UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JACKSON WOMEN'S HEALTH ORGANIZATION, on behalf of itself and its patients, *et al.*,	)	
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, *et al.*,	)	
Defendants.	)	

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

There is nothing to try here, and this case is ripe for summary judgment on the constitutionality of the ob-gyn requirement. Defendants have no expert witnesses to controvert the opinions of Plaintiffs' highly-qualified experts, nor any fact witnesses to controvert the testimony of the Clinic staff about the requirement's impact on the Clinic and its patients. Instead, Defendants' opposition is nothing more than legal argument, which is based on a misunderstanding of the relevant legal standard under *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). But legal argument is not enough to create a genuine dispute of material fact.

Given the burdens the ob-gyn requirement imposes on women, Defendants' failure to present *any* record evidence that the requirement will provide safety benefits to Mississippi women above and beyond pre-existing law requires that it be struck down under the balancing test in *Whole Woman's Health*. Under that binding legal standard, Plaintiffs need not show that the ob-gyn requirement would pose insurmountable burdens, like shutting down the Clinic or

preventing women from obtaining abortions; instead, the burdens that Plaintiffs have presented are more than enough to invalidate the requirement given its lack of medical benefit. Put simply, Defendants' position in this case cannot be squared with the Supreme Court's decision in *Whole Woman's Health*. Defendants contend that Mississippi can impose yet another barrier to abortion access in the state by limiting the pool of qualified providers, with no evidence that this additional barrier will make women safer as compared to pre-existing law. Such a law is unconstitutional under *Whole Woman's Health*. Accordingly, the Court should grant summary judgment and strike down the ob-gyn requirement.[1]

I. There Are No Genuine Disputes of Material Fact about the Central Issues in the Case, and Defendants Cannot Create a Dispute with Legal Argument.

Unable to show that any material facts are in dispute, Defendants attempt to misrepresent what this case is about. Contrary to their arguments, this case is *not* about whether ob-gyns are competent abortion providers or whether they can continue to provide abortions in Mississippi. Plaintiffs agree that board-certified ob-gyns, such as the physicians at the Clinic, can be excellent abortion providers. But ob-gyns could provide abortion services under pre-existing law in Mississippi. *See* Mem. of Law Supp. Pls.' Mot. for Summ. J., 17, Apr. 26, 2017, ECF No. 198. Thus, pre-existing law gives women all the "benefits" of the ob-gyn requirement that Defendants identify. Defs.' Mem. Opp. Pls.' Mot. Summ. J., 6, May 25, 2017, ECF No. 206 (listing 3 alleged benefits to women of ob-gyns performing abortions); *see also id.* at 9 n. 3.

What this case is about is whether there is medical justification for precluding *all other* types of physicians from providing abortion services in Mississippi, and whether the requirement provides any safety benefits to women beyond pre-existing law. The evidence is undisputed that it does not. Further, there is no genuine dispute that the ob-gyn requirement compounds the

[1] Plaintiffs respectfully request oral argument on their summary judgment motion.

burdens women face in accessing abortion in the state by limiting the pool of qualified providers.

The evidence in this case is entirely undisputed on at least four critical issues:

- Training, not specialty or board status, is what determines competence in abortion care. *See* Pls.' Mem. 7 (providing citations). Major medical organizations like ACOG agree that training is the key issue. *Id.* at 8. Because training is what makes a competent abortion provider, the ob-gyn requirement provides no benefits beyond pre-existing law, which already requires training for physicians working at a clinic;

- Physicians other than board-certified or board-eligible ob-gyns, including family medicine physicians, can and do safely provide abortion services to women throughout the country. *Id.* at 7. Currently, about one-quarter to one-third of abortion providers in the nation come from specialties other than ob-gyn, and, in particular, abortion is within the broad scope of practice of family medicine physicians. *Id.*;

