UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

WHOLE WOMAN'S HEALTH ALLIANCE, et al.	)	
Plaintiffs,	)	
v.	)	No. 1:18-cv-01904-SEB-MJD
CURTIS T. HILL, JR. Attorney General of the State of Indiana, in his official capacity, et al.	)	
Defendants.	)	

ORDER ON DEFENDANTS' MOTION TO STAY (DKT. 119)

On May 31, 2019, on Plaintiffs' motion, Dkt. 76, we issued an order preliminarily enjoining Defendants from requiring Plaintiff Whole Woman's Health Alliance (WWHA) to obtain a license from the Indiana State Department of Health ("the Department") before providing medical abortions at WWHA's clinic in South Bend, Indiana ("the South Bend Clinic"). Dkt. 116. On June 2, 2019, Defendants filed a notice of appeal from that order, Dkt. 117, together with a motion to stay the injunction pending appeal. Dkt. 119. *See* Fed. R. Civ. P. 62(d). Plaintiffs filed a response in opposition to a stay on June 4, 2019. Dkt. 124.

The motion to stay is now before the Court. For the reasons given below, the motion is denied.

In deciding whether to grant Defendants' motion, we consider

> "(1) whether the stay applicant[s] ha[ve] made a strong showing that [they are] likely to succeed on the merits; (2) whether the applicant[s] will be irreparably injured absent a

> stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."

Nken v. Holder, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). The first two factors "are the most critical." *Id*. This test "mirrors that for granting a preliminary injunction." *In re A&F Enters., Inc. II*, 742 F.3d 763 (7th Cir. 2014) (citing *In re Forty-Eight Insulations, Inc.*, 115 F.3d 1294, 1300 (7th Cir. 1997)). "The goal is to minimize the costs of error." *Id*. (citations omitted).

I. Defendants Have Not Made a Strong Showing That They Are Likely to Succeed on the Merits

Defendants' stay motion recapitulates the same arguments they presented in opposition to Plaintiffs' underlying injunction motion, which our order expressly or impliedly rejected. Having already held forth at length on the subject, we will not greatly expand on that discussion here, except to note the following:

A. Defendants argue that "as-applied challenges to licensing regimes" are not "cognizable." Br. Supp. 4. Defendants cite no case so holding, nor any case imposing a threshold "cognizability" requirement on claims to relief for alleged violations of established rights for which there is an established cause of action. As we stated in the order appealed from, "[w]hile the specific claim . . . appears novel, application of settled principles, so far as these exist in the abortion context, points reliably to Plaintiffs' ultimate success." Op. 70.

B. Defendants argue further that the undue-burden standard cannot be applied to subdivisions of a state or to geographic areas within a state; only to states themselves by

means of a facial challenge, Br. Supp. 5—or else, only to states themselves by means of a facial challenge and to individuals by means of an as-applied challenge. Br. Supp. 6. Neither variant of the argument is supported. Various bases for the facial/as-applied distinction have been proposed, *see* Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 Wm. & Mary Bill. Rts. J. 657, 657–73 (2010), but geographic scope is not among them. And, where provided for by the substantive law, courts regularly assess local impacts of generally applicable statutes. *See, e.g.*, *One Wis. Inst. v. Thomsen*, 198 F. Supp. 3d 896, 931 (W.D. Wis. 2016) (assessing burden on voting rights imposed by state statute "in larger municipalities like Madison and Milwaukee").

"[T]he 'ultimate question,'" say Defendants, "is not [whether] the Licensing Law creates an undue burden for the women of *South Bend*, but [whether] it creates an undue burden for the women in the State of *Indiana*." Br. Supp. 6. Neither formulation is correct. "'The proper focus of constitutional inquiry is the group for whom the law is a restriction[.]'" Op. 55–56 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895 (1992)). We cannot perceive what difference it makes whether that group is delineated by geographic location, or, for example, by unwillingness to communicate with spouses about abortion. *See Casey*, 505 U.S. at 894. Moreover, it is of course possible (however unlikely) that there are women in Evansville or New Albany or anywhere else in Indiana who are burdened by the Department's refusal to allow the South Bend Clinic to operate—but that was not what Plaintiffs alleged and not what their evidence was directed to. We decided the claim that was presented to us.

C. Defendants argue further that our order is a "business-protection injunction" which unfairly advantages WWHA relative to its competitors. Br. Supp. 6–7. That prudential consideration would operate, if at all, in the balance of equities rather than the constitutional merits. But it does not operate there or anywhere else because WWHA is not a business and has no competitors.

