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

JUNE MEDICAL SERVICES LLC, d/b/a HOPE MEDICAL GROUP FOR WOMEN, on behalf of its patients, physicians, and staff, et al.,

Plaintiffs,

v.

REBEKAH GEE, in her official capacity as Secretary of the Louisiana Department of Health, et al.,

Defendants.

Case No. 3:16-CV-444-BAJ-RLB

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' FIRST MOTION FOR PARTIAL DISMISSAL RE: H.B. 606/ACT 304; H.B. 1019/ACT 563; AND H.B. 488/ACT 98

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INTRODUCTION

In 2016, the Louisiana legislature enacted seven bills restricting abortion. The Louisiana Department of Health ("LDH") subsequently adopted emergency regulations related to the implementation of three of the bills. The 2016 laws and regulations, together with a host of pre-existing laws governing abortion, form a regulatory system that places significant, yet unnecessary obstacles in the path of women seeking abortions in Louisiana. Plaintiffs, abortion clinics and physicians who provide abortions in Louisiana, challenge all of the 2016 restrictions on behalf of themselves and their patients, asserting that individually and cumulatively, they impose an undue burden on women's access to abortion. Defendants now move to dismiss claims related to three of the challenged bills.

House Bill 606, Regular Session (2016) (Act 304), to be codified at La. Rev. Stat. §§ 40:1061.6(A) and 36:21, prohibits any state agency, official, employee, or any local political subdivision from "contract[ing] with, award[ing] any grant to, or otherwise bestow[ing] any funding upon, an entity or organization that performs abortion, or that contracts with an entity or organization that performs abortions," except in a very limited set of circumstances. The bill thus prohibits contracts for critical services that the clinics need to stay open.

House Bill 1019, Regular Session (2016) (Act 563), to be codified at La. Rev. Stat. § 40:1061.1.1, requires that a physician give all his or her abortion patients who are prior to 20 weeks gestation, "an informational document including resources, programs, and services for pregnant women who have a diagnosis of fetal genetic abnormality and resources, programs, and services for infants and children born with disabilities." Violation of this provision subjects Plaintiff physicians to criminal penalties, *see id.* (creating § 1061.1.1(D)), and clinics to administrative action, *see* LAC 48:I.4431. This requirement applies regardless of the reason why

the woman is seeking the abortion, even to the great majority of women for whom this information is irrelevant.

House Bill 488, Regular Session (2016) (Act 98), to be codified at La. Rev. Stat. § 40:1061.10(A)(1), prohibits any person from providing an abortion unless they are a physician board-certified in obstetrics and gynecology or family medicine, or a resident training under such a physician. H.B. 488 limits, without medical justification, the pool of physicians eligible to perform abortion, making it even more difficult for clinics to hire physicians and reducing women's access to abortions in Louisiana.

As to each of the bills, Plaintiffs have alleged both injury in fact and imminent harm. Defendants' motion should therefore be denied.

I. Plaintiffs' Pleadings and Evidence Must Be Liberally Construed in Favor of Jurisdiction and Justiciability.

"[A] motion to dismiss for lack of subject matter jurisdiction should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). In reviewing the sufficiency of a complaint on a motion to dismiss under Rule 12(b)(1), a court may make its determination based on the complaint alone, or may also consider evidence. *Id.*

Similarly, a Rule 12(b)(6) motion to dismiss should be granted only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)) (internal quotation marks omitted). In analyzing a 12(b)(6) motion, courts must accept all well-pled factual allegations as true, *Kaiser Alum. & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982), and evaluate evidence in the light most favorable to the non-moving party, *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996).

At the pleading stage, "allegations of injury are liberally construed," *Little v. KPMG LLP*, 575 F.3d 533, 540 (5th Cir. 2009), and "specific facts are not necessary" to overcome a motion to dismiss, *Erickson v. Pardus*, 551 U.S. 89, 93 (2007); *see also Reams v. Johnson*, No. CIV.A. 14-88-JWD-RLB, 2015 WL 300414, at *3 (M.D. La. Jan. 22, 2015) ("factual allegations . . . need not be detailed or specific"). The complaint need only provide "adequate notice of the claim and the grounds upon which it is based," and be factually plausible. *Reams*, 2015 WL 300414, at *3. As defined by the Supreme Court, plausibility simply "calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of" the claims. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

II. Plaintiffs Have Pled Justiciable Claims Regarding H.B. 606.

Plaintiffs challenge H.B. 606, which prohibits contracts between state and local governments and abortion clinics, and which also prohibits third parties who contract with state or local governments or agencies from also contracting with abortion providers. Plaintiffs allege that H.B. 606 would interfere with the clinics' ability to contract for critical services from both public and private entities, resulting in the closure of clinics, which in turn would cut off legal access to abortion in Louisiana. Am. Compl. ¶¶ 104-11. Plaintiffs' claims that H.B. 606 violates their due process and equal protection rights, and those of their patients,[1] have been adequately pled, and nothing more is required to permit this Court's review. Indeed, any delay in review would threaten Plaintiffs with imminent constitutional injury.

