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' [PROPOSED] SURREPLY IN FURTHER OPPOSITION TO DEFENDANTS' SECOND MOTION FOR PARTIAL DISMISSAL RE: S.B. 33/ACT 196; H.B. 815/ACT 593; AND H.B. 386/ACT 97

I. The Court Should Reject Defendants' Proposed Interpretation of H.B. 815.

Plaintiffs have alleged that H.B. 815 on its face effectively bans medication abortions, and have established that this claim is sufficiently pled under Rule 12 in spite of the emergency regulations adopted by the Louisiana Department of Health ("LDH"). Am. Compl. ¶ 6, 76, 83, 141 (Doc. 22); Pls.' Resp. at 3-5 (Doc. 47). Defendants argue in their Reply not only that the emergency regulations deprive Plaintiffs of a "justiciable injury," but also, for the first time, that this Court should accept LDH's interpretation as "consistent with the plain language of the statute," citing in support a newly-filed declaration by Defendant Gee. Defs.' Reply at 5 (Doc. 53).

Defendants' contention that their interpretation of H.B. 815 is consistent with the plain language of the statute is both inaccurate and undermined by the fact that they saw fit to submit evidence in support of their argument. The plain language of H.B. 815 states that it applies to "[e]ach physician who performs *or induces* an abortion." H.B. 815 (to be codified at La. Rev. Stat.

§ 40:1061.25(A)) (emphasis added). Defendants' position that it applies only to physicians who perform surgical abortions and not to physicians who induce medication abortions by prescribing medication, is decidedly not "consistent" with the plain language of the statute. The purported permanence of Defendants' interpretation of H.B. 815, represented in the regulations, is further undermined by their concession that one of the emergency regulations expired and was apparently only reenacted after Plaintiffs brought this fact to Defendants' attention in their response to this motion to dismiss. Furthermore, in addressing a second inconsistency between the statute and the regulation, Defendants concede that "quite obviously the statute controls, and regulations cannot change its express scope." Defs.' Reply at 5.

In any case, it is improper to submit additional declarations with a reply to a motion to dismiss—which Defendants have now done twice in this litigation[1]—as it denies Plaintiffs the opportunity to respond. *See Vais Arms, Inc. v. Vais*, 383 F.3d 287, 292 (5th Cir. 2004) (noting that "a district court may [only] rely on arguments and evidence presented for the first time in a reply brief [if] . . . the court gives the nonmovant an adequate opportunity to respond"); *McGovern v. Moore*, No. 5:13-CV-1353, 2013 WL 5781315, *4 (W.D. La. Oct. 25, 2013) (same). Defendants have effectively presented a new litigation position via declaration; the fact that this legal argument is presented via declaration does not give it any additional weight, nor does it change the fact that Plaintiffs have had no opportunity to respond to Defendants' new position.

Defendants are also incorrect that their interpretation can trump the plain meaning of the language of the statute. In fact, this Court recently rejected this exact same argument in a challenge to a different Louisiana abortion restriction. "Whatever discretion the Secretary may have in a

[1] *See* Defs.' Reply (Doc. 53), Ex. A. Defendants also submitted a declaration, again from Dr. Gee, with their reply to their first motion to dismiss. *See* Defs.' Reply (Doc. 39), Ex. A. That declaration similarly presented a new interpretation of H.B. 606 that is inconsistent with the plain meaning of the statute, and Plaintiffs had no opportunity to respond to Defendants' new arguments.

law's enforcement, no deference is owed to an opinion contrary to the law's unambiguous and plain meaning." *June Med. Servs. LLC v. Kliebert*, No. 14-CV-00525-JWD-RLB, __ F. Supp. 3d __, 2017 WL 1505596, at *40 (M.D. La. April 26, 2017); *see also Util. Air Regulatory Grp. v. EPA*, __ U.S. __, 134 S. Ct. 2427, 2442 (2014) (observing that "an agency interpretation that is inconsisten[t] with the design and structure of the statute as a whole . . . does not merit deference").

II. Defendants' Arguments on the Merits of Plaintiffs' Claims Against H.B. 386 Are Improper and Incorrect.

Instead of focusing on the arguments relevant to the sufficiency of Plaintiffs' pleadings, Defendants have, for the first time in this case, argued both which test should apply to the Court's analysis of the merits of Plaintiffs' substantive due process claims, and the ultimate outcome this Court should reach. At this stage, however, the Court need only determine if Plaintiffs' claims are "plausible." *Ashcroft v. Iqbal*, 556 U.S. 662, 669-70 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562-63 (2007); *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 837 F.3d 477, 487 (5th Cir. 2016) (declining to address "the substantive issue before us" as it would improperly allow "LDH[] to bootstrap this issue into our standing inquiry"). While the issues raised by Defendants for the first time in their reply will surely be litigated if and when this Court reaches the merits, they are not relevant to Defendants' motion to dismiss Plaintiffs' claims regarding H.B. 386.[2]

Nonetheless, Defendants' argument that *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (hereinafter *WWH*), applies a test that is different from the test applied in *Planned Parenthood of Southeast Pennsylvania v. Casey* and *Gonzales v. Carhart* is incorrect. The