- Mississippi has the most limited access to abortion of any state in the country. The Clinic is the only abortion provider in the state. *See id.* at 2 (providing citations); Defs.' Opp. 10, 20 n. 7. And after comparing the ratio of abortion clinics in each state to the population of women of reproductive age, Plaintiffs' expert concluded that Mississippi ranks the lowest in the U.S. *See* Pls.' Mem. 9 (providing citations). Defendants' own chief statistician at the Office of Vital Records and Public Health Statistics for the Department of Health agrees that approximately half of Mississippi women leave the state to obtain an abortion because of limited access inside the state. *See* Decl. of Julie Rikelman in Supp. of Pls.' Mot. for Summ. J. ("Rikelman Decl.") Ex. C, 15-17, 54, Apr. 26, 2017, ECF No. 197-12; and,

- The ob-gyn requirement compounds the barriers women face accessing abortion in the state by limiting the pool of qualified providers. The Clinic's ability to provide abortions is directly tied to the availability and number of its physicians. Pls.' Mem. 9 (providing citations). Two physicians currently provide the vast majority of abortions at the Clinic, but each has other work commitments. *Id.* The requirement prevents the Clinic from hiring other qualified physicians, including family medicine physicians who have been at the vanguard of providing abortion services in the South, so that it can offer abortions on more days. *Id.* at 12. By limiting the pool of physicians from which the Clinic can hire, the requirement adds to scheduling delays, which in turn lead to a variety of burdens on women. *Id.* at 10-11.

Lacking any actual evidence to contradict the above facts, Defendants attempt to rely on attorney argument to manufacture disputes about the central issues in this case. *See, e.g.*, Defs.' Opp. 8 (providing attorney argument about relevance of actions by insurance companies but no evidence). But attorney argument cannot create a genuine dispute of material fact. *See, e.g.*,

Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (to defeat summary judgment, actual controversy must exist based on record facts); *Topalian v. Ehrman*, 954 F.2d 1125, 1132 (5th Cir. 1992) (nonmovant must "set forth specific facts" to show genuine dispute).[2]

Defendants even go so far as to try and introduce medical testimony through their attorneys by citing journal articles and other medical materials about board-certification in their opposition brief. *See* Defs.'Opp. 6-7 & Exs. L-P, R, T. The Court should reject this attempt to disregard well-settled summary judgment and evidence rules. Defendants' attorneys cannot transform themselves into medical experts who can opine about these materials, and, without an expert declaration or testimony to authenticate the articles, or explain their meaning and limitations, the articles are inadmissible hearsay and cannot be considered under Federal Rule of Civil Procedure 56. *See, e.g., Duplantis v. Shell Offshore, Inc.*, 948 F.2d 187, 192 (5th Cir. 1991); *Spears v. U.S.*, No. 5:13-CV-47, 2014 WL 3513203, at *3-5 (W.D. Tex. July 14, 2014). Accordingly, Plaintiffs respectfully request that the Court disregard these materials.

In short, Defendants' opposition discounts Plaintiffs' evidence, but it does not dispute it. The key facts are clear: the ob-gyn requirement provides no additional safety benefits to women above pre-existing law, but it does impose additional and real burdens on Mississippi women.

II. Defendants Continue to Misrepresent the Undue Burden Standard.

Defendants fundamentally misunderstand the undue burden standard, which requires the Court to "weigh the asserted benefits [of an abortion restriction] against the burdens." *Whole Woman's Health*, 136 S. Ct. at 2310. In conducting this balancing, the Court's evaluation is comparative and proportional. *Id.*; *see also id.* at 2309 (court must consider burdens together

[2] Defendants also continue to attempt to discount the opinions of Dr. Grossman simply because they do not agree with them. Plaintiffs refer the Court to their Opposition to Defendants' Motion to Exclude Certain Opinions of Plaintiffs' Expert Witnesses, ECF No. 207, which addresses fully each of Defendants' baseless arguments.

with any benefits to determine if burden is undue); *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 920 (7th Cir. 2015) ("The feebler the medical grounds . . . the likelier is the burden on the right to abortion to be disproportionate to the benefits and therefore excessive."), *cert. denied*, 136 S. Ct. 2545 (2016). The crux of the undue burden standard is that states cannot impose barriers to abortion access, whether those barriers are high or low, without credible evidence that those barriers have real benefits. *Whole Woman's Health*, 136 S. Ct. at 2310-11 (discussing importance of record evidence).

