UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

BOSSIER CITY MEDICAL SUITE, INC.; CHOICE, INC. OF TEXAS D/B/A CAUSEWAY MEDICAL CLINIC; DELTA CLINIC OF BATON ROUGE, INC.; MIDTOWN MEDICAL, LLC; WOMEN'S HEALTH CARE CENTER, INC.; AND JOHN DOE, M.D.	*	CIVIL ACTION 3:10-cv-00783-JJB-CN
versus	*	DISTRICT JUDGE BRADY
BRUCE D. GREENSTEIN, in his official capacity as Secretary of the Louisiana Department of Health and Hospitals	*	MAGISTRATE JUDGE NOLAND
	*	MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COMPLAINT PURSUANT TO FED. R. CIV. P. 12(B)(1), AND FED. R. CIV. P. 12(B)(6)
	*	Oral Argument Requested: L.R. 78.1M

****

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COMPLAINT PURSUANT TO FED. R. CIV. P. 12(B)(1) AND FED. R. CIV. P. 12(B)(6)

NOW INTO COURT, through undersigned counsel, comes Defendant Bruce D. Greenstein, in his official capacity as Secretary of the Louisiana Department of Health and Hospitals, who, after being served with a copy of Plaintiffs' Complaint [Rec. Doc. No. 1], files this Memorandum in Support of his contemporaneously filed Motion to Dismiss. Defendant seeks dismissal of all claims brought in this lawsuit on the grounds that Plaintiffs lack standing and/or fail to present a justiciable case or controversy (FED. R. CIV. P. 12(b)(1)); and Plaintiffs' Complaint fails to state claims as to which relief can be granted (FED. R. CIV. P. 12(b)(6)).

STATEMENT OF FACTS

Plaintiffs are five medical facilities licensed to perform outpatient abortions and one physician who performs abortions at some of these facilities. The Plaintiffs are seeking declaratory and injunctive relief against Bruce D. Greenstein, the Secretary of the Louisiana Department of Health and Hospitals ("Defendant" or "the Secretary"), related to the enforcement

of Act 490 of the 2010 Louisiana Regular Session which is codified at LA. R.S. 46:2175.6(G-I). Act 490 amended and re-enacted LA. R.S. 40:2175.6 section (G) and added sections (H) and (I) relative to outpatient abortion facilities. Through these provisions the Secretary may suspend or revoke the license of an outpatient abortion facility based upon violations of Department of Health and Hospitals ("DHH") rules or state or federal law or regulations.[1] The suspension may occur immediately if "the secretary determines that the violation or violations pose an imminent or immediate threat to the health, welfare, or safety of a client or patient." LA. R.S. 40:2175.6 (H). In the event of an immediate suspension, the licensee may file a devolutive appeal with the office of the Secretary or seek injunctive relief in the district court for East Baton Rouge Parish. LA. R.S. 40:2175.6(H)(1-2). Revocation of a license or denial of the right to renew a license for a violation of DHH rules or of state or federal laws or regulations may result in an indefinite prohibition on the licensee owning or operating another outpatient abortion clinic in Louisiana. LA. R.S. 40:2175.6(I).

Plaintiffs have alleged that Act 490 as codified in LA. R.S. 40:2175.6 (G-I) is unconstitutional on its face. Specifically, Plaintiffs contend that the Act is unconstitutionally vague in violation of their right to due process because it allegedly fails to provide notice and

---

[1] LA. R.S. 40:2175.6(G) provides:

> G. The secretary of the department may deny a license, may refuse to renew a license, or may revoke an existing license, if an investigation or survey determines that the applicant or licensee is in violation of any provision of this Part, in violation of the licensing rules promulgated by the department, or in violation of any other federal or state law or regulation.
>
> (1) The secretary shall furnish the applicant or licensee thirty calendar days' written notice specifying the reasons for the denial, nonrenewal, or revocation.
>
> (2) The applicant or licensee shall have the right to file a suspensive appeal of the denial, nonrenewal, or revocation with the office of the secretary within thirty calendar days from the date of receipt of the written notice. The appeal request shall specify in detail the reasons why the appeal is lodged.

may be enforced in an arbitrary and discriminatory manner; that the Act violates the equal protection clause of the Fourteenth Amendment because it allegedly treats outpatient abortion facilities differently from other medical facilities regulated by DHH; that the Act violates the Plaintiffs' rights to substantive due process under the Fourteenth Amendment because it deprives them of liberty and property interests in an arbitrary, unreasonable, and capricious manner; and that the Act violates Plaintiff Doe's patients' rights to terminate a pre-viability abortion guaranteed by the Fourteenth Amendment. For the reasons set forth below, Plaintiffs' Complaint does not present a justiciable Article III "case or controversy," and fails to state causes of action on which relief can be granted.[2]

---

[2] Pursuant to L.R. 3.1, Defendant makes the following Related Case Designation pertaining to civil actions pending before other courts or administrative agencies, and which involve subject matter comprising a material part of the subject matter or operative facts of this action:

Hope Medical Group for Women v. Louisiana Dept. of Health and Hospitals, No. 594653, Sec. 24 (19th Judicial District Baton Rouge), filed Sep. 14, 2010 *Hope Medical Group for Women v. DHH* is a civil action commenced in the 19th Judicial District seeking injunctive relief against a notice of suspension of Hope Medical Group for Women's license to operate an abortion facility issued by the Secretary's predecessor, Anthony Keck, on September 3, 2010, pursuant to Act 490, the legislation challenged herein. (Exhibit A, attached)

In re Gentilly Medical Clinic for Women, No. 00-42-060, (DHH Bureau of Appeals), filed Jan. 26, 2010. *In re Gentilly Medical Clinic for Women* is an agency appeal from a notice of revocation issued by DHH on January 19, 2010, by Defendant's predecessor, Alan Levine, pursuant to authority that predated Act 490, revoking the facility's provisional license based on a determination of substantial failure to comply with the minimum standards for licensure of abortion clinics. *Gentilly* was decided October 15, 2010 (Exhibit B, attached); Gentilly filed a Petition for Judicial Review (Exhibit C, attached), Docket No. 595, 873, Division "D", from the adverse elements of that decision, in the 19th Judicial District Court on October 20, 2010.

