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United States District Court, E.D. Arkansas, Western Division.

PLANNED PARENTHOOD ARKANSAS AND EASTERN OKLAHOMA, d/b/a Planned Parenthood of the Heartland; and Stephanie Ho, M.D., on behalf of themselves and their patients, Plaintiffs
v.
Larry JEGLEY, Prosecuting Attorney for Pulaski County, in his official capacity, his agents and successors; and Matt Durrett, Prosecuting Attorney for Washington County, in his official capacity, his agents and successors, Defendants

Case No. 4:15-cv-00784-KGB
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Signed 07/20/2018

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ORDER

Kristine G. Baker, United States District Judge

***1** After conducting a two-day evidentiary hearing and reviewing briefings, this Court entered a preliminary injunction on July 2, 2018, enjoining enforcement of Section 1504(d) of the Abortion-Inducing Drugs Safety Act, 2015 Arkansas Acts 577 (2015) ("Section 1504(d)," "the Act," or "the contracted physician requirement"), codified at Arkansas Code Annotated § 20-16-1501 *et seq.* Presently before the Court is the motion for stay of preliminary injunction pending appeal and to shorten response time filed by defendants Larry Jegley, prosecuting attorney for Pulaski County, in his official capacity, his agents and successors, and Matt Durrett, prosecuting attorney for Washington County, in his official capacity, his agents and successors (Dkt. No. 146). Plaintiffs Planned Parenthood of Arkansas and Eastern Oklahoma, d/b/a Planned Parenthood of the Heartland ("PPAEO"), and Stephanie Ho, M.D., on behalf

of themselves and their patients responded in opposition to the motion (Dkt. No. 155). For the reasons discussed below, the Court finds that defendants have not met their burden to receive a temporary administrative stay of the preliminary injunction or a stay pending appeal of the preliminary injunction.

I. Legal Standard

The Court considers the following four factors in determining whether to grant a motion to stay pending appeal: (1) the likelihood of the movant's success on the merits, (2) whether the movant will be irreparably harmed absent a stay, (3) whether issuance of the stay will substantially injure the non-moving party and (4) the public interest. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Shrink Mo. Gov't PAC v. Adams*, 151 F.3d 763, 764 (8th Cir. 1998). As the moving party, defendants bear the burden to prove all four factors. *See James River Flood Control Ass'n v. Watt*, 680 F.2d 543, 544 (8th Cir. 1982) (per curiam). The most important factor is the moving party's likelihood of success on the merits. *See Brady v. Nat'l Football League*, 640 F.3d 785, 789 (8th Cir. 2011) (discussing the standard for stay pending appeal under Federal Rule of Appellate Procedure 8(a)).

A. Likelihood Of Success On The Merits

In this Court's July 2, 2018, preliminary injunction Order, this Court found that plaintiffs are likely to succeed on the merits of their challenge to the enforcement of Section 1504(d) (Dkt. No. 142). In their present motion, defendants argue that it is they who are likely to succeed on the merits. Without restating its entire preliminary injunction Order, the Court addresses each of defendants' latest arguments and explains why in part defendants are not likely to succeed on the merits.

First, contrary to defendants' assertions, this Court recited and applied the correct standard to determine whether Section 1504(d) is constitutional. As defendants concede, the Court recited this standard—"whether the contract-physician requirement's benefits are substantially outweighed by the burdens it imposes on a large fraction of women seeking medication abortion in Arkansas"—throughout its preliminary injunction Order (Dkt. No. 142, at 45, 46, 108, 142, 144 (quoting *Planned Parenthood of Arkansas & Eastern Oklahoma v. Jegley*, 864 F.3d 953, 959 n. 9 (8th Cir. 2017)). The Court applied this standard (*Id.*, at 142) ("Weighing the benefits and burdens ... the Court determines that Section 1504(d)'s contracted physician requirement ... imposes substantial burdens on a large fraction of Arkansas women seeking medication abortions...."). Defendants present no argument or evidence—beyond the bare assertion that this Court "applied a more nebulous standard"—to demonstrate that this Court misapplied the standard (Dkt. No. 147, at 3).

***2** Second, the Court found that, for the reasons discussed in the preliminary injunction Order and based upon the record evidence before it, plaintiffs could not comply with Section 1504(d)'s contracted physician requirement (Dkt. No. 142, at 90-98). As discussed in more detail in the preliminary injunction Order, among other steps taken in an effort to comply, plaintiffs sent a letter in August 2017 to every obstetrician/gynecologist in the physician directories of the Arkansas Medical Society and Arkansas State Medical Board (*Id.*, at 91). This letter invited the recipients to reply for the purpose of "discuss[ing] compensation and other logistics." (*Id.*, at 91-21). Contrary to defendants' assertions, among other evidence, the record evidence before the Court demonstrated that Dr. Ho and PPAEO's staff called at least 60 doctors, though Dr. Ho could recall the names of only three such physicians while under examination (Dkt. No. 142, at 25, 92). Finally, there is considerable evidence in the record that doctors are reluctant to associate with abortion providers, given the likely impact to an associating doctor's safety, job opportunities, and perceived standing in the local community (*Id.*, at 92-96). Defendants present no new evidence to support their assertion that plaintiffs will be able to comply with Section 1504(d). Accordingly, the Court declines to find that, for the reasons discussed in the preliminary injunction Order and based upon the record evidence at this stage of the litigation, plaintiffs are able to comply with Section 1504(d).

