IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

BARBARA BEAVERS; MONICA CABLE; LAURA KNIGHT; and PAMELA MILLER — **APPELLANTS/PLAINTIFFS**

VS — **CIVIL ACTION NO.: 3:19cv 735-DPJ-FKB**

CITY OF JACKSON, MISSISSIPPI — **APPELLEE/DEFENDANT**

MEMORANDUM IN SUPPORT OF RESPONSE IN OPPOSITION TO APPELLANTS' MOTION TO REMAND

COMES NOW the Appellee/Defendant, City of Jackson, Mississippi ("City"), through the undersigned counsel, and files this Response of City of Jackson, Mississippi, to Appellants/Plaintiffs' Motion to Remand, filed by Barbara Beavers, Monica Cable, Laura Knight, and Pamela Miller ("Appellants/Plaintiffs") on November 14, 2019. For the reasons set forth below, the Appellants/Plaintiffs' Motion to Remand should be denied and this matter should remain in District Court, having been properly removed by the City pursuant to 28 U.S.C. §§ 1331, 1441(a). Because removal was proper, the Appellants/Plaintiffs' demand for attorney's fees should also be denied.

BRIEF STATEMENT OF FACTS

In response to continual complaints, and the consistent need for intervention by the Jackson Police Department, relating to disputes between individuals seeking or providing medical counseling and treatment and those protesting or "counseling" against such actions, the City Council of the City of Jackson enacted an ordinance on October 1, 2019. The ordinance prohibits certain activities near health care facilities, including a fifteen-foot clearance around the entrance, an eight-foot bubble of personal space around individuals accessing the facility, and a limitation on loud noise where quiet zones have been established. Because the efforts of the Jackson Police Department to mediate disputes, avoid violent confrontations, and enforce existing City ordinances regulating use of public sidewalks and other conduct was insufficient or ineffectual, the City Council enacted the ordinance to create clear guidelines that would ensure a patient's unimpeded access to an appropriately calm medical environment, while ensuring the First Amendment rights of those seeking to communicate their message would not be impaired.

Following the City Council's decision to enact the ordinance, Appellants/Plaintiffs filed a Notice of Appeal to reverse the decision, so they could continue to approach within eight feet of individuals without their consent, shout at individuals when Appellants/Plaintiffs deem it necessary to be heard, and congregate with others near the entrance, around the premises of health care facilities.

Although the Notice of Appeal raises a federal question, Appellants/Plaintiffs attempt to couch their cause of action in terms of state constitutional violations, even though the nexus of the analysis is inextricably bound to questions of federal constitutional law that have been developed in the federal court system for the past thirty

years, amid a controversial and ever-changing landscape. Appellants/Plaintiffs now improperly seek to evade this federal forum despite the City's substantively justified and procedurally proper removal.

INTRODUCTION
Standard for "Arising Under" Jurisdiction

Federal district courts have original jurisdiction over any civil action "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Any "civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant . . . to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a). The "laws" of the United States includes federal common law. *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972). While federal question jurisdiction exists where a plaintiff pleads an action created by federal law, the Supreme Court has long held that federal question jurisdiction also applies when a plaintiff pleads an action as a state law claim but implicates significant federal issues. See, *Grable & Sons Metal Prods, Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005).

The "doctrine captures the common sense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Id.* at 314. While no single test exists for determining federal question jurisdiction over federal issues embedded in state-law claims, the Fifth Circuit framed the test as whether (1) a federal right is an essential element of the state claim, (2) interpretation of the federal right is necessary to resolve the case, and (3) the question of federal law is substantial. *Howery v. Allstate Ins. Co.*,

243 F.3d 912, 917 (5th Cir. 1001). The Supreme Court in *Grable* ultimately framed the test as whether the state-law claim "necessarily raises 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." See, *Grable*, 545 U.S. at 314.

ARGUMENT

I. This case is removable because Appellants/Plaintiffs' claims allege violations of federal constitutional rights and raises issues under the Supremacy Clause.

