IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ADAMS & BOYLE, P.C., on behalf of itself and its patients; *et al*., Plaintiffs, v. HERBERT H. SLATERY III, Attorney General of Tennessee, in his official capacity; *et al*., Defendants.	CASE NO. 3:15-cv-00705 JUDGE FRIEDMAN MAGISTRATE JUDGE FRENSLEY

MEMORANDUM OF LAW IN SUPPORT OF EXPEDITED MOTION TO FILE SUPPLEMENTAL COMPLAINT

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Plaintiffs Adams & Boyle, P.C., Memphis Center for Reproductive Health, and Planned Parenthood of Tennessee and North Mississippi ("Plaintiffs"), as well as proposed Plaintiffs Knoxville Center for Reproductive Health and Dr. Kimberly Looney (together, the "Providers") have moved on an expedited basis to file a supplemental complaint pursuant to Federal Rule of Civil Procedure 15(d). As explained below, the Court should grant the Providers' motion because it would promote judicial economy and would not unduly prejudice Defendants.

BACKGROUND

This case concerns Plaintiffs' challenge to Tennessee's requirement that women seeking an abortion make an additional, medically unnecessary trip, at least 48 hours before they can obtain an abortion, to attend an in-person meeting with their physician and receive certain state-mandated information. Tenn. Code Ann. § 39-15-202(a)-(h) (the "Delay Law"). The Delay Law imposes severe burdens on patients seeking abortion care in the state—subjecting them to extensive delays and preventing some from obtaining an abortion entirely—with no countervailing benefits. This Court held a trial on the merits of Plaintiffs' constitutional challenge to the Delay Law in September 2019. The parties subsequently submitted proposed findings of fact and conclusions of law for the Court's consideration. A decision is pending.

On April 8, 2020, Governor Bill Lee issued Tennessee Executive Order 25, "An Order To Reduce The Spread of COVID-19 By Limiting Non-Emergency Healthcare Procedures" (the "Executive Order" or "EO"), effectively barring patients from receiving a procedural abortion in Tennessee, and compounding the burdens already faced by Tennessee abortion patients due to the Delay Law. Because medication abortions are not available in Tennessee after 11 weeks, as measured from the first day of the patient's last menstrual period ("LMP"), the Executive Order amounts to a ban on abortion for all patients who are more than 11 weeks LMP, and bans abortion

entirely for patients for whom a medication abortion is medically contraindicated or otherwise not an option.

Executive Order 25 requires that "[a]ll healthcare professionals and healthcare facilities in the State of Tennessee . . . postpone surgical and invasive procedures that are elective and non-urgent." EO at 2. Elective and non-urgent procedures are defined as "procedures that can be delayed until the expiration of this Order because they are not required to provide life-sustaining treatment, to prevent death or risk of substantial impairment of a major bodily function, or to prevent rapid deterioration or serious adverse consequences to a patient's physical condition if the surgical or invasive procedure is not performed, as reasonably determined by a licensed medical provider." *Id.* at 2-3. The Executive Order became effective at 12:01 AM on April 9, 2020, and will remain in effect until April 30, 2020 unless further extended. Executive Order 25 amends and supersedes the provisions of Executive Order No. 18, dated March 23, 2020, which explicitly exempted "pregnancy-related visits and procedures" and medical procedures that are "necessary to . . . preserve the health and safety of a patient, as determined by a licensed medical provider." *Id.* at 2.

Like similar orders issued in other states—including Alabama, Ohio, Oklahoma, and Texas—the Executive Order subjects patients seeking abortion care to enormous, and in many cases, insurmountable, burdens, in direct contravention of public health guidance from leading medical organizations that such bans are not in the interest of public health. *See e.g.*, *Joint Statement on Abortion Access During the COVID-19 Outbreak*, Am. Coll. of Obstetricians & Gynecologists (Mar. 18, 2020), https://www.acog.org/news/news-releases/2020/03/joint-statement-on-abortion-access-during-the-covid-19-outbreak.

The Providers now seek to supplement the Second Amended Complaint in this action to bring a constitutional challenge under 42 U.S.C. § 1983. The proposed Supplemental Complaint is Exhibit 1 to this Motion.

ARGUMENT

Federal Rule of Civil Procedure 15(d) provides that a court "may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Supplementation is appropriate when it "will promote the economic and speedy disposition of the entire controversy between the parties, will not cause undue delay or trial inconvenience, and will not prejudice the rights of any of the other parties to the action." 6A Charles A. Wright & Arthur R. Miller et al., Federal Practice and Civil Procedure § 1504 (3d ed. 2016). It is also well established that a supplemental complaint may include "new claims, defenses, and parties to the lawsuit." *Mattox v. Edelman*, 851 F.3d 583, 592 (6th Cir. 2017). The Court may expedite its consideration of urgent motions to supplement.

