

2013 WL 3482056 (S.D.Miss.) (Trial Pleading)
United States District Court, S.D. Mississippi,
Jackson Division.

JACKSON WOMEN'S HEALTH ORGANIZATION, on behalf of itself and its patients, and Willie Parker, M.D., M.P.H., M. Sc., on behalf of himself and his patients, Plaintiffs,

v.

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 for Hinds County, Mississippi, and Sherri M. Flowers-Billups, in her official capacity as Hinds County Attorney, and Barbara A. Bluntson, in her official capacity as Acting Chief City Prosecutor for the City of Jackson, Mississippi, Defendants.

No. 3:12-CV-00436-DPJ-FKB.
July 2, 2013.

Second Amended Complaint

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Plaintiffs Jackson Women's Health Organization (the "Clinic") and Willie Parker, M.D., M.P.H., M.Sc. (collectively "Plaintiffs"), by and through their undersigned attorneys, bring this Complaint against the above-named Defendants, their employees, agents, and successors in office ("Defendants") and in support thereof state the following:

I. Preliminary Statement

1. This is a challenge, pursuant to the Constitution of the United States of America and 42 U.S.C. § 1983, to Mississippi House Bill 1390 ("the Act"),¹ which imposes extreme, burdensome, and medically unjustified requirements on the provision of abortion care in the State of Mississippi. These requirements will obstruct women's access to abortion in Mississippi and could even function as an effective ban on the provision of abortion. The Act was intended to have precisely this effect: it was clearly enacted with the unconstitutional purpose "to cause fewer abortions." Ex. B, M.J. Lee, *Bill Dooms Only Miss. Abortion Clinic*, Politico, April 5, 2012.

2. These new requirements are not medically justified and will cause serious harm to Plaintiffs and their patients in at least two ways.

3. First, the requirement that physicians associated with an abortion facility must have "admitting privileges and staff privileges to replace local hospital on-staff physicians" ("the Admitting Privileges Requirement") effectively gives local hospitals veto power over Plaintiffs' ability to provide abortion care to women in Mississippi. Plaintiffs cannot control whether any local hospital will grant the applications for privileges submitted on behalf of the Clinic's doctors, and accordingly cannot control whether they are in compliance with the Admitting Privileges Requirement. Non-compliance with the Admitting Privileges Requirement is grounds for revocation of the Clinic's license. Accordingly, the Admitting Privileges Requirement makes Plaintiffs vulnerable to closure at the discretion of local hospitals.

4. The Clinic is the only licensed abortion provider in Mississippi. It provides the vast majority of abortions obtained by women in the State. If the Clinic is forced to close, women seeking abortions will have nowhere to turn in Mississippi.

5. Second, the Admitting Privileges Requirement and the requirement that any physician associated with an abortion facility must be a board certified or eligible obstetrician/gynecologist (“the OB/GYN Requirement”) will-in combination and individually-dramatically constrict the pool of qualified physicians from which the Clinic can draw to meet the needs of the women who seek abortion care at the Clinic, without any legitimate medical justification.

6. Accordingly, the Act endangers the health of women in Mississippi and violates their constitutional rights.

7. Plaintiffs seek injunctive and declaratory relief to prevent irreparable harms to themselves and their patients. Plaintiffs have no adequate remedy at law.

II. Jurisdiction and Venue

8. This court has jurisdiction under 28 U.S.C. §§ 1331 and 1343.

9. Plaintiffs’ action for declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201 and 2202.

10. Venue is proper under 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to this action occurred in this district.

III. Parties

A. Plaintiffs

11. The Clinic is a health care facility in Jackson, Mississippi that has been providing abortion care and other reproductive health care to women since 1996. It has been the sole abortion provider in the State of Mississippi for almost ten years. The Clinic has been continuously licensed by the Department of Health since licensure was required. The Clinic sues on its own behalf and on behalf of its patients.