[1] Under long-established Supreme Court and Fifth Circuit precedent, abortion providers have third-party standing to assert the rights of their patients. *See, e.g.*, *Singleton v. Wulff*, 428 U.S. 106, 117 (1976); *Doe v. Bolton*, 410 U.S. 179, 188 (1973); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 589 (5th Cir. 2014).

A. Plaintiffs Have Established Standing as to H.B. 606.

"To establish standing, a plaintiff must prove that (1) she has sustained an injury in fact that is both (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical, (2) there is a causal connection between the injury and the conduct complained of, and (3) a favorable decision is likely to redress the injury." *Planned Parenthood Gulf Coast, Inc. v. Gee*, 837 F.3d 477, 485-86 (5th Cir. 2016) (internal quotation marks omitted). "Particularized" means that "the injury must affect the plaintiff in a personal and individual way." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 n.1 (1992). "Imminence" is an "elastic concept," *id.* at 564 n.2, and an "allegation of future injury may suffice" to establish standing "if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur," *Gee*, 837 F.3d at 486 (quoting *Susan B. Anthony List v. Driehaus* 134 S. Ct. 2334, 2341 (2014)).

1. Plaintiffs Face Concrete, Imminent Injuries from H.B. 606

Plaintiffs have established injury-in-fact, because H.B. 606 singles out abortion providers for discriminatory treatment that is both concrete and particularized. Without judicial intervention, Plaintiffs' threatened injuries include (a) immediate loss of direct contracts with any city or state entity, including contracts for essential services such as water and sewage; (b) loss of contracts with any existing vendors who also have contracts with any public entity; (c) a dramatically reduced pool of potential vendors with whom to contract; and (d) stigma and adverse business repercussions. *See* Am. Compl. ¶¶ 104-11, 153-57.

These injuries are neither conjectural nor hypothetical. The operation of the law is clear and self-executing. Immediately upon becoming effective, H.B. 606 would require city and state entities to terminate existing contracts with the clinics. *See Gardner v. Toilet Goods Ass'n*, 387 U.S. 158, 171 (1967) (noting "the fact that these regulations are self-executing, and have an

immediate and substantial impact upon the respondents"). As established by the Amended Complaint, and further explained in the declaration of Plaintiff Hope Clinic's Administrator, Kathaleen Pittman, the clinic contracts with the City of Shreveport (a local political subdivision) for water and sewage. *See* Declaration of Kathaleen Pittman ("Pittman Decl.") (attached hereto as Ex. A) ¶ 4. This contract is just one example of the type of contracts that would be prohibited by H.B. 606. Contrary to Defendants' assertion, there is no other vendor available to provide these critical services. Accordingly, H.B. 606, if enforced, could cause the clinic to close.

Similarly, any in-state third-party vendor that contracts with the clinics will be in the same situation—their contracts for essential services with local political subdivisions would be prohibited if they maintain contracts with the clinics. *See* Pittman Decl. ¶ 6. Since no business can operate without access to basic services such as water and sewage, third-party vendors would have no choice but to discontinue or refuse contracts with abortion providers.

Accordingly, regardless of the involvement of third parties, H.B. 606 directly affects contracts between the clinics and any public entity, and therefore impacts existing contracts for essential services. Second, with regard to third party vendors, the coercive effect of H.B. 606 on vendors that contract with any public entity is manifest. *See Gee*, 837 F.3d at 487 ("Although injury resulting from the independent action of some third party not before the court will not suffice, that does not exclude injury produced by determinative or coercive effect upon the action of someone else." (internal quotation marks and citation omitted)). This Court should reject Defendants' invitation to "conduct a proximate cause analysis to determine the immediate cause" of the injuries, since "this is not what the Supreme Court requires." *Id.*[2]

[2] *Allen v. Wright* is inapposite. There, the Court held the alleged injury was not "fairly traceable to the assertedly unlawful conduct" because the "line of causation between that conduct and [the alleged injury] is attenuated at best." 468 U.S. 737, 757 (1984), *abrogated in part on other grounds by Lexmark Int'l, Inc. v. Static Control Components,*

Contrary to Defendants' arguments, Plaintiffs need not provide a list of all such vendors to establish that this injury is the immediate and unavoidable consequence of H.B. 606. *See Lujan*, 504 U.S. at 561 ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." (internal quotation marks, citation, and alterations omitted)). Loss of contracts, the sudden need to seek substitute contracts (which may not be available), and the reduced pool of potential vendors are themselves cognizable injuries. Plaintiffs have asserted that this set of circumstances could lead to impairment of their operations and closure. These injuries satisfy the requirements for standing. *See Gee*, 837 F.3d at 485-86.

