UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI

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.

Case No. 3:12-CV-00436-DPJ-FKB

DR. MARY CURRIER, 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 BLUNTSON, in her official capacity as Acting Chief City Prosecutor for the City of Jackson, Mississippi

Defendants.

DEFENDANTS' RESPONSE IN OPPOSITION
TO PLAINTIFFS' SECOND MOTION FOR PRELIMINARY INJUNCTION

COME NOW, Defendant Mary Currier, M.D., 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' Second Motion for a Preliminary Injunction (Docket No. 46), filed herein on November 28, 2012.

Plaintiffs seek preliminary relief against the "Admitting Privileges" provision of HB 1390, charging that the provision has both an unconstitutional "purpose" of banning abortion practice in Mississippi and the inevitable "effect" of doing so, and so cannot pass muster under the United States' Supreme Court "undue burden" test of *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (*See* Motion at 2 – 3, Docket No. 5); and that the Act deprives Plaintiffs of an asserted Due Process right to provide abortion services in the State. Motion at 3.[1] For the reasons set forth below, Plaintiffs' motion fails because they cannot show that the Admitting Privileges Requirement is not a legitimate health and safety regulation or that it was enacted for improper purpose, and any constitutional process that is due them has already been provided through the regulatory process afforded by the Health Department.

STATEMENT OF FACTS

HB 1390 was passed overwhelmingly by the Mississippi House of Representatives (80-37) and the state Senate (45-6), and signed into law by Governor Bryant on April 16, 2012. The Act amends Title 41, Chapter 75 of the Mississippi Code, which regulates all ambulatory surgical facilities, including abortion clinics. The purpose of this title is to

> [P]rotect 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.

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[1] As Plaintiffs do, Defendants incorporate by reference prior briefing and exhibits filed in support and opposition to the Motion, in order to avoid unnecessarily burdening the Court.

MISS. CODE ANN. § 41-75-3.1. *See Pro-Choice Mississippi v. Fordice*, 716 So.2d 645, 661 (Miss. 1998), citing same ("As part of its policing power, the State may set standards to regulate abortion facilities.").

HB1390 revises the definition of "abortion facilities" found at MISS. CODE ANN. § 41-75-1(f). The amendment requires that all physicians associated with these 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." Ex. A to Plaintiffs' Complaint, House Bill No. 1390 at 3 (Docket No. 1, Attach. 1).[2] Plaintiffs' Motion challenges only the "Admitting Privileges Requirement" of HB 1390. The Act was originally scheduled to take effect on July 1, 2012, two-and-a-half months after enactment, *id.*, at 5, but the Court temporarily restrained its operation by Order dated July 1, 2012 (Docket No. 17). Subsequently, the Court allowed all provisions except those relating to criminal and regulatory enforcement to go into effect pursuant to an order granting in part and denying in part preliminary relief issued on July 13, 2012 (Docket No. 27). The Order provided Plaintiffs an additional six months to attempt to procure admitting privileges for their two physicians who lack them, effectively giving Plaintiffs nearly ten months to come into compliance. Plaintiffs now report that despite efforts to do so, they have been unable to obtain privileges at any hospital in the area. Docket No. 47 at 3 – 5.

"Admitting privileges" means the right of a doctor, by virtue of membership on a hospital's medical staff, to admit patients to a particular hospital or medical center for providing specific diagnostic or therapeutic services to such patients in that hospital. Admitting Privileges (Health Care) Law & Legal Definition, USLegal.com, Jul. 7 (2012). "The authority for granting

[2] Although HB 1390 uses the terms "admitting" and "staff" privileges, they are for purposes of discussion in this lawsuit one and the same.

privileges, including special, temporary, or other appointments, is established by the governing body of an institution and should be delineated in the institution and medical staff bylaws. Granting privileges should be based on the individual's training, experience, and demonstrated current competence…. Privileges should be granted only for treating illnesses or performing procedures that can be supported properly by the facilities and the staff." American College of Obstetricians and Gynecologists, GUIDELINES FOR WOMEN'S HEALTH CARE (3rd ed. 2007) ("ACOG GUIDELINES") at 34.

The Admitting Privileges Requirement eliminates a distinction that previously existed between the two types of facilities governed by Title 41, "Abortion Facilities" and "Ambulatory Surgical Facilities."[3] State Health Department regulations require every physician staffing an ambulatory surgical facility to have admitting privileges at local hospitals. *Minimum Standards for Ambulatory Surgical Centers*, MISS. ADMIN. CODE 15-16-1:42.9.7 ("Each member of the medical staff shall have like privileges in at least one local hospital."). However, until HB 1390, abortion facilities were allowed to operate with as few as one such physician on staff. MISS. ADMIN. CODE 15-16-1:42.9.7 (prior version 2011) ("[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 at 18. In the case of Plaintiff Jackson Women's Health Organization ("JWHO"), the regulation is ostensibly met by having a single physician whose participation in the clinic's abortion practice is "extremely limited" serve as the physician with privileges in compliance with the statute, although he is not normally on site. *See* Docket No. 6 at 3. This physician is the only physician of the four who

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[3] Title 41 defines "Ambulatory Surgical Facility" and "Abortion Facility" in similar terms. Both apply to outpatient surgical procedures, and both require physicians to perform those services. *Compare* MISS. CODE ANN. § 41-75-1(a) (definition of "Ambulatory Surgical Facility") with 41-75-1(f) (definition of "Abortion Facility"). "Ambulatory Surgery" and "Abortion" are likewise similarly defined. *Compare* § 41-75-1(e) (definition of "Abortion") with 41-75-1(d) (definition of "Ambulatory Surgery").

participate in the clinic's abortion practice who is not an itinerant surgeon residing in another state. *Id.*

