IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

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

VS. **CIVIL ACTION 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**

RESPONSE IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

COME NOW Defendants, Mary Currier, M.D., M.P.H., in her official capacity as State Health Officer of the Mississippi Department of Health, and Robert Shuler Smith, in his official capacity as District Attorney of Hinds County, Mississippi, and respectfully submit this Response in Opposition to Plaintiffs' Motion for a Preliminary Injunction.

Before the Court is the Plaintiffs' motion for a preliminary injunction against enforcement of House Bill 1390, a measure that would require all physicians associated with abortion clinics in Mississippi to have admitting privileges at local hospitals. The Court must decide whether allowing the bill to take effect would irreparably injure a woman's fundamental right to access abortion services, even though it is indisputable that the State's lone abortion clinic would be allowed to stay open for at least 60 days after the effective date whether or not its physicians complied with the admitting privileges requirement. Also at issue is whether the Plaintiffs are substantially likely to demonstrate that the law is unconstitutional on the merits, despite its clear relation to safeguarding the health of abortion patients. Because Plaintiffs can make neither demonstration, their motion for a preliminary injunction should be denied.

FACTUAL BACKGROUND

House Bill 1390 is a valid regulation to protect the health and safety of abortion patients.

This litigation concerns House Bill 1390, which was passed by the Mississippi House of Representatives 80-37, approved by the state Senate 45-6, and signed into law by Governor Phil Bryant on April 16. The act is an amendment to Title 41, Chapter 75 of the Mississippi Code, which regulates all ambulatory surgical facilities. The stated purpose of the Title 41, Chapter 75 is to

> protect and promote the public welfare by providing for the development, establishment and enforcement of certain standards in the maintenance and operation of ambulatory surgical facilities and abortion facilities which will ensure safe, sanitary, and reasonably adequate care of individuals in such facilities.

Miss. Code Ann. § 41-75-3. The act revises the definition of "abortion facilities" found at Miss. Code Ann. § 41-75-1(f). The amendment would require that all physicians associated with the facilities "be board certified or eligible in obstetrics and gynecology" and "have admitting privileges at a local hospital and staff privileges to replace local hospital on-staff physicians." [Doc. No. 1, Plaintiffs' Complaint, Exhibit A, House Bill No. 1390, at 3]. It was originally scheduled to take effect July 1. *Id.*, at 5.

The Admitting Privileges Requirement would eliminate a distinction that now exists between abortion clinics and "ambulatory surgical facilities," which are both covered by the same section of state law. See generally Miss. Code Ann. § 41-75-1 *et seq*. Currently, state Health Department regulations require all doctors at ambulatory surgical facilities to have admitting privileges at local hospitals, while allowing abortion facilities to operate with as few as one such physician on staff. Miss. Admin. Code 15-16-1:42.9.7 ("[I]n the case of a Level I

Abortion Facility, at least one physician member performing abortion procedures in the facility must have admitting privileges in at least one local hospital."). *See also* Doc. No. 6, Memorandum of Law in Support of Plaintiffs' Motion for Temporary Restraining Order and/or Preliminary Injunction, at 18.

Both the Admitting Privileges Requirement and the OB-GYN Requirement have been endorsed by medical experts as beneficial to protecting the health and safety of women receiving abortions. *See* Exhibit A, Declaration of John Thorp, Jr., M.D.; Exhibit B, Declaration of James Anderson, M.D.. "When the [abortion] provider is an ob-gyn and has admitting and treating privileges at a local hospital, he or she is more likely to effectively manage patient complications by providing continuity of care and decrease the likelihood of medical errors," according to John Thorp, Jr., a physician and professor of obstetrics and gynecology at the University of North Carolina (Chapel Hill) School of Medicine. Exhibit A, at 8, ¶23.

Additionally, similar requirements have been adopted by other states, which have had the provisions for seven years. See, e.g., Fla. Stat. Ann. § 390.012 (requiring "a medical director who is licensed to practice medicine in this state and who has admitting privileges at a licensed hospital in this state or has a transfer agreement with a licensed hospital within reasonable proximity of the clinic") (adopted in 2005); Mo. Ann. Stat. § 188.080 (West 2009) ("Any physician performing or inducing an abortion who does not have clinical privileges at a hospital which offers obstetrical or gynecological care located within thirty miles of the location at which the abortion is performed or induced shall be guilty of a misdemeanor…") (adopted in 2005).

The State has substantial reason for concern regarding the health and safety record of Jackson Women's Health Organization.

This challenge to the law was filed by Jackson Women's Health Organization and Willie Parker, a physician who performs abortions and recently began work at JWHO. Complaint, Doc. No. 1, at 9, 48 (alleging that Dr. Parker joined the clinic medical staff on June 18).

The Plaintiffs' Complaint alleges that, in compliance with the administrative provision described above, "one of the physicians on the Clinic's medical staff has admitting privileges in a local hospital." Complaint, Doc. No. 1, at 8, 34. John Doe, M.D., "the only physician providing abortion to women at the Clinic on a regular basis," lacks such privileges and has allegedly been trying to obtain them from area hospitals since April. The Complaint alleges that Parker has been trying to obtain privileges since he joined the clinic staff 18 days ago.

JWHO's owner, Diane Derzis, and another clinic owned by Derzis have been charged previously with violations of health and safety regulations. The Alabama Department of Public Health instituted proceedings to revoke the license of a clinic Derzis owned in Birmingham after charging it with "multiple and serious violations of State Board of Health rules." [Exhibit C, News Release from Alabama Department of Public Health.] Inspection reports compiled by the Alabama authorities contain evidence that clinic staff failed to respond to complaints of post-surgical complications. [Exhibit D, Alabama Department of Public Health Inspection Reports]. Derzis resolved the matter with the State of Alabama by entering into a consent order in which she agreed not to run the clinic. Under the order, Alabama authorities provided for another business or individual "independent from and not affiliated with [Derzis' operation] or its officers and directors" to seek a license to run the clinic. [Exhibit E, Consent Order and Agreement.] In April, however, the state Department of Public Health denied such an application. The new operator proposed to lease the facility from Derzis, paying clinic profits as

"rent." [Exhibit C.] The Department found that the deal would circumvent the consent order: "It is clear that this arrangement would allow the former operator to remain involved in the center's financial affairs and to be entitled to all the profits from the continued operation of the center; it does not allow for the proposed new operator to independently operate the center." [Exhibit C].