Plaintiffs' injuries as a result of H. B. 606 are impending, and far from a "speculative chain of possibilities." *McCardell v. U.S. Dep't of Hous. & Urban Dev.*, 794 F.3d 510, 520 (5th Cir. 2015) (finding standing where the alleged injury did not depend "on a long and tenuous chain of contingent events," and the "asserted injury would be concretely felt in the logical course of probable events"). Defendants' citation to *NAACP v. City of Kyle*, 626 F.3d 233, 237 (5th Cir. 2010), is therefore misplaced, because plaintiff in that case failed to allege how the challenged ordinances "may deprive a NAACP member of the opportunity to acquire a new residence." *Id*. By contrast here, Plaintiffs have pled facts that establish that H.B. 606 would have an immediate impact on their ability to maintain their business operations and provide abortions to Louisiana women.

Inc., 134 S. Ct. 1377 (2014). Here, the line of causation is clear: Plaintiffs will suffer injuries as a direct result of H.B. 606 taking effect. Like *Allen*, *Hotze v. Burwell* involved a long, speculative chain of events, where for one of the links, two possible third party actions were "equally probable." 784 F.3d 984, 995 (5th Cir. 2015). H.B. 606 does not present such a speculative chain of events, and the action of third parties in refusing to contract with clinics is either certain or overwhelming likely. Finally, in *Little v. KPMG LLP*, the "claim of injury depend[ed] several layers of decisions by third parties," which simply is not the case here. 575 F.3d at 541.

Further, Defendants overlook the injuries associated with H.B. 606's violation of equal protection, as well as the due process prohibition on unconstitutional conditions. In the equal protection context, the Supreme Court has made clear that "[w]hen the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group," the "injury in fact" is the "denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). Similarly here, H.B. 606 denies equal treatment by depriving clinics of the opportunity to contract with any public entity, and erecting a substantial barrier to contracts with private entities that do business with a public entity or wish to do so in the future.[3] The resulting injury from the violation of the unconstitutional conditions doctrine—which forbids "burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them," *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013)—is imminent, because abortion providers will be deprived of the opportunity to contract with public entities or affected third-party vendors.[4]

Defendants' argument that Plaintiffs' claims are inappropriate for a facial challenge are similarly misplaced. Pre-enforcement, facial challenges to abortion restrictions have been routinely entertained in this circuit and around the country. *See, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Planned*

[3] *See* 13A Wright & Miller, Fed. Prac. & Proc. Juris. § 3531.4 (3d ed.) (hereinafter "Wright & Miller") ("Equal-protection interests are another abstract value that may support standing without further benefit. The Supreme Court has clearly ruled that the denial of equal protection by withholding a benefit conferred on others is an injury that supports standing . . . .").

[4] Abortion providers have standing to bring an unconstitutional conditions claim based on their patients' right to abortion. *See, e.g.*, *Planned Parenthood of Greater Ohio v. Hodges*, No. 1:16-cv-539, 2016 WL 4264341, at *8 (S.D. Ohio Aug. 12, 2016), *appeal docketed* No. 16-4027 (6th Cir. Sept. 8, 2016); *Planned Parenthood of Sw. & Cent. Fla. v. Philip*, 194 F. Supp. 3d 1213, 1217-20 (N.D. Fla. 2016).

Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 748 F.3d 583 (5th Cir. 2014); *Barnes v. State of Miss.*, 992 F.2d 1335 (5th Cir. 1993).[5] As the Supreme Court has repeatedly emphasized, whether a plaintiff can prevail in a facial challenge is not a question of justiciability to be assessed at the outset of a lawsuit, but a question of remedy to be assessed at the conclusion.[6] Plaintiffs need not wait to file suit until they are forced to close their doors. *See Gee*, 837 F.3d at 486-87.

2. Stigma Is a Cognizable Injury.

Plaintiffs have also pled that H.B. 606 stigmatizes the provision of abortion care. Am. Compl. ¶¶ 111, 157, 165. Contrary to Defendants' assertions, the stigma of discriminatory treatment is a cognizable injury under both Supreme Court and Fifth Circuit precedent. Therefore, Plaintiffs' allegations satisfy the "injury in fact" requirement for standing.

In *Allen v. Wright*, the Supreme Court concluded that "there can be no doubt" that "the stigmatizing injury often caused by . . . discrimination . . . is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing." 468 U.S. at 755. The Court continued: "such injury accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct." *Id.*

Here, unlike in *Allen*, Plaintiffs' claims[7] are based on direct denial of equal treatment to a defined class: H.B. 606 singles out Louisiana's four abortion clinics for discriminatory treatment. *See Heckler v. Mathews*, 465 U.S. 728, 740 n.9 (1984) ("because appellee personally has been

[5] In addition, this argument—like much of Defendants' motion—focuses on Plaintiffs' claim that H.B. 606 places an undue burden on the right to abortion, and ignores that Plaintiffs have raised two additional claims against H.B. 606.

[6] *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 330-31 (2010) (noting that the distinction between facial and as-applied challenges "goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint"); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328-31 (2006) (remanding case for reconsideration of remedy after holding plaintiff failed to meet standard for facial relief).

