**IN THE UNITED STATES DISTRICT COURT FOR THE<br>MIDDLE DISTRICT OF TENNESSEE<br>NASHVILLE DIVISION**

| | | |
|---|---|---|
| **MEMPHIS CENTER FOR REPRODUCTIVE HEALTH, et al.,** | ) | |
| **Plaintiffs,** | ) | |
| | ) | **NO. 3:20-cv-00501** |
| **v.** | ) | |
| | ) | **JUDGE CAMPBELL** |
| **HERBERT H. SLATERY, et al.,** | ) | **MAGISTRATE JUDGE FRENSLEY** |
| **Defendants.** | ) | |

**ORDER**

Pending before the Court is Plaintiffs' Renewed Motion for Temporary Restraining Order and/or Preliminary Injunction (Doc. No. 65). Through the Motion, Plaintiffs request the Court enjoin enforcement of Tennessee Code Annotated § 39-15-217 ("Section 217"). For the reasons stated herein, the Motion is **DENIED.**

In a prior Memorandum and Order (Doc. Nos. 41, 42), the Court enjoined enforcement of Section 217 based on the determination that the provision likely is unconstitutionally vague. The Court found it unnecessary, at that time, to address Plaintiffs' alternative argument that Section 217 operates as an unconstitutional ban on pre-viability abortions. In an Order issued on November 20, 2020 (Doc. No. 63), the Sixth Circuit Court of Appeals granted Defendants' request for a stay of the preliminary injunction as to Section 217 based on the Plaintiffs' vagueness challenge. Plaintiffs now request the Court issue a temporary restraining order enjoining enforcement based on their alternative argument regarding the constitutionality of the provision.

In determining whether to issue a temporary restraining order under Rule 65 of the Federal Rules of Civil Procedure, the Court is to consider: (1) the plaintiff's likelihood of success on the merits; (2) whether the plaintiff may suffer irreparable harm absent the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) the impact of the injunction on the public interest. *See, e.g., Doe v. Univ. of Cincinnati*, 872 F.3d 393, 399 (6th Cir. 2017).

Section 217 provides that a person who performs or induces an abortion upon a pregnant woman "if the person knows that the woman is seeking the abortion because of the sex of the unborn child" or the "race of the unborn child" commits a Class C felony. Section 217(d) criminalizes the provision of an abortion "if the person knows that the woman is seeking the abortion because of a prenatal diagnosis, test, or screening indicating Down syndrome or the potential for Down syndrome in the unborn child."

Plaintiffs argue Section 217 operates as a ban on pre-viability abortions, and is, therefore, unconstitutional under *Roe v. Wade,* 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833 (1992). Defendants argue Section 217 does not operate as a ban on pre-viability abortions because a woman is not prohibited from obtaining an abortion for one of the "reasons" identified in the section, so long as she does not disclose the reason to the abortion provider. (Doc. No. 27, at 11). Section 217, according to Defendants, operates only to prohibit physicians from knowingly facilitating abortions based on discriminatory reasons. (*Id.*)

The Court concludes that Plaintiffs have not shown a likelihood of success on the merits in establishing that Section 217 is an unconstitutional ban under *Roe* and *Casey.* The prohibition on performing abortions based on discriminatory motivations, under Section 217, is not directed

at the patient, but at the physician. The patient is not prohibited by Section 217 from obtaining a pre-viability abortion, provided she does not disclose to the physician that her motivations are based on sex, race, or the potential for Down syndrome.

The Court notes that a Sixth Circuit panel decision reaching a contrary conclusion has been vacated, and remains pending before the *en banc* court. In *Preterm-Cleveland v. Himes*, 940 F.3d 318, 320 (6th Cir. 2019), a panel of the Sixth Circuit addressed a challenge to an Ohio law prohibiting abortion providers from performing an abortion with the knowledge that the decision to abort arises from a diagnosis or indication that the unborn child has Down syndrome. The panel held the statute operated as an unconstitutional ban on pre-viability abortions in violation of *Casey*. *Id.*, at 323-25. A majority of Sixth Circuit judges subsequently voted for rehearing *en banc* and vacated the panel opinion. 944 F.3d 630 (6th Cir. 2019).