Like its sister circuits, the Sixth Circuit has a "liberal policy" in favor of supplemental pleadings. *Id.*; *see also McHenry v. Ford Motor Co.*, 269 F.2d 18, 25 (6th Cir. 1959) ("[t]he courts give [Rule 15(d)] a liberal construction"); *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 625 (6th Cir. 2016) ("Rule 15(d) aims to give the court broad discretion in allowing a supplemental pleading.") (internal quotation marks omitted); *Brian A. v. Bredesen*, No. 3:00-0445, 2009 WL 4730352, at *1 (M.D. Tenn. Dec. 4, 2009) (same) (citing *Stewart v. Shelby Tissue, Inc.*, 189 F.R.D. 357, 362 (W.D. Tenn. 1999)). *See also United States v. One Piece of Real Prop. at 5800 SW 74th Ave.*, 182 F. App'x 921, 924-25 (11th Cir. 2006) (citing *Harris v. Garner*, 216 F.3d 970, 984 (11th Cir. 2000)); *United States ex rel. Gadbois v. PharMerica Corp.*, 809 F.3d 1, 7 (1st Cir. 2015) ("courts customarily have treated requests to supplement under Rule 15(d) liberally"); *Predator Int'l, Inc. v. Gamo Outdoor USA, Inc.*, 793 F.3d 1177, 1186 (10th Cir. 2015) (same);

Hall v. C.I.A., 437 F.3d 94, 101 (D.C. Cir. 2006) ("motions for supplemental pleadings . . . are to be freely granted . . . .") (quotation marks and citation omitted); *Quaratino v. Tiffany & Co.*, 71 F.3d 58, 66 (2d Cir. 1995) (same); *Keith v. Volpe*, 858 F.2d 467, 473 (9th Cir. 1988) (supplemental pleadings are "favored"); *Ramsey v. Georgia-Pacific Corp.*, 597 F.2d 890, 892 (5th Cir. 1979) (noting "liberal application of Rule 15 . . . which freely permits supplemental amended pleadings"); *New Amsterdam Cas. Co. v. Waller*, 323 F.2d 20, 28-29 (3d Cir. 1963) (supplemental pleadings "ought to be allowed as of course"). "[A]pplications for leave to file a supplemental pleading are normally granted.'" *Brian A.*, 2009 WL 4730352, at *1; *see also McHenry*, 269 F.2d at 25; *Stewart*, 189 F.R.D. at 362.

"Such amendments [under Rule 15(d)] are well within the basic aim of the rules to make pleadings a means to achieve an orderly and fair administration of justice." *Griffin v. Cty. Sch. Bd. of Prince Edward Cty.*, 377 U.S. 218, 227 (1964). They serve the interests of judicial economy. *See also Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 598 (5th Cir. 1981) ("[I]t is appropriate for the court to consider judicial economy and the most expeditious way to dispose of the merits of the litigation."); *New Amsterdam Cas. Co.*, 323 F.2d at 28-29 ("Rule 15(d) of the Federal Rules of Civil Procedure provides for such a supplemental pleading. It is a useful device, enabling a court to award complete relief, or more nearly complete relief, in one action, and to avoid the cost, delay and waste of separate actions which must be separately tried and prosecuted. So useful they are and of such service in the efficient administration of justice that they ought to be allowed as of course . . . .").

Motions to supplement a complaint can be brought at any time the action is before the trial court, including after trial. *See, e.g.*, *Stewart*, 189 F.R.D. at 362.; *FieldTurf USA, Inc. v. Astroturf, LLC*, No. 2:10-CV-12492, 2018 WL 5961422, at *1 (E.D. Mich. Mar. 12, 2018) (Plaintiff allowed

to supplement complaint with new defendants and claims after a "two-and-a-half week trial by jury," and prior to a judgment being entered); 6A Charles A. Wright et al., Federal Practice and Procedure § 1506 (3d. ed.) ("[A] party should be given every opportunity to join in one lawsuit all grievances against another party regardless of when they arose."). "Rule 15(d) of the Federal Rules of Civil Procedure plainly permits supplemental amendments to cover events happening after suit, and it follows, of course, that persons participating in these new events may be added if necessary." *Griffin*, 377 U.S. at 227.

As explained below, the Providers' proposed Supplemental Complaint will promote judicial economy, and every factor this Court should consider in determining the Providers' motion strongly favors the Providers. The Providers' Motion to File the Supplemental Complaint should therefore be granted.

