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United States District Court, S.D. Mississippi,
Jackson Division.

JACKSON WOMEN'S HEALTH ORGANIZATION, et al., Plaintiffs
v.
MARY CURRIER, MD., M.P.H., et al., Defendants.

CIVIL ACTION NO. 3:12cv436-DPJ-FKB
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Signed 08/13/2013

Attorneys and Law Firms

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Paul E. Barnes, Wilson D. Minor, Beatryce McCrosky Tolsdorf, Mississippi Attorney General's Office, Mississippi Department of Health, Lashundra B. Jackson-Winters, Office of the City Attorney, Jackson, MS, for Defendants.

ORDER

Daniel P. Jordan III, UNITED STATES DISTRICT JUDGE

***1** This matter is before the Court on the Rule 52(b) Motion to Clarify [89] filed by Defendants Mary Currier and Robert Schuler Smith. The Court will address the issues to some extent.

Defendants seek clarification under Federal Rule of Civil Procedure 52, which governs findings of fact and conclusions of law. Rule 52(a)(2) requires the Court, "[i]n granting or refusing an interlocutory injunction, [to] state the findings [of fact] and conclusions [of law] that support its action." The findings and conclusions required by Rule 52 "may appear in an opinion or a memorandum of decision filed by the court." Fed. R. Civ. P. 52(a)(1). Consistent with Rule 52, the Court in this case set forth its findings and conclusions in a 13-page opinion addressing the factual and legal arguments raised by the parties and concluding that, on the record before it, Plaintiffs had met their burden to justify preliminary injunctive relief.

Defendants ask the Court to "amend its findings—or make additional findings" to clarify the ruling in two primary respects. First, Defendants seek clarification as to whether the Court concluded "that any regulation which would close a state's only abortion clinic is *per se* unconstitutional—regardless of whether the regulation is medically necessary ...." Defs.' Mem. [90] at 2. Second, Defendants ask the Court to clarify whether it concluded, in footnote three, "that necessity analysis is not required because the law would impose an undue burden, whether the Court is also making a preliminary finding of fact that the admitting privileges requirement is 'unnecessary,' or both." *Id.* at 3.

As to the first issue, the Court made clear, at the outset of its discussion of the constitutionality of the Act, that Plaintiffs pursued an "as-applied" challenge to the law. Order [81] at 6. Thus, its conclusion that "Plaintiffs have demonstrated a substantial likelihood of success on the merits of their claim" related solely to Plaintiffs' claim that *this* Act, as-applied to *this* clinic, on the particular facts before the Court, is likely to be found unconstitutional. No further clarification is needed.

On the second point, the footnote in question states in its entirety:

> As JWHO notes, [*Planned Parenthood of Se. Pa. v.*] *Casey*'s summary of the standard states, "Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." 508 U.S. [833,] 878 [(1992)]. How the term "unnecessary" factors into the analysis is not entirely clear because since *Casey* the Supreme Court has consistently proceeded to the purpose and effect side of the equation without considering whether a particular regulation is "unnecessary." In any event, the State did not address the issue in its response, and based on the present record, the Court agrees that JWHO has established a likelihood of success on the merits, even assuming a necessity inquiry.

Order [81] at 8 n.3.

Defendants assert that the footnote is inconsistent with the Court's observation that "this Act might survive a facial attack," *id.* at 5, contending that the latter observation implied a ruling that the Act *is* medically necessary.

Defs.' Mem. [90] at 4. No such ruling was intended from the Court's statement. The Act might survive a facial attack—as similar statutes have in other jurisdictions—if Plaintiffs failed to establish "that no set of circumstances exists under which [the Act] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 170, 175 (4th Cir. 2000) (rejecting facial attack and finding no undue burden). But given the facts of this as-applied attack, Plaintiffs are entitled to relief.

***2** Footnote three was probably unnecessary because Defendants offered no argument or analysis based on the term "unnecessary" as used in *Casey*. They instead argued in the alternative that a rational-basis test applies, or if undue burden does apply, then no impermissible purpose or effect has been shown. Because Defendants did not offer a legal analysis based on the "necessity," *vel non*, of the statute, the Court focused on the arguments Defendants pursued and found that they would not prevent the injunction.

Nevertheless, the Court elected to include footnote three to alert the parties to this issue and observe that the test is not entirely clear. The word "unnecessary" appears in the summary of the controlling *Casey* opinion, but not in the analysis. And since *Casey*, there has been no clear indication how the necessity of a regulation affects the undue-burden test. *See generally Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 539–41 (9th Cir. 2004) (discussing test and applying undue burden); *Greenville Women's Clinic*, 222 F.3d at 170, 175 (indicating that regulation was necessary, but still considering "whether the cost imposed by the lawfully directed regulation presents a substantial obstacle to a woman seeking an abortion" (citation and quotation omitted)). As originally noted, "the Supreme Court has consistently proceeded to the purpose and effect side of the equation without considering whether a particular regulation is 'unnecessary.' " Order [81] at 8 n.3.

Defendants now argue that the word "unnecessary" in the *Casey* summary "requires a court to balance a state's interest in enacting a particular regulation to promote health and safety against a woman's right to terminate a pre-viability pregnancy." Defs.' Mem. [90] at 3. But they cite *Casey* for this argument, and *Casey* does not explain a balancing test. Defendants cite no other authority for this test, and at most Plaintiffs have merely offered the factual argument that the Act is not necessary.[1] Though the Court may need to better address the applicable test in the future, it was not necessary given the arguments in the initial briefs, and even now the parties have not provided sufficient analysis to reach any legal conclusions on that point. Nevertheless, even accepting, *arguendo*, Defendants' balancing approach, the record fails to show that the Act is so necessary as to overcome the undue-burden Plaintiffs established.

For the foregoing reasons, Defendants' Rule 52(b) Motion to Clarify [89] is granted in part to the extent that this order clarifies its previous ruling, but the Order [81] remains the ruling of the Court.

SO ORDERED AND ADJUDGED this the 13th day of August, 2013.

All Citations

Not Reported in Fed. Supp., 2013 WL 12122002

Footnotes

1 The Court would also seek guidance on how "necessary" should be defined. Should it receive the dictionary meaning "absolutely needed?" *Merriam-Webster.com.* Merriam-Webster, 2013.