[7] Plaintiffs' equal protection (Count X) claim alleges direct discrimination against abortion providers, and Plaintiffs' unconstitutional condition (Count IX) and undue burden (Count VIII) claims allege direct discrimination against women seeking abortion, which Plaintiffs have standing to assert on behalf of their patients. *See supra* at n.1.

denied benefits that similarly situated women receive, his is not a generalized claim of the right possessed by every citizen" (internal quotation marks omitted)); *Allen*, 468 U.S. at 755-56 (noting that while standing based on stigmatic injury may be problematic for a large, nation-wide class, it can extend to a defined class suffering direct discrimination). Plaintiffs are not required to show "more," Defs.' Mem. in Supp. of First Mot. for Partial Dismissal (hereinafter "Defs.' Mem.") at 10, to plead a cognizable injury.

Similarly, the Fifth Circuit has held that stigmatic injury is "not too abstract or conjectural" for purposes of injury under Article III. For example, in a challenge by homeowners to an order addressing discrimination in public housing, the Fifth Circuit held that the "[t]he remedial order's explicit racial classification alone is sufficient to confer standing." *Walker v. City of Mesquite*, 169 F.3d 973, 979 (5th Cir. 1999). The Court reasoned that the homeowners had pled both "purposeful[] discriminat[ion] because of their race (*i.e.*, they were intentionally singled out because of their race)" and that the order "has inflicted or threatens to inflict specific injury," which was sufficient to confer standing. *Id.*; *see also Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 636 (5th Cir. 2012) ("'Discriminatory treatment at the hands of the government is an injury long recognized as judicially cognizable;'" where the law "singles out certain incumbent operators as ineligible for the benefit of a statewide franchise, ...'no further showing of suffering based on that unequal positioning is required for purposes of standing.'"). Similarly, H.B. 606 discriminates against abortion clinics by singling them out as ineligible for certain contracts, resulting in both stigmatic harms and the threat of injury to their businesses.[8]

[8] Plaintiffs' equal protection claim alleges that H.B. 606 does not even survive rational basis review. In an equal protection claim, the Court's analysis of standing for stigmatic harms is the same regardless of the type of stigma alleged. *See Apache Bend Apartments, Ltd. v. U.S. Through I.R.S.*, 987 F.2d 1174, 1183 n.13 (5th Cir. 1993) (en banc) (Goldberg, J., dissenting) ("[T]he Court's finding of standing [is] not premised on the level of scrutiny accorded to

The cases cited by Defendants do not address standing or the stigmatic harms that stem from discrimination.[9] In particular, Defendants' references to *Carhart*, 550 U.S. 124, and *Harris v. McRae*, 448 U.S. 297 (1980), are irrelevant to standing: The fact that the state has a legitimate interest in promoting potential life, even if in doing so it stigmatizes abortion, does not preclude a court from considering those stigmatic harms both at the pleading stage and on the merits. If and when this Court reaches the merits of Plaintiffs' undue burden and unconstitutional condition claims, it must weigh stigmatic harms, along with all of the other burdens imposed by H.B. 606, against the state's asserted interests. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309-10 (2016) (holding that the undue burden standard "requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer" and "then weigh[] the asserted benefits against the burdens"). Similarly, when the Court reaches the merits of Plaintiffs' equal protection claim, it must consider the rationality of H.B. 606's discriminatory treatment.

B. Plaintiffs' Claims Regarding H.B. 606 Are Ripe.

The key considerations for ripeness are "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Choice Inc. of Tex. v. Greenstein*, 691 F.3d 710, 715 (5th Cir. 2012) (internal quotation marks omitted). "Ripeness separates those matters that are premature because the injury is speculative and may never occur from those that are appropriate for judicial review." *United Transp. Union v. Foster*, 205 F.3d 851, 857 (5th Cir. 2000). "A claim also may be ripe because the future injury is nearly certain, even though there is nothing the plaintiff can do to alter present conduct to affect the future." Wright & Miller § 3532.2.

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the plaintiff's equal protection claim. . . . [A]dopting a per se rule that . . . standing only applies to claims falling under strict or intermediate level scrutiny would lead to absurd results.").

[9] Curiously, the cases Defendants cite instead involve 12(b)(6) motions addressing whether allegations of defamation are sufficient to allege procedural due process claims, which has no bearing on the issues in this case. *See* Defs.' Mem. at 10-11. Those cases cannot be generalized to all claims involving any type of stigma.

As explained above, *see supra* Section I.A, Plaintiffs' injuries are imminent, and withholding review at this time would cause immediate hardship. *See generally Lopez v. City of Houston*, 617 F.3d 336, 342 (5th Cir. 2010) (the standing injury-in-fact inquiry and the ripeness hardship inquiry "overlap in practice" because both entail an examination of "whether a plaintiff has suffered a concrete injury."). "The Supreme Court has found hardship to inhere in legal harms, such as the harmful creation of legal rights or obligations" as well as "practical harms on the interests advanced by the party seeking relief." *Texas v. United States*, 497 F.3d 491, 499 (5th Cir. 2007).