LAW AND ARGUMENT

I. STANDARD OF REVIEW.

A. FED. R. CIV. P. 12(b)(1).

A FED. R. CIV. P. 12(b)(1) challenge to subject matter jurisdiction may be raised at any time, by any party, or by the court *sua sponte*. *Giles v. NYLCare Health Plans, Inc.*, 172 F.3d 332, 336 (5th Cir. 1999). Whenever a FED. R. CIV. P. 12(b)(1) challenge is raised in conjunction with another Rule 12(b) motion, "the court should consider the jurisdictional attack before addressing any attack on the merits." *Id.*

The burden of proof lies with the party invoking the court's jurisdiction. *Ramming v. U.S.*, 281 F.3d 158, 161 (5th Cir. 2001). "Lack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Id.*

B. FED. R. CIV. P. 12(b)(6).

Dismissal is proper under FED. R. CIV. P. 12(b)(6) where the moving party demonstrates that the Complaint fails to assert a "legally cognizable claim" upon which relief could be granted. *Ramming*, 281 F.3d at 161. The court may not look beyond the pleadings,[3] which are to be considered by the Court "in a light most favorable to the plaintiff, and the allegations contained therein are taken as true." *Id.* The pleading standard recently elucidated by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, __

---

[3] *Sonnier v. State Farm Mutual Auto Ins. Co.*, 509 F.3d 673, 675 (5th Cir. 2007); *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996); *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000).

U.S. __, 129 S.Ct. 1937 (2009), has retired the "no-set-of-facts test"[4] of *Conley v. Gibson*, 355 U.S. 41 (1957), in favor of a "plausibility" standard, which demands more than "an unadorned… accusation" of unlawful harm. *Iqbal*, 129 S.Ct. at 1949, citing *Twombly*, 550 U.S. at 555. Determining whether a complaint states a plausible claim for relief is a "common sense," "context-specific task," *Iqbal,* 129 S.Ct. at 1950; and "where the well-pleaded facts do not permit the court to infer more than a mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]' – 'that the pleader is entitled to relief.'" *Id.*, quoting FED. R. CIV. P. 8(a)(2).

Where, as here, the facial validity of a law is challenged, the Court should apply the standard set forth in *United States v. Salerno*, 481 U.S. 739, 745 (1987), that there must be "no set of circumstances" under which the statute could be constitutional for it to be declared facially unconstitutional, and the burden is on the challenger to show that there is no such reasonable construction of the law. *Barnes v. Moore*, 970 F.2dd 12, 14 (5th Cir.), *cert. den.*, 506 U.S. 1021 (1992); *Barnes v. Mississippi*, 992 F.2d 1335, 1342-43 (5th Cir.), *cert. den.*, 510 U.s. 976 (1993) (citing "no circumstances" test of *Barnes v. Moore*).

II. LOUISIANA PROVIDES PLAINTIFFS WITH ADEQUATE PROCESS THROUGH STATE ADMINISTRATIVE AND JUDICIAL PROCEEDINGS, AND THE COURT SHOULD THEREFORE ABSTAIN FROM HEARING THE CASE UNDER SETTLED FEDERAL PRINCIPLES.

Plaintiffs challenge the constitutionality of Act 490 insofar as they argue that it allegedly dispenses with the "substantiality" requirement extant in previous regulatory authority, and thus (they argue) permits license revocation or denial based upon any violation of any federal or state

[4] *See, e.g., Piotrowski v. City of Houston*, 51 F.3d 512, 514 (5th Cir. 1995) (holding dismissal warranted if it appears certain that the Plaintiffs cannot prove any set of facts in support of their claims that would entitle them to relief), citing *Lefall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 524 (5th Cir. 1994).

law. Complaint at 11, ¶ 40. Plaintiffs do not and cannot contend that Defendant has actually exercised his authority in such a Draconian fashion. Likewise, the alleged "lifetime ban" contemplated by Section I of the Act merely provides that in a case of final revocation or denial of licensure for cause, persons owning or operating outpatient abortion clinics "may be" prohibited from owning or operating outpatient clinics within the State. LA. REV. STAT. ANN. § 40:2175.6[I]. It remains to be seen whether and under what circumstances the Secretary may determine that such a ban is appropriately invoked; but Plaintiffs urge that because the authority may be exercised in an arbitrary or discriminatory manner, this provision must be stricken as unconstitutional. Complaint at 23, ¶ 77.

In essence, Plaintiffs' grievance is not with the language of the statute or the actions of the Secretary with regard to Plaintiffs (there have been none under the challenged provisions), but with the specter of arbitrary and discriminatory enforcement. However, in the event that the Secretary were truly determined to "close down outpatient abortion facilities regardless of whether those facilities are operating safely," Complaint at 23, ¶ 73, any of the Plaintiff clinics would have recourse to the agency proceedings that Gentilly Clinic has successfully utilized, *see* n.1 *supra*, and a right of appeal to the 19th Judicial District in Baton Rouge, as Hope Medical Group also has done successfully.[5] In such proceedings, the Department's interpretation and application of the Act 490 amendments would be subject to administrative and judicial review.

