

**THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION**

LITTLE ROCK FAMILY PLANNING SERVICES, *et al.*

PLAINTIFFS

v.

Case No. 4:19-cv-00449-KGB

**LESLIE RUTLEDGE, in her official capacity as Attorney
General of the State of Arkansas, *et al.***

DEFENDANTS

TEMPORARY RESTRAINING ORDER

Plaintiffs commenced this action on June 26, 2019. Along with the complaint for injunctive and declaratory relief, a motion for a temporary restraining order and/or preliminary injunction was filed by separate plaintiffs LRFP and Dr. Tvedten (Dkt. Nos. 1, 2).¹ Plaintiffs filed this action seeking declaratory and injunctive relief on behalf of themselves and their patients under the United States Constitution and 42 U.S.C. § 1983 to challenge three acts passed by the Arkansas General Assembly: (1) Arkansas Act 493 of 2019, which bans abortion “where the pregnancy is determined to be greater than 18 weeks,” as measured from the first day of a woman’s last menstrual period (“LMP”) in nearly all cases; (2) Arkansas Act 619 of 2019, which prohibits a physician from intentionally performing or attempting to perform an abortion “with the knowledge” that a pregnant woman is seeking an abortion “solely on the basis” of: a test “indicating” Down syndrome, a prenatal diagnosis of Down syndrome, or “[a]ny other reason to believe” the “unborn child” has Down syndrome (“Act 619”); and (3) Arkansas Act 700 of 2019, which provides that “[a] person shall not perform or induce an abortion unless that person is a

Based on record evidence, only the following types of abortion care are available in Arkansas currently: medication abortions, which are available only up to 10 weeks as measured

C. Discussion

The limited record before the Court demonstrates that the Supplemental Complaint Plaintiffs are entitled to a temporary restraining order barring enforcement of the Challenged Provisions.

1. Scope Of T

and office visits that

the life or health of the patient. Any further violations of the April 3 Directive will result in an immediate suspension of your facility's license.

(Dkt. No. 132-1, at 36).

From the face of the April 3, 2020, ADH Directive and the April 10, 2020, ADH Cease-and-Desist Order, defendants appear to have created a conflict or narrowing of the exceptions available to LRFP and its clinicians when determining how to proceed with surgical abortion patient care in Arkansas. The Court is aware of no clarification provided by defendants with respect to this apparent conflict.²

The record demonstrates the reality of abortion care in Arkansas (Dkt. No. 134-2, ¶¶ 16–17, 19–22). Mandatory in-person counseling is required prior to procedures, with prescribed wait times and return visits to the clinic. The Court understands that these in-person counseling sessions have not been permitted to be conducted by telemedicine by defendants and instead are still proceeding as required by current law. Further, there are limits on clinic capacity resulting from the COVID-19 pandemic and required social distancing (*Id.*, ¶ 26). There also are limits on LRFP's capacity to see surgical abortion patients each day (*Id.*, ¶ 48). Moreover, every day patients are at risk of contracting the COVID-19 virus, jeopardizing their ability to visit a clinic and receive time-sensitive care (*Id.*, ¶ 49).

The Supplemental Complaint Plaintiffs maintain that they seek relief “on behalf of patients who are particularly burdened” due to the time-sensitive nature of abortion care, including patients

² As a claim in their supplemental complaint, the Supplemental Complaint Plaintiffs also assert that the Challenged Provisions are unconstitutionally vague because, according to Supplemental Complaint Plaintiffs, it is “impossible to determine what specific medical procedures the Arkansas Health Department's April 3, 2020 Directive on Elective Surgeries prohibits clinicians from providing their patients.” (Dkt. No. 132-1, ¶ 53).

for whom the Challenged Provisions will, in the good faith, professional judgment of the treating physician:

- (i) likely worsen any maternal-health conditions that predate the pregnancy or result from the pregnancy;
- (ii) likely stand in the way of the patient ultimately accessing abortion care, because of patient-specific factors like medical history, the circumstances that led to the patient's decision to seek care in the first place (*i.e.*, domestic violence), and the logistical and financial obstacles faced by the patient;