Contrary to Plaintiffs' assertions, termination of pregnancy is not a benign medical procedure. In some cases, serious complications, even life-threatening ones, arise and necessitate optimal and evidence-based treatment. *See* Dec. of John Thorp, Jr., Md. Docket No. 20-1 at 7, ¶ 21.[4] In fact, an abortion provider who is the author of a leading abortion textbook writes, "there are few surgical procedures given so little attention and so underrated in its potential hazard as abortion." W.M. Hern, ABORTION PRACTICE 101 (1990). Serious complications can only be evaluated in full service hospitals and often occur after regular business hours. Given the frequency of short-term complications from abortion (2-10%), follow-up medical care is often needed on an urgent basis to treat infection, bleeding, or organ damage. If recognized and attended to promptly, long-term consequences can be minimized. Often, though, abortion procedures are performed in freestanding clinics during weekday hours and complications are managed in urgent care centers or emergency departments after hours or on weekends. *Id.* at 7-8, ¶ 22. Nationally, 73% of emergency departments report *inadequate* on-call coverage by specialist physicians, including obstetricians/gynecologists who are particularly difficult to secure. *See*: O'Malley, A., Draper, D. & Felland, L. *Hospital Emergency On-Call Coverage: Is There a Doctor in the House?* Issue Brief No. 115 Center for

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[4] Plaintiffs make the remarkable claim, without citing to any authority for the proposition, that the Health Department differentiates between abortion clinics and ambulatory surgical facilities out of "recognition that a requirement for all physicians at an abortion facility is simply not necessary because of the extraordinarily safe nature of abortion care." Memo in Supp. of Motion (Docket No. 6) at 18. To the contrary, Mississippi law recognizes that complications arise from abortion and requires physicians at both abortion facilities and ambulatory surgical facilities to "file a written report with the State Department of Health regarding each patient who comes under the physician's professional care and requires medical treatment or suffers death that the attending physician has a reasonable basis to believe is a primary, secondary, or tertiary result of an induced abortion." MISS. CODE ANN. § 41-41-77(1), (5) (requirement to report); § 41-41-78 (contents of report).

Studying Health System Change 2007 (available: http://www.hschange.com/content/956/956.pdf); Docket 20-1 at 8 – 9, ¶ 24. Thus, it is important that the physician inducing the abortion have admitting and staff privileges at a local hospital to reasonably meet the health care needs of his or her patients. *Id.* at 7 – 8, ¶ 22.

The State's medical experts testified that the Admitting Privileges Requirement is beneficial to protecting the health and safety of women receiving abortions. According to John Thorp, Jr., a physician and professor of obstetrics and gynecology at the University of North Carolina (Chapel Hill) School of Medicine,[5] "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." Thorp Dec. at 8, ¶ 23.

According to Dr. Thorp, although Plaintiff Dr. Parker alleges in his declaration that the Admitting Privileges Requirement of HB 1390 is "burdensome," "[a]ll competent physicians endure the 'burdensome' nature of applying for hospital privileges for the safety and well-being of their patients." Thorp Dec. at 9, ¶ 25. Dr. Thorp concludes that "H.B. 1390 is medically necessary to prevent itinerant surgeons like Dr. Parker from being allowed to abandon his patients if complications arise and emergency follow-up intervention is necessary. Mississippi

[5] Dr. Thorp is an eminent academic in the field of obstetrics-gynecology, as well as a twenty-year practitioner in the field. Board-certified in obstetrics/gynecology and maternal-fetal medicine, Dr. Thorp is a Fellow of the American Gynecological and Obstetrics Society and a member of the American College of Obstetricians and Gynecologists. Thorp Dec. at 2, ¶ 2. He serves as the Hugh McAllister Distinguished Professor of Obstetrics and Gynecology at the University of North Carolina (Chapel Hill) ("UNC") School of Medicine, as well as a Professor in the Department of Maternal and Child Health of the UNC School of Public Health. *Id.*, ¶ 3. He is also (among numerous other positions) the Deputy Director of the Center for Women's Health Research, Cecil G. Sheps Center for Health Services Research at both the UNC School of Medicine and School of Public Health and the Division Director of Women's Primary Healthcare, Program Director of the Women's Reproductive Health Research Scholars Program and Research Core Co-Director of the Women's Reproductive Health Research Scholars Program at UNC. *Id.*, ¶¶ 4 – 5.

women expect and deserve to receive responsible medical services which conform to accepted standards of care in medicine, not substandard care offered by itinerant surgeons who lack both board certification and hospital privileges." *Id.*, ¶ 26.

Likewise, the State's expert Dr. James Anderson, a board-certified emergency medicine physician who serves as clinical professor at the Medical College of Virginia, states that "[r]equiring physicians associated with Mississippi's abortion clinics to have hospital privileges is consistent with the time-honored practice of requiring training and credentialing of physicians who are making decisions and doing procedures that have life-impacting consequences. If a physician cannot obtain privileges for the specific requested procedures at his or her local hospital, then in my expert opinion, the physician is not qualified to do the surgical procedures that have life-changing or life-threatening impact." Docket No. 20-2, Dec. of James Anderson, M.D. at 3, ¶ 7. Recognizing these principles of sound medical practice, similar requirements for continuity of care in abortion practice have been adopted in eleven other states.[6]

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[6] *See* ALA. ADMIN. CODE r. 420-5-1-.03 (2012); ARK. ADMIN. CODE 007.05.2-8 (2012) ("[t]he Abortion Facility shall have written procedures for emergency transfer of a patient to an acute care facility."); FLA. STAT. ANN. § 390.012 (West 2008) (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); 902 KY. ADMIN. REGS. 20:106 (2012), 902 KY. ADMIN. REGS. 20:360 (2012) (non-ambulatory surgical centers providing abortions must have the ability to transfer patients); LA. ADMIN. CODE tit. 48, pt. I, § 4407 (2012); 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; former version upheld by *Women's Health Center of West County, Inc. v. Webster*, 871 F.2d 1377 (8th Cir. 1989); OHIO ADMIN. CODE 3701-83-19 (2012) (upheld in *Women's Medical Professional Corp. v. Baird*, 438 F.3d 595 (6th Cir. 2006) (holding transfer agreements were not an undue burden on the right to an abortion)); 28 PA. CODE § 29.33 (2012); (transfer agreement requirement); S.C. CODE ANN. REGS. 61-12.205 (2012), S.C. CODE ANN. REGS. 61-12.305 (2012) (upheld in *Greenville Women's Clinic v. Comm'r, South Carolina Dept. of Health and Env't Control*, 317 F.3d 357 (4th Cir. 2002) (upholding, *inter alia*, abortion clinic licensure requirements that the clinic have a physician on staff who has hospital admitting privileges or a contract with one who does); 25 TEX. ADMIN. CODE § 139.56 (2012) (upheld in *Women's Medical Center of N.W. Houston v. Archer*, 159 F.Supp.2d 414 (S.D. Tex. 1999) (upholding requirement that physicians at abortion clinic have a working arrangement with a physician with admitting privileges); UTAH ADMIN. CODE r. 432-600-12 (2011).