Because independent and adequate state agency and judicial proceedings exist to challenge any interpretation or application of the amendments, the federal court should abstain in

---

[5] The District Court entered a preliminary injunction on September 23, 2010, enjoining Defendant from "enforcing any suspension of Hope Medical Group for Women's license to operate an abortion facility...." See Exhibit "A" (copy of Order in *Hope Medical Group for Women v. Keck*, et al., No. 594653). Gentilly Medical Clinic for Women enjoyed partial success in opposing a notice of violation proposing revocation of the facility's license. *See* Ex. "B" (copy of Appeal Decision, *In re Gentilly Medical Clinic for Women*, Docket No. 0042060 (Oct. 15, 2010).

favor of such proceedings under settled doctrines enunciated in *Railroad Comm'n of Texas v. Pullman Co, Burford v. Sun Oil Co., Younger v. Harris and Colorado River Conservation District v. United States.*

Pullman abstention applies where state courts have not been afforded "a reasonable opportunity to pass on underlying issues of state law and to construe the statutes involved." *Harman v. Forssenius*, 380 U.S. 528, 534 (1965), citing *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941):

> In applying the doctrine of abstention, a federal district court is vested with discretion to decline to exercise or to postpone the exercise of its jurisdiction in deference to state court resolution of underlying issues of state law. Where resolution of the federal constitutional question is dependent upon, or may be materially altered by, the determination of an uncertain issue of state law, abstention may be proper in order to avoid unnecessary friction in federal/state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication.

Burford abstention is appropriate where there is a "possibility of unwarranted disruption of a state administrative process." *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 415 (1964), citing *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). *Burford* abstention applies if the following two factors pertain, both of which are present in this case: "First, the presence of a complex state regulatory scheme which would be disrupted by federal court review; and, secondly, the existence of a state-created forum with specialized competence in the particular area."

"[I]n the case of *Younger* abstention, the [Supreme] Court [is] concerned with federal court interference with a state's ability to function. By blocking proceedings involving state governments, federal courts could interfere unduly with the state's ability to govern." *Royal Ins. Co. of America v. Quinn-L Capital Corp*, 3 F.3d 877, 886 n.10 (5th Cir. 1993), citing *Younger v. Harris*, 401 U.S. 37 (1971). *Younger* abstention "is appropriate where, absent bad faith,

harassment, or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings or proceedings similar to criminal proceedings ...." *Towson v. Crain Bros., Inc.*, No. 06-10545 2007 WL 2402634, *1, n.2 (E.D. La. Aug. 17, 2007), quoting *Woodward v. Sentry Select Ins. Co.*, No. 03-2481, 2004 WL 834634, at *3 (E.D.La.2004) (interior citations omitted).

Colorado River abstention holds that "Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar;" or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989), quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 at 814 (1976). *Colorado River* abstention is prudential and discretionary, resting on "considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." 424 U.S. at 817.

Although these doctrines obviously overlap to some degree in their scope and application, the principle animating them is clear, and has obvious application to the instant case: where state administrative proceedings and judicial review afford claimants adequate opportunity to test the constitutionality of state law, and the exercise of federal jurisdiction would jeopardize state efforts to establish state policy on matters of public concern, the court should abstain from hearing the case. The operation of abstention principles has been recognized by courts in the abortion context. *See, e.g., Reproductive Health Svcs. of the St. Louis Region, Inc. v. Nixon,* 428

F.3d 1139 (8th Cir. 2005); *Roe v. Rampton*, 394 F.Supp. 677 (Dist. Utah 1975). Plaintiffs should not be indulged in their attempt to invoke the jurisdiction of this Court in the absence of State agency action against them that would delineate the Department's interpretation of the challenged provisions, and in the presence of adequate state administrative and judicial procedures for redress if that eventuality were to occur.

III. PLAINTIFFS' COMPLAINT MUST BE DISMISSED FOR LACK OF JUSTICIABILITY.

Plaintiffs' Complaint fails to present a justiciable case or controversy because Plaintiffs' claims are not yet ripe for judicial resolution and they lack standing. The Declaratory Judgment Act, 28 U.S.C. § 2201, permits a federal court to issue declaratory relief solely "in a case of actual controversy within its jurisdiction."[6] The Act's restriction on federal jurisdiction to actual controversies extends to the "cases and controversies" limit set forth in Article III of the United States Constitution.[7] The Fifth Circuit has explained that "[a] controversy, to be justiciable, must be such that it can presently be litigated and decided and **not hypothetical**, conjectural, conditional or based upon the possibility of a factual situation that may never develop."[8] In other words, even actions seeking declaratory judgment must have an actual "case or controversy."[9]

A. Plaintiffs' Claims are Not Yet Ripe for Consideration.

In order for this Court to entertain Plaintiffs' lawsuit, their claims must be ripe for adjudication. The ripeness doctrine arises out of the Article III judicial limitations as well as prudential reasons for declining to exercise jurisdiction.[10] "The 'basic rationale [behind the ripeness doctrine] is to prevent the courts, through avoidance of premature adjudication from

---

6 28 U.S.C. § 2201, *et seq.*

7 *Jabr v. Rapides Parish School Bd. ex rel. Metoyer*, 171 F.Supp. 2d 653, 664-65 (W.D.La. 2001).