12. Plaintiff Willie Parker, M.D., M.P.H., M.Sc. is a board-certified obstetrician-gynecologist licensed to practice medicine in Mississippi, Alabama, the District of Columbia, Maryland, Pennsylvania, and Virginia. Dr. Parker graduated with an M.D. from the University of Iowa College of Medicine and completed his residency in obstetrics and gynecology at The University of Cincinnati College of Medicine. He also holds a Master’s of Public Health from the Harvard School of Public Health. Dr. Parker provided general ob-gyn care to his patients for nearly 20 years, including delivering babies. He has been providing abortion care since 2002. Dr. Parker sues on his own behalf and on behalf of his patients.

B. Defendants

13. Defendant Mary Currier, M.D., M.P.H., is the State Health Officer of the Mississippi Department of Health. Among other things, she is responsible for supervising and directing all activities of the Department of Health, pursuant to Miss. Code Ann. §§ 41-3-5.1, 41-3-15(1)(c). She is sued in her official capacity.

14. Defendant Robert Shuler Smith is the District Attorney for Hinds County, in which the Clinic is located. Defendant Smith has enforcement authority for any intentional violation of the licensing scheme for abortion facilities, pursuant to Miss. Code Ann. § 41-75-26(2). He is sued in his official capacity.

15. Defendant Sherri M. Flowers-Billups is the Hinds County Attorney. Among other things, she is responsible for prosecuting misdemeanors, pursuant to Miss. Code Ann. § 19-23-11(4). She is sued in her official capacity.

16. Defendant Barbara A. Bluntson is the Acting Chief City Prosecutor for the City of Jackson, Mississippi. Defendant Bluntson has the authority to prosecute misdemeanor offenses committed in the City of Jackson, pursuant to Miss. Code Ann. § 21-13-19. She is sued in her official capacity.

IV. Factual Allegations

A. Mississippi House Bill 1390

17. On April 16, 2012, Governor Phil Bryant signed Mississippi House Bill 1390 into law. The Act's effective date was July 1, 2012.

18. The Act amends Miss. Code Ann. § 41-75-1, which defines certain terms for purposes of Mississippi's statutory scheme regulating ambulatory surgical facilities. Two amendments are at issue in this litigation.

19. First, the Act amends the definition of "abortion facility" to state that all physicians "associated with an abortion facility must be board certified or eligible in obstetrics and gynecology." H.B. 1390 § 1, *to be codified at* Miss. Code Ann. § 41-75-1(f).

20. Second, the Act amends the definition of "abortion facility" to state that 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." *Id.*

21. The Act makes no provision for a waiver or exception to either the Admitting Privileges Requirement or the OB/GYN Requirement.

22. Numerous elected officials have made statements indicating that the purpose of the Act is to end abortion in Mississippi.

23. For example, in an official statement issued shortly after the Mississippi Legislature passed the Act, Lieutenant Governor Tate Reeves declared that HB 1390 "should effectively close the only abortion clinic in Mississippi." *See* Ex. D, Joe Sutton and Tom Watkins, *Mississippi Legislature Tightens Restrictions on Abortion Providers*, CNN Politics, Apr. 4 2012.

24. Similarly, Governor Bryant vowed to sign the bill, saying, "I will continue to work to make Mississippi abortion-free." *See* Ex. E, Phil West, *Mississippi Senate Passes Abortion Regulation Bill*, The Commercial Appeal, April 4, 2012.

25. As of the filing of this Amended Complaint, Lt. Gov. Reeves has the following statement posted on his website: "[T]he Legislature took steps to end abortion in Mississippi by requiring doctors performing abortion to have admitting privileges at a local hospital. This measure not only protects the health of the mother but should close the only abortion clinic in Mississippi." Ex. F, Statement from Lt. Gov. Reeves' Website, <http://ltgovreeves.ms.gov/Pages/About.aspx> (last visited Aug. 8, 2012).