Also, Joseph Booker, a doctor who performed abortions at JWHO until July 2010, has filed suit against JWHO alleging that Derzis had instituted numerous practices that jeopardized the health and safety of patients. *See* Exhibit F at ¶ 57, Complaint of Joseph Booker. Among the unsafe practices noted by the physician were: (1) permitting untrained medical staff to perform and interpret ultrasounds, despite the fact that "accurate" ultrasounds are vital to the medical "safety of the patients" (id. at ¶¶ 29, 31); and (2) pressure from JWHO to administer RU486 in a manner that is "dangerous" and not approved by the Federal Food and Drug Administration (*id.* at ¶¶ 34, 38). Dr. Booker has alleged that JWHO may not carry malpractice insurance. *Id.* at ¶ 50. Dr. Booker's lawsuit also alleges that JWHO is jeopardizing patient safety by not using a "local doctor who has hospital admitting privileges" when administering RU486 because of the "real risk of severe hemorrhage" and "the risk of ectopic pregnancy" associated with the drug. *Id.* at ¶ 38.

Under existing state law, there is no credible threat that JWHO would be immediately closed if H.B. 1390 takes effect.

As is clear from the terms of Title 41, Chapter 75, as well as from the Health Departments's regulations, Mississippi has established an administrative process which encourages ambulatory surgical facilities, including abortion clinics, by providing a reasonable

time for them to cure deficiencies and by providing significant notice, hearings, and appeals before a facility's license can be revoked. Mississippi could not summarily revoke JWHO's operating license should it be found to be not complying with the Admitting Privileges Requirement. State law establishes a series of hearings and appeals which guarantee that a clinic will be allowed to retain its license and conduct business for at least 60 days, if not longer, after the Department of Health provides initial notice of its plans to seek revocation, suspension or denial of a license.

Specifically, after discovering a "substantial failure to comply with the requirements" that govern a clinic, the State must notify the clinic of the deficiency and hold "a prompt and fair hearing" at least 30 days from the notice date to determine whether its license should be revoked, suspended, or denied. Miss. Code Ann. § 41-75-11. The decision that results from that hearing does not take effect for another 30 days. *Id.* For that time, the clinic enjoys the right to appeal an adverse ruling to state chancery court. *Id.* The decision of the chancery court, in turn, may be appealed to the Mississippi Supreme Court. Miss. Code Ann. § 41-75-23. "Pending final disposition of the matter, the status quo of the applicant or licensee shall be preserved, except as the court otherwise orders in the public interest." *Id.*

The necessity of these procedures has been repeatedly affirmed to the Plaintiffs by state officials responsible for enforcing House Bill 1390. Deputy State Health Officer Michael Lucius has stated that the Health Department would allow JWHO "reasonable" time to correct non-compliance with the law before even providing the clinic with formal notice of intent to revoke its license. [Exhibit G, Affidavit of Michael Lucius]. Robert Shuler Smith, the district attorney of Hinds County and a defendant in this lawsuit, has previously represented his intention

not to pursue any criminal charges against JWHO for violations of the Admitting Privileges Requirement while administrative proceedings are ongoing. The executive director of the Mississippi State Board of Medical Licensure has similarly asserted that that agency would not pursue disciplinary action against doctors who perform abortions at the clinic before administrative proceedings are finished. [Exhibit H, Affidavit of H. Vann Craig]. Meanwhile, the Department of Health on June 28 renewed JWHO's license for the 2012-2013 fiscal year. [Exhibit I, JWHO License].

Nevertheless, JWHO and Dr. Parker have filed this action for an injunction against enforcement of House Bill 1390. On July 1, this Court issued an order temporarily restraining enforcement of the law and scheduling a July 11 hearing on the Plaintiffs' motion for a preliminary injunction.

ARGUMENT

To obtain a temporary restraining order or preliminary injunction, Plaintiffs carry the burden of establishing four elements:

> (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest.

Janvey v. Alguire, 628 F.3d 164, 174 (5th Cir.2010) (citation omitted). "A preliminary injunction is an extraordinary remedy. It should only be granted if the movant has clearly carried the burden of persuasion on all four prerequisites. The decision to grant a preliminary injunction is to be treated as the exception rather than the rule." *Cherokee Pump & Equipment Inc. v. Aurora Pump*, 38 F.3d 246, 249 (5th Cir. 1994) (citing *Mississippi Power & Light v. United Gas*

Pipe Line Co., 760 F.2d 618 (5th Cir.1985)).

The Plaintiffs in this case have failed to satisfy any of the test's four prongs. Accordingly, their motion for a preliminary injunction should be denied.

I. The Plaintiffs face no substantial threat of irreparable harm.

To obtain injunctive relief, the Plaintiffs must show that they will suffer "irreparable harm" if this Court does not immediately intervene to prevent Mississippi's newly revised law from taking effect. The irreparable-harm requirement is "[p]erhaps the single most important prerequisite for the issuance of a preliminary injunction." 11 C. Wright & A. Miller, Federal Practice and Procedure § 2948. The harm, in addition to being irreparable, must be imminent and cannot be satisfied by "speculative injury." *E.g., Holland America Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985). Rather, to demonstrate irreparable harm, "there must be more than an unfounded fear on the part of the applicant." *Id.* The plaintiff must instead demonstrate that the harm likely to occur absent judicial intervention is "real" and "immediate." *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). The U.S. Supreme Court has described the test for irreparable injury as follows:

> Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of [an injunction], are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Sampson v. Murray, 415 U.S. 61, 90 (1974) (quoting *Virginia Petroleum Jobbers Ass'n v. Federal Power Commission*, 259 F.2d 921, 925 (D.C.Cir.1958)).

To be sure, violations of some constitutional speech or privacy rights "for even minimal periods of time" may amount to irreparable harm *per se*. *Deerfield Medical Center v. Deerfield*

Beach, 661 F.2d 328, 338 (5th Cir. 1981). "However, this statement relates only to the irreparability aspect of the alleged injury, and not to its imminence." *Pinson v. Pacheco*, 397 F. App'x 488, 492 (10th Cir. 2010). While a court "may assume that a constitutional injury is irreparable in the sense that it cannot be adequately redressed by post-trial relief," "that has no bearing on whether the alleged constitutional injury is imminent. If the possibility of future harm is speculative, the movant has not established that he will suffer irreparable injury *if the preliminary injunction is denied*." *Id.* (emphasis in original; alteration and quotation marks omitted). Accordingly, a court should "determine irreparable injury by considering what adverse factual consequences the plaintiff apprehends if an injunction is not issued, and then considering whether the infliction of those consequences is likely to violate any of the plaintiff's [constitutional] rights." *Time Warner Cable of New York City v. Bloomberg L.P.*, 118 F.3d 917, 924 (2d Cir. 1997). And just as in any other case, the plaintiff cannot meet its burden of proving irreparable injury with speculative predictions of future constitutional harms. *Hunt v. Manning*, 119 F.3d 254, 265 (4th Cir. 1997) (speculative allegations of future constitutional harms caused by enforcement of abortion regulations insufficient to establish irreparable harm); *see also Respect Maine PAC v. McKee*, 622 F.2d 13, 15-16 (1st Cir. 2010) (same with respect to alleged First Amendment violations).