8 *Rowan Companies, Inc. v. Griffin*, 876 F.2d 26, 28 (5th Cir. 1989) (citing *Brown & Root, Inc. v. Big Rock Corp.*, 3836 F.2d 662, 665 (5th Cir. 1967) (emphasis added).

9 *Lawson v. Callahan*, 111 F.3d 403, at 405 (5th Cir. 1997).

10 *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, at 544 (5th Cir. 2008)

entangling themselves in abstract disagreements.'"[11] The Fifth Circuit Court of Appeals has noted how "[a] ripeness inquiry is often required when a party is seeking pre-enforcement review of a law or regulation."[12] An inquiry into the ripeness of Plaintiffs' claim is appropriate in this case because Plaintiffs are seeking pre-enforcement review of LA. R.S. 40:2175.6(G-I). Plaintiffs' contention that LA. R.S. 40:2175.6(G-I) is unconstitutional is precisely the type of request for pre-enforcement review that the ripeness doctrine is designed to prevent. The Defendant has yet to enforce LA. R.S. 40:2175.6(G-I) by revoking or suspending any of the Plaintiffs' licenses. Such a revocation or suspension is merely speculative as it may never occur. Therefore, Plaintiffs' Complaint is premature.

Fifth Circuit precedent has firmly established the principle that "a court should dismiss a case for lack of 'ripeness' when the case is abstract or hypothetical."[13] "The ripeness doctrine counsels against premature adjudication by distinguishing matters that are hypothetical or speculative from those that are posed for judicial review."[14] The Fifth Circuit in *New Orleans Public Service, Inc. v. Council of New Orleans*, 833 F.2d 583 (5th Cir. 1987), set forth the prevailing standards for determining whether a dispute is ripe for adjudication, as follows:

> A court should dismiss a case for lack of 'ripeness' when the case is abstract or hypothetical. The key considerations are 'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.' A case is generally ripe if any remaining questions are purely legal ones; conversely, a case is not ripe if further factual development is required.

Id. at 586-87 (internal citations omitted). Under the *New Orleans Public Service* test, the claims in the pending action are not ripe for adjudication. Plaintiffs' claims remain abstract and

---

[11] *Id.* (citing *Abbott Labs v. Gardner*, 387 U.S. 136, 148 (1967)).

[12] *Id.*

[13] *Lopez v. City of Houston*, 2010 WL 3341643 (5th Cir. 2010) (citing *Monk v. Huston*, 340 F.3d 279, 282 (5th Cir. 2003)).

[14] *LeClerc v. Webb*, 419 F.3d 405, 414 (5th Cir. 2005) (citing United Transp. Union v. Foster, 205 F.3d 851, at 857 (5th Cir. 2000)).

hypothetical. In sum, the matter before this Court is premature because any injury to the Plaintiffs is speculative and may never occur.

B. Plaintiffs Lack Standing to Challenge the Constitutionality of the Act.

Plaintiffs have failed to demonstrate that they have standing; therefore, the Court cannot reach the merits of the claims. The standing doctrine represents an essential part of Article III's "case or controversy" requirement.[15] The question of standing concerns "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf."[16] A plaintiff must allege the following three core elements in order to meet the "irreducible constitutional minimum" requirement of standing: (1) it has suffered or is about to suffer an "injury in fact" that is concrete and particularized, and actual or imminent; (2) "there must be a causal connection between the injury and the conduct complained of"; and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[17]

Plaintiffs have not suffered nor are they about to suffer an "injury in fact" which is concrete and particularized, or actual or imminent; the injury may not merely be conjectural or hypothetical.[18] The Plaintiffs-Outpatient Abortion Facilities have not alleged that their licenses to operate their facilities have been suspended or revoked under LA. R.S. 40:2175.6 (G-I). Nor

---

[15] *Rivera v. Wyeth –Ayerst Laboratories*, 283 F.3d 315, 318 (5th Cir. 2002), referring to *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

[16] *Florida Department of Insurance v. Chase Bank of Texas*, 274 F.3d 924, 929 (5th Cir. 2001) (citing *Warth v. Seldin*, 442 U.S. 490, 498-99 (1975)).

[17] *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 661-65 (1993), referring to *Lujan*, 504 U.S. at 560 (citations and footnotes omitted) and *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 471 (1982); *Okpalobi v. Foster*, 244 F.3d 405, at 425 (5th Cir. 2001) (*en banc*) (citing *Lujan*, 504 U.S. at 560).

[18] *American Forest And Paper Ass'n. v. U.S. EPA*, 137 F.3d 291, at 296 (5th Cir. 1998).

has Plaintiff John Doe alleged that any of the outpatient abortion facilities where he performs abortions had their licenses suspended or revoked. Furthermore, had any of the Plaintiffs-Outpatient Abortion Facilities alleged that their licenses have been revoked or suspended, which Defendant maintains they have not, then these facilities have failed to allege that they have taken advantage of and/or exhausted their administrative right to seek an appeal or to pursue a temporary restraining order to reinstate their licenses.[19]

Based on the foregoing, Plaintiffs have not suffered any injury in fact. Plaintiffs have not alleged any facts indicating that their operating licenses have been revoked or suspended. Said failures are fatal to their claims and evidence a lack of standing to bring this lawsuit and a lack of justiciability. For these reasons, Plaintiffs' claims should be dismissed in their entirety and there would be no need for this Court to address the merits.

IV. PLAINTIFFS UTTERLY FAIL TO ALLEGE SUFFICIENT FACTS TO PLAUSIBLY PLEAD THE EXISTENCE OF A "ZERO TOLERANCE" POLICY AGAINST ABORTION CLINICS.