I. Granting the Motion will Promote Judicial Economy

Granting this motion will further the interests of judicial economy underlying Rule 15(d) in multiple respects. First, there is substantial overlap between the legal underpinnings of the Second Amended Complaint and the record developed at trial on the one hand, and the proposed Supplemental Complaint on the other. Second, there is substantial overlap between the factual record from trial and the facts at issue in the proposed Supplemental Complaint. Third, supplementation will avoid duplication of effort by the litigants and the Court.

A. There is Significant Legal Overlap between the Two Pleadings

The claims raised in the Second Amended Complaint and the proposed Supplemental Complaint are premised on the same body of case law that was presented to the Court at trial – namely, whether the restriction in question unconstitutionally infringes on the Providers' patients' substantive due process right to abortion. In particular, this Court is asked to determine, *inter alia*, whether the restrictions place an undue burden on patients' constitutional right to abortion care,

and whether any purported benefits are outweighed by the burdens imposed. *See Roe v. Wade*, 410 U.S. 113, 162 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876-77 (1992) (laws restricting abortion are impermissible if they "impose[] an undue burden on the women's decision"); *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292, 2309 (2016) (abortion restrictions "that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on that right.") (quotation marks and citation omitted). Motions to supplement have been granted in similar contexts. For example, the court in *West Alabama Women's Center v. Miller*, Civ. Action No. 2:15cv497-MHT (WO) (M.D. Ala. July 5, 2016) granted a motion to supplement a complaint where the court was fully familiar with the "complex legal framework" and "analytical approach" necessary for the undue burden analysis. Opinion and Order at 21. As this Court has already performed this legal analysis in connection with the Delay Law, supplementation will allow for "a more efficient and expeditious resolution" of the case. *Id.* at 18. Further, Plaintiffs have requested that during the pendency of the Executive Order, the Delay Law's in-person counseling requirement be temporarily enjoined, to protect against additional community exposure to COVID-19 and ameliorate this additional barrier patients currently face in accessing abortion care during the COVID-19 crisis.

B. <u>There is Significant Factual Overlap between the Two Pleadings</u>

The Court also has significant familiarity with many of the facts that are relevant to the Providers' proposed Supplemental Complaint. The Second Amended Complaint and the trial record on the one hand, and the proposed Supplemental Complaint on the other, share the same "focal point": restrictions on access to abortion in Tennessee and the effect of these restrictions on patients when they are denied or delayed in accessing abortion care. *Keith*, 858 F.2d at 474 (allowing plaintiffs to supplement their complaint 13 years after the initial complaint because the original complaint and supplemental complaint shared the same "concern"); *see also Griffin*, 377

U.S. at 227. Because the Court is "familiar[ ] with the subject matter," supplementation would "serv[e] the efficient administration of justice." *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs*, 243 F.R.D. 253, 257 (S.D. W. Va. 2007). The substantial similarity in the facts is particularly important in applying the undue burden standard, which is heavily fact dependent. *See Karlin v. Foust*, 188 F.3d 446, 485 (7th Cir. 1999) (in assessing whether law imposes "an undue burden on women in that state," the court must look at the "interplay of factors" including "the number of physicians who perform abortions, the number of abortion facilities, the distances women must travel in order to reach an abortion facility, and the average income of women seeking abortions").

Evidence presented to this Court at trial that also bears on the allegations in the proposed Supplemental Complaint includes:

> (a) Information about abortion services offered in Tennessee, including Plaintiffs' provision of abortion care (*Compare* Supp. Compl. ¶¶ 31-41, *with* Trial Transcript ("Tr.") Vol. 2, 60:25-61:18, 68:22-71:11, 88:6-90:7, 91:6-14, 97:1-9, 103:10-104:25 (Young); Tr. Vol. 1, 47:9-52:22, 62:2-71:1, 72:18-73:3, 76:10-79:13, 80:14-22 (Wallett); Tr. Vol. 1, 253:4-258:12, 274:13-19 (Terrell); Tr. Vol. 2, 229:19-235:18 (Katz));
>
> (b) Evidence of the safety of abortion (*Compare* Supp. Compl. ¶¶ 31-41, *with* Tr. Vol. 2, 57:18-58:8, 66:13-19 (Young); Tr. Vol. 1, 41:3-8 (Wallett)), and the risks inherent in carrying an unwanted pregnancy to term, (Tr. Vol. 2, 65:19-68:3 (Young));
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> (c) Testimony concerning the differences between medication and procedural abortions (*Compare* Supp. Compl. ¶¶ 31-41, *with* Tr. Vol. 1, 39:15-43:18 (Wallett); Tr. Vol. 2, 58:9-59:1, 113:22-115:14 (Young));
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> (d) Testimony concerning the reasons patients seek abortion or require or strongly prefer particular abortion methods (*Compare* Supp. Compl. ¶ 31, *with* Tr. Vol. 1, 41:21-44:6, 45:1-46:9 (Wallett); Tr. Vol. 2, 60:25-63:5, 91:6-14 (Young); Tr. Vol. 1, 249:19-250:4, 291:24-292:8 (Terrell));
>
> (e) Testimony concerning the decision-making process that goes into obtaining an abortion (*Compare* Supp. Compl. ¶¶ 69, *with* Tr. Vol. 1, 52:23-59:5, 70:24-71:19 (Wallett); Tr. Vol. 2, 73:19-78:24 (Young); Tr. Vol. 1, 264:6-13 (Terrell); Tr. Vol. 3-B, 34:13-37:5 (Huntsinger); Tr. Vol. 4, 115:18-116:8, 201:23-202:1 (Biggs));

(f) Testimony concerning the financial, logistical, and other burdens faced by patients seeking abortion care, and how delay exacerbates those burdens, (*Compare* Supp. Compl. ¶¶ 2, 11, 41, 62-71, 79, *with* Tr. Vol. 1, 41:9-20, 73:4-75:18, 99:17-100:2 (Wallett); Tr. Vol. 2, 93:18-96:25, 97:1-102:3 (Young); Tr. Vol. 1, 271:6-9, 281:16-21, 286:23-287:8 (Terrell));

(g) Testimony concerning the physical, emotional, and psychological harms patients experience when abortion care is delayed or denied (*Compare* Supp. Compl. ¶¶ 2, 41, 62-71, 79, *with* Tr. Vol. 1, 75:2-11 (Wallett); Tr. Vol. 2, 64:24-66:19, 68:4-21, 118:7-119:12, 120:2-11 (Young); Tr. Vol. 1, 290:20-23, 291:24-293:1 (Terrell); Tr. Vol. 4. 138:3-139:17 (Biggs)).

This Court is familiar with how the Delay Law impacts patients seeking abortion care in Tennessee, including through evidence presented at trial that the Delay Law pushes patients significantly later in pregnancy, when the risks and complexity of abortion are greater, and prevents others from obtaining an abortion altogether. (Tr. Vol. 2, 63:6-64:23, 99:15-100:21, 106:13-113:14, 115:15-118:6 (Young); Tr. Vol. 1, 70:24-71:11,84:17-85:4, 92:12-94:23 (Wallett); Vol. 1, 271:-273:21, 290:16-292:22, Vol. 2, 8:21-92:2, 14:23-16:21 (Terrell)). The Court has also heard evidence describing how the Delay Law causes patients to expend more money and other resources to obtain care, including because the cost of the procedure itself increases. (Tr. Vol. 1, 250:1-4, 273:2-277:1, 286:2-288:21 (Terrell); Tr. Vol. 1, 89:1-91:14 (Wallett); Tr. Vol. 2, 93:9-17 (Young)). These burdens will be compounded by the Executive Order addressed in the proposed Supplemental Complaint, which enforces a delay of at least several weeks, and likely months.

When the Executive Order is eventually lifted, there will be a backlog of patients who need care, and the additional delay imposed by the Delay Law (including the requirement that physicians meet with patients in-person *twice*) will make it even more difficult for women to access abortion at that time. As a result, even those patients who are still eligible to obtain an abortion in Tennessee after the Executive Order is lifted will face serious burdens. Many will be forced to obtain a costlier, more complex, and longer procedural abortion, and others will be unable to access an abortion in Tennessee at all. It is efficient – and important – for the same Court to consider

these facts here, especially where they are tied to Plaintiffs' request for a temporary injunction of the Delay Law.

C. Allowing the Supplemental Complaint Will Prevent Unnecessary Duplication

Granting the Providers' motion to supplement the complaint will avoid duplication of efforts and conserve judicial resources by consolidating most of the same plaintiffs and defendants and addressing many of the same facts, issues, and claims in a single lawsuit. Indeed, other courts have permitted supplementation on these grounds in existing cases involving challenges to abortion restrictions. *See, e.g.*, *Ohio*, 2014 WL 1308718, at *7 (granting plaintiff's motion to file a supplemental complaint to avoid "piecemeal litigation and needless waste of judicial resources"); *West Alabama Women's Center*, Opinion and Order at 21-22 (allowing supplementation after considering the undue burden evidence already before the court). Here, the parties to the proposed Supplemental Complaint are nearly identical to the original parties. All of the plaintiffs who brought the case to trial, as well as two additional proposed plaintiffs – one of whom previously appeared as a plaintiff in the action – seek relief from the same State defendants and two others. The two additional State defendants – the Governor and the Chair of the Board of Licensing Health Care Facilities – will be represented by the same counsel as the other Defendants and share substantially the same interests in this matter as the other Defendants.