Here, H.B. 606 affects the clinics' current legal rights to enter into contracts, rendering them ineligible to contract with public entities, and imposing barriers to contracting with an array of private entities. Moreover, the practical harms that will be imposed on the clinics, and therefore on the doctors, staff, and patients, by H.B. 606 are virtually certain and severe. As soon as H.B. 606 takes effect, the clinics will very likely lose contracts with public entities for essential services, such as water and sewage. *See* Pittman Decl. ¶ 4. Any current private vendor that also has a contract with a public entity (including their public utilities contracts) would be forced to terminate its relationship with the clinics. In short, the ongoing ability of the clinics to remain open would be thrown into doubt, and the impact of H.B. 606 will be "felt immediately by those subject to it in conducting their day-to-day affairs." *Toilet Goods Ass'n, Inc.*, 387 U.S. at 164.

Additionally, the very operation of H.B. 606 will inevitably force the clinics to contract and conduct business in a different manner—if at all—given the barriers to contracting with public and private entities. *Contra Choice Inc. of Tex.*, 691 F.3d at 716-17 ("operat[ing] in a heightened state of vigilance" was an insufficient hardship for purposes of the ripeness analysis because the outpatient abortion facilities did not have to modify their behavior in order to comply with the

challenged act). Because "Plaintiffs have shown the real possibility of irremediable adverse consequences" if this Court were to deny review, "Plaintiffs have shown hardship." *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 545 (5th Cir. 2008).

In addition to demonstrating the hardship they would suffer if the Court declined review, Plaintiffs have presented claims against H.B. 606 that are fit for judicial decision. "A case is generally ripe if any remaining questions are purely legal ones; conversely, a case is not ripe if further factual development is required." *Choice Inc. of Tex.*, 691 F.3d at 715 (internal quotation marks omitted). Because of the imminent and automatic nature of the injuries Plaintiffs would suffer upon enforcement, no further delay would assist this Court in addressing whether the burdens imposed by H.B. 606 outweigh its benefits, whether it impermissibly discriminates against abortion providers, and whether it imposes unconstitutional conditions. In short, this is "a case in which the impact of the [challenged provision] upon the petitioners is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage." *Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).[10]

III. Plaintiffs Challenge to the Mandated Disclosure Requirement in H.B. 1019 is Ripe for Review.

Plaintiffs challenge the requirement in H.B. 1019 that all women seeking abortions prior to twenty weeks receive an "informational document" containing information about resources "for pregnant women who have a diagnosis of fetal genetic abnormality" and "infants and children born with disabilities." (Hereinafter the "mandated disclosure.") The informational document "must be

[10] Defendants' suggestion that the claims against H.B. 606 should be narrowed must also be rejected. Plaintiffs have alleged that H.B. 606 would have the imminent, predictable effect of shutting down Hope and Bossier, which plainly has direct implications for its doctors, staff, and patients.

given to all abortion patients, regardless of the reason why the women is seeking the abortion," even though this information is irrelevant to the great majority of women. Am. Compl. ¶ 71.[11]

As the Amended Complaint makes clear, Plaintiffs challenge the mandated disclosure on the grounds that it requires women to receive information that is irrelevant to their decision or informed consent for abortion. *See Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F. 3d 570, 576 (5th Cir. 2012) ("informed consent laws that do not impose an undue burden on the woman's right to have an abortion are permissible if they require truthful, nonmisleading, and *relevant* disclosures" (emphasis added)).[12] Accordingly, Defendants' assertion that Plaintiffs do not challenge the State's right to require such information, and that the claim thus rests solely on the content of the mandated disclosure, is incorrect. As pled by Plaintiffs, the basis of the claim is not the content of the informational document, but rather the fact that all women must receive the irrelevant information in the first place. As a result, Plaintiffs' claim against the mandated disclosure requirement is ripe, even though LDH has not yet created the informational document.[13]

As noted, courts should only dismiss a case on ripeness grounds if the claims are "abstract or hypothetical," taking into account "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 833 F.2d 583, 586-87 (5th Cir. 1987). "A case is generally ripe if any remaining questions are purely legal ones . . . ." *Id.* at 587.

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[11] Count III of the Amended Complaint, avers that H.B. 1019 violates Plaintiffs' patients' rights because it has "the unlawful purpose and effect of imposing an undue burden of women's right to choose abortion." Am. Compl. ¶ 173.

[12] Contrary to Defendants' suggestion, Defs.' Mem. at 3-4, 14, *Planned Parenthood v. Casey* did not give states carte blanche to require that women receive information on any subject matter mandated by the State. *See* 505 U.S. at 882-83 (assessing the validity of each type of information required to be provided prior to abortion).