Plaintiffs allege the existence of a "Zero Tolerance Policy" toward abortion clinics in Louisiana, "pursuant to which the Secretary denies outpatient abortion facilities notice of alleged violations and an opportunity to correct them before taking action to suspend or revoke a license." Complaint at 2, ¶ 2. In fact, Plaintiffs have only surmised that Defendant has adopted or administers a "zero tolerance" policy based on their interpretation of events surrounding one non-party clinic, Hope Medical Group for Women.[20] No such policy actually exists. Plaintiffs

---

[19] *See Central States Southeast and Southwest Areas Pension Fund v. T.I.M.E.—D.C., Inc.*, 826 F.2d 320, 329 (5th Cir. 1987); *McClendon v. Jackson Television, Inc.*, 603 F.2d 1174, at 1176 (5th Cir. 1979) (citing *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938); *McKart v. United States*, 395 U.S. 185, 193 (1969); *Hedley v. United States*, 594 F.2d 1043 (5th Cir. 1979) ("(N)o one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.")

[20] *See* n.1, *supra.* For Plaintiffs' allegations regarding Hope Medical Group, *see* Complaint at 8-9, ¶ 34. Specifically, Plaintiffs allege that the "Zero Tolerance Policy" operated to deny Hope Medical Group

do not and cannot plead that there exist any written guidelines or policies, articulated public statements of policy or practice, or anything resembling an official "Zero Tolerance" policy or practice toward abortion clinics. Plaintiffs have utterly failed to plead articulable facts regarding this alleged so-called "Zero Tolerance" policy that give rise to a plausible claim that such a policy or practice exists and is being unconstitutionally enforced against outpatient abortion providers. The Supreme Court's recent jurisprudence, and Fifth Circuit and Louisiana District Court interpretations of it, require more than a bare pleading that a "policy or practice" has been adopted by state officers. This is purely rank speculation couched as factual allegations, and such ersatz "facts" are insufficient to articulate cognizable claims under the Supreme Court's *Twombly/Iqbal* standard and controlling Circuit precedent.

For example, Plaintiffs speculate that the Act 490 amendments and the so-called "Zero Tolerance Policy"[21] allow Defendant to shut down a clinic for a "non-compliant boiler," and keep it shuttered during the pendency of the appeal. But Plaintiffs fail to explain why the fact that a boiler that is merely non-compliant with state law would provide Defendant with the authority to close the clinic pending appeal, when the law would provide such authority only when the boiler posed an "imminent or immediate threat to [] health, safety or welfare." LA. R.S. 40:2175.6(G). Nor do they explain why in a proper case involving a boiler that was so out of conformity with state law that it legitimately posed a danger to staff and patients, the

---

an opportunity to cure an alleged deficiency. *Id.* Plaintiffs also contend that the Department's decision to suspend Hope Medical Group's license during the pendency of the appeal – a "devolutive appeal," as opposed to a "suspensive" appeal in which the suspension is held in abeyance during the appeal – was an application of the "Zero Tolerance Policy." Complaint at 12, ¶ 42.

[21] Plaintiffs' appending of a pejorative label to the Department's actions toward Hope Medical Group, in an effort to impart constitutional suspicion, cannot move their claims across the line of plausibility, since mere "labels and conclusions" will not do. *Twombly*, 550 U.S. at 555. *Cf. Rhodes v. Prince*, 360 Fed. Appx. 555, 559, 2010 WL 114203, *4 (5th Cir. Jan. 12, 2010) (rejecting as insufficient conclusory allegations that claimant was unconstitutionally detained, despite claimant's characterization of incident as an "arrest" and "interrogation").

devolutive appeal procedure should not be available to the Secretary. As a matter of law, speculation does "not suffice to invoke the federal judicial power." *Eastern Kentucky Welfare Rights Org. v. Simon*, 426 U.S. 26, 44 (1976). Such "conclusory allegations" and "unwarranted deductions of fact" are insufficient to prevent dismissal. *United States ex rel. Willard v. Human Health Plan of Texas, Inc.*, 336 F.3d 375, 379 (5th Cir. 2003); *Iqbal*, at 1950 (Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.").

A court considering a motion to dismiss begins by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. *Iqbal*, at 1950; *Rhodes v. Prince*, 360 Fed. Appx. 555, 559, 2010 WL 114203, *4 (5th Cir. Jan. 12, 2010). "The Court is 'not bound to accept as true a legal conclusion couched as a factual allegation.'" *Iqbal*, at 1950, quoting *Twombly*, 550 U.S. at 556. Plaintiffs' Complaint is rife with these insufficient conclusory allegations. *See, e.g.*, Complaint at 22, ¶¶ 66 – 69 (claiming the Department "issues deficiencies not only for violations of the applicable licensing statutes" but also for other deficiencies under wholly separate statutes, and "often applies statutes and regulations in inconsistent ways" but failing to provide examples). Plaintiffs' allegations of an undocumented "Zero Tolerance" policy against them are indistinguishable from the allegations of an unconstitutional policy toward post-911 detainees held insufficient in *Iqbal*. The *Iqbal* plaintiff, an individual of Arab descent who was detained after the September 11th attacks, claimed that the Attorney General and the Director of the FBI crafted a policy by which they "willfully and maliciously agreed to subject [him]" to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." *Id.* at 1951. The complaint alleged that the Attorney General was the "principal

architect" of the policy, and that the Director was "instrumental" in adopting and executing it. *Id.* The Court held this pleading insufficient:

> These bare assertions, much like the pleading of conspiracy in *Twombly*, amount to nothing more than a "formulaic recitation of the elements" of a constitutional discrimination claim, namely, that petitioners adopted a policy "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." As such, the allegations are conclusory and not entitled to be assumed true.