In spite of Plaintiffs' representations that "[JWHO] has been providing safe, high-quality abortion care… to women in Mississippi for almost twenty years" (Docket No. 6 at 2) and that "[t]he Clinic's safety record has been impeccable," (*Id.* at 4), the State had substantial reason for concern regarding the health and safety record of abortionists in Mississippi generally and JWHO specifically. Plaintiff Dr. Willie Parker is an itinerant physician[7] who flies in intermittently from Washington, DC to perform 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, 2012). John Doe, M.D., another itinerant physician, is "the only physician providing abortion to women at the Clinic on a regular basis." Dr. Doe lacks such privileges and has allegedly been trying unsuccessfully to obtain them from area hospitals since April.

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." *See* Docket No. 24-3, News Release from Alabama Department of Public Health dated April 30, 2012. Inspection reports compiled by Alabama authorities contain evidence that clinic staff failed to respond to complaints of post-surgical complications – *the very safety concern that animated the*

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[7] "Surgeons who occasionally commute as needed to perform surgery (eg, to rural areas) often are referred to as *itinerant surgeons*…. If the services of itinerant surgeons are used, the hospital should follow its own policy to verify the physicians' credentials. In addition, when itinerant surgery is an appropriate option for the community and the patient, the physician should provide the following:

- A written and complete preoperative workup
- A written plan for postoperative care

ACOG GUIDELINES at 36 – 37.

Admitting Privileges Requirement of HB 1390. Docket No. 20-4, Alabama Department of Public Health Inspection Reports at 50-52, 55, 59-60, 70-73.[8]

Further, Joseph Booker, a doctor who performed abortions at JWHO until July 2010, filed suit against JWHO alleging that Derzis had instituted numerous practices that jeopardized the health and safety of patients. *See generally* Docket No. 20-6, Complaint in *Booker v. Jackson Women's Health Organization, Inc.*, Cause No. 251-10-973-CIV, Cir. Ct. of Hinds Cty. (1st Jud. Dist.), filed April 1, 2012. Among the unsafe practices noted by Dr. Booker 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 the chemical abortion drug RU-486 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.[9] Dr. Booker's lawsuit also alleges that JWHO is jeopardizing patient safety by not using a "local doctor who has hospital admitting privileges" (again, *the very concern behind HB 1390*) when administering RU486 because of the "real risk of severe hemorrhage" and "the risk of ectopic pregnancy" associated with the drug. *Id.* at ¶ 38.

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[8] 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. Docket No. 20-5, Consent Order and Agreement dated April 2, 2012. In April 2012, however, the state Department of Public Health denied an application to open under new ownership. The new operator proposed to lease the facility from Derzis, paying clinic profits as "rent." Docket No. 20-3. The Department found that the deal would "allow [Derzis] 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." *Id.*

[9] If this allegation is accurate, it may be a reason why one or more hospitals of which Plaintiffs inquired for staff privileges declined the application. *See* ACOG GUIDELINES at 32 (listing "professional liability experience" as one of the components of documentation a hospital should obtain from an applicant for privileges and noting "Information should be obtained directly from the practitioner's liability insurance company.").

The historical context of the provision of abortion in Mississippi also presents a checkered past of unsafe practices and unscrupulous providers. Dr. Malachy DeHenre provided abortion services at New Woman Medical Center in Jackson, MS.[10] New Woman Medical Center was held liable for an abortion performed on Latosha Travis by Dr. DeHenre which allegedly resulted in severe hemorrhaging requiring a hysterectomy.[11] Mississippi reportedly suspended Dr. DeHenre's license in response to Ms. Travis's claim, the death of a woman in Alabama, and other claims of malpractice against Dr. DeHenre.[12] Alabama and New York quickly followed suit in suspending Dr. DeHenre's license.[13]

Dr. Milan Chepko also provided abortions at New Woman Medical Center and was sued for alleged negligence, along with Dr. Larry Lipscomb, for his part in a failed abortion.[14] Mississippi revoked Dr. Chepko's license in 1991 due to conviction of “a felony or misdemeanor involving moral turpitude."[15] North Carolina revoked Dr. Chepko's license in 1991.[16] Dr.

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[10] The Associated Press, *Murder, rape trial date in works for physician*, Laurel Leader-Call, Jan. 11, 2007, http://www.zoominfo.com/CachedPage/?archive_id=0&page_id=1841933003&page_url=//www.clarionledger.com/apps/pbcs.dll/article?AID=/20070111/NEWS/701110381/1001/NEWS&page_last_updated=2007-01-11T16:31:01&firstName=Malachy&lastName=DeHenre.

[11] Daniel Hawn, *Woman Injured After Abortion Awarded $500,000*, LAWYERSHOP.COM, Dec. 28, 2005, http://www.lawyershop.com/2005/12/28/woman-injured-after-abortion-awarded-500000.

[12] *Id.*

[13] *See* Order, Alabama State Board of Medical Examiners v. DeHenre, 6, Dec. 15, 2004; Comm'r's Summary Order, In the Matter of Malachy DeHenre, M.D., 1-2, Sept. 3, 2004.

[14] *See, Kiddy v. Lipscomb*, 628 So.2d 1355, 1356-57 (Miss. 1993).

[15] Actions by the Board - January 1, 1991 through August 31, 1991, Newsletter (Mississippi State Board of Medical Licensure), Fall 1991.