Third, defendants repeat their prior arguments about why this Court should not credit Dr. Colleen Heflin's analysis or the study conducted by Scott Cunningham.[1] After reviewing briefing on this issue and observing extensive cross-examination of both Dr. Heflin and Dr. Tumulesh K.S. Solanky, the Court credited Dr. Heflin's analysis and findings over Dr. Solanky's objections (*Id.*, at 121). As already discussed in the preliminary injunction Order, the Court credited Dr. Heflin's conclusion that the Cunningham study could be validly applied to Arkansas and that she did not commit mathematical errors in her calculations (*Id.*, at 119-20). Defendants argue that "[t]he Court did not explain or give any basis for crediting Dr. Heflin's flawed calculations...." (Dkt. No. 147, at 4). In fact, the Court compared Dr. Heflin's explanation for her

calculations and methodology against Dr. Solanky's rebuttal testimony (Dkt. No. 142, at 120-21). The Court declines to revisit the basis for its finding that "Dr. Heflin's conclusions appear grounded in valid statistical methods and appear to be analytically sound." (*Id.*, at 121). That basis is set out in its preliminary injunction Order. Finally, despite defendants' urging, the Court also declines to revisit its determination that, for the reasons discussed in the preliminary injunction Order and based upon the record evidence at this stage of the litigation, for "a large fraction of women seeking medication abortions in Arkansas," Section 1504(d)'s contracted physician requirement "places a substantial obstacle in the path of a woman's choice." (*Id.*, at 142) (quoting *Jegley*, 864 F.3d at 959; *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292, 2312 (2016) (internal citation omitted)).

Fourth, contrary to defendants' arguments, the Court considered the burden imposed by Section 1504(d)'s effective ban on medication abortions in Arkansas. The Court considered this burden in conjunction with the other burdens imposed by Section 1504(d) and weighed those burdens against the benefits provided by Section 1504(d). The Court did not confine its analysis of the evidence to this effective ban on medication abortions when determining that plaintiffs satisfied their burden to receive a preliminary injunction (*see* Dkt. No. 142, at 110) ("Even if this burden, by itself, does not render the contracted physician requirement a substantial obstacle in the path of a woman's choice ..., the Court will not discount it as some evidence of burden." (internal cites and quotes omitted)).

Fifth, the Court will not revisit its finding that "[s]ome women who will seek abortion services in Little Rock will be delayed by the increased travel distances and increases in costs...." (*Id.*, at 136-37). Defendants argue that the Court did not cite any evidence for this finding: in fact, the Court cited record evidence in support of this finding (*see id.* at 133-38).

***3** Sixth, defendants misconstrue the Court's finding regarding wait times for those patients who would be forced to travel to Little Rock to obtain a surgical abortion. Based upon the record evidence, the Court found that:

> the contracted physician requirement will likely force those women who choose to seek a surgical abortion at LRFPS' Little Rock facility to endure longer wait times and reduced quality of care compared to the quality of care they would have received if the contracted physician requirement were not enforced, even if LRFPS can absorb the increased demand for surgical abortions.

(Dkt. No. 142, at 140-41). Thus, the Court's finding does not contradict the testimony of Lori Williams but rather makes a finding that the women affected by Section 1504(d) will face a burden relative to their situation prior to the enforcement of Section 1504(d). Defendants present no additional evidence, so the Court declines to revisit this finding.

Seventh, contrary to defendants' characterization of the preliminary injunction Order, this Court did not find that "the mere act of crossing a state border constitutes an undue burden...." (Dkt. No. 147, at 5). Rather, the Court, by analyzing Supreme Court precedent in *State of Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), found that it could not consider the availability of out-of-state abortion clinics when determining whether the contracted physician requirement imposes an undue burden on women seeking medication abortions in Arkansas (Dkt. No. 142, at 100-02). Indeed, to address defendants' concerns—which this Court determines are foreclosed by controlling legal authorities—the Court calculated the number of women seeking medication abortions in Arkansas who would forgo an abortion even if out-of-state abortion clinics are considered (*Id.*, at 129-33). Since defendants present no new evidence or precedents for the Court's consideration, the Court declines to revisit its prior findings on this subject.