Id., citing *Twombly*, 550 U.S. at 555 (other citations omitted). Plaintiffs' allegations are likewise strictly "formulaic," and cannot be assumed to be true. *See, e.g.*, Complaint at 23, ¶¶ 72 – 73.

Moreover, even if the factual allegations, properly separated from conclusory legal allegations, were somehow consistent with an entitlement to relief, *Iqbal* nonetheless requires that the Court consider whether other more likely valid explanations for the challenged conduct render the allegations implausible. *Id.* at 1952; *see, e.g., Edwards v. St. John the Baptist Parish*, 2010 WL 3720436, *5 (E. Dist. La. Sep. 9, 2010) (declining to infer that a parish's permitting requirement was established for unconstitutional purposes where more plausible, legitimate reasons for the action were evident). In view of the fact that the two non-party clinics have been able to successfully avail themselves of state administrative and judicial appeal procedures, and the Department's long history of working with outpatient abortion clinics to remediate regulatory violations, Plaintiffs' sky-is-falling cry that Act 490 was intended to give the Department the authority to shutter all seven Louisiana abortion clinics in the foreseeable future "regardless of whether they are operating safely," Complaint at 23, ¶¶ 72 73, is simply beyond the pale of credulity. Act 490 was passed to strengthen the Department's authority to act expeditiously in appropriate cases in which public health and safety are threatened, and there is no reason for the Court to entertain Plaintiffs' hysterical conjecture to the contrary.

V. PLAINTIFFS' CONSTITUTIONAL CHALLENGES MUST BE DISMISSED AS AN IMPROPER PREMATURE FACIAL ATTACK ON ACT 490.

After *Gonzales v. Carhart*, 550 U.S. 124 (2007), plaintiff abortion providers cannot mount blunderbuss constitutional attacks on state legislation based on speculative hypothetical situations. Plaintiffs are clearly stating facial challenges to Act 490, as they have no facts to allege that the amendments have been applied to them at all. A pre-enforcement challenge must generally be regarded as a facial challenge, not an as-applied one, since the statute has not in fact been applied to any particular parties or circumstances. *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 163-64 (4th Cir. 2000) ("Because of the nature of facial challenges, they could not present the district court with a concrete factual circumstance - a particular case or controversy - to which to apply the Regulation.... Because a trial on a facial challenge can focus only on arbitrarily selected hypotheticals to which the Regulation might apply, a court is required to speculate about the Regulation's overall effect."). *See also Wisconsin Right to Life, Inc. v. Paradise*, 138 F.3d 1183, 1186 (7th Cir. 1998) ("WRTL has not engaged in any speech that the Board has found to be inappropriate for a group unregistered as a political committee. WRTL's argument accordingly must be that the Wisconsin campaign laws are unconstitutional as written rather than as applied - in legal jargon, that the statute is unconstitutional 'on its face.'"). Moreover, where a plaintiff seeks the invalidation of a law *in toto*, as Plaintiffs do here (Complaint at 25-26, ¶ 1, 2), the presumption of a facial attack is confirmed. *Wisconsin Right to Life, Inc.*, 138 F.3d at 1186.

"The latitude given facial challenges in the First Amendment context is inapplicable here. Broad challenges of this type impose 'a heavy burden' upon the parties maintaining the suit." *Gonzales*, at 167; *Greenville Women's Clinic*, 222 F.3d at 163 ("[A]bortion clinics undert[ake] a heavy burden in bringing a facial challenge...."). "It is neither [the Court's] obligation nor within

[its] traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop." *Gonzales*, at 168. For this reason, "[a]s-applied challenges are the basic building blocks of constitutional adjudication." *Id.*, quoting Fallon, *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L.REV. 1321, 1328 (2000). Like the federal Partial-Birth Abortion Act, Act 490 "is open to a proper as-applied challenge in a discrete case." *Gonzales,* at 168, citing *Wisconsin Right to Life, Inc. v. Federal Election Comm'n*, 546 U.S. 410, 411-412 (2006) (*per curiam*). If Plaintiffs are aware of any such "discrete cases," they are free to bring them before the DHH Bureau of Appeals or the 19th Judicial District Court, as other clinics have. Failing such concrete cases of unconstitutional application, their claims fail and must be dismissed.

VI. PLAINTIFFS FAIL TO PLAUSIBLY PLEAD THAT ACT 490 IS UNCONSTITUTIONALLY VAGUE.

Gonzales also forecloses Plaintiffs' vagueness challenge. "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Gonzales*, 550 U.S. at 148-49, quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). All that the doctrine requires in the instant context is that the Act "provide[] [clinic owners and operators] 'of ordinary intelligence a reasonable opportunity to know what is prohibited'." *Gonzales*, at 149 (quoting *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972)); *Women's Medical Center for Northwest Houston v. Bell*, 248 F.3d 411, 421-22 (5th Cir. 2001), quoting *United States v. Clinical Leasing Serv., Inc.*, 925 F.2d 120, 122 (5th Cir. 1991) (quoting *Kolender*, 461 U.S. at 357) ("A quasi-criminal statute [such as an abortion licensing regulation] must define its terms 'with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not

encourage arbitrary and discriminatory enforcement.'"). Like the description of an intact dilatation and extraction abortion set out by the federal act challenged in *Gonzales*, Act 490 "sets forth 'relatively clear guidelines as to prohibited conduct' and provides 'objective criteria' to evaluate whether a doctor has performed a prohibited procedure." *Id.* (quoting *Posters N' Things, Ltd. v. United States*, 511 U.S. 513, 525-526 (1994)).

