IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
Northern Division

BARBARA BEAVERS; MONICA CABLE; LAURA KNIGHT; and PAMELA MILLER,	
Appellants,	
vs.	Civil Action No.: 3:19-cv-00735-DPJ-FKB
CITY OF JACKSON, MISSISSIPPI,	ORAL ARGUMENT REQUESTED
Appellee.	

APPELLANTS' REBUTTAL MEMORANDUM IN SUPPORT OF THEIR MOTION TO REMAND

Barbara Beavers, Monica Cable, Laura Knight, and Pamela Miller, ("Sidewalk Advocates") file this Rebuttal Memorandum in Support of their Motion to Remand. For the reasons set forth below, this appeal should be remanded and the City of Jackson, Mississippi ("Jackson") should be required to pay the costs and expenses incurred as a result of the removal.

Jackson proffers three arguments in opposition to remand: (1) the "artful pleading" doctrine applies, (2) the "substantial federal issue" doctrine applies, and (3) a Supremacy Clause issue exists. Jackson also argues that costs and fees should not be awarded because removal was proper.

ARGUMENT

I. This Appeal Should Be Remanded to State Court.

A. The artful pleading doctrine does not apply.

Jackson argues that the "artful pleading" exception to the well-pleaded complaint rule applies in this appeal. *See* Jackson's Opposition Memorandum 4, 6. ("Jackson's Mem.") (ECF No. 9). "Under this principle, removal is not defeated by a plaintiff's omission to plead *necessary*

federal questions." *Grace Chapel Presbyterian Church (USA) v. Presbytery of Mississippi*, No. CIV.A. 3:07CV552 DPJ, 2007 WL 4557866, at *2 (S.D. Miss. Dec. 21, 2007) (citing *MSOF Corp. v. Exxon Corp.*, 295 F.3d 485, 490 (5th Cir. 2002)) (emphasis supplied). "This rule requires the court to determine federal jurisdiction from only those allegations *necessary to state a claim*. . . ." *Id*. (citing *Willy v. Coastal Corp.*, 855 F.2d 1160, 1165 (5th Cir.1988)).

1. The Sidewalk Advocates properly pled available state constitutional claims that have not been preempted by federal law.

Jackson misunderstands the artful pleading doctrine. The doctrine does not apply simply because the plaintiff's claims are similar to claims involved in "controversial and evolving federal jurisprudence," or because the defendant incorrectly believes, as Jackson appears to, that the plaintiff's claims conflict with other's federal rights or "raise questions" under the Supremacy Clause. Jackson's Mem. 6-7. Rather, the doctrine applies "*only* where state law is subject to complete preemption." *McCrae Law Firm, PLLC v. Gilmer*, No. 3:17-CV-704-DCB-LRA, 2018 WL 283774, at *2 (S.D. Miss. Jan. 3, 2018) (quoting *Bernhard v. Whitney Nat. Bank*, 523 F.3d 546, 551 (5th Cir. 2008)) (emphasis original). "Federal question jurisdiction therefore exists where, because state law is completely preempted, 'there is, in short, *no such thing* as a state-law claim.'" *Bernhard*, 523 F.3d at 551. (emphasis supplied).

In fact, the very case that Jackson cites to invoke the artful pleading doctrine, *Jackson v. Mississippi Farm Bureau Mut. Ins. Co.*, states unequivocally that the doctrine only applies when no state remedy is available. 947 F. Supp. 252, 255 (S.D. Miss. 1996) ("'[I]f the only remedy available to plaintiff is federal ... the case is removable regardless of what is in the pleading.'"). (citations omitted). Surprisingly, Jackson even includes this fact in its opposition memorandum. *See* Jackson's Mem. 6. ("Similarly, in *Mississippi Farm Bureau*, the reference to federal law was significant because no state action was available on the basis of race discrimination.").