26. Likewise, State Senator Merle Flowers reportedly stated, "There's only one abortion clinic in Mississippi. I hope this measure shuts that down." *See* Ex. E.

27. State Representative Bubba Carpenter was videotaped saying, "We have literally stopped abortion in the state of Mississippi.... Three blocks from the Capitol sits the only abortion clinic in the state of Mississippi. [The Act] says, if you would perform an abortion in the state of Mississippi, you must be a certified OB/GYN and you must have admitting privileges to a hospital. Anybody here in the medical field knows how hard it is to get admitting privileges to a hospital." *See* Alcorn County G.O.P., Rep. Bubba Carpenter: *We Have Literally Stopped Abortion in the State of Mississippi*, YouTube, <http://www.youtube.com/watch?v=N3LOm2iXa4U&noredirect=1> (last visited Aug. 8, 2012).

B. The OB/GYN Requirement

28. The Act is not the first attempt by the State of Mississippi to require physicians who provide abortions to have specialized, and medically unnecessary, training in obstetrics and gynecology (“OB/GYN”).

29. On October 9, 1996, the United States District Court for the Southern District of Mississippi preliminarily enjoined then-new regulations that required any physician providing abortions to have completed a residency in OB/GYN. *Pro-Choice Mississippi v. Thompson*, CV No. 3:96CV596BN (Oct. 9, 1996).

30. The Court held that “the state cannot meet its burden ... [to show] that there is a reasonable medical necessity directed to preserve the woman’s health in requiring ob-gyn residency training for all physicians performing abortions.” *Id.*, Tr. of Hr’g and Bench Op. at 18 ln.14-19 (Sept. 28, 1996).

31. Board certification or eligibility in OB/GYN is not necessary for the safe provision of abortion care.

32. Medical evidence has shown that physicians with specialties other than OB/GYN can safely provide abortion care.

33. The Clinic has hired physicians with specialties other than OB/GYN to provide abortion care in the past, and would do so again. Hiring appropriately trained and qualified physicians, regardless of their specialty, is an important way to provide women with access to abortion care.

34. On an ongoing basis, the Clinic attempts to hire qualified physicians to serve the women in Mississippi. For example, the Clinic seeks to hire physicians who will commit to provide abortion care and other reproductive health care on a regular basis, to expand the Clinic’s medical staff or to replace departing physicians. The Clinic also seeks to hire physicians who will commit to being available on an as-needed basis, in case one of the regular physicians is ill or has transportation problems or is otherwise unable to come to the Clinic as scheduled.

35. The OB/GYN Requirement will prevent the Clinic from hiring qualified physicians with specialties other than obstetrics and gynecology to provide abortion care to patients. This would restrict access to care with no showing of “a reasonable medical necessity directed to preserve the woman’s health.” *Id.*

C. The Admitting Privileges Requirement

1. The Clinic’s Current Arrangements With Respect to Local Hospitals

36. Because the Clinic provides abortion care up to 16 weeks of pregnancy, as calculated from the first day of a woman’s last menstrual period (“1mp”), it is required to be licensed as a “Level I abortion facility.” *See* Miss. Admin. Code 15-16-1:44.2. Level I abortion facilities must comply with the regulations applicable to abortion facilities and also with the regulations applicable to ambulatory surgical facilities. *Id.*

37. The Department frequently conducts rigorous inspections of the Clinic to assess its compliance with all applicable regulations.

38. The Department’s two inspections of the Clinic prior to the filing of this litigation were conducted on June 18, 2012 and on April 12, 2012. Both inspections found the Clinic to be in compliance with applicable regulations.

39. The Department inspected the Clinic on July 16, 2012. It found the Clinic to be in violation of the Admitting Privileges Requirement.

40. In compliance with Miss. Admin. Code 15-16-1:44.12, the Clinic has a written transfer agreement with a local hospital.

41. In compliance with Miss. Admin. Code 15-16-1:42.9.7, one of the physicians on the Clinic’s medical staff has admitting privileges at a local hospital.