Defendants ignore this critical point. Applying the correct legal standard to the undisputed facts demonstrates that the ob-gyn requirement is invalid; the burdens Plaintiffs show here are more than enough to strike down the requirement given its lack of any medical benefit.

First, in evaluating potential benefit under the undue burden standard, the Court should assess whether, "compared to prior law, . . . the new law advance[s] [the State's] legitimate interest in protecting women's health." *Id.* at 2311; *see also Planned Parenthood of Ind. & Ky., Inc. v. Comm'r*, No. 1:16-CV-01807-TWP-DML, 2017 WL 1197308, at *21-22 (S.D. Ind. Mar. 31, 2017) (explaining "critical question" in challenge to law requiring women view ultrasound at least eighteen hours prior to abortion was whether state's interest "is *enhanced*" by requiring viewing earlier than day of abortion, as pre-existing law allowed (emphasis added)), *appeal docketed*, No. 17-1883 (7th Cir. April 27, 2017). Thus, contrary to Defendants' argument, the question is *not* whether the State can assert generally that board-certified or board-eligible ob-gyns can be competent abortion providers, but whether it can show with credible evidence that, since the law has been in effect, it has improved women's health. But, as in *Whole Woman's Health*, "there [is] no evidence in the record" of "a single instance in which the [ob-gyn] requirement would have helped even one woman obtain better treatment." *Id*. at 2311-12.

Second, Defendants suggest that there is no real burden because the Clinic has not been forced to close and, in their view, not enough women have been prevented from obtaining abortions. But clinic closings and prevention are not the only legally cognizable burdens. Indeed, this cramped version of the undue burden standard is the one the State of Texas advanced,[3] and the Supreme Court rejected. *Whole Woman's Health*, 136 S. Ct. at 2313; *see also Schimel*, 806 F.3d at 910, 920 (discussing burdens associated with law limiting "number of doctors who [were] allowed to perform abortions," "thereby increasing the waiting time").

Whole Woman's Health makes clear that the undue burden standard requires courts to consider the full variety of burdens abortion restrictions impose. 136 S. Ct. at 2309, 2313, 2318. Every federal court to have ruled on an abortion restriction in the past year has interpreted *Whole Woman's Health* in this way. *See, e.g.*, *June Med. Servs. LLC v. Kliebert*, No. 14-CV-00525-JWD-RLB, 2017 WL 1505596, at *53 (M.D. La. Apr. 26, 2017) ("[C]ourts must consider not only . . . closure of clinics and reduction in the number of available providers . . . but also "'additional burden[s]' imposed on women by reducing abortion access." (quoting *Whole Woman's Health*, 136 S. Ct. at 2313)), *appeal docketed*, No. 17-30397 (5th Cir. May 12, 2017); *Whole Woman's Health v. Hellerstedt*, No. A-16-CA-1300-SS, 2017 WL 462400, at *9 (W.D. Tex. Jan. 27, 2017) (considering burdens including increased cost and logistical challenges), *appeal docketed*, No. 17-50154 (5th Cir. Mar. 6, 2017). Plaintiffs have clearly demonstrated that the ob-gyn requirement imposes burdens on women, including increased delays and loss of the option of the abortion method that is best for them, that are more than enough to render this medically baseless law invalid.

[3] *See*, *e.g.*, Br. in Opp., *Whole Woman's Health v. Cole*, 136 S. Ct. 499 (2015) (No. 15-274), 2015 WL 5817977, at *22 (argument by government that restriction does not impose undue burden because "vast majority of Texas women of childbearing age" would continue to live within 150 miles of abortion facility and there was no "identified . . . large fraction of Texas women who have *been unable to receive an abortion*" (emphasis added)).