Plaintiffs here point to a single constitutional harm that they believe will flow from implementation of House Bill 1390: an alleged infringement on the constitutional right to an abortion. A "woman has a right to choose to terminate or continue her pregnancy before viability." *Planned Parenthood v. Casey*, 505 U.S. 833, 872 (1992); *Deerfield Beach*, 661 F.2d at 869 ("it is a constitutional liberty of the woman to have some freedom to terminate her

pregnancy"). However, neither the clinic nor Dr. Parker has a constitutional right to perform abortions under *Roe* or *Casey*. Instead, these Plaintiffs are asserting the constitutional rights of women to have access to abortions. *See Singleton v. Wulff*, 428 U.S. 106, 118 (1976) ("it generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision"); *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 146 (3d Cir. 2000) ("abortion providers have third party standing to assert the rights of their patients in the face of government intrusion into the abortion decision in order to determine whether such interference would constitute an undue burden"). Thus, the "irreparable harm" foreseen by Plaintiffs[1] must be assessed from the perspective of women seeking access to abortion services, not from that of those who would provide the abortions.

Such evaluation compels a conclusion that plaintiffs have failed to establish irreparable injury. Under Supreme Court precedent, an individual has a qualified right to an abortion; however, the Court has never suggested, much less held, that an individual has a right to obtain an abortion from a provider who is not subject to ongoing state administrative proceedings or who is not actively applying for hospital privileges. The "immediate" enforcement of House Bill 1390 would not, as Plaintiffs fear, result in denial of access to abortion. Instead, state law

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[1]What Plaintiffs contend to be the actual irreparable harm justifying an immediate preliminary injunction is clearly articulated in the Complaint. In Section V, entitled "Irreparable Harm," Plaintiffs frame the issue as follows: "The Department's decision to immediately enforce the Admitting Privileges Requirement and its refusal to issue the Clinic a renewal license without proof of compliance" will deprive the "at least twenty-five women [who] will seek abortions during the week following July 1, 2012" of access to those services. *See* Doc. No. 1, Complaint, at ¶¶70, 72, 73. Section V also contends that enforcing House Bill 1390 will "threaten[] the health of women seeking abortions." *See* Complaint, Doc. No. 1, at ¶¶71, 72. But this allegation is solely dependent on whether enforcing House Bill 1390 will result in the immediate closure of the facility, therefore requiring women to, allegedly, turn to unsafe abortions or travel to other states. *Id.*

provides several levels of procedural due process protections and lengthy periods in which the Plaintiffs could come into compliance with the new law. *Cf. Women's Medical Professional Corp. v. Baird*, 438 F.3d 595, 613 (6th Cir. 2006) (finding that substantial threat of irreparable harm existed when clinic would have been immediately shut down without a hearing in the absence of a preliminary injunction). The actual constitutional right at issue-as opposed to mere inconvenience to the plaintiffs-will be unaffected for at least 60 days under the new law, likely much longer, and, indeed, will only be impacted if plaintiffs ultimately fail to obtain hospital admitting privileges.

Predicting otherwise is utterly speculative for two reasons. First, state law bars the Mississippi Department of Health from closing a clinic for at least 60 days after the clinic receives initial notice that it's not complying with licensure regulations and also provides a right for the clinic to appeal from a final Department decision. Second, the state's only abortion clinic already employs a physician with admitting privileges at a local hospital; therefore, it could comply with the law currently. The Defendants now will address these considerations more fully and also respond to Plaintiffs' contention that the mere onset of administrative procedures under House Bill 1390 would amount to "irreparable harm."

A. State law governing the closure of abortion clinics prevents the Admitting Privileges Requirement from immediately restricting the right to obtain abortion services in Mississippi.

The licenses of "ambulatory surgical facilities," a class of medical service providers that includes abortion clinics, cannot be revoked summarily in Mississippi. Statutory requirements preclude shuttering such a facility for at least 60 days after the clinic receives notice that it is not complying with any licensure requirement. *See* Miss. Code Ann. § 41-75-11; -23. Specifically,

the Department would have to provide the clinic with notice of non-compliance and hold a "prompt and fair hearing" regarding the notice "not less than thirty (30) days" from service of the notice. Miss. Code Ann. § 41-75-11. If the hearing resulted in an unfavorable ruling for the clinic, it could not take effect for another 30 days. *Id.* But the clinic's operations could survive even past that period, for Section 41-75-23 of the Code provides for appeals from the hearing to state chancery court and from the chancery court to the Mississippi Supreme Court. Miss. Code Ann. § 41-75-23. While the appeal is pending, "the status quo of the applicant or licensee shall be preserved" barring an affirmative ruling otherwise from the state court. *Id.* In sum, the Plaintiffs will have at least 60 days from the effective date of the Admitting Privileges Requirement to achieve compliance with it-in addition to the 11 weeks that will have already elapsed since Governor Bryant signed the bill that contains the provision. If the clinic achieved compliance within that time, the prospect of license revocation would disappear completely.

This window for compliance illuminates the speculation at the base of Plaintiffs' irreparable-injury argument. Women would not lose access to abortion in Mississippi if the Admitting Privileges Requirement is allowed to become effective. And nothing in the record suggests that the clinic physicians who now lack admitting privileges at Jackson area hospitals would fail to obtain them in the time the law provides for compliance. Thus, Plaintiffs must speculate to predict that enforcement of the Admitting Privileges Requirement would restrict the constitutional right to access abortion services in Mississippi. Moreover, nothing would bar them from returning to court for injunctive relief if the doctors' failure to obtain admitting privileges did move the clinic to the verge of closure. Presently, though, the Plaintiffs have offered evidence of no harm that is not speculative or premature.

B. There is no proof that Plaintiffs will be unable to comply with the law before the completion of the administrative process.