42. The Clinic has not needed to use either of these arrangements.

43. The Clinic's current arrangements are more than adequate to ensure patient safety.

2. Safety of Abortion Care Provided to Patients at the Clinic

44. Abortion care before 16 weeks lmp is extremely safe and significantly safer than carrying a pregnancy to term.

45. Complications of any kind following an abortion are rare. The overall complication rate for abortion care nationwide is less than 1%. The nationwide rate for complications requiring hospitalization following an abortion is less than .3% (less than 3 out of 1000).

46. In the vast majority of cases, the types of complications that may occur following an abortion can be safely and appropriately managed in an outpatient setting.

47. Admitting privileges are not necessary to provide appropriate care in the unlikely event of a serious complication following an abortion.

48. In the unlikely event that a patient experienced a serious complication that required hospitalization while at the Clinic, the Clinic would transfer her by ambulance to the nearest hospital.

49. The customary practice is for a facility that accepts a patient in emergency situations to remain in contact with the physician who made the decision to transfer the patient, whether or not that physician has admitting privileges at the facility.

50. The Clinic has an impeccable safety record.

51. Since the current owner took over in 2010, the Clinic has had no major incidents, nor has a single patient required admittance to a hospital after obtaining an abortion at the Clinic.

52. Many of the Clinic's patients travel substantial distances to receive abortion care at the Clinic.

53. In the unlikely event that a patient experienced a serious complication after leaving the Clinic, the appropriate course of action would be for her to go to the nearest emergency room. For many of the Clinic's patients, the nearest emergency room would not be in Jackson, where the Clinic is located, and might not even be in the State.

54. Thus, requiring all of the physicians "associated with" the Clinic to have admitting privileges at a local hospital would not increase patient safety, because the Clinic is already more than adequately prepared to respond to a serious complication or other health emergency.

D. The Clinic Doctors' Applications for Admitting Privileges

55. Shortly after the Act was signed into law, the Clinic began the process of applying for privileges on behalf of John Doe, M.D.,² who was at that time the only physician providing abortion to women at the Clinic on a regular basis and did not have privileges at a local hospital.

56. As soon as Dr. Parker joined the Clinic's medical staff on June 18, 2012, the Clinic began to seek privileges for him as well.

57. The burdens associated with the process of applying for admitting privileges in compliance with the Act required the Clinic to hire additional staff and to gather a substantial amount of information.

58. Clinic staff members have worked diligently to assist Drs. Doe and Parker in attempting to obtain privileges in compliance with the Act, without success.

59. For example, one hospital has not even sent an application to the Clinic, despite the Clinic's repeated efforts since early May to obtain one. The Clinic began attempting to contact University Medical Center in early May, has made multiple phone calls and, pursuant to instructions from hospital staff, submitted a written request for an application, but has not been able to obtain an application for privileges at that hospital.

60. Similarly, although another hospital received Dr. Doe's application for privileges on or about May 30, 2012, Clinic staff have been unable to learn when the application would be considered. At the time Dr. Doe's application was submitted, the Clinic's staff understood that it would be considered at a meeting on June 19, 2012. However, on or about June 19, 2012, when Clinic staff contacted the hospital to ask for an update, the hospital's staff advised that Dr. Doe's application had not been considered at the meeting and that it was unclear when it would be considered.

61. Despite Plaintiffs' diligent efforts, no local hospital has granted privileges to Dr. Doe or Dr. Parker as of the date of this filing.

62. Two hospitals, Crossgates River Oaks Hospital and Woman's Hospital, have denied the applications for privileges submitted by Drs. Doe and Parker. Each of the hospitals characterized its denial of the doctors' applications as "administrative" in nature.