A. Overview

A defendant may remove a civil action when the action initially could have been filed in federal court. 28 U.S.C. § 1441(a); see also, *Caterpillar Inc. v. Williams*, 482 U.S. 386, 391-392 (1987). District courts have original jurisdiction for cases "arising under the Constitution, laws, or treaties of the United States," and whether a claim "arises under" federal law depends upon whether the "plaintiff's well-pleaded complaint raises issues of federal law." *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987); see also, 28 U.S.C. § 1331. Even when a plaintiff states a claim in terms of state law, federal jurisdiction is still proper if "some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims, or one of the other claims is 'really' one of federal law." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 13 (1983). This precept applies even though the party bringing the suit is generally considered the "master to decide" the law that he will rely upon. Rather, the courts specifically admonish that a plaintiff may not evade removal by artful pleading. See, *id.* at 22 (noting that "it is an independent corollary of the well-pleaded complaint rule that a plaintiff may not defeat removal by omitting to plead necessary federal

questions in a complaint[.]"), citing *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) and *Avco Corp. v. Aero Lodge No. 735, Int'l Assn. of Machinists*, 376 F.2d 337, 339-340 (CA6 1967), aff'd, 390 U.S. 557 (1968); see also, *Peters v. Union Pac. R. R.*, 80 F.3d 257, 260 (8th Cir. 1996), citing *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987) (finding that "a plaintiff's characterization of a claim as based solely on state law is not dispositive of whether federal question jurisdiction exists.")

B. The City's removal was proper because substantial, disputed questions of federal law contained in Appellants/Plaintiffs' Notice of Appeal are necessary elements of Appellants/Plaintiffs' claims.

According to well-established case law, whether this Court has subject-matter jurisdiction is determined by the substantial federal question doctrine, which is satisfied when "(1) the state-law claim . . . necessarily raise[s] a disputed federal issue; (2) the federal interest in the issue [is] substantial; and (3) the exercise of jurisdiction [does] not disturb any congressionally approved balance of federal and state judicial responsibilities." *United States v. City of Loveland*, 621 F.3d 465, 472 (6th Cir. 2010), citing *Grable*, 545 U.S. at 314. All three prongs are satisfied in the present matter.

1. Plaintiff's "state-law" claims necessarily raise a disputed federal issue.

Appellants/Plaintiffs claim that the City's Health Care Facility Ordinance[1] violates their rights under Article 3, Section 13 (free speech), Section 11 (peaceable assemblage), Section 14 (due process and equal protection) of the Mississippi Constitution.[2] The basis

[1] City of Jackson, Mississippi Code of Ordinances, § 86-401, *et seq.* ("Health Care Facility Ordinance" or "Ordinance"), attached as Exhibit "A".

[2] See, Notice of Appeal, pp. 6 – 12 (Counts I, II, III, and IV). Count V claims that the City Council's adoption of the Ordinance was beyond the Council's scope of power, in violation of the Mississippi Constitution "or Mississippi statutes." No specific state law or ordinance has been asserted, but Count V also turns on the construction of applicable constitutional law whether or not a statutory violation is claimed.

of Appellants/Plaintiffs' appeal is limited to constitutional violations, and the rights asserted pursuant to the Mississippi Constitution are inextricably entwined with rights created by the United States Constitution.[3] In addition, Appellants/Plaintiffs specifically state that Article 3, Section 13 of the Mississippi Constitution is "more protective of the individual's right to freedom of speech than is the First Amendment to the United States Constitution, since the Mississippi Constitution makes free speech worthy of religious veneration."[4]

Appellants/Plaintiffs' argue in their Motion to Remand that their reference to the more restrictive nature of Mississippi's free speech protection was a "passing reference" and mere "surplusage."[5] See, *Jackson v. Mississippi Farm Bureau Mut. Ins. Co.*, 947 F.Supp. 252, 255 (S.D. Miss 1996) (recognizing that references to the United States Constitution "may be surplusage and/or may not be intended to and may not have the effect of advancing a federal cause of action.") However, "plaintiffs may not avoid federal jurisdiction simply by failing to denominate as federal what is in substance a federal claim, i.e., by artful pleading." *Id.* (holding that removal was proper when reference to the United States Constitution was first made via unsigned and unfiled responses to interrogatories, even though plaintiffs specifically stipulated that they were pursuing no federal claims, and even though the claim relating to race discrimination was part of a larger claim of insurer's bad faith claims denial.)