According to the complaint, the clinic already has a "physician on staff with admitting privileges at a local hospital." *See* Doc. No. 1, Complaint, at 43. Two other doctors who do not have admitting privileges began submitting applications to local hospitals in May and June of 2012. *See* Complaint, at 47-51. These applications remain pending and none of the doctors who desire to work at the clinic have been denied by local hospitals. *Id.* It is not unusual for such applications to take up to three months. *See* Exhibit B, Declaration of Anderson, at 9. Given that one physician already has privileges, Plaintiffs have provided no evidence to suggest that the other two doctors will not receive similar privileges within two-to-three months of their application dates. As the Fourth Circuit noted in a similar situation, "[t]here is nothing in the record or, indeed, in the general experience in South Carolina that suggests that the requirements to have admitting arrangements with local hospitals and referral arrangements with local experts in various related fields present a substantial impediment to obtaining or retaining a license. To the contrary, the appellants in this case have obtained licenses and have made such arrangements." *Greenville Women's Clinic v. Commissioner, South Carolina Dept. of Health and Environmental Control*, 317 F.3d 357, 362 -363 (4th Cir. 2002). "Indeed, a physician who has been arbitrarily denied surgical privileges by a public hospital has an action for violation of his due process rights." *Women's Health Center of West County, Inc. v. Webster*, 871 F.2d 1377, 1382 n.8 (8th Cir. 1989) (discussing admission requirements in abortion context).

As set forth above and in the opposition to the temporary restraining order, Mississippi law provides facilities such as the clinic with extensive time in which to achieve compliance with

new provisions before a facility's license can be revoked and the facility closed. For example, once a violation is noted, the Department of Health and the Clinic would consult on a reasonable time necessary for the clinic to achieve compliance. *See* Lucius Affidavit, Exhibit G, at ¶10. Further, the Department cannot revoke a facility's license without months of statutorily mandated notice and hearings, during which the facility license remains effective and the facility may remain open. *See* Miss. Code Ann. § 41-75-11; -23.

C. The clinic could comply with the law today.

Moreover, the Plaintiffs' speculation is undermined by their own Complaint, which admits that clinic physicians have applications for admitting privileges pending at five Jackson area hospitals–and that one of the doctors associated with the clinic already has such privileges. Therefore, even if the doctors without privileges do not obtain them during the time allotted for administrative review of the clinic, JWHO would remain able to provide abortion services in Mississippi. To be sure, this would require the Clinic to temporarily dissociate itself from physicians who lack admitting privileges. As noted above, however, the right to abortion services belongs to the women who access those services–not to the physicians who provide them.

D. The mere onset of administrative procedures does not amount to irreparable harm.

The definition of "irreparable harm" should not be broadened by the following statement from *Deerfield Beach*, a case in which a municipal government denied an abortion clinic's license application: "We have already determined that the constitutional right of privacy is 'either threatened or in fact being impaired,' and this conclusion mandates a finding of irreparable injury." *Deerfield Beach*, 661 F.2d at 338 (quoting *Elrod v. Burns*, 427 U.S. 347, 373

(1976)). This is not a holding that any theoretical "threat" to the constitutional "right of privacy" warrants injunctive relief. The *Deerfield Beach* Court elsewhere concluded that the government decision at issue would actually impair, not simply threaten, women's right to access abortion services. "[T]he decision not to grant DMC an occupational license places a significant burden on a woman's abortion decision," the Fifth Circuit held, adding that the decision's "immediate impact…is to forestall the availability of abortion facilities in *Deerfield Beach* for an indefinite period of time." *Deerfield Beach*, 661 F.2d at 336 (emphasis added). Neither *Deerfield Beach* nor *Elrod* has ever been cited to justify enjoining any abortion-related law or government decision except those found to immediately burden or threaten women's access to abortion services. *Deerfield Beach* cannot be read to direct a finding of "irreparable harm" in cases where some anticipated government action might-at some future date-threaten access to abortion services.

E. No Preliminary Injunction is warranted or should be issued.

Consideration of exactly what injunctive relief could be requested by Plaintiffs is also instructive as to why the injunction should not be issued. An injunction that delays the effective date of House Bill 1390 or which otherwise decrees that Plaintiffs should not be required to apply for admitting privileges will alter the manner in which this case is litigated and resolved. Whether or not local hospitals grant Dr. Parker and Dr. Doe the same admitting privileges already possessed by one doctor at the clinic will be a highly relevant factor for determining whether House Bill 1390 imposes an undue burden on access to abortion. If admitting privileges are approved for all doctors at the clinic, Plaintiffs would be very hard-pressed to prevail on their claim that the requirement is an undue burden that is unconstitutionally limiting access to

abortion. Plaintiffs should be required to continue with the application process they started before filing this lawsuit. Enjoining the effective date of the law would transform this matter into a facial challenge, rather than the as-applied challenge actually brought by Plaintiffs. In this respect, the Fourth Circuit has reviewed admission privileges for abortion providers and found them to be facially constitutional:

> These requirements of having admitting privileges at local hospitals and referral arrangements with local experts are so obviously beneficial to patients, *see, e.g., Women's Health Ctr. of West County, Inc. v. Webster*, 871 F.2d 1377, 1382 (8th Cir.1989), and the possibility that the requirements will amount to a third-party veto power is so remote that, on a facial challenge, we cannot conclude that the statute denies the abortion clinics due process. *See Whalen v. Roe*, 429 U.S. 589, 601-02, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977) (noting that, on a facial challenge of a statute, a "remote possibility" is "not a sufficient reason for invalidating" a statute); *see also Webster*, 871 F.2d at 1382 (rejecting due process challenge to a statute requiring physicians performing abortions to have surgical privileges at a hospital).

Greenville Women's Clinic v. Commissioner, South Carolina Dept. of Health and Environmental Control, 317 F.3d 357, 363 (4th Cir. 2002). This Court should not short-circuit the law; the application process should proceed.