[13] Defendants similarly misunderstand Plaintiffs' challenge to LAC 48:I.4431. The Regulation, by making violation of the mandated disclosure requirement grounds for an enforcement action by LDH, subjects the clinics to additional legal exposure, thus necessitating that the substantive provisions of the regulation be challenged, in spite of the 30-day grace period.

Here, Plaintiffs' claim against H.B. 1019 is neither abstract nor hypothetical. The terms of the Act are clear—Plaintiffs must provide the informational document to every woman seeking an abortion prior to twenty weeks. Plaintiffs allege that this requirement, in and of itself, imposes unconstitutional burdens. In addition, Plaintiffs' claim is appropriate for judicial review without the need for additional factual development. The harm Plaintiffs seek to remedy stems from the very enactment of H.B. 1019; no further act by either the Plaintiffs or the State need occur for the harm alleged to occur.

Defendants' argument that the claim is not ripe due to "contingent future events that may not occur as anticipated," Defs.' Mem. at 14, should be rejected. House Bill 1019 directs that LDH "shall develop an informational document to comply with the mandate established in this Section," and "shall make such information available to any requesting provider of women's health care services." H.B. 1019, Section 1, creating La. Rev. Stat. § 1061.1.1(C)(2). There is no reason to believe, nor have Defendants suggested, that LDH will not comply with this mandate and produce the informational document. "[I]n determining whether a justiciable controversy exists, a district court must take into account the likelihood that these contingencies will occur," and focus on "whether an injury that has not yet occurred is sufficiently likely to happen to justify judicial intervention." *Orix Credit Alliance, Inc. v. Wolfe*, 212 F.3d 891, 897 (5th Cir. 2000) (internal quotation marks omitted). Thus the "contingency" of production of the document does not defeat ripeness. *See Roman Catholic Diocese of Dallas v. Sebelius*, 927 F. Supp. 2d 406, 420 (N.D. Tex. 2013) ("Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." (internal quotation marks omitted)).

Plaintiffs will suffer hardship should their claim be dismissed and they are forced to wait

to proceed until the informational document is produced. Under the "note" in the Emergency Regulation, LAC 48:I.4431(A)(4)d, enforcement against the clinics can begin "30 days after the department publishes a notice of the availability of such materials." The affidavits of Defendants Stewart and Marvin state that they do not intend to prosecute any person for violation of the mandated disclosure "until the required document is promulgated," ECF No. 27-2 at 2, ¶ 4, ECF No. 27-3 at 2, ¶ 4, but do not address whether they will observe the 30-day grace period provided in the Emergency Regulation. Enforcement of the Act will therefore require Plaintiffs and their patients to immediately change their behavior at that time, or face criminal prosecution. *See Choice Inc. of Tex.*, 691 F.3d at 715 (hardship inheres from "the harm of being 'force[d] . . . to modify [one's] behavior in order to avoid future adverse consequences'" (alterations in original)).

Under these circumstances, the threat that Plaintiffs will suffer criminal and civil penalties is sufficient for purposes of the ripeness inquiry. *See Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 302 (1979) (adequate case or controversy presented, even though "the criminal penalty provision ha[d] not yet been applied and may never be applied"; "when fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative a plaintiff need not 'first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute.'" (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)) (alterations in original)).[14]

Not only have Plaintiffs established an adequate threat of prosecution, but Defendants' assertion that Plaintiffs must wait until the informational document is produced would impose further hardship on Plaintiffs, by denying them a meaningful opportunity to litigate their claim.

[14] Defendants' reliance on *Google, Inc. v. Hood*, 822 F.3d 212, 227 (5th Cir. 2016), Defs.' Mem. at 15, is misplaced. The court in *Google* was not considering subject matter jurisdiction based on ripeness, but rather, whether Google had established irreparable injury to justify the issuance of a preliminary injunction. While the court found that Google had failed to satisfy that requirement because the threat of prosecution was not "sufficiently imminent," it expressed no opinion on Google's ongoing claim, based on the same conduct, for declaratory relief. *Id.* at 228 & n.14.

Defendants unreasonably suggest that Plaintiffs must forego their claim now in favor of having to immediately refile a new case and seek temporary and preliminary injunctive relief when the informational document is produced (at a time of Defendant's choosing, with no requirement of advance notice to Plaintiffs, and with no certainty regarding application of the grace period). *Contra Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 734 (1998) (before the logging that Plaintiffs seek to prevent can commence, numerous events must take place, including an opportunity for public notice and comment and court challenge; Plaintiff will "thus will have ample opportunity later to bring its legal challenge at a time when harm is more imminent and more certain"). Here, Plaintiffs would have virtually no meaningful opportunity to bring their claims, given that Defendants Stewart and Marvin have indicated that they will only forestall prosecution until the document is produced, and LDH would grant a scant 30-day delay. Nor would Plaintiffs' harms be more certain when the document is produced than they are now. The ripeness doctrine does not preclude claims in these circumstances.[15]

IV. Plaintiffs Have Sufficiently Pled Injury from H.B. 488 and Their Challenge Is Ripe for Review.

Plaintiffs challenge H.B. 488, which prohibits any person from providing an abortion unless they are a physician board-certified in obstetrics and gynecology or family medicine, or a resident training under such a physician.