Third, contrary to Supreme Court and Circuit precedent, Defendants suggest that the Court evaluate the ob-gyn requirement divorced from its context. *See, e.g.*, Defs.' Opp. 17 (suggesting that Court ignore undisputed evidence about burdens created by adding ob-gyn requirement on top of mandatory delay and two-trip law). But the undue burden standard requires evaluating the challenged restriction by "look[ing] to the entire record and factual context in which the law operates." *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 (5th Cir. 2014), *cert. denied*, 136 S. Ct. 2536 (2016); *see also Whole Woman's Health*, 136 S. Ct. at 2313 (recognizing, for example, that increased driving distances were "but one additional burden, which when taken together with others . . . and when viewed in light of the virtual absence of any health benefit, lead us to conclude" that restriction is invalid).[4]

Similarly, Defendants assert that Plaintiffs could simply relieve burdens on their patients by changing the Clinic's "business model and scheduling practices." Defs.' Opp. 19. Again, this is not what the undue burden standard demands.[5] As part of evaluating the context in which a restriction operates, the inquiry is whether abortion access is unduly burdened "given the reality of how the [Clinic] provides abortion services," which "does *not* contemplate re-examining every pre-existing policy or practice of abortion providers to see if they could further mitigate burdens imposed by a new abortion regulation." *Planned Parenthood of Ind. & Ky., Inc.*, 2017

[4] *See also Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 915 (9th Cir. 2014) (holding that undue burden analysis requires "consider[ing] the ways in which an abortion regulation interacts with women's lived experience, socioeconomic factors, and other abortion regulations"), *cert. denied*, 135 S. Ct. 870 (2014); *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 796 (7th Cir. 2013) (affirming preliminary injunction blocking admitting privileges requirement because "[w]hen one abortion regulation compounds the effects of another, the aggregate effects on abortion rights must be considered").

[5] Defendants rely here on the same statement from *K.P. v. LeBlanc*, 729 F.3d 427, 442 (5th Cir. 2013), on which they relied in defense of the admitting privileges requirement. *See* Appellants' Reply Br., *Jackson Women's Health Org. v. Currier*, 760 F.3d 448 (5th Cir. 2014) (No. 13-60599), 2014 WL 580685, at *19 n.10 ("Any board-certified OB/GYN with admitting privileges could open an abortion clinic in Mississippi. If there are no physicians licensed in Mississippi willing to provide abortion services, any burden on abortion rights cannot be attributed to the State."). The Court of Appeals rejected this analysis. 760 F.3d at 458.

WL 1197308, at *8 (internal quotation marks and citation omitted) (emphasis added); *see also Schimel*, 806 F.3d at 918 (recognizing delays would "push [some women] past the . . . deadline for Planned Parenthood clinics' *willingness* to perform abortions" (emphasis added)). In any event, if the State believes that the Clinic could change its practices, "it is the State's obligation to present specific evidence, not just a general assertion that this is so." *Planned Parenthood of Ind. & Ky., Inc.*, 2017 WL 1197308 at *10 (citing *Whole Woman's Health*, 136 S. Ct. at 2317). Defendants present no such evidence.

Defendants also suggest that it is the Clinic, and not the ob-gyn requirement, that creates the burdens at issue because its physicians arbitrarily stop providing medication abortion at 10 weeks lmp and surgical abortion at 16 weeks lmp. Defs.' Opp. 16-17. But it is current evidence-based medical practice to provide medication abortion until only 10 weeks. Decl. of Julie Rikelman Supp. Pls.' Reply Ex. A, 16. Surely, in defending the ob-gyn requirement as purportedly necessary to protect women's health, Defendants cannot argue that the Clinic and its physicians disregard evidence-based medicine. Similarly, Defendants ignore that Mississippi recently criminalized one of the safest abortion procedures used after 16 weeks lmp. Miss. Code. Ann. § 41-41-151 *et seq.*; Decl. of Willie J. Parker, M.D., M.P.H., M.Sc. Supp. Pls.' Mot. Summ. J. ¶ 16, Apr. 26, 2017, ECF No. 197-1; Rikelman Reply Decl. Ex. A, 103.