In response, Plaintiffs may contend that they are not seeking an order directing that they need not apply for privileges. Instead, they merely seek an injunction ensuring that the clinic remains open while the applications are pending and so that they have a reasonable time to attempt compliance. An injunction prohibiting the closure of the facility by way of license revocation until such time that the Plaintiffs have had a reasonable time to comply with the House Bill 1390 is improper because that prohibition is already provided under state law. *See L.A. v. Lyons*, 461 U.S. 95, 109 (1983) (explaining that injunction to "follow the law" in the absence of some allegedly imminent violation of the law is inappropriate); *Conway v. Jackson*,

2010 WL 3547226, at *2 (E.D.Ark. 2010) ("Because a 'presumption exists that public officials will follow the law in performance of their duties,' *Haynes v. State*, 354 Ark. 514, 527, 127 S.W.3d 456, 463 (2003), and Plaintiff has failed to show that he will suffer any irreparable harm if an injunction is not issued in this case"); *see also Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 106 (1984) (*Ex Parte Young* doctrine, which allows suits for injunction in federal court in certain circumstances against state officials, is "inapplicable in a suit against state officials on the basis of state law."); *West Virginia Highlands Conservancy v. Norton*, 147 F.Supp.2d 474, 481 (S.D.W.Va. 2001) ("Under *Ex parte Young* and *Pennhurst*, *supra*, this Court cannot order a State official to follow state law, and it lacks jurisdiction over a civil action seeking such relief").

The proper course would be for the Court to deny the requested injunctive relief at this time subject to Plaintiffs re-urging their motion if they are unable to secure privileges or are otherwise faced with an imminent threat of closure.

II. The Plaintiffs have failed to demonstrate that they are substantially likely to succeed on the merits.

Even if the Plaintiffs could show the threat of irreparable harm, though, they have additionally failed to demonstrate the substantial likelihood of success on the merits that is required to obtain preliminary injunctive relief. Though the Fourteenth Amendment guarantees a woman's right to end her pregnancy prior to fetal viability, the Supreme Court has held that "[g]overnment regulation of abortions is allowed so long as it does not impose an undue burden on a woman's ability to choose." *Victoria W v. Larpenter*, 369 F.3d 475, 483 (5th Cir. 2004) (citing *Planned Parenthood of SE Pa. v. Casey*, 505 U.S. 833, 874 (1992)). A state regulation

constitutes an undue burden if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* (citing *Casey*, 505 U.S. at 877).

A. Purpose

As an initial matter, Plaintiffs' reliance on the Fifth Circuit's opinion in *Okpalobi v. Foster*, 190 F.3d 337 (5th Cir. 1999), *vacated en banc on other grounds*, 244 F.3d 405 (5th Cir. 2001), is misplaced. A decision vacated by an *en banc* court has no precedential effect. *See Beiser v. Weyler*, 284 F.3d 665, 668 (5th Cir. 2002); *Corporate Management Advisors, Inc. v. Artjen Complexus, Inc.*, 561 F.3d 1294, 1295 n.1 (11th Cir. 2009); *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1424 n. 2 (9th Cir.1991) ("A decision may be reversed on other grounds, but a decision that has been vacated has no precedential authority whatsoever."); *cf. O'Connor v. Donaldson*, 422 U.S. 563, 577 n. 12 (1975) ("Of necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect"); *Russman v. Bd. of Educ. of the Enlarged City Sch. Dist. of the City of Watervliet*, 260 F.3d 114, 122 n. 2 (2d Cir.2001) (noting in dicta that "[w]hen imposed by the Supreme Court, vacatur eliminates an appellate precedent that would otherwise control decision on a contested question throughout the circuit"); *U.S. v. Carmel*, 548 F.3d 571, 579 (7th Cir. 2008) (same).

Nonetheless, the reasoning in *Okpalobi* does not carry the day for Plaintiffs. In assessing the purpose of statutes that regulate abortion, the Fifth Circuit panel turned for guidance to the methods of federal courts that inquired into legislative purpose in other contexts. *Okpalobi*, 190 F.3d at 354 (observing that courts often must try to discern legislative purpose in Establishment Clause and voting rights cases). From its review of those sources, the *Okpalobi* panel concluded that "a government's articulation of legislative purpose" is due "significant

deference." *Id.* Courts may also consider other types of evidence relevant to purpose, "including the language of the challenged act, its legislative history, the social and historical context of the legislation, or other legislation concerning the same subject matter as the challenged measure." *Id*[2].

1. The language of the challenged act

But the first of those factors-"the language of the challenged act"-is often dispositive, according to the analogous authority to which *Okpalobi* turned. "The starting point in every case involving construction of a statute," the U.S. Supreme Court has said, "is the language itself." *Edwards v. Aguillard*, 482 U.S. 578, 597-98 (1987) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring). Indeed, courts are disinclined to continue searching for an unconstitutional legislative motive when no such motive is evident from an act's language. *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983) (stating that the Court is reluctant "to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute"); *see also ACLU v. Praeger*, 815 F. Supp. 2d 1204, 1215 (D. Kan. 2011) ("Where a law can be viewed as having a rational purpose other than simply obstructing the right to abortion, the court cannot presume that an invalid purpose actually motivated the legislature to adopt the law, let alone that the invalid purpose was the legislature's predominant motive.").

The legislation in this case updates Miss. Code Ann. § 41-75-1 with two sentences:

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[2]In *Okpalobi* itself, the State of Louisiana claimed that its law exposing abortion providers to tort liability was aimed toward encouraging such providers "to inform a woman of all the risks associated with having an abortion." *Id.* at 356. The Fifth Circuit panel found no evidence of such a purpose in the law, which would "reduce, not bar, damages regarding types of injuries of which the physician informed the woman prior to the abortion." *Id.*

> All physicians associated with the abortion facility must have admitting privileges at a local hospital and staff privileges to replace local hospital on-staff physicians. All physicians associated with an abortion facility must be board certified or eligible in obstetrics and gynecology, and a staff member trained in CPR shall always be present at the abortion facility when it is open.

See House Bill 1390, attached as Exhibit A to Plaintiffs' Complaint, at 3. Aside from the bill's title and a brief provision setting its effective date as July 1, the measure includes no other original language. On its face, then, the bill evinces no unconstitutional purpose. As *Casey* held, a regulation serves a "valid purpose" if it is "not designed to strike at the right [to abortion] itself" and furthers the State's "legitimate interests…in protecting the health of the woman and the life of the fetus that may become a child." *Casey*, 505 U.S. at 846. *See also Simopolous v. Virginia*, 462 U.S. 506, 511 (1983) (affirming that "[t]he State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient"); *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 172 (4th Cir. 2000) (holding that a "valid purpose" was served by a regulation requiring abortion clinics to be associated with a physician who has admitting privileges at a local hospital).

Indeed, according to the U.S. Supreme Court, states have "considerable discretion" to formulate licensing requirements to protect the health of women seeking abortions. *Simopoulos*, 462 U.S. at 516, 103 S.Ct. 2532 ("In view of its interest in protecting the health of its citizens, the State necessarily has considerable discretion in determining standards for the licensing of medical facilities"). Such regulations are not required to bear a relationship to any obvious public health problem. To the contrary, the Supreme Court has upheld health-related abortion-clinic rules that merely "may be helpful" and "can be useful." *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 80, 81 (1976).