571 F. Supp. 2d 1014, 1033 (N.D. Iowa 2008) (“Likelihood of success on the merits requires that the movant find support for its position in governing law.”).³

This Court has previously examined the law generally directed at pre-viability abortions and the types of abortions offered in Arkansas (Dkt. No. 119, at 84–89). The Court concludes that, at this stage of the proceedings, and on the record evidence currently before the Court, the Supplemental Complaint Plaintiffs are likely to prevail on their argument that the Challenged Provisions unconstitutionally restrict pre-viability abortions and, therefore, are facially unconstitutional. The Challenged Provisions prohibit virtually all pre-viability abortions after 10 weeks LMP and prohibit virtually all pre-viability abortions for patients for whom medication abortion is contraindicated. That the ADH Cease-and-Desist Order allows for a very narrow exception for surgical abortions “immediately necessary to protect the life or health of the patient” does not change the Court’s analysis.

It is the view of the Court that the undue-burden test announced by the Supreme Court in *Planned Parenthood of Southern Pennsylvania v. Casey*, 505 U.S. 833 (1992), does not apply to

past 10 weeks LMP, which the Supreme Court has repeatedly held is a prohibition that cannot be imposed by the state. *See Casey*, 505 U.S. at 846 (plurality op.) (affirming *Roe*'s "essential holding" that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure"); *see also Little Rock Family Planning Servs. v. Rutledge*, 397 F. Supp. 3d 1213, 1266 (E.D. Ark. 2019) ("[P]rohibitions on abortions pre-

pregnancy before viability); *Isaacson*, 716 F.3d at 1228 (“[W]hile a health exception is necessary to save an otherwise constitutional post-viability abortion ban from challenge, it cannot save an unconstitutional prohibition on the exercise of a woman's right to choose to terminate her pregnancy before viability.”); *see also Robinson v. Marshall*, No. 2:19cv365-MHT (WO), at 22 n.6, 32–33 (M.D. Ala. Apr. 12, 2020) (reasoning, in the context of a constitutional challenge to a pre-viability ban on abortion premised upon COVID-19 concerns, that “[i]t is abundantly clear that the medical restrictions in the state health order are unconstitutional to the extent that they *prevent* a woman from obtaining an abortion before viability—that is, where they effect a *prohibition* on abortion), *appeal filed*, (11th Cir. Apr. 13, 2020).

Even if the undue-burden standard applies to the Court’s analysis of the Supplemental Complaint Plaintiffs’ substantive due process claim

the police power of a state, whether exercised directly by the legislature, or by a local body acting under its authority, may be exerted in such circumstances, or by regulations so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression.

Id. at 38. For the reasons discussed above, the Court is justified in barring enforcement of the Challenged Provisions against LRFP on this temporary basis given the record evidence before it.

The Court notes that four other federal district courts have found that such a pre-viability ban on abortion premised upon COVID-19 concerns is unconstitutional.

Ctr. LLC v. Stitt, No. CIV-20-277-G, 2020 WL 1677094 (W.D. Okla. Apr. 6, 2020), *appeal docketed*, No. 20-6045 (10th Cir. Apr. 7, 2020); *Robinson*, 2020 WL 1520243 (M.D. Ala. Mar. 30, 2020), *stay granted, order amended*, 2020 WL 1659700 (M.D. Ala. Apr. 3, 2020); *Pre-term Cleveland v. Attorney Gen. of Ohio*, No. 1:19-cv-00360 (S.D. Ohio Mar. 30, 2020), *stay denied and appealed dismissed*, No. 20-3365 (6th Cir. Apr. 6, 2020);

Supplemental Complaint Plaintiffs' likelihood of success on their equal protection or void-for-vagueness claims.