What Jackson appears to misunderstand is that the action in *Mississippi Farm Bureau* was removable not because the reference to the United States Constitution in the plaintiffs' interrogatory responses was "significant," as Jackson asserts. *Id.* Indeed, the Court explicitly stated that its analysis was not based on this reference to federal law. *See Mississippi Farm Bureau Mut. Ins. Co.*, 947 F. Supp. at 255. ("Thus, accepting plaintiffs' counsel's explanation that his reference to the 'United States Constitution' was inadvertent or the result of his 'misspeaking' does not alter the court's analysis of the nature of plaintiffs' claim."). Rather, the action was removable because the exclusive remedy available to the plaintiffs was federal. *Id.* at 255–56. ("[A] race discrimination [claim] . . . would necessarily be federal since Mississippi has no . . . cause of action for race or other types of class-based discrimination. . . . [P]laintiffs are indeed asserting a federal claim, whether or not that wish to so denominate it.").

Here, Jackson has not, and cannot, argue that any of the Sidewalk Advocates' state constitutional grounds for appeal have been completely preempted. Thus, the artful pleading doctrine does not apply. *See e.g. Bernhard*, 523 F.3d at 551. Indeed, if the Sidewalk Advocates' state constitutional claims are preempted simply by virtue of the Supremacy Clause, or by the mere existence of federal litigation regarding similar federal rights, then federal jurisdiction exists over all state constitutional claims except those grounded in the rare rights which are unique to various state constitutions. Such a condition would be anathema to principles of federalism. *See e.g. Michigan v. Long*, 463 U.S. 1032, 1041 (1983) ("'It is fundamental that state courts be left free and unfettered by [federal courts] in interpreting their state constitutions.'") (citations omitted).

B. The substantial federal issue doctrine does not apply.

Jackson also argues that this Court has jurisdiction under the substantial federal issue doctrine. Jackson's Mem. 5. "The mere presence of a federal issue in a state cause of action does

not automatically confer federal-question jurisdiction." *Mangia Bene, Inc. v. HR Screening Servs., Inc.*, No. 3:08-CV-361-DPJ-JCS, 2008 WL 11506632, at *2 (S.D. Miss. Dec. 1, 2008) (quoting *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 813 (1986)). Under this theory, "federal question jurisdiction exists when 'a state-law claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.'" *Id.* (quoting *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005)).

1. The Sidewalk Advocates' claims do not raise a necessary and actually disputed federal issue.

a. The fact that the Federal Constitution affords similar rights does not create a necessary and actually disputed federal issue.

Jackson argues that the Sidewalk Advocates' claims necessarily raise a disputed federal issue because the state constitutional rights they assert are "inextricable entwined" with comparable federal constitutional rights. Jackson's Mem. 6. Jackson cites no authority for this proposition. Rather, Jackson simply notes that the rights guaranteed by the state constitutional provisions asserted by the Sidewalk Advocates are similar to the rights guaranteed by the First and Fourteenth Amendment to the United States Constitution. *Id*. at 5-6. Even if the mere existence of these Amendments somehow created a federal issue, Jackson has not even attempted to demonstrate that it would be a "substantial" and "actually disputed" issue of federal law, or that the outcome of this appeal would turn on that dispute. As explained by this Court in a similar case:

> [The Defendant] simply never explains how its interpretation of federal law with respect to the Hurricane Katrina employees differs from Plaintiff's interpretation. . . . In this case, [the Defendant] has demonstrated that a federal law will be examined, but it has failed to demonstrate an actual dispute over that law. The Court must therefore find that Defendant has failed to demonstrate federal question jurisdiction.

See e.g Mangia Bene, Inc., 2008 WL 11506632 at *2.

Here, Jackson has not demonstrated that the First and Fourteenth Amendments will need to be examined in this appeal; or if they did, that the parties' interpretation of those Amendments would actually differ; or if they did, that the outcome of this appeal would turn on the proper application of those Amendments. In truth, these Amendments will be irrelevant to this appeal, as the Sidewalk Advocates' claims are based solely on state constitutional provisions.