Two federal circuit courts have expressly found that "admitting privileges at local hospitals and referral arrangements with local experts" are "so obviously beneficial to patients" undergoing abortions as to easily withstand a facial constitutional challenge alleging them to be undue burdens. *Greenville Women's Clinic v. Commissioner, South Carolina Dept. of Health and Environmental Control*, 317 F.3d 357, 363 (4th Cir. 2002); *Women's Health Ctr. of West County, Inc. v. Webster*, 871 F.2d 1377, 1382 (8th Cir. 1989). According to testimony from experts, the OB-GYN Requirement and Admitting Privileges Requirement of House Bill 1390 serve to protect the health and safety of women seeking abortions. "The vast majority" of abortion providers are OB/GYNs, and requiring such credentials "provides added protection for women." Exhibit A, Declaration of John Thorp, Jr., at 4, 13. "When the [abortion] provider is a ob-gyn and has admitting privileges at a local hospital, he or she is more likely to effectively manage patient complications by providing continuity of care and decrease the likelihood of medical errors." *Id.* at 8, 23. Because these rules "appear to be generally compatible with accepted medical standards governing ... abortions," *Simopoulos*, 462 U.S. at 517, 103 S.Ct. 2532, a court cannot reasonably conclude that the provisions were not directed at promoting Mississippi's valid interest in a woman's health.

The Plaintiffs argue that the Admitting Privileges Requirement is "cumulative of the existing regulation that requires a Level I abortion facility-such as the Clinic-to have on its medical staff a physician with admitting privileges at a local hospital." But this is not correct. Existing regulations require only one physician on an abortion clinic's staff to have admitting privileges at a local hospital, while mandating that all doctors associated with ambulatory surgical facilities possess such privileges. Miss. Admin. Code § 42.9.7. Eliminating this

distinction is neither irrational nor indicative of animus toward abortion; as the testimony and facts summarized above demonstrate, ample medical justifications exist for such action. Furthermore, the legislative action makes uniform the requirements the State imposes upon abortion clinics and other ambulatory surgical facilities.

The appearance of a plausible constitutional legislative purpose weighs in favor of immediately rejecting Plaintiffs' challenge to it. *Mueller*, 463 U.S. at 394-95. Accordingly, the Court would be justified in finding the purpose of House Bill 1390 constitutional on that basis alone.

2. The social and historical context of the legislation.

The historical context for the enactment of House Bill 1390 is consistent with the concern for the safety of patients at clinics such as JWHO. The Alabama Department of Public Health has taken action to remove JWHO's current owner, Diane Derzis, from the operation of a clinic in Alabama following "multiple and serious violations of State Board of Health rules," including evidence that clinic staff failed to respond to complaints of post-surgical complications. *See* Exhibits C & D. Derzis resolved that matter through a consent order which bars her from operating the clinic. Exhibit E. Moreover, the allegations contained in a lawsuit filed by a former doctor who practiced until July 2010 at JWHO raise concerns about unsafe practices and the danger to patients posed by physicians without admitting privileges. *See* Exhibit F. Among the unsafe practices noted by the physician were: (1) permitting untrained medical staff to perform and interpret ultrasounds, despite the fact that "accurate" ultrasounds are vital to the medical "safety of the patients" (*Id.* at ¶¶ 29, 31); and (2) pressure from JWHO to administer RU486 in a manner that is "dangerous" and not approved by the federal Food and Drug

Administration (*Id.* at ¶¶ 34, 38). Dr. Booker has alleged that JWHO may not carry malpractice insurance. *Id.* at ¶50. Dr. Booker's lawsuit also alleged that JWHO is jeopardizing patient safety by not using a "local doctor who has hospital admitting privileges" when administering RU486 because of the "real risk of severe hemorrhage" and "the risk of ectopic pregnancy" associated with the drug. *Id.* at ¶38. Given that two federal circuit courts have found that "admitting privileges at local hospitals and referral arrangements with local experts" are "so obviously beneficial to patients" seeking abortions as to easily withstand a facial constitutional challenge alleging them to be undue burdens, the historical context provided by the above safety concerns cannot and should not be overlooked. *See Greenville Women's Clinic*, 317 F.3d at 363; *Women's Health Ctr. Of West Co., Inc.,* 871 F.2d at 1382.

But the Plaintiffs argue that any assertion of this purpose is pretense, relying on another *Okpalobi* factor-the social and historical context of the legislation-that has never carried as much authority as the purpose articulated by the government for a challenged act or the language of the act itself. The Plaintiffs point particularly to the statements of individual participants in the lawmaking process that produced H.B. 1390. But federal courts have found such statements especially unhelpful to the purpose inquiry. See, e.g., *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 457 (2002) ("We see no reason to give greater weight to the views of two Senators than to the collective votes of both Houses, which are memorialized in the unambiguous statutory text"); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1552 (8th Cir.1996) ("Furthermore, an isolated statement by an individual legislator is not a sufficient basis from which to infer the intent of that entire legislative body: in the absence of a showing that a more significant segment of the Minnesota legislature shared Senator Marty's views, we are not inclined to conclude that his

statements accurately reflect the legislative purpose underlying the State's public financing scheme."); *Bown v. Gwinnett Co. Sch. Dist.*, 895 F. Supp. 1564, 1575 (N.D. Ga. 1995) ("The Court first finds that the stated purpose of a few legislators in voting for the Act demonstrates only the legislators' personal motives in voting for the Act, but does not establish the legislative purpose of the Act."). "Even if" some legislators were motivated to vote for a bill by unconstitutional purposes, the U.S. Supreme Court said in an Establishment Clause case, "that alone would not invalidate the Act, because what is relevant is the legislative purpose of the statute, not the possibly religious motives of the legislators who enacted the law." *Bd. of Educ. of Westside Comm. Sch. v. Mergens*, 496 U.S. 226, 249 (1990) (emphasis in the original). In the abortion context, the Court has succinctly averred that "the fact that an anti-abortion group drafted the Montana law…says nothing significant about the legislature's purpose in passing it." *Mazurek v. Armstrong*, 520 U.S. 968, 973 (1997).