[16] Licensee Information: Milan Daniel Chepko - MD, North Carolina Medical Board, http://wwwapps.ncmedboard.org/Clients/NCBOM/Public/LicenseeInformationDetails.aspx?&EntityID=51034&PublicFile=1.

Chepko surrendered his license in New Jersey in 1992[17] and his license in Georgia lapsed in 1989.[18]

Dr. Thomas Tvedten worked as an abortionist at New Woman Medical Center, though he had not completed an approved residency in obstetrics and gynecology.[19] Dr. Tvedten was sued for alleged malpractice due to a purpoted incomplete abortion and injuries suffered during the abortion.[20]

Dr. Thomas W. Tucker was registered as the officer of Tucker Women's Clinic (Jackson), P.C., an Alabama based business registered as a foreign business in Mississippi.[21] Dr. Tucker surrendered his clinic license and closed Tri-State Women's Medical Center in Southaven, MS, four days after Mississippi suspended his medical license.[22]

Finally, although Plaintiffs repeatedly assert that JWHO is "the sole provider of abortion services in the State of Mississippi" (Motion at 2) and that HB 1390 "will make abortion unavailable in Mississippi" (*Id.*), that is simply not so. JWHO may be the only Level 1 "Abortion Clinic" licensed under Title 41 in Mississippi, but the State does not apply its regulations to facilities providing less than ten abortions a month. MISS. CODE ANN. § 41-75-1(f)

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17 Search for a Person License, The State of New Jersey Dept. of Law& Public Safety Div. of Consumer Affairs, https://newjersey.mylicense.com/verification/Search.aspx?facility=N (select "Medical Doctor" as the License Type; enter "Chepko" in the Last Name field; click "Search"; then follow "Milan D Chepko" hyperlink)

18 Look Up a Licensed Provider, Georgia Composite Medical Board, https://services.georgia.gov/dch/mebs/startSearch.do (enter "Chepko" in "Last Name" field; then follow "Search" hyperlink).

19 *Pro-Choice Mississippi v. Fordice*, 716 So.2d 645, 649 (Miss. 1998).

20 *Abortion Physician Named In Jackson Woman's Suit*, Sun Herald, June 22, 1995, at C2.

21 Mississippi Secretary of State Business Services, https://business.sos.state.ms.us/corp/soskb/Corp.asp?181085.

22 The Associated Press, *Tucker surrenders clinic license in Mississippi*, The Tuscaloosa News, Apr. 27, 1994, at 3B.

(definition of "abortion facility"). Thus, abortion remains available in private physicians' offices and at hospitals that offer the procedure.[23]

ARGUMENT

To obtain preliminary relief, 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 is in the public interest. *Women's Med. Ctr. of Nw. Houston v. Bell*, 248 F.3d 411, 419 (5th Cir. 2001). "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)). Plaintiffs have failed to satisfy any of the test's four prongs, and their motion for a preliminary injunction should accordingly be denied.

I. PLAINTIFFS CANNOT DEMONSTRATE A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS.

A. The Admitting Privileges Requirement is a Legitimate Health and Safety Requirement and the "Undue Burden" Analysis is Inapplicable.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, *supra*, the Supreme Court rejected *Roe v. Wade*'s rigid trimester framework in favor of the "undue burden" standard. 505

[23] Abortion procedures performed in a physician's office are "Level II" or "Level III" "Office Surgery." Physicians performing such procedures are required to have admitting privileges or a transfer agreement with with a licensed hospital within reasonable proximity of the office. MISS. ADMIN. CODE § 30-17-1:15.501, 601. Apparently, JWHO could not even comply with this basic requirement, since only the Clinic purportedly has a transfer agreement. Docket No. 6 at 4.

U.S. at 875-76. The trimester framework prohibited states from placing any limitations on a woman's right to abortion prior to fetal viability, but the undue burden standard allowed states to regulate abortion prior to viability. *Id.* at 877. The Court further clarified in *Gonzales v. Carhart*, 550 U.S. 124 (2007), that a mere rational basis review pertains when a court considers a legitimate health and safety regulation of abortion. "Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends." 550 U.S. at 166. "'[W]hen the government requires... the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth,' and other information broadly relevant to the decision to have an abortion, it does not impose an undue burden on abortion rights, even if the disclosure 'might cause the woman to choose childbirth over abortion.'" *Planned Parenthood Minnesota v. Rounds*, 686 F.3d 889, 893 (8th Cir. 2012) (*en banc*), quoting *Casey*, 505 U.S. at 882–83. Even where the medical science relating to the beneficial value of an abortion regulation is equivocal, the court must defer to the state legislature's judgment, for "The Court has given state and federal legislatures wide discretion in areas where there is medical and scientific uncertainty." *Id.* at 163; *Rounds*, 686 F.3d at 899-900. Because, there was more than ample evidence available of the need for admitting privileges on the part of abortion providers in Mississippi, as the context of HB 1390 set forth above and the argument below demonstrate, the Court should apply a mere rational basis analysis to the Admitting Privileges Requirement, a standard the provision undoubtedly meets.

B. Plaintiffs Cannot Demonstrate that the Purpose of the Admitting Privileges Requirement Is to Impose an Undue Burden on Access to Abortion.