Moreover – and yet again – if Jackson's position were correct, then federal jurisdiction would exist over all state constitutional claims except those grounded in the rare rights which are unique to various state constitutions. Additionally, while Jackson claims that it "does not assert that states may not create individual rights that expand those rights granted under the United States Constitution," Jackson clearly does hold the position that states cannot afford their citizens more expansive rights without creating federal jurisdiction over those rights. *See* Jackson's Mem. 13. This position is unsupported by any authority and is completely at odds with principles of federalism. *See e.g. Long*, 463 U.S. at 1041. ("'It is fundamental that state courts be left free and unfettered by [federal courts] in interpreting their state constitutions.'") (citations omitted).

b. The reference to the First Amendment in the Notice of Appeal does not create a necessary and actually disputed federal issue.

Jackson appears to argue that the passing reference to the First Amendment in the Notice of Appeal raises a necessary and disputed federal issue.[1] Jackson's Mem. 6. Jackson relies, in part, on the "artful pleading" doctrine, which, as addressed above, does not apply to this appeal. *See e.g. Bernhard*, 523 F.3d at 551. Jackson also argues that, based on this reference to the First Amendment, a Supremacy Clause issue is raised "on the face of the pleading." Jackson's Mem. 7. Jackson does not cite any authority to support its argument that this reference to the First

[1] Jackson appears to have abandoned its argument that the Notice of Appeal's reference to the fact that the Mississippi Constitution makes free speech worthy of "religious veneration" asserts a claim under the Establishment Clause and the Free Exercise Clause of the First Amendment. *See* Remov. ¶ 3.

Amendment raises a Supremacy Clause issue. Jackson also fails to explain how this in turn creates a "necessary" and "actually disputed" federal issue, or how this reference to the First Amendment relates to Jackson's argument that the Sidewalk Advocates' claims pit "one individual's state constitutional rights over another's federal constitutional rights." *Id*. Jackson's arguments on this point are incoherent and unsupported by any authority, and thus do not meet Jackson's heavy burden of proof to show that removal was proper.

Moreover, as thoroughly discussed in the Sidewalk Advocates' Opening Memorandum (ECF No. 4) ("Opening Mem."), the Notice of Appeal did not allege any violations of the First Amendment or seek relief under the First Amendment. Opening Mem. 4-6. Thus, an analysis of the First Amendment is not necessary in this appeal, and even if it were, Jackson has not demonstrated that its interpretation of the First Amendment would differ from the Sidewalk Advocates', or that the outcome of this appeal would turn on the proper application of the First Amendment. *See e.g Mangia Bene, Inc.*, 2008 WL 11506632 at *2. For this reason, Jackson's reliance on the "substantial federal question" doctrine articulated in *Grable* is misplaced. "The 'only legal or factual issue contested' in *Grable* was the meaning of the federal statute at the heart of the claim." *Id*. (quoting *Grable & Sons Metal Prods., Inc.*, 545 U.S. at 315.).

c. Jackson's intent to raise federal rights in its defense does not does not create a necessary and actually disputed federal issue.

Jackson argues, without citation to authority, that a necessary and actually disputed federal issue exists because the Sidewalk Advocates' Notice of Appeal "asserts one individual's state constitutional rights over another's federal constitutional rights." Jackson's Mem. 7. Jackson never fully fleshes out this argument in either in its Notice of Removal or its opposition brief. However, Jackson appears to believe that there is a federal issue as to whether the federal rights

belonging to women seeking an abortion prevent the enforcement of the Sidewalk Advocates' state constitutional free speech rights near abortion centers. *Id*.

First, as discussed in the argument below concerning the Supremacy Clause, this appeal does not present any such potential conflict between state and federal constitutional rights. Second, even if there were such a potential conflict, it would not be sufficient to confer federal question jurisdiction, because the federal rights Jackson discusses would only arise as a *defense* to the Sidewalk Advocates' claims, not as an essential *element* of their claims. *Bernhard*, 523 F.3d at 551 (5th Cir. 2008) ("'A defense that raises a federal question is inadequate to confer federal jurisdiction.'") (quoting *Merrell Dow Pharmaceuticals, Inc.*, 478 U.S. at 808). As explained by the United States Supreme Court:

> [T]o support removal, the defendant must locate the basis of federal jurisdiction in those allegations necessary to support the plaintiff's claim, ignoring his own pleadings and petition for removal. A defendant may not remove on the basis of an anticipated or even inevitable federal defense, but instead must show that a federal right is 'an element, and an essential one, of the plaintiff's cause of action.'