Accordingly, while the words of Representative Bubba Carpenter and Senator Merle Flowers might provide probative evidence of their own motives, those lawmakers hardly speak for the entirety of Mississippi's 52-member Senate or 122-member House of Representatives. Neither are quotes from Governor Bryant's press release or Lieutenant Governor Reeves' website convincing evidence of legislative intent. Governor Bryant's vow to "continue to work to make Mississippi abortion-free" is not even specifically related to the law. While Lieutenant Governor Reeves' statement at least addresses the bill directly, nothing suggests that his understanding of the measure was shared by or motivated every member of the state Senate majority that ensured its passage. Additionally, the settings of these statements are notable. Representative Carpenter was addressing a political gathering, Governor Bryant and Senator Flowers were apparently

speaking to a newspaper reporter, and Lieutenant Governor Reeves' quote is taken from a section of his public website that touts his accomplishments as presiding officer of the state Senate. None of the statements is part of official legislative history.

Aside from quoting isolated statements of current state officials, the Plaintiffs also illustrate the "social and historical context" of H.B. 1390 by highlighting two attempts by former state officials to "restrict abortion care" and cataloging current state laws that regulate abortion services. The former is especially weak evidence of the legislative purpose that animated H.B. 1390, given substantial changes in the membership of the Mississippi legislature and wholesale changes in its leadership in the years since the other bills were adopted. The relevance of the latter is not immediately clear, as none of the laws enumerated by the Plaintiffs have been held unconstitutional.

In conclusion, the most probative evidence of legislative intent-the language and the context of the law-strongly supports a ruling that H.B. 1390 carries a valid purpose related to the health and safety of women who seek abortion services. "Where a law can be viewed as having a rational purpose other than simply obstructing the right to abortion, the court cannot presume that an invalid purpose was the legislature's predominant motive." *Praeger*, 815 F.Supp.2d at 1215. Moreover, the Supreme Court has neither adopted nor endorsed the view that an alleged invalid purpose can doom an otherwise constitutional regulation on abortion providers. *See Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997).[3]

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[3]Under Plaintiffs' theory, clearly constitutional regulations on abortion could be struck down because of the statements of a handful of lawmakers. For instance, if a unanimously anti-abortion legislature enacts a law requiring abortions to be performed by doctors, and that law is accompanied by statements indicating that the intent is to end abortions, the statute could be struck down. Such a test would mean that regulations could be constitutional in one state, but

B. Effect

Though House Bill 1390 is aimed toward the legitimate purpose of protecting abortion patients' health, it may still be unconstitutional if its effect is to unduly burden "a woman's ability to make th[e] decision" to end her pregnancy. *Casey*, 505 U.S. at 874. The *Casey* Court elsewhere phrased the same point in different language: Regulations of abortion directed toward valid state ends is permitted "if they are not a substantial obstacle to the woman's exercise of the right to choose." *Id.* at 878. However, a regulation does not amount to an undue burden or substantial obstacle merely because it "has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." *Id.* Plaintiff's argument regarding the "effect" of H.B. 1390 rests on the Fifth Circuit's holding that a "measure that has the effect of forcing all or a substantial portion of a state's abortion providers to stop offering such procedures creates a substantial obstacle to a woman's right to have a pre-viability abortion, thus constituting an undue burden under *Casey*." *Okpalobi*, 190 F.3d at 357.

Specifically, Plaintiffs raise two issues regarding the act's constitutionality. First, they claim that "immediate enforcement" of the act's Admitting Privileges Requirement would "effectively and unconstitutionally ban abortion in Mississippi." [Doc. No. 6, at 10]. As shown above, this argument is baseless, because state law would unequivocally preserve the right to access abortion services for at least 60 days-and likely much longer-if Health Department authorities start administrative proceedings against Jackson Women's Health Organization on the day the law goes into effect.

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unconstitutional in others, based on nothing other than the fervor of anti-abortion sentiment among legislators. Such a single-minded focus on purpose is inappropriate.

But, second, the Plaintiffs ask the Court to enjoin the Admitting Privileges Requirement from ever taking effect, pointing to an unpublished 1996 bench opinion in which the Southern District of Mississippi barred the State from implementing a regulation that would have required abortion providers to obtain written transfer agreements from local hospitals. The Court cited concern that "wide-spread public opposition and protest to abortions in this state" might convince hospitals "to deny these written transfer agreements to abortion providers," unduly burdening abortion rights by providing hospitals "third-party vetoes over whether the abortion providers can obtain a license." The law has changed in the years since that opinion was issued, though. The Fourth Circuit in 2002 upheld a South Carolina regulation requiring at least one physician on an abortion facility's medical staff to have admitting privileges at a nearby hospital, rejecting a contention that this policy made licensing the clinics "contingent upon the cooperation of hospitals, clergy and other third parties." *Greenville Women's Clinic v. Commissioner*, 317 F.3d 357, 361 (2002). The Fourth Circuit noted a lack of evidence "that the requirements to have admitting arrangements with local hospitals…present a substantial impediment to obtaining or retaining a license. To the contrary, the appellants in this case have obtained licenses…." *Id.* at 362. The court further observed that South Carolina law prohibited public hospitals from acting "unreasonably, arbitrarily, capriciously, or discriminatorily in granting or denying admitting privileges." *Id.* (internal citations omitted).

So, too, here. According to the Plaintiffs, the medical staff of Jackson Women's Health Organization even now includes a doctor with admitting privileges at a local hospital. Applications from others are pending. And state law affirms that admitting privileges at public hospitals may not be denied arbitrarily. Miss. Code Ann. § 73-25-93. As in *Greenville*

Women's Clinic, then, there is scant proof that the "effect" of H.B. 1390 would substantially impede women from accessing abortion services in Mississippi.

C. Due Process Claims of the Clinic and Dr. Parker

Neither the Clinic nor Dr. Parker have a protected property or liberty interest that would be infringed by the requiring the Clinic's doctors to have admitting privileges at a local hospital. Their individual claims lack all merit and cannot form the basis of injunctive relief.

First, from the perspective of the clinic, any procedural due process rights are protected by the time-to-cure and pre-revocation hearing provided under state law. *See Women's Medical Professional Corp. v. Baird*, 438 F.3d 595, 613 (6th Cir. 2006) (finding violation due process violation when state law did not provide for time to cure or pre-revocation hearing for abortion facility). Moreover, admission requirements have been found not to violate the substantive due process rights of clinics. *Women's Health Center of West County, Inc. v. Webster*, 871 F.2d 1377, 1382 (8th Cir. 1989) ("The requirement that physicians performing abortions obtain surgical privileges, which involves the independent action of a public or private hospital, poses no more significant threat to plaintiffs' due process rights than the requirement that those performing abortions be licensed physicians, which involves the independent action of a medical licensing board. Both requirements represent the state's legitimate effort to ensure that abortion is 'as safe for the woman as normal childbirth at term ... [and] is performed by medically competent personnel under conditions insuring maximum safety for the woman.' *Menillo*, 423 U.S. at 11, 96 S.Ct. at 171).")