[2] Defendants are no doubt aware that they are raising merits arguments, as counsel for Plaintiffs and counsel for Defendants in the instant case recently submitted amicus briefs for the Center for Reproductive Rights and the Attorneys General of various states, respectively, on this very issue in an Eleventh Circuit appeal of a case decided on the merits in plaintiffs' favor. *See* Brief for Center for Reproductive Rights as Amicus Curiae Supporting Appellees, *W. Ala. Women's Ctr. v. Miller*, No. 16-17296 (11th Cir. May 1, 2017); Brief for Attorneys General of Louisiana, et al. as Amici Curiae Supporting Appellants, *W. Ala. Women's Ctr. v. Miller*, No. 16-17296 (11th Cir. Mar. 17, 2017). The law at issue in the Eleventh Circuit case is an Alabama law similar to Louisiana's H.B. 1081 banning D&E abortions, which will be addressed in Defendants' third motion to dismiss.

Supreme Court's decision in *WWH* applies to all restrictions on access to abortion, regardless of the asserted state justification for the law. *WWH* reaffirmed the plurality opinion in *Casey*, which established that a restriction on abortion is impermissible if it amounts to an "undue burden." "An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Casey*, 505 U.S. 833, 878 (1992); *see also WWH*, 136 S. Ct. at 2309 ("We begin with the standard, as described in *Casey*."). In adopting this standard in *Casey*, the Court recognized both that women have liberty interests in making personal decisions about family and childbearing, and that states have valid interests in protecting both "the health of the woman" and "potential life." *Casey*, 505 U.S. at 846. Indeed, in applying the undue burden standard in *Casey*, the Court applied the same analysis and factual inquiry to restrictions intended to promote the state's interest in potential life and to those asserted to protect women's health. *See id.* at 882-900.

WWH clarifies that "[t]he rule announced in *Casey* . . . requires that courts consider the burden a law imposes on abortion access together with the benefits those laws confer," to determine "whether any burden imposed on abortion access is 'undue.'" *WWH*, 136 S. Ct. at 2309-10 (citing *Casey*, 505 U.S. at 887-901); *see also June Med. Servs. LLC*, 2017 WL 1505596, at *56 (quoting same). A court must "consider[] the evidence in the record," and "then weigh[] the asserted benefits against the burdens." *WWH*, 136 S. Ct. at 2310. Where a law fails to confer "benefits sufficient to justify the burdens," those burdens are "undue"—that is to say, unconstitutional. *Id.* at 2300.

There is nothing in *WWH* stating or suggesting that this rule applies only in some cases. And since *WWH*, courts analyzing abortion restrictions premised on interests other than women's

health have uniformly rejected an undue burden standard that ignores *WWH*.[3]

Respectfully submitted this 12th day of May, 2017.

/s/ Charles M. Samuel
Charles M. Samuel III
Louisiana State Bar No. 11678
RITTENBERG, SAMUEL AND PHILLIPS, LLC
715 Girod St.
New Orleans, LA 70130-3505
(504) 524-5555
samuel@rittenbergsamuel.com

Janet Crepps*
Zoe Levine*
Molly Duane*
CENTER FOR REPRODUCTIVE RIGHTS
199 Water St., 22nd Floor
New York, NY 10038
(864) 962-8519
jcrepps@reprorights.org

Dimitra Doufekias*
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, NW
Suite 6000
Washington, DC 20006-1888
(202) 887-1500
ddoufekias@mofo.com

Counsel for Plaintiffs

**Admitted pro hac vice*

[3] *See Planned Parenthood of Ind. & Ky., Inc. v. Commissioner*, No. 1:16-CV-01807-TWP-DML, __ F. Supp. 3d __, 2017 WL 1197308, at *5 (S.D. Ind. March 31, 2017) ("The premise of the State's argument—that different standards are applied in *Casey* and *Whole Woman's Health*—is belied by those decisions."), *appeal docketed*, No. 17-1883 (7th Cir. April 27, 2017); *Whole Woman's Health v. Hellerstedt*, No. A-16-CA-1300-SS, __ F. Supp. 3d __, 2017 WL 462400, at *7 (W.D. Tex. Jan. 27, 2017) ("[The State's] argument a different test applies when the State expresses respect for the life of the unborn is a work of fiction, completely unsupported by reading the sections of Supreme Court opinions [the State] cites in context."), *appeal docketed*, No. 17-50154 (5th Cir. Mar. 1, 2017); *Planned Parenthood of Ind. & Ky., Inc. v. Commissioner*, 194 F. Supp. 3d 818, 828 (S.D. Ind. 2016) ("[T]he State simply ignores that the Supreme Court in *Casey* 'struck a balance' between this interest [in potential life] and a woman's liberty interest in obtaining an abortion."); *W. Ala. Women's Ctr. v. Miller*, No. 2:15-CV-497-MHT, __ F. Supp. 3d __, 2016 WL 6395904, at *16 (M.D. Ala. Oct. 27, 2016) ("The *Casey* undue-burden standard . . . governs" the "fetal-demise law."), *appeal docketed*, No. 16-17296 (11th Cir. Nov. 29, 2016).

CERTIFICATE OF SERVICE

I certify that on this 12th day of May, 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