Gully v. First Nat'l Bank, 299 U.S. 109, 111 (1936).

While Jackson argues that the Sidewalk Advocates' claims "assert[] one individual's state constitutional rights over another's federal constitutional rights," Jackson's Mem. 7, a more accurate statement of the case is that Jackson intends to raise federal rights as a defense to the Sidewalk Advocates' claims under their state constitution. *See Grace Chapel Presbyterian Church (USA)*, No. CIV.A. 3:07CV552 DPJ, 2007 WL 4557866, at *3. (finding that, while the removing defendant claimed the case was removable because the plaintiff sought relief that could not be granted consistent with the First Amendment, "a more accurate statement of the case" was that the defendant intended to raise the First Amendment as a defense."). Jackson is free to raise federal

constitutional issues in its defense, whether merited or not. Its reliance on the Federal Constitution, however, does not create a federal question. *Bernhard*, 523 F.3d at 551 (5th Cir. 2008).

2. The purported federal interests are not substantial.

a. Prior federal cases interpreting federal rights do not confer a substantial federal interest in interpreting purely state constitutional claims.

Jackson argues that the federal issues purportedly raised by this appeal are "substantial" because similar cases have "historically" been litigated in federal court. Jackson's Mem. 8-9. From this observation, Jackson argues, without citation to authority, that future state constitutional challenges should be litigated in federal courts as well. *Id*. at 9. Jackson ignores the fact that all of the federal cases it cites as examples of prior litigation involved *federal* constitutional challenges. *See Schenck v. Pro-Choice Network Of W. New York*, 519 U.S. 357 (1997) (federal First Amendment claim); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994) (federal First Amendment claim); *Hill v. Colorado*, 530 U.S. 703 (2000) (federal First Amendment claim); *McCullen v. Coakley*, 573 U.S. 464 (2014) (federal First and Fourteenth Amendment claims).

Moreover, Jackson's conclusion does not follow from its premise. The fact that some similar federal constitutional challenges have been litigated in federal court does not mean that all future state constitutional challenges should be as well. Here, as with other arguments made by Jackson, there is no limiting principle. Virtually every enumerated federal right is the subject of extensive litigation. If this creates federal question jurisdiction over similar state constitutional rights, then federal jurisdiction exists over virtually all pure state constitutional claims.

b. There is no need for "consistency" with federal decisions.

While Jackson urges removal based on non-existent federal interests, Jackson's true concern appears to be that a state court might reach a different result under state law than a federal court might under federal law. Jackson admits as much, arguing that "removal is not only proper,

it is necessary" because "retaining jurisdiction limits the risk of inconsistency" with prior federal court decisions. Jackson's Mem. 14. In this assertion, Jackson makes an error, but one that is illuminating. There is a need for consistency between federal courts interpreting federal rights. However, there is no such need for consistency between federal courts and state courts interpreting the rights afforded under their respective constitutions where, as in this case and discussed below, there are no competing rights at issue. In fact, the entire point of our federal system is to ensure that states may take different approaches to similar judicial and political issues. *See e.g. New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country.").

Put plainly, if for example, the United States Supreme Court holds that an ordinance restricting speech near abortion centers does not violate the First Amendment to the United States Constitution, but the Mississippi Supreme Court holds that an identical ordinance does violate the free speech guarantees of Article 3, Section 13 of the Mississippi Constitution, the resulting inconsistency would not be a failure of the judicial system. Rather, it would be a sign that our constitutional order was working exactly as intended. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977) ("[T]he decisions of the [United States Supreme] Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law. . . . [O]ne of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens."). As Sixth Circuit Judge Jeffrey Sutton has aptly explained:

> In this country, state and local laws face two sets of constitutional restraints: those under the U.S. Constitution and those under the relevant state constitution. . . . The upshot is that American constitutional law creates two potential opportunities, not one, to invalidate a state or local law. . . . Dual governing powers come with dual

> limits on those powers. A loss in the U.S. Supreme Court under the U.S. Constitution need not foreshadow a loss in a State High Court under a comparable guarantee found in the state constitution.