Moreover, if the Providers were required to file a new action, the two actions would clearly be related cases. Admin. Order No. 176 (M.D. Tenn., Aug. 13, 2007). The proposed Supplemental Complaint and the Second Amended Complaint both involve "common questions of law or fact"; "one or more of the same parties"; the relief sought could result in "a party being subject to conflicting orders or judgments"; and reassignment to this Court would avoid "[s]ubstantial duplication of effort and expense by the Court and the parties." *Id.* Denying supplementation and requiring a new and related action, which would then need to be reassigned to this Court, would

result in "pointless formality." *Gadboi*, 809 F.3d at 4 (citing *Predator Int'l, Inc. v. Gamo Outdoor USA, Inc.*, 793 F.3d 1177, 1186–87 (10th Cir. 2015)). A principal purpose of Rule 15(d) is to avoid that by promoting an "efficient mechanism for litigating such claims." *Id.*

Accordingly, under the Sixth Circuit's liberal standard for allowing supplementation, the Providers' motion should be granted.

II. Every Factor This Court Should Consider Favors Granting the Providers' Motion

"In considering whether to allow a plaintiff to supplement its complaint, the Court should consider (1) undue delay in filing the motion; (2) lack of notice to adverse parties; (3) whether the movant is acting in bad faith or with a dilatory motive; (4) failure to cure deficiencies by previous amendments; (5) the possibility of undue prejudice to adverse parties; and (6) whether the amendment is futile." *Brian A.*, 2009 WL 4730352, at *2; *see also Foman v. Davis*, 371 U.S. 178, 182 (1962) (In exercising its discretion in determining whether to grant leave to file a supplemental complaint, the trial court may consider such factors as undue delay, prejudice to the opposing parties and futility of the proposed amendment.); Wright & Miller, 6A Fed. Prac. & Proc. Civ. § 1504 (supplementation will be allowed when it "will not cause undue delay or trial inconvenience, and will not prejudice the rights of any of the other parties to the action"). All of these factors strongly favor allowing the Providers to file their Supplemental Complaint here.

First, there has been no undue delay in filing this motion. The Executive Order took effect this past Thursday, April 9. The Providers submitted this motion shortly thereafter, and before this action has been decided. *Stewart*, 189 F.R.D. at 362.

Second, the Providers have provided notice to Defendants.

Third, the Providers bring this motion in good faith – to protect the Providers' patients' constitutional rights.

Fourth, the proposed Supplemental Complaint is not designed to correct any deficiencies in the prior pleading.

Fifth, there is no undue prejudice to Defendants that would prevent the Court from exercising its wide discretion to grant this motion. Defendants will have an opportunity to respond to the proposed Supplemental Complaint. The Court can request party submissions as it deems necessary to decide the issues presented by the proposed pleading. The naming of two new State defendants would not abridge those individuals' rights as they would be represented by the same attorneys and share the same interests in this lawsuit as the other State defendants. *Griffin*, 377 U.S. at 227 ("Rule 15(d) of the Federal Rules of Civil Procedure plainly permits supplemental amendments to cover events happening after suit, and it follows, of course, that persons participating in these new events may be added if necessary."). In contrast, denying this motion would cause undue prejudice to *Plaintiffs*, who would then need to establish the record already submitted at trial in this matter before a new Court.

Sixth, the proposed Supplemental Complaint is not futile. The additional claim is meritorious as explained further in the Providers' related filings. It seeks to prevent the irreparable harm that the enforcement of the Executive Order has had and will continue to have on patients seeking procedural abortions in the state.

Because the above factors all favor allowing the Providers' to file the Supplemental Complaint in this action, the Court should grant this motion.

CONCLUSION

For the reasons set forth above, the Court should grant this motion on an expedited basis and permit the Providers to file the attached proposed Supplemental Complaint.

Dated: April 13, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *MEMORANDUM OF LAW IN SUPPORT OF EXPEDITED MOTION TO FILE SUPPLEMENTAL COMPLAINT* has been served on the following counsel of record through the Electronic Filing System on this 13th day of April, 2020:

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