Eighth, the Court is not convinced that it "wrongly ignore[d] [the contracted physician requirement's] command that a contract physician must 'handle complications' and 'emergencies associated with the use or ingestion of ... abortion-inducing drug[s]' ... and Arkansas's interest in setting minimal continuity-of-care standards where none previously existed." (Dkt. No. 147, at 5) (citing Ark. Code Ann. § 20-16-1504(d)). In fact, the Court found that "nothing [in Section 1504(d)] requires the contracted physician actually to handle such complications." (Dkt. No. 142, at 72). Further, for the reasons discussed in the preliminary injunction Order and based upon the record evidence, the Court declined to find that that Section 1504(d) set or raised from an existing level a "floor of care" for women seeking medication abortions in Arkansas (*Id.*, at 81-82). As defendants present no new evidence in their latest motion, the Court declines to revise this finding.

Ninth, the Court agreed with the findings of multiple federal courts, based upon overwhelming record evidence, that medication abortions are safe (*Id.*, at 49, 50 n.4). Defendants present no new evidence to the contrary, so the Court declines, at this time, to revisit the safety of medication abortions.

***4** Tenth, defendants incorrectly characterize the holding in *Hellerstedt* as "bless[ing] a working-arrangement provision mirroring Arkansas's contract-physician requirement." (Dkt. No. 147, at 6). The prior Texas law, the one that pre-existed House Bill 2, which was struck down in *Hellerstedt*, required doctors who provided abortions to "have admitting privileges *or* have a working arrangement with a physician who ha[d] admitting privileges at a local hospital in order to ensure the necessary back up for medical complications." *Hellerstedt*, 136 S. Ct. at 1381 (emphasis added). Texas also has a law that prohibits hospitals from discriminating against a physician applying for admitting privileges based on that physician's status as an abortion provider or views as to abortion. *See* Tex. Occ. Code § 103.002(b). Thus, defendants' contention that the Supreme Court blessed an arrangement that "mirrors" Section 1504(d) ignores the fact that Section 1504(d) lacks a "working arrangement" option and that Arkansas lacks an anti-discrimination law. Accordingly, the Court is not convinced that the holding in *Hellerstedt* requires this Court to stay its preliminary injunction Order.

Given that defendants have presented no new testimony or precedents to rebut this Court's prior findings and conclusions, and based upon the reasons discussed above and those reasons set out in this Court's preliminary injunction Order, the Court finds that defendants have not established a likelihood of success on the merits.

B. Irreparable Harm And Public Interest

The Court finds that defendants have not established that: (1) defendants will suffer irreparable harm absent a stay of the preliminary injunction; (2) plaintiffs will not suffer an irreparable harm absent a stay; and (3) the public interest favors a stay. Defendants argue that their inability to enforce Section 1504(d) constitutes an irreparable harm (Dkt. No. 147, at 6). This Court, however, has already found that Section 1504(d), for the reasons discussed in the preliminary injunction Order and based upon the record evidence, is likely facially unconstitutional. The Court declines to find that the State of Arkansas will be irreparably harmed if it cannot enforce a facially unconstitutional statute. Further, defendants argue that plaintiffs and their patients will suffer no irreparable harm, as those women seeking medication abortions in Arkansas will only "have to travel just *once* to [an] abortion facility just 80 miles from the county where Plaintiffs' Fayetteville facility is located." (*Id.* (emphasis in original)). This Court previously found that "[i]t is not a short distance to an alternative provider for most women seeking a medication abortion in Arkansas affected by the challenged regulation, and the availability of abortions at all in states surrounding Arkansas is subject to on-going and changing regulation...." (Dkt. No. 142, at 146). Since defendants have presented no new evidence for this Court's consideration, the Court declines to reconsider its finding that Arkansas women seeking medication abortions face an imminent and irreparable threat of harm if Section 1504(d) is enforced.

Finally, defendants argue that because plaintiffs cannot point "to a *single woman* who was prevented from obtaining an abortion during the brief period where the contract-physician requirement was in effect," the balance of equities favors a stay pending appeal (Dkt. No. 147, at 7 (emphasis in original)). Such a finding is not necessary under the applicable test, nor does the Court determine that such evidence is indicative of where the equities lie in making this determination. As noted in the preliminary injunction Order, there is record evidence before the Court of the impact Section 1504(d) had in the short time it was in effect. Accordingly, for all of these reasons, the Court finds that defendants have failed to establish that either the public interest or the balance of equities favor a stay at this time.

II. Conclusion

As defendants have failed to meet their burden for a stay of the preliminary injunction pending appeal, the Court also finds that defendants have failed to meet their burden for a temporary administrative stay of the preliminary injunction. The Court denies defendants' motion for stay of preliminary injunction pending appeal and to shorten response time (Dkt. No. 146).

***5** So ordered this 20th day of July, 2018.

All Citations

Not Reported in Fed. Supp., 2018 WL 11265675

Footnotes

[1] Scott Cunningham, et al., Working Paper No. 2336: *How Far is Too Far? New Evidence on Abortion Clinic Closures, Access, and Abortions*, NBER Working Paper Series (2017, rev. 2018).

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