With respect to the only doctor who is a named plaintiff, Dr. Willie Parker, his claimed violations of procedural and substantive due process also fail as a matter of law. The nature of

liberty and property interests safeguarded by the Fourteenth Amendment is defined by state law. *Chrissy F. by Medley v. Mississippi Dept. of Public Welfare*, 925 F.2d 844, 851 (5th Cir. 1991). As this Court has recognized, to have a protect property interest, Dr. Parker must point to "existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Washington v. Jackson State University*, 2008 WL 2779297, at *9 (S.D.Miss. 2008) (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)). Here, Dr. Parker did not join the clinic until after House Bill 1390 was signed into law. *See* Complaint, at 48. He has no expectation of a property or liberty right to perform abortions without admitting privileges. Moreover, a state does not violate a doctor's substantive due process rights when it regulates the practice of medicine as long as the regulation is rationally related to a legitimate purpose. *See Meier v. Anderson*, 692 F.Supp. 546, 551 -552 (E.D.Pa. 1988). Admission requirements are, unquestionably, rationally related to the "state's legitimate effort to ensure that abortion is 'as safe for the woman as normal childbirth at term ... [and] is performed by medically competent personnel under conditions insuring maximum safety for the woman." *Women's Health Center of West County, Inc.*, 871 F.2d at 1382.

Plaintiffs have not cited "any statutory, regulatory, jurisprudential, or other authority for the proposition that [they have] a constitutionally protected property or liberty interest" in practicing medicine without the requirement of admitting privileges at a local hospital. *See Washington*, 2008 WL 2779297, at *9.

Finally, Plaintiffs' procedural due process claim is legally barred because the Plaintiffs have yet to utilize the due process procedures available to them under state law when it

voluntarily dismissed its state court appeal. While as a general rule an aggrieved person need not exhaust state remedies before filing suit in federal court to vindicate a state deprivation of constitutional rights, there is "an exception to this rule that applies when the alleged constitutional deprivation is the denial of procedural due process." *Vicari v. Ysleta Indep. Sch. Dist.*, 2008 WL 4111407, at * 2 (5th Cir. 2008) (plaintiff "complains of an absence of process, but she did not use the sufficient process provided")); see *Rathjen v. Litchfield*, 878 F.2d 836, 840 (5th Cir.1989) ("[N]o denial of procedural due process occurs where a person has failed to utilize the state procedures available to him."); *Galloway v. Louisiana*, 817 F.2d 1154, 1158 (5th Cir.1987) ("An employee cannot ignore the process duly extended to him and later complain that he was not accorded due process."). The procedures set up by Miss. Code Ann. §§ 41-75-11 and 41-75-23 to regulate revocation, denial and suspension of licenses provide procedures meant to vindicate the due process requirements of the Constitution. Consistent with the cases cited above, the Plaintiffs may not challenge their adequacy without exhausting them.

D. Ripeness

In addition to the other shortcomings of Plaintiffs' claims, their action is not ripe for review by this Court at this time. "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998). The Fifth Circuit, for instance, has vacated a preliminary injunction enjoining a state agency from considering a landfill permit application:

> Even assuming plaintiffs have identified constitutionally protected property interests that would be harmed by approval of the permit application, they have not suffered any deprivation, because the … permitting process has not yet run its course. The application may or may not be granted, and thus plaintiffs may or may not be harmed. Therefore, until the [agency] issues the permit, this dispute remains abstract and hypothetical and

thus unripe for judicial review.

Monk v. Huston, 340 F.3d 279, 283 (5th Cir. 2003) (internal quotation marks and citations omitted). The Plaintiffs here have also brought a claim based upon "contingent future events that may not occur as anticipated" or "at all." *Texas*, 523 U.S. at 300. Their claim is predicated specifically upon conjecture that they will be unable to obtain admitting privileges at local hospitals, and that JWHO would decide that it is unable to operate with the one doctor on staff who already has such privileges. The obviously "hypothetical" nature of these claims renders them unripe for adjudication.

III. Granting a preliminary injunction would disserve the public interest.

As discussed previously, the State of Mississippi has a valid interest in safeguarding the health of patients through legitimate regulation of abortion services. States are due generous deference in this arena. "In view of its interest in protecting the health of its citizens, the State necessarily has considerable discretion in determining standards for the licensing of medical facilities," the Supreme Court reasoned. *Simopoulos*, 462 U.S. at 516. The Court has upheld regulations that merely "may be helpful" and "can be useful." *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 80, 81 (1976). Given this recognition of a State's right to formulate its own public-health policies covering abortion providers, the public interest would be disserved if House Bill 1390's amendments to clinic licensure requirements are enjoined without trial.

IV. The balance of the equities weighs against granting a preliminary injunction.

As illustrated above, absolutely no harm would befall the rights asserted by Plaintiffs as a result of House Bill 1390's enforcement. Women would continue to have access to abortion at

Jackson Women's Health Organization for at least 60 days following the law's effective date, and likely for much longer. However, to find for the Plaintiffs on the final factor in the injunctive-relief analysis, the Court must find that the harm posed to them "substantially outweighs any harm that might be occasioned to" the Defendants. *Tisino v. R & R Consulting and Coordinating Group, L.L.C.*, 2012 WL 2005282, at *3 (5th Cir. 2012). Such a finding is simply impossible on the record before the Court, given the illusory nature of the harm "threatened" to the plaintiffs and the state's significant interest in its public-health laws.

WHEREFORE, PREMISES CONSIDERED, Defendants, Mary Currier and Robert Shuler Smith, respectfully request that the Plaintiffs' motion be denied.

RESPECTFULLY SUBMITTED this, the 6th day of July, 2012.

MARY CURRIER, M.D., M.P.H., in her official capacity as State Health Officer of the Mississippi Department of Health, and ROBERT SHULER SMITH, District Attorney of Hinds County, Mississippi, Defendants

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CERTIFICATE OF SERVICE

I, Benjamin Bryant, Special Assistant Attorney General for the State of Mississippi, do hereby certify that on this date I electronically filed the foregoing document with the Clerk of this Court using the ECF system, which sent notification of this filing to:

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THIS, the 6th day of July, 2012.

/s/ Benjamin Bryant
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