63. Crossgates River Oaks Hospital and Woman's Hospital both gave the following two reasons for denying privileges to Drs. Doe and Parker: "The nature of your proposed medical practice is inconsistent with this Hospital's policies and practices as concerns abortion and, in particular, elective abortions; ... [and] The nature of your proposed medical practice would lead to both an internal and external disruption of the Hospital's function and business within this community."

64. Crossgates River Oaks Hospital also gave the following reason for denying privileges to Drs. Doe and Parker: "The nature of your proposed medical practice is inconsistent with this Hospital's practices as concerns obstetric/ gynecological services. This Hospital has no obstetrical services and very limited gynecological services, with no OB/GYN's on its Active Staff[.]"

65. Woman's Hospital also gave the following reason for denying privileges to Drs. Doe and Parker: "In light of this Hospital's Rules and Regulations concerning therapeutic abortions, namely that such procedures may only be performed by physicians with major surgical privileges, your application does not comport with a functional practice at this Hospital[.]"

E. The Department's Enforcement of the Act

66. While its efforts to obtain privileges were underway, the Clinic wrote to the Department on May 15, 2012, asking it to suspend enforcement of the Admitting Privileges Requirement for either one year or six months, pursuant to Miss. Code Ann. § 41-75-16, so that the Clinic could complete the process of applying for privileges for its doctors.

67. When it had not received a response to its letter within a week, the Clinic followed up with a phone call to Department staff.

68. By letter dated May 29, 2012, the Department declined to suspend enforcement of the Admitting Privileges Requirement for the period of time requested by the Clinic. However, the Department indicated that it would be following its normal rule-making process and stated in the letter that it would not be considering amendments to the rules affected by the Act until its meeting on July 11, 2012. Further, the Department stated that it would review the Clinic's compliance with the Act at the Clinic's "next annual survey," which the Clinic expected to occur in August or September 2012. *See* Ex. G, Letter from Defendant Dr. Mary Currier to Diane Derzis (May 29, 2012).

69. From the May 29 letter and its conversations with Department staff, the Clinic understood that the Department intended to promulgate amended rules according to Miss. Code Ann. § 25-43-3.113(1), which provides for a 30-day period between filing and effective date. Because the Department's letter stated it would be considering amendments to the rules affected by the Act at its July 11, 2012 meeting, the Clinic understood that the new rules enforcing the Admitting Privileges Requirement would not be effective until August 10, 2012, at the earliest.

70. On information and belief, the Department has never required the Clinic to comply with newly-promulgated regulations without the 30-day period between filing and effective date described in Miss. Code Ann. § 25-43-3.113(1).

71. For all of the reasons stated above, the Clinic reasonably believed that the Department would not be requiring compliance with the Admitting Privileges Requirement on July 1, 2012.

72. On June 20, 2012, State Representative Sam C. Mims wrote to Defendant Currier to ask her to enforce the new requirements imposed by the Act by the first business day after the law's effective date. His letter stated, "I would expect that any abortion facility in Mississippi that is staffed by a physician or physicians without hospital admitting and staff privileges ... must immediately cease performing abortions until such time as the requirements of House Bill 1390 have been met." Ex. C., Letter from Representative Sam C. Mims to Dr. Mary Currier, State Health Officer (June 20, 2012)

73. On June 22, 2012, the Department advised the Clinic by telephone that it would be enforcing the new requirements imposed by the Act immediately upon its effective date of July 1, 2012.

74. On June 25, 2012, the Clinic received a letter from the Department stating that, in order to continue operating as an abortion provider, the Clinic was required to send proof of compliance with the Act to the Department on or before July 1, 2012. *See* Ex. H, Letter from Vickey Berryman to Diane Derzis (June 25, 2012).

75. Although the Clinic applied for a renewal license and paid the application fee in May 2012, it was not until June 28, 2012, after this litigation was filed, that the Department renewed the Clinic's license for the period beginning July 1, 2012.