If Section 217 does not operate as a ban on pre-viability abortions, but is, instead, considered to be a regulation limiting the conditions under which abortions may be performed, it is subject to the "undue burden" standard set forth in *Gonzales v. Carhart,* 550 U.S. 124, 146, 127 S. Ct. 1610, 1626, 167 L. Ed. 2d 480 (2007). Under the undue burden standard, as articulated in Chief Justice Roberts' concurrence in *June Med. Servs. L. L. C. v. Russo*, ___ U.S. ___, 140 S. Ct. 2103, 2135, 207 L. Ed. 2d 566 (2020) (Roberts, C.J., concurring in judgment and summarizing the Court's analysis in previous abortion cases), a regulation relating to pre-viability abortions is constitutional as long it does not pose a "substantial obstacle" to abortion access and is "reasonably related" to a "legitimate state interest."

The legislative "findings" supporting Section 217 articulate the State's legitimate interest in preventing discrimination based on sex, disability and race, and Plaintiffs do not argue such interest is not legitimate on its face. As for whether Section 217 reasonably furthers that interest,

or operates, instead, as a substantial obstacle to abortion access, the Court considers the defendants' representations as to how they will enforce the statute.[1] According to the defendants, the statute will not be enforced unless the physician "knows" the abortion is being sought because of a prohibited reason, and the physician is under "no duty to *inquire* about a patient's reasons for seeking the abortion." (Doc. No. 27, at 17). Defendants represent that "a physician must be 'aware' that the abortion is being sought because of the unborn child's race, sex, or Down syndrome diagnosis . . . oblique references to race, sex, or advanced maternal age – would be insufficient to establish knowledge" under the statute. (*Id.,* at 29). The statute will not be applied "when a patient merely mentions the words 'sex' or 'race.'" (*Id.*, at 17). Based on these representations, Plaintiffs have not shown, at this juncture, that Section 217 is unconstitutional such that the "extraordinary remedy" of a temporary restraining order, *see Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 923 (6th Cir. 2020), is appropriate.[2]

As to the remaining factors governing the issuance of a temporary restraining order, the Court is guided by the Sixth Circuit's conclusion in lifting the stay:

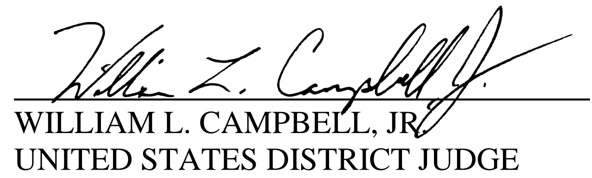
> As to the remaining equitable factors, plaintiffs have not shown a likelihood of success on the merits of their vagueness challenges to Section 217. On the other hand, the district court's preliminary injunction of Section 217 'subjects [the State] to ongoing irreparable harm.' *Maryland v. King,* 567 U.S. 1301 (2012) (Roberts, C.J., in chambers). '[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.' *Id.* (citation omitted). The equitable factors therefore weigh in favor of granting a stay.

[1] Defendants are Attorney General Herbert H. Slatery III; Dr. Lisa Piercey, Commissioner of the Tennessee Department of Health; Dr. Rene Saunders, Chair of the Board for Licensing Health Care Facilities; Dr. W. Reeves Johnson, Jr., President of the Tennessee Board of Medical Examiners; District Attorney General for Knox County Amy Weirich; District Attorney General for Nashville Glenn R. Funk; District Attorney General for Knox County Charme P. Allen; and District Attorney for Wilson County Tom P. Thompson, Jr. (*Id.*)

[2] Further, the Court of Appeals opinion in the instant case also addressed the "medical emergency" defense in Section 217 and found that provision provides to physicians an affirmative defense in the event of prosecution.

(Doc No. 63, at 5) (footnote omitted).

It is so **ORDERED**.



WILLIAM L. CAMPBELL, JR.
UNITED STATES DISTRICT JUDGE