Plaintiffs claim that the purpose of HB 1390 is to impose a "de facto ban" on abortion in Mississippi and prevent women from obtaining pre-viability abortions. Docket No. 6 at 15. Plaintiffs, however, can cite no circuit precedent for the proposition that a statute that presents only a proper purpose on its face may be held unconstitutional based on the motivations that a handful of legislative proponents may have harbored, nor is there such authority. The so-called "purpose" prong of *Casey* has been sparingly applied by courts due to its failure to explain how to discern legislative "purpose" or to delineate the quantum of illegitimate motive necessary to render a statute unconstitutional on this basis. The chief source of confusion, according to courts and scholars, is the *Casey* plurality's intimation that the "purpose" analysis should delve into discerning legislative intent. *See, e.g., A Woman's Choice – E. Side Women's Clinic v. Newman*, 904 F. Supp. 1434, 1463 – 64 (S.D. Ind. 1995) ("*Casey* does not explain how lower courts should go about determining the purpose of a challenged statute regulating abortions, and there are few areas of constitutional law as troublesome as determining the 'purpose' of a statute…. [T]he Supreme Court generally avoids inquiries into subjective legislative motives and focuses the analysis of legislation on its actual or likely effects and other objective evidence."); *Karlin v. Foust*, 975 F. Supp. 1177, 1208 (W.D. Wisc. 1997), aff'd in part, rev'd in part, 188 F.3d 446 (7th Cir. 1999) ("The absence of any detailed discussion of the purpose prong of the undue burden test in *Casey* signals the considerable difficulty of mounting a credible challenge to an abortion law on the premise that the law harbors an impermissible purpose, even if the law's provisions are medically unnecessary.").[24]

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[24] Constitutional scholars have also been critical of the "purpose" language. See Gillian E. Metzger, *Unburdening the Undue Burden Standard: Orienting Casey in Constititional Jurisprudence*, 94 COLUM. L. REV. 2025, 2035 (1994) ("[*Casey*] failed to indicate how regulations 'calculated to inform the woman's free choice' will be differentiated from those calculated to 'hinder it.'... In short, *Casey* provided no methodology for identifying a purpose to create an undue burden or for determining when a regulation creates an undue burden through its effects."); and Alan Brownstein, *How Rights Are Infringed: The Role*

While an inquiry into legislative "purpose" may require some resort to official "legislative history," Plaintiffs cite no authority for the proposition that statements made outside the context of legislative deliberations are even probative, let alone a proper component of "legislative history." 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 improper because a decision vacated by an *en banc* court has no precedential effect. *See Beiser v. Weyler*, 284 F.3d 665, 668 (5th Cir. 2002); *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."); *Fox v. Reed*, 2000 WL 288379, *3 (E.D. La. 2000). ("[*Okpalobi*] was recently vacated pending rehearing *en banc and therefore lacks precedential value*.") (Emphasis supplied.).

Moreover, even the reasoning of the since-vacated opinion in *Okpalobi* and similar decisions such as *Hodes & Nauser, MDs, P.A. v. Moser*, 2011 WL 4553061 (D. Kan. 2011), cannot carry the day for Plaintiffs. The *Okpalobi* panel observed that "a government's articulation of legislative purpose" is due "significant deference." 190 F.3d at 354. 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.* Here, it is clear from the language of HB 1390 and the context for its consideration that the legislature had in view the proper purpose of ensuring the health and safety of Mississippi citizens.

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of Undue Burden Analysis in Constitutional Doctrine, 45 HASTINGS L.J. 867, 884 – 85 (1994) ("…. in theory, even a law imposing a minor burden on the ability of a woman to have an abortion may be struck down if it can be shown that its purpose is to hinder the exercise of this fundamental right…. In practice, however, it may be difficult to establish that a regulation that does not create a substantial obstacle to obtaining an abortion was adopted for the purpose of interfering with the exercise of this fundamental right.").

The first of those factors - "the language of the challenged act" - is often dispositive, according to analogous authority. "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").

The legislation in this case simply updates MISS. CODE ANN. § 41-75-1 with two sentences. *See* House Bill 1390. Aside from the bill's title and a brief provision setting its effective date, the measure includes no other original language. *Id.* 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." 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), cert. denied, 531 U.S. 1191 (2001) ("*Greenville I*") (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 Supreme Court, states have "considerable discretion" to formulate licensing requirements to protect the health of women seeking abortions and safeguard the integrity of the medical profession. *Simopoulos*, 462 U.S. at 516 ("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"); *Gonzales, supra*, 550 U.S. at 163 ("The Court has given state and federal legislatures wide discretion in areas where there is medical and scientific uncertainty."); *id.*, at 157 ("[t]here can be no doubt that the government 'has an interest in protecting the integrity and ethics of the medical profession'"), quoting *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997). Such regulations are not even required to bear a relationship to any obvious public health problem, (although, in view of the history of abortion in Mississippi detailed above, HB 1390 obviously does). 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* 317 F.3d 357, 363 (4th Cir. 2002) ("*Greenville II*); *Women's Health Ctr. of West County, Inc. v. Webster*, 871 F.2d 1377, 1382 (8th Cir. 1989). *Accord Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 547 (9th Cir. 2004) (holding that Arizona statute requiring only abortionists who performed a certain number of abortions per month to obtain admitting privileges did not violate equal protection because it was rationally related to achieving a legitimate end). Indeed, Plaintiffs cite no published authority striking down an admitting privileges requirement as

violative of the "undue burden" test. The State's experts opine that maintaining admitting privileges is a routine and ordinary part of patient care. *See* Anderson Dec., Docket No. 20-2 at 10 – 11, ¶ 17. "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;" Thorp Dec., Docket 20-1 at 8, ¶ 23. Because these rules "appear to be generally compatible with accepted medical standards governing ... abortions," *Simopoulos*, 462 U.S. at 517, 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. 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 making uniform the requirements the State imposes upon abortion clinics and other ambulatory surgical facilities. "The law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the community." *Gonzales*, 550 U.S. at 163. The manifest constitutional legislative purposes of increasing protections for health and safety of Mississippi's citizens and making uniform the standards governing same-day surgical clinics such as ambulatory surgical facilities and abortion facilities refute Plaintiffs' challenge to HB 1390's Admitting Privileges

Requirement. *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.

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 took steps 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* Docket No. 20-3, 20-4. Derzis resolved that matter through a consent order which bars her from operating the clinic. Docket No. 20-5. Moreover, the allegations contained in a lawsuit filed by a former JWHO abortion doctor raise concerns about unsafe practices and the danger to patients posed by physicians without admitting privileges. *See* Docket No. 20-6 at ¶38 (alleging that JWHO jeopardized patient safety by not utilizing a "local doctor who has hospital admitting privileges" when administering RU-486). 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 II,* 317 F.3d at 363; *Women's Health Ctr. Of West Co., Inc.*, 871 F.2d at 1382.