In the pre-enforcement context, *Gonzales* lays to rest Plaintiffs' argument that a vagueness challenge can be made when "'no evidence has been, or could be, introduced to indicate whether the [Act] has been enforced in a discriminatory manner or with the aim of inhibiting [constitutionally protected conduct].'" *Id.*, at 150 (quoting *Hoffman Estates v. Flipside, Hoffman Estates, Inc.* 455 U.S. 489, 503 (1982)). And as in *Gonzales*, "The canon of constitutional avoidance,... extinguishes any lingering doubts as to whether the Act [is constitutional]." *Id.* at 153. "[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Id.* The Court should duly regard the Supreme Court's admonition in *Gonzales* that "The [Supreme] Court at times employed an antagonistic canon of construction under which in cases involving abortion, a permissible reading of a statute [was] to be avoided at all costs," but that "*Casey* put this novel statutory approach to rest." *Id.*, at 153-154 (internal cites and parentheses omitted).

VII. PLAINTIFFS FAIL TO PLAUSIBLY PLEAD THAT EITHER ACT 490 OR THE ALLEGED "ZERO TOLERANCE" POLICY DEPRIVES PLAINTIFFS OF EQUAL PROTECTION.

Abortion providers are not a suspect class,[22] and women seeking abortions are not a suspect class.[23] Where, as here, there is a complete absence of pleading of facts giving rise to a

---

[22] *Birth Control Centers*, 743 F.3d at 358 (statutory differentiation between outpatient facilities, under which abortion providers were regulated, and physician's private offices involved no suspect class). *Ref. Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 489 (1955) (legislature may elect apply a

plausible inference of discriminatory animus against abortion providers, the challenged statute will be upheld if it has a rational basis. *Bell, supra*, 248 F.3d at 419 (observing absence of "evidence of anti-abortion animus" or that law was passed in effort to limit access to abortion); *Birth Control Centers, Inc. v. Reizen*, 743 F.2d 352, 358 (6th Cir. 1984). "All that is required to survive rational basis review is a showing that the classification under examination conceivably could be related to a legitimate governmental purpose. *Accord Bell*, 248 F.3d at 419.

Act 490 easily survives rational basis review in view of the amendments' reasonable relationship to Louisiana's legitimate state interest in protecting maternal health *See Roe v. Wade*, 410 U.S. 113, 164 (1973). *Casey*, 505 U.S. at 885. Further, "There can be no doubt that the government 'has an interest in protecting the integrity and ethics of the medical profession.'" *Gonzales v. Carhart*, 550 U.S. at 157, quoting *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997). "Under our precedents it is clear the State has a significant role to play in regulating the medical profession." *Id.* at 157.[24]

---

remedy to one aspect of a professional field and leave others alone; prohibition of the Equal Protection Clause goes no further than invidious discrimination).

[23] The U.S. Supreme Court has repeatedly made it clear that ersatz "classes" such as "indigent woman desiring an abortion" and "teenage women desiring medically necessary abortions" do not constitute a "suspect class" for purposes of triggering a heightened level of equal protection scrutiny. *Harris v. McCrae*, 448 U.S. 297, 323 n.26 (1980); *Maher v. Roe*, 432 U.S. 464, 470-471 (1977); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269 (1993) (likewise rejecting the proposition that "opposition to abortion constitutes discrimination against the 'class' of 'women seeking abortion'"). *Harris v. McRae, id.* at 322 ("where the classification drawn by the state does not involve a suspect class of persons or a constitutionally protected interest, equal protection is offended only if the classification is wholly unrelated to the objectives of the state's action"). "Whatever may be the precise meaning of a "class". . . the term unquestionably connotes something more than a group of individuals who share a desire to engage in [disfavored] conduct." *Bray, supra*, 506 U.S. at 269.

[24] Although it is unclear whether Plaintiffs intend to plead discriminatory enforcement by pleading that "animus toward abortion providers" explains the Department's treatment of outpatient abortion facilities differently from other regulated medical facilities, Complaint at 23, ¶ 79, this theory is unavailing in any event. Although selective enforcement can in some circumstances violate the right to equal protection, *see Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886), Plaintiffs must shoulder the burden to prove discriminatory enforcement by showing that "clear and intentional discrimination" occurred. *Birth Control Centers*, 743 F.3d at 359, citing *Snowden v. Hughes*, 321 U.S. 1, 8 (1944). As discussed above, Plaintiffs' conclusory allegations do not begin to meet the threshold necessary to plead a

VIII. PLAINTIFFS' COMPLAINT FAILS TO STATE A CLAIM OF DEPRIVATION OF SUBSTANTIVE DUE PROCESS BY ARBITRARY OR IRRATIONAL GOVERNMENT ACTION.