In their First Amendment Complaint, Plaintiffs aver that:

> H.B. 488 limits, without medical justification, the pool of physicians eligible to perform abortion and thus makes it even more difficult for women to obtain abortion in their own communities. By extension, it also limits, without medical justification, the pool of physicians the clinic Plaintiffs may hire to perform abortions. It thus reduces women's access to abortions in Louisiana by exacerbating the current shortage of physicians providing abortions in Louisiana, and it threatens the ongoing viability of clinic Plaintiffs,

[15] Plaintiffs do not oppose dismissal of their claim that H.B. 1019 impermissibly bans pre-viability abortions sought for reason of genetic abnormality, as averred in ¶ 63 of the Amended Complaint, but note that that assertion remains relevant to Plaintiffs' cumulative undue burden claim.

> by limiting their ability to replace departing physicians and to hire new ones. . . . The number of physicians offering abortion care in Louisiana's abortion clinics is now so low that the loss of even one more physician will result in a deep shortage of abortion care providers in Louisiana. Reducing the number of such physicians by even one further would result in long waits throughout the state, and the denial of abortion care for some women.

Am. Compl. ¶¶ 102, 150-51.[16] Plaintiff clinics are two of the only four remaining clinics providing abortion care in the state of Louisiana, *id.* ¶ 19, and there are only three physicians—the physician Plaintiffs in this action—providing abortions at these clinics, *id.* ¶¶ 22-24.

The Amended Complaint, on its face, sufficiently pleads injury for the purposes of standing and ripeness as to Plaintiffs' claims against H.B. 488. In addition, since this case was filed, unexpected issues with physician availability have significantly impacted the availability of abortion services at the clinic Plaintiffs' facilities. In the last two months, Dr. Doe 3—who is already nearing retirement age—was unable to provide abortion services for several weeks due to a serious health issue. Pittman Decl. ¶¶ 8-9. Dr. Doe 3 is the only physician at Hope providing abortions past 15 weeks, so the clinic was unable to provide abortions past this gestational age while he was ill. Pittman Decl. ¶¶ 9-10. Moreover, because there are so few providers in Louisiana, any time a physician goes on vacation or is otherwise unavailable, women's access to abortion care suffers. Pittman Decl. ¶¶ 8-10. As a result of Dr. Doe 3's illness, Hope would like to begin a search for a backup physician to fill in when Doe 1 or 3 are not available. In other words, Hope has concrete plans to hire an additional physician. Pittman Decl. ¶ 9.

A. <u>Plaintiffs Have Established Injury in Fact That Is Imminent and Concrete</u>.

While all of the current Plaintiff physicians meet H.B. 488's requirement of board certification, Plaintiffs nonetheless possess standing. The Fifth Circuit has repeatedly emphasized

[16] Count VII of the Amended Complaint avers that: "H.B. 488 violates Plaintiffs' patients' right[s] . . . because it has the unlawful purpose and effect of imposing an undue burden on women's right to choose abortion." Am. Compl. ¶ 183.

that "'imminence' is an 'elastic concept' that is broad enough to accommodate challenges to at least some [circumstances] that a [plaintiff] has not personally encountered." *Frame v. City of Arlington*, 657 F.3d 215, 235 (5th Cir. 2011) (en banc). The imminence requirement excludes only conjectural injuries, not inevitable future injuries. *Compare Lujan*, 504 U.S. at 564 (holding no injury in fact where plaintiff pled only "'some day' intentions—without any description of concrete plans"), *with Frame*, 657 F.3d at 235-36 (holding that a disabled person may bring a claim under the Americans with Disabilities Act involving inaccessible sidewalks and "seek injunctive relief with respect to a soon-to-be-built sidewalk, as long as the plaintiff shows a sufficiently high degree of likelihood that he will be denied the benefits of that sidewalk once it is built"), *and Gee*, 837 F.3d at 486-87 (holding that "a threatened injury may be sufficient to establish standing" and plaintiffs "need not wait to file suit until [clinic] is forced to close its doors").

The fact that Does 1, 2, and 3, are currently in compliance with H.B. 488 does not automatically mean that Plaintiffs cannot show an imminent and concrete injury for the purposes of standing. Under long-established Supreme Court precedent, "it is not necessary that petitioner first expose himself to actual . . . prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *see also Duarte ex rel. Duarte v. City of Lewisville*, 759 F.3d 514, 517-18 (5th Cir. 2014) (injury in fact established where subject of ordinance limiting where child sex offenders could reside alleged "concrete plans" to live in the City; as "an object of the [government] action . . . there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it" (quoting *Lujan*, 504 U.S. at 561-62)); *Houston Chronicle Pub. Co. v. City of League City*, 488 F.3d 613, 617-19 (5th Cir. 2007) (standing

established for facial and as-applied pre-enforcement challenge where petitioners showed "imminent future prosecution if the City is not enjoined"); *Peyote Way Church of God, Inc. v. Smith*, 742 F.2d 193, 198 (5th Cir. 1984) ("A person who desires to violate a criminal statute that he considers unconstitutional need not, however, disobey the law and await his prosecution before challenging its unconstitutionality.").