Plaintiffs argue that this purpose is pretextual, pointing to a handful of extra-legislative public statements of individual lawmakers that produced H.B. 1390. But federal courts have found that even *legislative* statements made by one or a handful of legislators – even legislative statements by the bill's sponsor - are 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) ("[A]n 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."); *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979) (statements by bill's sponsor are not controlling in assessing legislative history); *Mims v. Arrow Fin. Services, LLC*, 132 S. Ct. 740, 752, (2012) (same).[25] "Even if" some legislators were motivated to vote for a bill by unconstitutional purposes, the Supreme Court has 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). In the abortion context, the Court has succinctly pronounced 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).

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[25] Mississippi state law does not permit testimony by legislators as to motive or intent of their respective legislative bodies. *Mississippi Gaming Comm'n v. Imperial Palace of Mississippi, Inc.*, 751 So.2d 1025, 1028 (Sup.Ct. 2000) (rejecting testimony by one state senator and one state representative). *Accord Pagand v. State*, 13 Miss. (15 S. & M.) 491, 497, 1845 WL 2031 (1845) ("The legislative intent can be deduced from the legislative acts alone… Testimony to explain the motives which operated upon the lawmakers, or to point out the objects they had in view, is wholly inadmissible.").

Accordingly, while the words of Representative Carpenter and Senator Flowers might reflect their own motives, those lawmakers do not 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. Moreover, the Governor explained the context of this hand-picked and edited remark to the Court, Amicus Brief of Governor Bryant, Docket No. 24, and that he also expressed his firm resolve to strengthen protections for the health and safety of women in Mississippi by signing HB 1390. *Id.* at 2-3. Lieutenant Governor Reeves did not even vote on the bill, and nothing suggests that his understanding of the measure was shared by or motivated every member of the state Senate majority that ensured its passage. 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 his website. None of the statements is part of "legislative history," which is defined as "[t]he background and events leading to the enactment of a statute, including *hearings, committee reports, and floor debates*." BLACK'S LAW DICTIONARY (9th ed. 2009) at 983; *See also Stormans v. Selecky*, 586 F.3d 1109, 1133 (9th Cir. 2009) ("[t]he collective will of the [State Board of Pharmacy] cannot be known, except as it is expressed in the text and associated notes and comments of the final rules.").[26] *Accord Garcia v. United States*, 469 U.S. 70, 76 (1984), quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969) ("In surveying legislative history we have

[26] Unsurprisingly, no case cited by Plaintiffs, nor any cases of which Defendants' counsel is aware, sanctions the use of personal comments outside of the context of legislative deliberation as "legislative history." Under Plaintiffs' theory, clearly constitutional regulations on abortion could be struck down because of Facebook messages posted by a handful of lawmakers who voted for them. Moreover, a statute could be struck down despite its patent constitutionality and relation to public safety (e.g., a requirement that surgical abortions be performed by licensed physicians) based on the expressed antiabortion fervor of members of the legislature.

repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.' We have eschewed reliance on the passing comments of one Member….").

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. And while Plaintiffs complain that "anti-abortion state officials have made repeated and consistent efforts to restrict abortion care in Mississippi to the maximum extent possible," citing several decisions against the State in litigation over abortion regulations, Docket No. 6 at 12-13, they conveniently omit the fact that the State's actions in enacting various health and safety measures for abortion procedures have been upheld numerous times by federal and State courts. *See, e.g., Barnes v. Moore*, 970 F.2d 12 (5th Cir. 1992) ("*Barnes I*"); *Barnes v. Mississippi*, 992 F.2d 1335 (5th Cir. 1993) ("*Barnes II*") ("this Court has once before encountered these plaintiffs complaining of intolerable conditions for the exercise of abortion rights in Mississippi. In [*Barnes I*], this Court turned away their facial challenge to a 24-hour waiting period."); *Pro-Choice Mississippi v. Fordice*, 716 So.2d 645 (Miss. 1998). And while, as the Fifth Circuit noted in *Barnes*, abortion providers are wont to complain of the State's supposed anti-abortion atmosphere, the State Supreme Court held in *Fordice* that a right to

abortion pertains under the State Constitution as a component of the right to privacy. 716 So.2d at 653.

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 has the valid purpose of protecting the health and safety of women seeking 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." *ACLU v. Praeger*, 815 F.Supp.2d 1204, 1215 (D. Kan. 2011). 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*, 520 U.S. at 972.

C. Plaintiffs Have Not Demonstrated that HB 1390 Has an Unconstitutional Effect.

Plaintiffs raise two issues regarding the Act's impact. First, they claim that "immediate enforcement" of the act's Admitting Privileges Requirement would "effectively and unconstitutionally ban abortion in Mississippi." Docket No. 6 at 10. As shown above, this argument is factually baseless, because a number of abortions would remain unregulated by Title 41. Further, even if that were true, the availability of abortions within a state is not a constitutional shibboleth. To the contrary, *Casey* made clear that "The fact that a law which serves a valid purpose… has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." 505 U.S. at 874. Many factors, including economics, demographics, geography, and social views about abortion influence whether a state has numerous abortion clinics (e.g., California and New York, which have dozens) or few (e.g., South Dakota, North Dakota and Missouri, which have one or two). Neither cost nor relative distance creates an unconstitutional burden on abortion; what matters is

reasonable access, and access to abortion can be had from anywhere in Mississippi within a short time.[27] If Plaintiffs' theory were correct, a generally applicable law increasing property tax rates would become unconstitutional if JWHO could not afford to pay its assessments.

In *Greenville I*, the plaintiffs argued that the disputed statute, including an admitting privileges requirement, was an undue burden because it increased the cost of abortions anywhere from $23 to $75 depending upon the clinic. 222 F.3d at 170. In responding to this claim, the court observed that regulations making abortion more expensive do not always place an undue burden on the ability to have an abortion and noted that "the Supreme Court has repeatedly emphasized that the focus must be aimed more directly at the ability to make a decision to have an abortion as distinct from the financial cost of procuring an abortion." *Id.* The court concluded that any "arbitrary cost threshold" "would irrationally hamstring the State's effort to raise the standard of care in certain abortion clinics, the procedures and facilities of which do not adequately safeguard the health of their patients, simply because the clinic's performance falls so far below appropriate norms that the expense of upgrading their practices and equipment exceeds the arbitrary defined amount." *Id.* at 171.