76. On July 11, 2012, the Department of Health adopted rules implementing the Act.

77. On July 16, 2012, the Department inspected the Clinic for compliance with the rules adopted on July 11, 2012.

78. The Department made no finding that would have waived the delayed effective date for amended rules pursuant to Mississippi's Administrative Procedure Act. *See* Miss. Code Ann. § 25-43-3.113(2).

79. Immediate implementation of the Act is not justified by any imminent peril. Indeed, the Department's initial decision to follow the normal rulemaking procedure indicates that it recognized no immediate peril exists.

80. The Act does not serve any legitimate state interest.

V. Irreparable Harm

81. But for the Act, the Clinic would be able to continue to recruit physicians to provide abortion care to women in Mississippi on the basis of the physicians' qualifications and abilities.

82. Recruiting and hiring qualified and capable physicians to provide abortion care to women in Mississippi is a time-consuming and difficult process. For example, it took well over a year for the Clinic to find, recruit, and hire Dr. Parker, and it took several months for Dr. Parker to obtain his Mississippi medical license.

83. The OB/GYN Requirement prevents the Clinic from hiring qualified physicians to provide abortion care.

84. The Admitting Privileges Requirement prevents the Clinic from hiring qualified physicians to provide abortion care.

85. If Plaintiffs are forced to stop providing abortion care to women in Mississippi, women's health will suffer.

86. Although abortion is a very safe procedure, its risks increase with gestational age; therefore, any delay in a woman's ability to obtain abortion would expose her to unnecessary, increased health risks. Some of the Clinic's patients may be able to travel to other states, but this can cause significant delays. Women without the means to travel will not have this option, and accordingly may not be able to obtain a safe abortion at all.

87. In addition, the Act will irreparably harm Plaintiffs by depriving them of protected property and/or liberty interests without due process of law.

88. As a whole, the Act will irreparably harm women in the State of Mississippi because it interferes with women seeking to exercise their constitutional right to a pre-viability abortion.

VI. Claims for Relief

COUNT ONE

(Substantive Due Process - Patients' Right to Privacy)

89. The allegations of ¶¶ 1-88 are incorporated by reference as though fully stated herein.

90. The Admitting Privileges Requirement violates the liberty interests of Plaintiffs' patients, as guaranteed by the Fourteenth Amendment to the United States Constitution, because it imposes a substantial obstacle in the path of a woman seeking a pre-viability abortion.

91. The OB/GYN Requirement violates the liberty interests of Plaintiffs' patients, as guaranteed by the Fourteenth Amendment to the United States Constitution, because it imposes a substantial obstacle in the path of a woman seeking a pre-viability abortion.

92. The Act violates the liberty interests of Plaintiffs' patients, as guaranteed by the Fourteenth Amendment to the United States Constitution, because its purpose is to prevent women from obtaining pre-viability abortions.

COUNT TWO

(Substantive Due Process - Unlawful Delegation)

93. The allegations of ¶¶ 1-98 are incorporated by reference as though fully stated herein.

94. The Admitting Privileges Requirement violates rights secured to Plaintiffs and their patients by the Fourteenth Amendment to the United States Constitution by impermissibly delegating the State's licensing authority to third party hospitals.

VII. Prayer for Relief

WHEREAS, Plaintiffs respectfully request that this Court:

A. issue a temporary restraining order and/or injunctive relief barring Defendants, their employees, agents, and successors in office from enforcing the Act;

B. declare that the OB/GYN Requirement and the Admitting Privileges Requirement are unconstitutional, void, and of no effect;

C. issue permanent injunctive relief, without bond, restraining Defendants, their employees, agents, and successors in office, from enforcing the Act; and

D. grant such other relief, including attorney's fees and costs under 42 U.S.C. § 1988, as this Court deems just and proper.

Respectfully submitted, this 2d day of July, 2013,

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Footnotes

¹ A copy of the Act is attached hereto as Exhibit A.

² Plaintiffs are using a pseudonym to refer to this physician out of concern for his safety and privacy.

* Admitted *pro hac vice*.

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