3. Irreparable Harm

“Irreparable harm occurs when a party has no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages.” *Gen. Motors Corp. v.* , 563 F.3d 312, 319 (8th Cir. 2009). “To succeed in demonstrating a threat of irreparable harm, ‘a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief.’” *Roudachevski v. All-Am. Care Centers, Inc.*, 648 F.3d 701, 706 (8th Cir. 2011) (quoting *Iowa Utilities Bd. v. F.C.C.*, 109 F.3d 418, 425 (8th Cir. 1996))

restrained.” Because the Supplemental Complaint Plaintiffs are “serving a public interest in acting to protect constitutional rights related to abortion,” and because defendants “will not be harmed by the order to preserve the *status quo*,” the Court waives the bond requirement under Rule 65(c). *Jegley*, 267 F. Supp. 3d at 1111 (E.D. Ark. 2017).

6. Nature Of *Ex Parte* Relief

Pursuant to Federal Rule of Civil Procedure 65(b)(1), the Court issues this *ex parte* temporary restraining order until all parties can be heard on the merits within the time permitted by Rule 65(b). Counsel for the Supplemental Complaint Plaintiffs certified in writing the efforts made to give notice to defendants and their counsel in this case before filing this motion and explained the reasons why notice should not be required (Dkt. No. 134-18). Further, in making the determination to grant this relief, the Court reviewed and relies upon the affidavits presented by the Supplemental Complaint Plaintiffs in this matter (Dkt. Nos. 134-2; 134-3) and the proposed verified supplemental complaint (Dkt. No. 132-1), which, along with the record evidence, the Court concludes clearly show that immediate and irreparable loss or damage will result to the Supplement Complaint Plaintiffs before defendants can be heard in opposition. The Supplemental Complaint Plaintiffs turned away numerous women seeking care at LRFP on April 10, 2020, and would have to do the same each day thereafter for an indefinite period of time due to the Challenged Provisions. Based on record evidence, there were 8 patients at LRFP to receive surgical abortion care on April 10, 2020, who LRFP had to turn away due to the Challenged Provisions, including a patient at 17 weeks LMP (*Id.*, ¶ 34). The Supplemental Complaint Plaintiffs present record evidence that, during the week of April 14, 2020, LRFP has 26 patients

than 12 weeks LMP and will soon require a D&E instead of an aspiration abortion to terminate their pregnancies if their abortions are delayed; and (3) 3 patients who are more than 17 weeks LMP and will soon require a 2-day procedure instead of a 1-day procedure and very soon will be past Arkansas's legal limit for abortion care (*Id.*, ¶ 46).

IV. Conclusion

For the foregoing reasons, the Court provisionally grants the Supplemental Complaint Plaintiffs' motion for expedited leave to file a supplemental complaint (Dkt. No. 132) and directs the Supplemental Complaint Plaintiffs to file their proposed first supplemental complaint for injunctive and declaratory relief, attached as Exhibit 1 to their motion for expedited leave to file a supplemental complaint, within seven days from the entry of this Order. Additionally, the Court provisionally grants the Supplemental Complaint Plaintiffs' motion for an *ex parte* temporary restraining order and has under advisement the request for a preliminary injunction (Dkt. No. 134).

The Court hereby orders that defendants, and all those acting in concert with them, including their employees, agents, and successors in office, are temporarily enjoined from enforcing the Challenged Provisions against any providers of surgical abortions in Arkansas to bar all surgical abortions, "except where immediately necessary to protect the life or health of the patient." Further, defendants are enjoined from failing to notify immediately all state officials responsible for enforcing the requirements of the Challenged Provisions about the existence and requirements of this temporary restraining order. Pursuant to Federal Rule of Civil Procedure 65(b)(2), this temporary restraining order shall not exceed 14 days from the date of entry of this Order and shall expire by its own terms on Tuesday, April 28, 2020, at 3:30 p.m. CT, unless before that time, for good cause shown and for reasons entered in the record, the Court extends it for a

like period or defendants consent to a longer extension, the Court modifies it, or the Court dissolves it.

The Court will reconsider these matters upon the submission of defendants' written arguments.

It is so ordered this Tuesday, April 14, 2020, at 3:30 p.m. CT.

A handwritten signature in black ink, appearing to read "Justin H. Parker". The signature is written in a cursive, somewhat stylized font.