D. Borrowing (without acknowledgment) from the principal *Hellerstedt* dissent, Defendants argue further our application of the "large fraction" test always sets the numerator equal to the denominator. Br. Supp. 7. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2343 n.11 (2016) (same) (Alito, J., dissenting). To begin with, if our approach mirrors that adopted by the *Hellerstedt* majority and condemned by *Hellerstedt* dissenters, that does not make Defendants' success on appeal more likely.

Moreover, we understand neither the dissenters' objection nor Defendants' recapitulation of it. By hypothesis there are more "restrictions" than there are "substantial obstacles." Some restrictions might never become substantial obstacles, and some restrictions might never become substantial obstacles for a large fraction of the group restricted. A 70-mile drive is a "restriction" for anyone, but for women with the time and money to undertake it, it is not a "substantial obstacle." For women without the time and money to undertake it, it is both a "restriction" and a "substantial obstacle." There are undoubtedly places in Indiana (and the country) where the latter group will never amount to a large fraction of the total. But Plaintiffs' evidence suggested that the contrary is true in and around South Bend.

Relatedly, Defendants assert there is "no proof of any 'unmet demand' for abortions in South Bend." Br. Supp. 8. *Also id.* at 13. The relevant evidence is cited on pages 6 through 8 of our order.

E. Defendants argue further that multiple licensure schemes have been upheld by the Supreme Court. Br. Supp. 8–9 (though citing no case post-*Hellerstedt*). But our analysis does not purport to assess the constitutionality of requiring licensure as a general matter; it assesses the constitutionality of Indiana's licensing scheme specifically as applied to the facts of this case.

Defendants assert that, under the standard applied by our order, no scheme for licensing abortion clinics could ever survive review. Br. Supp. 9–10. That is not so. Of course a state may require licensure of abortion clinics without thereby creating undue burdens on the abortion right. What a state cannot do is "strew impediments to abortion" by imposing a licensure requirement which, on its face or as applied, does not meaningfully transmit the state's regulatory authority, spinning like a gear without teeth. *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 921 (7th Cir. 2015).

F. Defendants argue further that our order "disregards the crucial *preventative* value of licensing." Br. Supp. 10. It does not, as Defendants go on to observe at the bottom of the same page. *Id.* (quoting Op. 61) ("[T]he Licensing Law's '"reputable and responsible character requirement" has obvious utility as an *ex ante* credentialing mechanism.'"). Defendants charge that our order "never explains why the *ex ante* certification function of the Licensing Law fails to further the State's interests in protecting women's health, fetal life, and the integrity of the medical profession." Br.

Supp. 11. Our order does in fact explain that point at pages 61 through 63 ("On the facts of this case, however, the benefits derived from further application of the 'reputable and responsible character' requirement appear slight.").

G. Defendants argue further that, "after a particular clinic is initially licensed, licensing allows the State to continually monitor the clinic to ensure it complies with applicable laws and regulations," and that our order "dismisses this function of the Licensing Law[.]" Br. Supp. 11. Our order does not dismiss the importance of such surveillance; it merely observes that Defendants did not carry their burden in showing how, under the governing statutory and regulatory framework, such surveillance is enabled by or made somehow contingent upon licensure. *See* Op. 20–21, 64–65.

Defendants still have not furnished any explanation, relying instead on the same *ipse dixit* of a Department staffer we found sufficient in the first instance. Br. Supp. 11. *See* Op. 64. Defendants simply have not shown, or even attempted to show, why the South Bend Clinic must be licensed before it can be inspected. Compare Defendants' gloss of *Hellerstedt*, Br. Supp. 17 ("[T]he Court in *Hellerstedt*, in the course of invalidating Texas's admitting privileges requirement, specifically relied on the availability of *licensing and* inspections in Texas as a sufficient safeguard against wrongdoing." (emphasis added)), with what *Hellerstedt* actually says. 136 S. Ct. at 2313 ("Pre-existing Texas law already contained numerous detailed regulations covering abortion facilities, including a requirement that facilities *be inspected* at least annually." (emphasis added)).

Our order also expressed incredulity at Defendants' implied and entirely unsupported assertion that all of Indiana's substantive abortion regulations that were on the books before the Licensing Law was enacted, including the informed-consent requirement, simply went unenforced until 2005 or 2013. *See* Op. 64–65. That is not, contrary to Defendants' suggestion, simply "an assumption that abortion clinics fully complied with Indiana's abortion laws" before the Licensing Law was enacted. Br. Supp. 11. Our incredulity reflects rather an assumption that states are not in the habit of passing laws and then waiting a decade or more before providing for their enforcement—an assumption Defendants do not challenge and have not controverted.

