arguments and evidence show that a statutory provision is unconstitutional on its face, an injunction prohibiting its enforcement is proper." (internal quotation marks omitted)).[2]

Relying on a straightforward application of binding Supreme Court precedent and other case law, the Court correctly determined that Plaintiffs need not parse every regulation issued pursuant to OAFLL.[3] Defendants cannot manufacture a substantial ground for difference by repeating arguments already considered and rejected by the Supreme Court.

III. Interlocutory Review Will Not Materially Advance the Termination of the Litigation

Defendants' "materially advance" arguments are nothing more than an attempt to avoid the discovery required by this Court's denial of their motion to dismiss. This Court should reject Defendants' attempt to prioritize the routine burdens associated with discovery over the devastating burdens they have imposed on Louisiana women's constitutional rights.

An interlocutory appeal materially advances the termination of a litigation if it "(1) significantly narrow[s] the scope of evidence; or (2) simplif[ies] or shorten[s] future analysis or trial." *Doe 1 v. Baylor Univ.*, No. 6:16-CV-173-RP, 2017 WL 1628994, at *2 (W.D. Tex. May 1, 2017). Thus, in *Scott v. Ruston Louisiana Hospital Company*—a case cited by Defendants—the court found that an interlocutory appeal would materially advance termination of the case in part because resolution of the disputed issue would facilitate settlement and the matter was

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[2] Defendants cherry-pick language from *Gonzales v. Carhart*, 550 U.S. 124 (2007), to suggest that the Supreme Court has applied heightened pleading requirements for as-applied challenges, Mot. for Appeal at 2–3, 10, but the *Gonzales* Court did no such thing. *Compare* 550 U.S. at 167 ("Broad [facial challenges] impose 'a heavy burden' upon the parties maintaining the suit.") *with id.* at 168 ("As-applied challenges are the basic building blocks of constitutional adjudication." (quoting Richard Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1328 (2000)). *Gonzales* was itself a facial challenge, and the Court found the more proper way to challenge the law at issue would have been through an as-applied suit, as brought here. *Id.* at 167.

[3] The Court also correctly noted that cumulative effects challenges are routinely permitted when constitutional rights are at stake, even outside the abortion context. Order at 9–10.

already stayed pending the outcome of a state investigation such that certifying the interlocutory appeal during the stay would enhance efficiency. 2017 WL 1364219, at *5.

A desire to avoid discovery does not itself warrant the extraordinary relief of interlocutory review. Where, as here, Defendants do not seek to appeal all the claims in this matter, must proceed with substantial discovery, and can achieve at best a dismissal of certain claims without prejudice, an immediate appeal does not serve the interests of the litigation. *See June Med. Servs.*, 2018 WL 1041301, at *2 (finding no material advancement because "[r]egardless of the outcome of the proposed interlocutory appeal, this action will proceed through extensive discovery, summary judgment, a potential trial, and an almost inevitable appeal"); *Doe 1*, 2017 WL 1628994, at *2 ("[C]ertification is particularly inappropriate when a party has claims remaining for adjudication by the finder of fact.").

A. Granting the Motion will not Significantly Impact Discovery

Defendants cannot show that an interlocutory appeal will make discovery easier. *See Coates*, 919 F. Supp. 2d at 867. Defendants instead will need to proceed with substantive discovery on the undue burden claim regardless of whether they pursue an interlocutory appeal.

First, the sole objection raised by Defendants' motion is to the portion of Count 1 addressing OAFLL. Plaintiffs, therefore, are entitled to discovery on Count 3, the Fourth Amendment claim, and on the twelve Sham Health Statutes also challenged in Count 1. Given that Defendants bear the burden of demonstrating that warrantless inspections are necessary to further Louisiana's abortion licensing scheme, discovery will necessarily implicate review of certain requirements set forth in OAFLL. And to the extent discovery continues with regards to the Sham Health Statutes, which overlap with certain parts of the OAFLL regulations,

Defendants are essentially asking the Court to break up discovery into precisely the piecemeal process courts seeks to avoid. *See, e.g.*, *June Med. Servs.*, 2018 WL 1041301, at *2.

Second, the procedural posture of the case means that even a reversal from the Fifth Circuit would not dispose of the case: At best, the complaint would be sent back for re-pleading under the liberal standard for amendment. *Monroe v. Cessna Aircraft Co.*, No. 2:05CV250, 2006 WL 1305116, at *2 (E.D. Tex. May 9, 2006) (finding interlocutory appeal inappropriate where, *inter alia*, a favorable ruling by the Circuit would merely result in "Plaintiffs [being] given the opportunity to amend their Complaint to assert their . . . claims in accordance with the Fifth Circuit's ruling," given the liberal re-pleading standard). Thus, interlocutory appeal would not materially advance the termination of this litigation.

B. Discovery Can and Will be Narrowed During the Ordinary Course of This Case

Defendants' dissatisfaction with the prospect of discovery is no basis for extraordinary relief and a motion for interlocutory appeal is no place to negotiate discovery disputes. Instead, the appropriate course is for Defendants to raise their concerns through the ordinary process set forth in the Federal Rules of Civil Procedure.

Defendants' discovery concerns, moreover, are overblown. Contrary to Defendants' self-serving assertions, Plaintiffs have not insisted on limitless discovery that would go on for years. To the contrary, Plaintiffs have proposed a discovery schedule that advances this case to trial by December 2019 because Plaintiffs believe the parties can and will effectively narrow the issues and work out disputes through the ordinary meet-and-confer process, and because Louisiana's women have already endured ongoing constitutional violations for long enough. Defendants have objected and seek a schedule almost twice as long, but have provided no reason that the

parties should not at least try to work through the concerns they have raised in good faith in the normal discovery process.

C. Defendants Cannot Use the Remedy Sought by Plaintiffs to Justify an Interlocutory Appeal

Defendants attempt to use Plaintiffs' requested relief—an injunction preventing Defendants from enforcing unconstitutional statutes—to justify an interlocutory appeal. Def. Br. at 14. But the question of remedy and relief necessarily requires final resolution of the merits. When that time comes—after discovery, summary judgment, and a trial on the merits in which Plaintiffs would have proven a violation of the Constitution—this Court will be in a position to craft appropriate relief to remedy the ongoing constitutional violations. Defendants' speculative concern about this Court's inability to fashion a workable remedy does not justify interlocutory appeal. This motion is nothing more than a bald-faced attempt by Defendants to delay adjudication so that they may keep an unconstitutional law in place as long as possible.

CONCLUSION

For the foregoing reasons, Defendants' Motion for Interlocutory Appeal should be denied.

Dated: May 4, 2018

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that on May 4, 2018, a true and correct copy of the foregoing was served on counsel for Defendants via the Middle District of Louisiana's Electronic Filing System.

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Dated: May 4, 2018