Jeffrey S. Sutton, FIFTY-ONE IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW, 8-9 (2018).

Jackson's argument that there is a need for "consistency" with prior federal opinions regarding federal rights echoes its argument addressed above that the Sidewalk Advocates' claims are "inextricable entwined" with comparable federal constitutional rights. Jackson's Mem. 6. Jackson even goes so far as to assert that such claims "belong in federal court," whether they assert state or federal claims. *Id*. at 9.

All of these arguments are strikingly dismissive of the principles of federalism and the institutional competence of state courts, and are eerily similar to the arguments raised to support removal in *Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362 (5th Cir. 1995). In that case, the plaintiff alleged "violations of state law only, in particular 'a violation of Plaintiff's right to free speech under the Texas Constitution, Article I, § 8.'" *Id*. at 367. "The right to free speech under the Texas Constitution is broader in some respects than its federal counterpart." *Id*. Although never asserting federal preemption of the Texas right to free speech, the removing defendant "suggested that this constitutional provision [was] 'essentially' a federal claim in disguise." *Id*. In reversing the denial of remand, the Fifth Circuit sharply rebuked this argument:

> This argument, standing alone, disregards principles of federalism; it ignores the superiority of state-court forums for state-law claims and denigrates the state's authority to fashion independent constitutional law. With regard to the latter proposition, the Supreme Court has recognized that every state has a "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 79, 100 S.Ct. 2035, 2040, 64 L.Ed.2d 741 (1980). For this reason, "[i]t is fundamental that state courts be left free and unfettered by ... [the federal courts] in interpreting their state constitutions." *Minnesota v. National Tea Company*, 309 U.S. 551, 555, 60 S.Ct. 676, 679, 84 L.Ed. 920 (1940).

Id. at 367-68 (emphasis supplied).

c. The challenged ordinance cannot create a substantial federal interest.

Jackson argues that the federal issues purportedly raised by this appeal are "substantial" because the challenged ordinance is "founded on federal constitutional principles." Jackson's Mem. 9. In support of this argument, Jackson observes that the preamble to the challenged ordinance claims to "recognize" that First Amendment rights must be balanced against other interests, and that the ordinance seeks to ensure that the appropriate balance is struck. *Id*. Thus, Jackson argues it is "impossible" to resolve the Sidewalk Advocates' claims without "analyzing and interpreting the validity of an ordinance that itself raises a federal question." *Id*. at 9-10.

Jackson cites no authority for the proposition that a federal question can be created by a challenged city ordinance. This argument turns federal question jurisdiction on is head, as such jurisdiction can only arise from "the allegations necessary to support the plaintiff's claim." *Gully*, 299 U.S. at 111. Federal rights which the Jackson City Council may have been concerned with when it passed the challenged ordinance, but which are nevertheless unnecessary to the Sidewalk Advocates' claims, simply cannot form the basis of federal question jurisdiction. *See Id*. This point is self-evident. If this were not the case, every state and local government could manufacture a federal question in every statute or ordinance it passed simply by referencing relevant federal rights in the text of those enactments. Moreover, as discussed below, the government interest actually involved in this appeal belong to the State of Mississippi, not the federal government. This is true regardless of whether the ordinance happens to reference federal rights.

d. An exercise of federal jurisdiction would upend the balance of federal and state judicial responsibilities.