H. Defendants argue further that *Casey*'s emphasis on the "reasonableness" of the fit between the state's ends and its chosen means condemns our conclusion that the state's interests could be just as well advanced by a registration requirement. Br. Supp. 12. True, *Casey* spoke of reasonableness, but *Hellerstedt* (and *Schimel*) spoke of what was "necessary," and our order follows *Hellerstedt* (and *Schimel*). Op. 69 (quoting *Hellerstedt*, 136 S. Ct. at 2315). (We note that, as a general matter, Defendants' near total reliance on *Casey* for the purposes of their stay motion, and their near total neglect of *Hellerstedt*, does not augur well for Defendants' success on appeal.)

I. Defendants argue further that the burdens on the abortion right identified in our order are "as much as anything the function of market factors" and "manifestly *not* a function of state central planning." Br. Opp. 13. But "state central planning" is manifestly not required for an undue-burden finding. No Texas politburo "force[d] women to travel long distances to get abortions in crammed-to-capacity superfacilities" so that they would

be "less likely to get the kind of individualized attention, serious conversation, and emotional support that doctors at less taxed facilities may have offered." *Hellerstedt*, 136 S. Ct. at 2318. Abortion-clinic closure caused by the application of Texas law did that (or would have, had the law taken effect), resulting in an undue-burden finding. *Also, e.g.*, *Planned Parenthood of Ind. & Ky. v. Comm'r of Ind. State Dep't of Health*, 896 F.3d 809, 819 (7th Cir. 2018) (finding undue burden) ("All of the burden in this case originates from the lengthy travel that is required of some women who have to travel far distances for an ultrasound appointment at least eighteen hours prior to an abortion."). The only distinction here is that application of Indiana law, rather than causing closure of a clinic, has prevented a clinic from opening at all. But that is a distinction without a difference, and Defendants do not argue the contrary.

J. Finally, as Plaintiffs point out, Br. Opp. 8, we note that Defendants have entirely failed to address our equal protection holding, where the state's operative interests are restricted to its interest in fetal life as furthered by enforcement of the informed-consent requirement. *See* Op. 58, 66.

In sum, Defendants have failed to make a strong showing that they are likely to succeed on the merits of their appeal.

II. Defendants Have Not Shown More Than a Possibility of Irreparable Harm

As noted in our order, the injunction "do[es] no more than return the state, vis-à-vis WWHA, to the status quo that reigned from 1993 to 2013 or, as a practical matter, 2015. We do not accept that the state inflicted irreparable harm on itself for those two

decades." Op. 70. A mere possibility of irreparable injury is insufficient. *Nken*, 556 U.S. at 434–35.

III. The Balance of Harms Weighs Against a Stay

Defendants argue, "The public interest in patient health and safety and the balance of equities . . . favor a stay. [WWHA] is asking for special judicial permission to dispense powerful hormone-curbing, abortion-inducing, uterus-contracting prescription drugs without any state regulatory oversight whatsoever." Br. Supp. 15. As noted above and repeatedly in our order, we find the prospects of "no state regulatory oversight" exceedingly unlikely and in any event not a consequence of our order imposing a preliminary injunction. Defendants' plea thereon is therefore unpersuasive.

More simply, it would be a different question if we believed that the South Bend Clinic, absent licensure, could not be regulated by the state. We issued our order in reliance on the prospect that the South Bend Clinic could and will be regulated by the state, in light of the history of abortion regulation in Indiana and of the existing statutory and regulatory framework. Licensure is not the *sine qua non* of state regulation.

Moreover, *every single day*, Indiana permits licensed physicians "to dispense powerful hormone-curbing, abortion-inducing, uterus-contracting prescription drugs" in unlicensed facilities—so long as those drugs are dispensed to women not seeking abortions. *See* Op. 3–4, 16, 58, 66. If this is a tolerable risk to the public health when no constitutional rights are at stake, we cannot find it intolerable when the other side of the balance groans under the weight of the countervailing constitutional interests: preventing

"period[s] of state-compelled gestation followed by . . . lifetime[s] of state-compelled motherhood." Op. 70.

Conclusion

For the reasons given above, Defendants' motion for a stay pending appeal, Dkt. 119, of our May 31, 2019, order, Dkt. 116, on Plaintiffs' motion for a preliminary injunction, Dkt. 76, is DENIED.

IT IS SO ORDERED.

Date: 6/7/2019

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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