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[27] Numerous abortion facilities are located in proximity to Mississippi, including centers in W. Monroe, Louisiana (121 miles from Jackson); Tuscaloosa, Alabama (185 miles from Jackson), Baton Rouge, Louisiana (174 miles from Jackson), and Memphis, Tennessee (209 miles from Jackson). In fact, currently far more Mississippi women travel out of state to get an abortion than have them in-state, according to vital statistics reported by the State Department of Health. In 2011, 2,224 in-State abortions were reported, compared to 3,188 out-of-state abortions (1,239 in Alabama, 1 in NM, and 1,948 in Tennessee). *Compare* http://msdh.ms.gov/phs/2011/Bulletin/vr2011.pdf at 177; with http://mstahrs.msdh.ms.gov/ forms/pregtable.html. This is likely because women in Southwestern, Southern and Southeastern Mississippi are closer to abortion facilities in Baton Rouge, New Orleans and Mobile than to Jackson. Women in Northern Mississippi (e.g., Oxford, Tupelo and Grenada) are nearer to Memphis than Jackson and hence more likely to travel there for an abortion. Thus, the impact, if any, of not being able to access abortion in Jackson would fall largely on women in the central part of the State. As to them, the net impact would be to require an additional two to three hours of travel. Therefore, the real effect of HB 1390 is no to prohibit anyone from obtaining an abortion; even if JWHO cannot comply, the only practical effect is that some women in Central Mississippi will have to travel somewhat further to obtain an abortion. Minimal additional travel is a minor inconvenience, not an unconstitutional "undue burden."

Plaintiffs also argue, as the plaintiffs did in *Greenville I*, that the regulations would force one of their clinics to close and women would be unduly burdened, since they would have to travel farther to obtain an abortion. The court of appeals dismissed this claim, noting that "no evidence suggests that women in Beaufort [i.e., the location of the closing clinic] could not go to the clinic in Charleston, some 70 miles away." *Id.* at 170. The court concluded that "in the absence of any evidence in the record about how the cost would affect women's ability to make a decision… the clinics have failed to demonstrate that the Regulation places any serious burden on a woman's ability to make an abortion decision." *Id.*

Women's Medical Professional Corp. v. Baird involved a Dayton, Ohio abortion clinic's challenge to the constitutionality of a regulation that required abortion providers to obtain written transfer agreements with local hospitals. 438 F.3d 595, 598 (6th Cir. 2006). The plaintiff alleged that the regulation would cause it to close, thereby imposing an undue burden on its future patients to travel long distances for alternative abortion services. *Id.* at 604. The court ruled that "while closing the Dayton clinic may be burdensome for some of its potential patients, the fact that these women may have to travel farther to obtain an abortion does not constitute a substantial obstacle." *Id.* at 605. Similarly, the Eighth Circuit has suggested that long distances did not constitute an undue burden in evaluating the constitutionality of requiring abortion providers to give certain information to patients twenty-four hours before obtaining an abortion. *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 533 (8th Cir.1994) ("Although the distance a woman must travel to obtain an abortion may be a factor in obtaining an abortion, it is not a result of the state regulation. We do not believe a telephone call and a single trip, *whatever the distance to the medical facility*, create an undue burden." (Emphasis supplied.)

Plaintiffs rely on an unpublished decision of the Southern District of Mississippi which barred the State from implementing a regulation that would have required abortion providers to obtain written transfer agreements from local hospitals. Docket No 6 at 13, citing *Pro-Choice Mississippi v. Thompson*, CV No. 3:96CV596BN (Sep. 28, 1996). 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." *Id*. at 21. The law, however, has changed significantly in the years since that opinion was issued. The Fourth Circuit's decision in *Greenville II* in 2002, for example, rejected a contention that an admitting privileges policy made licensing the clinics "contingent upon the cooperation of hospitals, clergy and other third parties." 317 F.3d at 361. The court 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. Mississippi law provides that admitting privileges at public hospitals may not be denied arbitrarily. MISS. CODE ANN. § 73-25-93 (mandating that "the procedures for such actions [suspending, denying or revoking privileges] shall comply with the hospital and/or medical staff bylaw requirements for due process"); *Warnick v. Natchez Comm. Hosp*., 904 So.2d 1019, 1022 (Sup.Ct. 2004) (noting State courts' role in ensuring hospital complied with the procedural due process requirements of its own bylaws); *Caine v. Hardy*, 943 F.2d 1406 (5th Cir. 1991) (reviewing suspension of physician's staff privileges and affirming due process was afforded). There is no evidence in the record in this case of "local pressure" (*Pro-Choice Mississippi* at 18) being brought on the hospitals who have declined to provide privileges to

Plaintiffs, which have merely cited "administrative reasons." Moreover, the medical staff of JWHO even now includes a doctor with admitting privileges at a local hospital. Plaintiffs do not explain why, if inordinate public pressure is brought to bear on abortionists to deny privileges, the Clinic actually has a staff physician who has them. Plaintiffs also do not offer any reason why this physician could not be persuaded by financial means or otherwise to take on the abortion practice, except (apparently) that he has a busy family practice he prefers not to give up. As in *Greenville II*, there is scant proof that the "effect" of H.B. 1390 would substantially impede women from accessing abortion services in Mississippi. Plaintiffs' Motion should accordingly be denied.