Jackson argues that an exercise of federal question jurisdiction would not disturb any congressionally approved balance of federal and state judicial responsibilities, simply because

such an exercise would not "open the floodgates of litigation that might overwhelm federal courts." Jackson's Mem. 10. Whether true or not, that is hardly the point. In fact, federal jurisdiction over these purely state constitutional claims would upend the balance between federal and state judicial responsibilities. Jackson's argument for federal jurisdiction has no limiting principle, and would thus create federal jurisdiction over virtually all state constitutional claims. This would constitute a major usurpation of state authority. *See Singh v. Duane Morris LLP*, 538 F.3d 334, 339 (5th Cir. 2008) (finding disruption for state-law legal malpractice claims because the defendant's argument "reached so broadly that it would sweep innumerable legal malpractice claims into federal court.").

C. There is No Supremacy Clause Issue.

1. Jackson's anticipated Supremacy Clause defense does not create a federal question.

Jackson argues, without citation to authority, that a Supremacy Clause issue exists in this appeal. Jackson bases this argument on its mistaken belief that the Sidewalk Advocates claim that their rights "supersede"[2] the rights of every other citizen, and are thus "requiring the Circuit Court to make a determination under the Supremacy Clause."[3] Jackson's Mem. 12.

A Supremacy Clause claim asks a court to invalidate a state constitutional or statutory provision that directly conflicts with federal law. *See e.g. Elizabeth Blackwell Health Ctr. for*

[2] The Sidewalk advocates have never alleged that their rights "supersede" the rights of any other person and Jackson has never explained what it means by rights "superseding" other rights.

[3] Jackson also argues that by citing federal cases discussing the authority of the states to afford greater liberty protections, the Sidewalk Advocates "demonstrate the point" made by Jackson, because the "recurring theme" is one of federal courts examining this issue. Jackson's Mem. 12. First, the cases cited by the Sidewalk Advocates were before federal courts because they involved *both* state and federal claims. But more importantly, the Sidewalk Advocates cited these federal cases because, as any law student knows, federal circuit court opinions are binding authority upon this federal court, while state court opinions are not. However, there are ample state court opinions discussing the same concept. *See e.g. Penick v. State*, 440 So. 2d 547, 552 (Miss. 1983) ("The words of our Mississippi Constitution are not balloons to be blown up or deflated every time, and precisely in accord with the interpretation the U.S. Supreme Court, following some tortuous trail, is constrained to place upon similar words in the U.S. Constitution.").

Women v. Knoll, 61 F.3d 170, 178 (3d Cir. 1995). The Sidewalk Advocates have not pled a Supremacy Clause claim, and have not claimed that any state or local law is preempted by any federal law. Moreover, none of the Sidewalk Advocates' claims requires proving anything under the Supremacy Clause as an element of the claim. While Jackson insists that the Sidewalk Advocates are "requiring" the state court to "make a determination under the Supremacy Clause," a more accurate statement of the case is that Jackson intends to raise the Supremacy Clause as a defense to the Sidewalk Advocates' claims. Jackson's Mem. 12. As discussed above, Jackson's anticipated defense cannot raise a federal question. *Bernhard*, 523 F.3d at 551 (5th Cir. 2008).

2. There is no conflict between the Mississippi and federal constitutions.

a. There is no federally created individual right to avoid unwelcome expression on public streets and sidewalks near abortion centers.

Jackson attempts to create a Supremacy Clause issue by framing the issue in this appeal as "whether the free speech liberties granted by a state constitution are in conflict with federal constitutional rights and freedoms." Jackson's Mem. 13. No such conflict exists, and Jackson cites no authority supporting this supposed conflict. The source of Jackson's error is in confusing the federally recognized *state* *interest* in ensuring citizens may obtain unimpeded medical counseling and treatment, as well as the federally recognized *individual* *interests* of unwilling listeners in avoiding unwelcome expression, with a federally created *individual* *right* to avoid unwelcome expression on public streets and sidewalks near abortion centers. No such federally created right exists.[4] *See e.g. Hill v. Colorado*, 530 U.S. 703 (2000).

[4] Clearly, there is a federal right to make the decision to have an abortion, *Roe v. Wade*, 410 U.S. 113 (1973), and to seek abortion services. *Madsen*, 512 U.S. at 767; *Schenck*, 519 U.S. at 376. However, there is "not a [federal] right to be insulated from all others in doing so." *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 877 (1992).