Fourth, Defendants argue that the Court should not enjoin the ob-gyn requirement because pre-existing state law would be unconstitutional for the same reasons Plaintiffs argue the ob-gyn requirement is unconstitutional. Defs.' Opp. 9 n. 3. This argument is legally irrelevant. That Mississippi may have other unconstitutional restrictions does not save this law. The Court's duty is to invalidate unconstitutional laws; "the decision of what to put in their place . . . is a question calling for legislative determination." *Beare v. Smith*, 321 F. Supp. 1100, 1109

(S.D. Tex. 1971), *aff'd sub nom. Beare v. Briscoe*, 498 F.2d 244 (5th Cir. 1974); *accord Andrews v. Ballard*, 498 F. Supp. 1038, 1056-57 (S.D. Tex. 1980).

Finally, as to remedy, Defendants erroneously claim that Plaintiffs have not shown that the ob-gyn requirement imposes a substantial obstacle on a large fraction of women and thus are not entitled to facial relief. *See* Defs.' Opp. 20-21. This simply recycles arguments made—and lost—by the State of Texas in *Whole Woman's Health*.[6] *Whole Woman's Health* confirms that the "large fraction" analysis requires courts to focus on "[women] for whom [the provision] is an actual rather than an irrelevant restriction." 136 S. Ct. at 2320 (alteration in original) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895 (1992)). In *Casey*, the Supreme Court struck down the spousal notice requirement on its face, despite the state's argument that it would affect only 1% of women seeking an abortion in the state and act as a restriction for even fewer. *See* 505 U.S. at 894-95. Here, the undisputed evidence demonstrates that the ob-gyn requirement affects women seeking services at the Clinic on a weekly basis. *See, e.g.*, Rikelman Reply Decl. Ex. B. For many of the affected women, it acts as a substantial obstacle under the standard set out by the Supreme Court, and the Court should strike it on its face.

The ob-gyn requirement cannot survive review under the legal standard set out in *Whole Woman's Health* and *Casey*. The undisputed evidence shows that the requirement imposes barriers to abortion access in Mississippi, which already has extremely limited access, while providing no safety benefit beyond pre-existing law. Like the restrictions at issue in *Whole Woman's Health*, the ob-gyn requirement is a solution in search of a problem. For these reasons, the requirement is wholly "unnecessary," and the Court should permanently enjoin it statewide.

[6] *See, e.g.*, Br. for Resp'ts, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 499 (2015) (No. 15-274), 2016 WL 344496, at *45 (arguing against facial invalidation of restriction "because an abortion clinic will remain operational in each metropolitan area," meaning "[o]ver 90% of Texas women of reproductive age will live within 150 miles" of a clinic). As explained *supra*, the Supreme Court rejected this version of the undue burden standard.

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Respectfully submitted,

s/ *Julie Rikelman*
Julie Rikelman*
NY Bar #3011426
Hillary Schneller*
NY Bar #5151154
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038
Ph: (917) 637-3670
Fax: (917) 637-3666
jrikelman@reprorights.org
hschneller@reprorights.org

Robert McDuff
McDuff & Byrd
767 North Congress Street
Jackson, MS 39202
Ph: (601) 969-0802
Fax: (601) 969-0804
rbm@mcdufflaw.com

Aaron S. Delaney*
NY Bar # 4321642
Paul, Weiss, Rifkind, Wharton & Garrison LLP
1285 Avenue of the Americas
New York, NY 10019
Ph: (212) 373-3119
Fax: (212) 491-0119
adelaney@paulweiss.com

*Admitted *pro hac vice*

CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2017, I electronically filed the foregoing with the Clerk of the Court by using the Court's CM/ECF system, which will send a notice of electronic filing to all counsel of record.

s/ *Hillary Schneller*
Hillary Schneller*
NY Bar #5151154
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038
Ph: (917) 637-3777
Fax: (917) 637-3666
hschneller@reprorights.org

*Admitted *pro hac vice*