D. Plaintiffs Have Not Been Denied Due Process.

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. "No authority exists to support a conclusion that abortion clinics or abortion providers have a fundamental liberty interest in performing abortions free from governmental regulation." *Greenville I*, 222 F.3d at 173; *Washington v. Jackson State University*, 2008 WL 2779297, at *9 (S.D. Miss. 2008) (Plaintiffs did not cite "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). "[T]here is no right to practice medicine which is not subordinate to the police power of the states," *Lambert v. Yellowley*, 272 U.S. 581, 596 (1926), and any right that a physician may have to perform abortions is entirely derivative of, and no broader than, the rights of the pregnant woman. *See Casey*, 505 U.S. at 884 ("Whatever constitutional status the doctor-patient relation may have as a general matter, in the present context it is derivative of the woman's

position."); *Harris v. McRae*, 448 U.S. 297, 318 n.21 (1980) ("[T]he constitutional entitlement of a physician who administers medical care to an indigent woman is no broader than that of his patient . . . .")

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 protected 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." *Jackson State University*, 2008 WL 2779297, at *9 (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)). 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 - 52 (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*, 871 F.2d at 1382, quoting *Connecticut v. Menillo*, 423 U.S. 9, 11 (1975). Thus, Plaintiffs' due process claim fails at the outset.

Moreover, any procedural due process rights Plaintiffs possess are more than adequately protected by the time-to-cure and pre-revocation hearing safeguards provided under state law. *Cf.*

Baird, 438 F.3d at 613 (finding a due process violation when state law did not provide for time to cure or pre-revocation hearing for abortion facility). *See* argument in Section II, *infra*.

Plaintiffs nonetheless object that the Admitting Privileges Requriement deprives them of due process by making abortion licensing contingent on the cooperation of hospitals and other third parties. Conditioning the grant of a permit to perform abortions solely on third party hospitals' approval of admitting privileges may violate due process only if those hospitals are "free to withhold consent for selfish reasons or arbitrarily." *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 117-18 (1928). That is not the case here, where the state maintains authority over a hospital's decision process. *Eden*, 379 F.3d at 555-56; *Baird*, 438 F.3d at 609-11.

In *Eden*, the Ninth Circuit held that an admitting privileges statute comported to due process, even though it did not contain a waiver clause. 379 F.3d at 556. The court noted that Arizona law (like Mississippi's) required hospitals "to refrain from arbitrary provisions of admitting privileges and required them to exercise their discretion based on reasons related to the hospital's interests" and also required hospital procedures to "comport with due process." *Id.* at 555. As here, the plaintiffs argued that these regulations were superficial and not convincing or binding in light of Arizona's strong anti-abortion stance. *Id.* at 556. However, the court held that Arizona could not and had not delegated to hospitals the power to place obstacles in the path of a woman seeking an abortion. *Id.* Even if hospitals had the ability to arbitrarily deny admitting privileges (which was not the case), the court noted that "Because this is a facial constitutional challenge, plaintiffs must show that there are no circumstances under which the delegation could be applied constitutionally." *Id.* The plaintiffs were unable to produce any evidence demonstrating that hospitals in Arizona were arbitrarily denying admitting privileges

and thus, the regulation found that the law did not violate due process. Similarly, here, all the record reflects is that Plaintiffs' applications have not been approved for "administrative" reasons, not that animus against abortion motivated the decisions. Particularly in view of the fact that JWHO has been able to maintain at least one physician on staff who has privileges, ample other plausible explanations for Plaintiffs' inability to obtain privileges, such as the prior regulatory history of the Clinic's owner and the possibility that the Clinic lacks insurance.

II. The Plaintiffs Face No Substantial Threat of Irreparable Harm.

To obtain preliminary injunctive relief, the Plaintiffs must show that they will suffer "irreparable harm" if the Court does not immediately intervene to prevent HB 1390 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).

Mississippi provides significant notice, hearings, and appeals before a facility's license can be revoked. Specifically, after the State discovers a "substantial failure to comply with the requirements" that govern a clinic, the clinic is entitled to notice of the deficiency and "a prompt and fair hearing" at least 30 days from the notice date to determine whether its license should be revoked or suspended. 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 will have 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.*

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). *Deerfield Beach* suffers from an even more fundamental flaw, however: its holding that the denial of a permit would place a significant burden on access to abortion in Deerfield Beach, 661 F.2d at

336, cannot survive subsequent Supreme Court and Circuit case law, discussed above, holding that an unconstitutional burden is not imposed by a legitimate health and safety regulation even if it results in the closure of a facility and a resulting increase in time or expense to travel to another.

Plaintiffs have failed to establish irreparable injury. Under Supreme Court precedent, an individual has a qualified right to obtain an abortion from a competent physician; 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 provides several levels of procedural due process protections and lengthy periods in which the Plaintiffs could come into compliance with the new law. *Cf. Baird*, 438 F.3d at 613 (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). Any actual constitutional rights at issue - as opposed to mere inconvenience to the plaintiffs – are not immediately threatened.

The Plaintiffs' speculation that "irreparable harm" is imminent is further undermined by their own Complaint, which admits 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.

III. Preliminary Relief Against a Legitimate Health and Safety Law 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." *Simopoulos*, 462 U.S. at 516. The Supreme Court has upheld regulations that merely "may be helpful" and "can be useful." *Danforth*, 428 U.S. at 80, 81 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 have continued to have access to abortion at Jackson Women's Health Organization for more than 60 days following the law's effective date, and will likely for much longer, subject to final review by the Supreme Court of Mississippi – which has held that the State Constitution affords a fundamental right to abortion. *Pro-Choice Mississippi v. Fordice*, 716 So.2d 645 (Sup.Ct. 1998). 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.*, 478 Fed.Appx. 183, 186 (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. And Plaintiffs cannot be heard to complain of "irreparable" harm when it is within their power to avoid it. *See Blue Bell Creameries, LLP v. Denali Co., LLC*, 2008 WL 2965655, *7 (S.D. Tex. 2008) (unpublished) (denying preliminary injunction where harm to movant was at least in part of its own making), citing *Haas Outdoors, Inc. v. Oak Country Camo., Inc*., 957 F.Supp. 835, 839 (N.D.Miss. 1997) (balance of hardships favored movant because harm to defending was "a creation of its own doing").

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

RESPECTFULLY SUBMITTED this, the 11th day of January, 2013.

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, Roger Googe Special Assistant Attorney General for the State of Mississippi, do hereby certify that on this date I caused to be 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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