In *Hill*, the United States Supreme Court upheld a Colorado statute making it unlawful to "knowingly approach" within eight feet of another person, without that person's consent, near a health care facility, "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person." ("disfavored speech zone"). *Id*. at 707. The Court framed the question confronting it as "whether the Colorado statute reflects an acceptable balance between the constitutionally protected ***rights*** of law-abiding speakers and the ***interests*** of unwilling listeners. . . ." *Id*. at 714. (emphasis supplied). The Court also examined the "state ***interests*** [in] . . . unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests. . . ." *Id.* (emphasis supplied). The Court explicitly noted that "whether there is a '***right***' to avoid unwelcome expression is not before us in this case." *Id*. at 718 n. 25. (emphasis supplied). While the Court relied on case law concerning a "right to be left alone," it clarified that "[t]his common-law 'right' is more accurately characterized as an 'interest' that States can *choose* to protect in certain situations." *Id*. at 717 n. 24. (citations omitted) (emphasis supplied). *See also Schenck*, 519 U.S. at 383. (upholding an injunction against antiabortion activities, but refusing to rely on any supposed "'right of the people approaching and entering the facilities to be left alone.'").

This distinction between a "right" and an "interest" is not semantic. Government interests and individual interests are not constitutionally protected – individual rights are. Thus, the Federal Constitution is not implicated by the balancing of government or individual interests against state constitutional rights, and as such, there is no Supremacy Clause issue in this appeal.

b. The relevant government interests belong to the State of Mississippi, not the federal government.

Moreover, even if a federal interest alone could form the basis of a Supremacy Clause issue, there is no federal interest involved in this appeal. Jackson argues that "[h]ere, a competing

federal interest exists that is not addressed by state law. . . .” (Jackson’s Mem. 13) (emphasis supplied). However, the government interests actually at issue in this appeal belong not to the federal government, but to the State of Mississippi, of which Jackson is a political subdivision.[5] *See e.g. Hill* at 715 (“[T]he *state* interests that the statute is intended to serve . . . is a traditional exercise of the *State’s* ‘police powers to protect the health and safety of their citizens’”. . . .) (citations omitted) (emphasis supplied). *See also* City of Jackson Code of Ordinances, § 86-401, *et seq.* (ECF No. 8-1) (“This article is enacted to protect, preserve, and promote the health, safety, and welfare for the citizens of the City of Jackson. . . .”). There is no federal interest in the balancing of these purely state interests against purely state constitutional rights.

c. The FACE Act does not create a Supremacy Clause issue.

Jackson also points to the Freedom of Access to Clinic Entrances (“FACE”) Act of 1994, 18 U.S.C.A. § 248, as evidence that women’s federal right to seek abortion services is in conflict with the state constitutional rights asserted by the Sidewalk Advocates. Jackson’s Mem. 11. However, Jackson does not explain how the conduct which the Sidewalk Advocates seek to engage in, or the rights they seek to assert, conflict with the FACE Act. *Id.* The Sidewalk Advocates seek to provide information about alternatives to abortion to individuals approaching the abortion center, to congregate near the abortion center in order to engage in speech, and to shout only when necessary to be heard over music that is sometimes played by the abortion center in order to prevent others from hearing the Sidewalk Advocates’ speech. Notice of Appeal ¶¶ 11-16 (“App.”) (ECF No. 1-1). Tellingly, the Sidewalk Advocates “regularly” engaged in this same conduct prior to

[5] “In Mississippi, a municipality is a ‘creature’ of the State, possessing only such power as may be granted by statute.” *Peterson v. City of McComb City*, 504 So. 2d 208, 209 (Miss. 1987).

Jackson's adoption of the ordinance creating disfavored speech zones, App. ¶¶ 13-16, but have never been charged with violating the FACE Act.