Here, Plaintiffs are clearly the target, or "object of" H.B. 488's requirements. Plaintiffs have pled that there is already a shortage of physicians providing abortions in Louisiana, and H.B. 488 impedes the clinics' ability to hire replacement and/or additional physicians by further shrinking the pool of eligible physicians. Am. Compl. ¶ 102. The loss of even one physician will result in "a deep shortage of abortion care providers," resulting in "long waits throughout the state, and the denial of abortion care for some women." Am. Compl. ¶¶ 150-51. While the state has temporarily agreed not to enforce H.B. 488, ECF No. 14-1, the specter of ultimate enforcement remains, *see* Am. Compl. ¶¶ 114, 119-21, and will impact Hope's ability to hire a backup physician.[17] It is thus inevitable that H.B. 488 has an immediate and concrete impact on the already precarious physician capacity situation at the clinics.

Finally, Defendants once again attempt to conflate the standing inquiry with whether Plaintiffs will ultimately be able to show constitutional injury on the merits. Defs.' Mem. at 16-17. At this stage, plaintiffs "need only show that the [restriction] treats them differently from other[s similarly situated,] . . . making it 'differentially *more burdensome*' for the [plaintiffs] . . .for standing purposes." *Duarte*, 759 F.3d at 520. Accordingly, the state's ability to regulate the medical profession under *Carhart*, 550 U.S. 124 and *Mazurek v. Armstrong*, 520 U.S.

[17] Thus, unlike *Hotze v. Burwell*, 784 F.3d at 993-94, where the Fifth Circuit held that a plaintiff complying with the Affordable Care Act lacked standing to challenge it, H.B. 488 forces Plaintiffs to change their behavior now with regard to physician recruitment by drastically limiting the pool of eligible physicians from which they can recruit.

968 (1997), is irrelevant. Moreover, Defendants' argument that Plaintiffs are foreclosed from *facially* challenging H.B. 488 because "Louisiana can require that abortions be performed by qualified doctors," Defs.' Mem. at 17,[18] is incorrect. *See supra* Section II.A.1.

B. Plaintiffs' Claims Against H.B. 488 Are Ripe for Review.

Defendants employ the same faulty "imminence" analysis in alleging that Plaintiffs' claims against H.B. 488 are not ripe. As with H.B. 606, *see supra* Section II.B, and H.B. 1019, *see supra* Section III, the practical harms that will flow from H.B. 488 are virtually certain and severe. *See Texas*, 497 F.3d at 499. The immediate harms to physician recruitment are far from "abstract or hypothetical," *Choice Inc. of Tex.*, 691 F.3d at 715, and indeed are "sufficiently likely to happen to justify judicial intervention," *Gee*, 837 F.3d at 488. Moreover, Plaintiffs' claims are clearly ripe because, as a result of Dr. Doe 3's recent illness, Hope would like to begin a search for another physician. Pittman Decl. ¶ 9.[19]

CONCLUSION

For the foregoing reasons, the Motions to Dismiss Plaintiffs' claims against H.B. 606, the mandated disclosure provision of H.B. 1019, and H.B. 488, should be denied.[20]

Respectfully submitted, February 21, 2017.

/s/ William E. Rittenberg
William E. Rittenberg

[18] Plaintiffs are not arguing, as Defendants assert, that "Louisiana is categorically foreclosed" from enacting H.B. 488. Defs.' Mem. at 17. Rather, Plaintiffs allege that, on the merits, the Physician Requirement individually and cumulatively in connection with the other 2016 Restrictions, imposes an undue burden on women's access to abortion. Am. Compl. ¶¶ 183, 191.

[19] Should the court rule in Defendants' favor based on Rule 12(b)(6) as to any of the claims against H.B. 606, H.B. 1019, or H.B. 488, Plaintiffs should be permitted to amend those claims. *See, e.g., U.S. ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 270-71 (5th Cir. 2010).

[20] Defendants also move, without substantive argument, to dismiss Count XI of the First Amended Complaint, which avers that the cumulative effect of all of the 2016 Restrictions violate Plaintiffs' patients substantive due process rights. Am. Compl. ¶ 191. That motion should be denied for lack of support and also because under the Scheduling Order, ECF No. 21, Defendants will address this claim in their filing due May 31, 2017.

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**Admitted pro hac vice*

CERTIFICATE OF SERVICE

I certify that on this 21st day of February, 2017, I electronically filed a copy of the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification to all counsel of record.

/s/ Janet Crepps
Janet Crepps