In point of fact, as discussed at length above, Plaintiffs have not had their "liberty and property interests" deprived by Defendant at all. "Historically, [the] guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property." *Daniels v. Williams*, 474 U.S. 327, 331 (1986). Moreover, a claim for deprivation of liberty or property interests (such as a license to operate a medical clinic) in violation of substantive due process does not pertain where the State provides an adequate post-deprivation process to the claimant. *Daniels, supra* at 331 ("Due process requires government to follow appropriate procedures when its agents decide to 'deprive any person of life, liberty, or property.'") "Nothing in [the Fourteenth] Amendment protects against all deprivations of life, liberty, or property by the State. The Fourteenth Amendment protects only against deprivations 'without due process of law....' [W]e must decide whether the tort remedies which the State of Nebraska provides as a means of redress for property deprivations satisfy the requirements of procedural due process." *Parratt v. Taylor*, 451 U.S. 527, 537 (1981). Thus, Plaintiffs' substantive due process claim of deprivation of liberty and property interests begs the question whether the Act's provision of post-deprivation process through state agency proceedings and judicial review is constitutionally adequate. As a matter of law, it is, since a suspensive appeal process does not offend due process. *Myers v. United States*, 647 F.2d

---

plausible theory of intentional discrimination, and thus Plaintiffs cannot make a claim of discriminatory enforcement.

591, 604 (5th Cir. 1981). For the reasons discussed above, Defendant urges that it is, and Plaintiffs' claims must accordingly be dismissed.[25]

IX. PLAINTIFFS' COMPLAINT FAILS TO STATE A CLAIM OF SUBSTANTIVE DUE PROCESS UNDER *PLANNED PARENTHOOD V. CASEY*.

Plaintiff "Dr. Doe's" fourth claim contends that Act 490 and the so-called "Zero Tolerance" policy have the "purpose and effect of imposing a substantial obstacle in the path of Dr. Doe's patients who are seeking to obtain pre-viability abortions." Complaint at 25, ¶¶ 84 – 85. As discussed above, Plaintiff's conclusory allegations regarding Defendant's ostensible "purpose" in shuttering all abortion clinics in the State cannot meet the *Twombly/Iqbal* pleading standard. *Iqbal*, at 1954 (rejecting pleading of discriminatory animus as a general allegation; "Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label 'general allegation, and expect his complaint to survive a motion to dismiss."). A challenge to statutory purpose "will rarely be successful, absent some sort of explicit indication from the state that it was acting in furtherance of an improper purpose." *Karlin v. Foust*, 188 F.3d 446, 493 (7th Cir. 1999). "*Casey* would seem to indicate that the Court would not scrutinize too closely the stated purpose or purposes of a regulation given the state's legitimate interest from the outset of a woman's pregnancy in persuading women to choose childbirth over abortion as long as the regulation was reasonably designed to further that interest." *Id.* at 493.

---

[25] To the extent that Plaintiffs are alleging that Defendant is singling them out for differential treatment based upon arbitrary and capricious criteria (or no criteria), their claim more appropriately sounds in equal protection. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000):

> [W]e have explained that "'[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.'"

528 U.S. at 564, quoting *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 443, 445 (1923) (quoting *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352 (1918)).

For the reasons discussed above, the Legislature's purposes in passing Act 490 were more than reasonable.

Nor has Plaintiff adequately pled that the Act 490 amendments have the "effect" of substantially burdening the right of access to abortion. The right established in *Roe v. Wade* and reaffirmed in *Planned Parenthood v. Casey* is merely the right to obtain a pre-viability abortion without undue obstacles or interference by the State. *Casey,* 505 U.S. at 846. Rather than burdening access to abortion, the challenged provisions here ensure that the "fundamental right" to abortion is exercised precisely as delineated in *Roe,* which made it clear that "the abortion decision in all its aspects is inherently and primarily a medical decision and basic responsibility must rest with the physician." 410 U.S. at 165-66. "Even the broadest reading of *Roe*... has not suggested that there is a constitutional right to abortion on demand." *Casey*, at 887. Rather, the "fundamental right" in question is the right of physicians and patients to decide, in consultation and subject to state regulation to protect the health and safety of its citizens, whether an abortion is appropriate in the particular circumstance. In view of this, a law touching upon access to abortion is not rendered unconstitutional merely because it operates to make it more difficult or more expensive to procure an abortion. *Karlin*, 188 F.3d at 489. The challenged law "must have a strong likelihood of preventing women from obtaining abortions rather than merely making abortions more difficult to obtain. *Id.* at 482. Here, all the Court has is Plaintiff's highly dubious conjecture that Defendant will succeed in closing his abortion business, thereby restricting access to abortion. This kind of rank speculation is insufficient to state a claim of deprivation of Dr. Doe's patient's right of substantive due process.

CONCLUSION

For the reasons set forth above, Defendant respectfully submits that Plaintiffs' Complaint should be dismissed.

DATED: This 14th day of December, 2010.

Respectfully submitted:

By:

/s/

Fernin F. Eaton, Bar Roll No. 05259, T.A.
Stephen R. Russo, Bar Roll No. 23284
Kimberly L. Humbles, Bar Roll No. 24465
Counsel for Bruce D. Greenstein, Secretary,
Louisiana Department of Health and Hospitals
628 N. 4th Street P.O. Box 3836
Baton Rouge, LA 70821-3836
(225) 342-1128 (phone); fax: (225) 342-2232

By:

/s/

ALLIANCE DEFENSE FUND
Steven H. Aden (*Pro Hac Vice* Application Forthcoming)
801 G Street, N.W., Suite 509
Washington, DC 20001
E-mail: saden@telladf.org

CERTIFICATE OF SERVICE

I certify that a true and correct copy of Defendant's Motion to Dismiss has been served on the following through the Court's CM/ECF filing system this 14th day of December, 2010:

1) William E. Rittenberg, rittenberg@rittenbergsamuel.com
2) Bonnie Scott Jones, bjones@reprorights.org
3) J. Alexander Lawrence, alawrence@mofo.com
4) Stephanie Toti, stoti@reprorights.org
5) Jamie A. Levitt jlevitt@mofo.com