Moreover, by its clear terms, the FACE Act does not prohibit the type of peaceful, non-obstructive expression that the Sidewalk Advocates seek to engage in. 18 U.S.C. § 248(d) ("nothing in this section shall be construed (1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration. . . .") *See also United States v. Scott*, 958 F. Supp. 761, 779 (D. Conn. 1997), *aff'd and remanded sub nom. United States v. Vazquez*, 145 F.3d 74 (2d Cir. 1998) (the FACE Act "speak[s] in clear, common words," defining many of its terms so as to "inform those opposed to abortion that they will not offend this law by peaceful, non–obstructive [expression]." Rather, the Act provides penalties against persons who use or threaten force in order to interfere with the performance of abortion services. 18 U.S.C. § 248.

While Jackson does not explain how the Sidewalk Advocates' intended conduct would conflict with the Act, it does put in underlined and bold font some of the Act's references to the more subjective *effects* of prohibited conduct, namely the effect of "intimidate[ing] or interfere[ing] with any person . . . obtaining or providing reproductive health services." (Jackson's Mem. 11). However, Jackson fails to acknowledge that this intimidation or interference must be produced by force or the threat of force in order to come within the statute's prohibitions. *Allentown Women's Ctr., Inc. v. Sulpizio*, 2019 WL 4060030, at *6 (E.D. Pa. Aug. 28, 2019) ("[f]orce, along with threat of force and physical obstruction, is a necessary precedent to 'intimidat[ing]' [or interfering with] a person in violation of FACE. . . ."). While the Sidewalk Advocates do not claim a right to intimidate or interfere with women seeking abortion services, it bears mention that much of the conduct Jackson apparently relies upon is, in and of itself, not an offense under the statute. Additionally, while Jackson also underlines and bolds the prohibited

forceful act of "physical obstruction," Jackson's Mem. 11, this emphasis is likewise misplaced, as the Sidewalk Advocates have not asserted a right to physically obstruct any person from obtaining abortion services. App. ¶¶ 34-73. Jackson cannot manufacture a federal question by ascribing grounds for this appeal that the Sidewalk Advocates have not asserted.

II. Jackson Should Be Required to Pay the Costs and Expenses Incurred by the Sidewalk Advocates as a Result of the Improper Removal.

None of the arguments raised in Jackson's opposition brief change the fact that Jackson lacked "objectively reasonable grounds to believe the removal was legally proper." *Valdes v. Wal–Mart Stores, Inc.*, 199 F.3d 290, 293 (5th Cir. 2000). If anything, Jackson's opposition brief has multiplied the justification for awarding costs and expenses by requiring the Sidewalk Advocates to respond to multiple irrelevant doctrines and arguments, most of which were asserted by Jackson without reference to any authority, and the remainder of which were asserted based on clearly misplaced authority, which a minimal amount of research would have revealed. *See e.g. Trawick v. Asbury MS Gray-Daniels, LLC*, 244 F. Supp. 2d 697 (S.D. Miss. 2003) (attorney's fee award was warranted where minimal amount of research by defense counsel would have revealed that federal-question jurisdiction did not exist); *Gannett River States Pub. Corp. v. Mississippi State Univ.*, 945 F. Supp. 128 (S.D. Miss. 1996) (Plaintiff awarded attorney's fees even though there was no finding of bad faith or harassment, simply on the ground that plaintiff should not have to bear the expenses of defendants' improvident removal).

CONCLUSION

For the reasons set forth above, and for those reasons urged in the opening memorandum, Appellants respectfully request that this Court enter an order granting Appellants' motion to remand, and requiring Jackson to pay the just costs and actual expenses, including attorney's fees, incurred by the Appellants as a result of the improper removal.

RESPECTFULLY SUBMITTED, this the 10th day of December, 2019.

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Counsel for Appellants

CERTIFICATE OF SERVICE

I, Aaron R. Rice, counsel for Appellants, hereby certify that the foregoing document has been filed using the Court's ECF filing system and thereby served on all counsel of record who have entered their appearance in this action to date.

This the 10th day of December, 2019.

/s/ *Aaron R. Rice*
Aaron R. Rice