Similarly, in *Mississippi Farm Bureau*, the reference to federal law was significant because no state action was available on the basis of race discrimination. *Id.* Here, the

[3] See U.S.C.A. Const. Amend. I-Speech; U.S.C.A. Const. Amend. I-Assemblage; U.S.C.A. Const. Amend. XIV § 1-Due Proc.; and U.S.C.A. Const. Amend. XIV, § 1-Equal Protect.
[4] Notice of Appeal at ¶ 35.
[5] Notice of Remand at pp. 4 - 5.

reference to federal law is significant because Appellants/Plaintiffs are asserting a claim that is at the center of controversial and evolving federal jurisprudence, that asserts one individual's state constitutional rights over another's federal constitutional rights, and that inherently, and on the face of the pleading, raises questions under the Supremacy Clause, which establishes the constitution and laws of the United States as the "supreme Law of the Land" over the constitution or laws of any state. U.S.C.A. Const. Art. VI, cl. 2.

2. The federal interest is substantial.

a. Federal constitutional rights developed in federal courts

The City's Health Care Facility Ordinance seeks to protect the health, safety, and welfare of the citizens of, and visitors to, the City of Jackson and State of Mississippi who are seeking medical treatment, counseling, and/or education from medical professionals. The Ordinance recognizes that those who are attempting to enter hospitals, clinics, and other health care facilities may be in particularly vulnerable medical and emotional conditions and may be adversely affected by unwanted and/or emotional confrontations, and that their individual rights may be violated by obstruction of access to, and deprivation of quiet environs within, health care facilities.[6] While the Ordinance applies to all health care facilities, Appellants/Plaintiffs have challenged the ordinance as it pertains to Jackson Women's Health Organization, a health care facility located in the City of Jackson where abortions are performed,[7] and it is in that context that the City responds.

[6] See Health Care Ordinance at Preamble and § 86-401-Purpose (Exhibit A).
[7] Notice of Appeal, ¶¶ 3, 14.

Since the United States Supreme Court recognized women's right to seek pre-viability abortions in *Roe v. Wade*, 410 U.S. 113 (1973),[8] the topic of abortion has been an emotional issue and the subject of constant litigation. It is considered by the courts to be "one of the most contentious and controversial in contemporary American society" and one that "presents extraordinarily difficult questions that . . . involve virtually irreconcilable points of view." *Stenberg v. Carhart*, 530 U.S. 914, 947 (2000) (concurring opinion by Justice O'Connor).

Local legislation enacted to protect the rights of individuals seeking counseling and medical treatment has been repeatedly challenged on the basis of free speech, with the Supreme Court examining issues relating to buffer zones on four occasions. (*Schenck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357 (1997) (holding governmental interests in public safety, traffic flow, property rights, and woman's freedom to seek pregnancy-related services were significant, justifying injunction's fixed buffer zone of fifteen feet from entrances; finding fifteen-foot zone around people and vehicles burdened more speech than necessary); *Madsen v. Women's Health Center, Inc.* 512 U.S. 753 (1994) (striking injunction's floating buffer zone of three hundred feet but upholding its fixed buffer zone of thirty-six feet); *Hill v. Colorado*, 530 U.S. 703 (2000) (upholding an eight-foot floating buffer zone law within a 100-foot fixed buffer zone); and *McCullen v. Coakley* 573 U.S. 464. (2014) (holding a 35-foot buffer zone law to be insufficiently narrowly tailored). These cases, decided in federal court and resolved by the Supreme Court in favor of competing governmental and constitutional interests is precisely why Appellants/Plaintiffs seek to bring their action in state court. The issues inherently

[8] See also, *Planned Parenthood of Southeastern Pennsylvania et al. v. Casey, Governor of Pennsylvania, et al.*, 505 U.S. 833 (1992), reaffirming the right of an individual to choose to have an abortion before viability and to obtain it without undue interference from the State.

involve competing constitutional liberties and, historically, decisions regarding constitutionality of the state and local laws, ordinances, and injunctions have been properly before the federal judiciary.[9] If cases such as this did not belong in federal court, there would be no need for the "arising from" language of § 1331.

b. Ordinance challenged asserts federal question

The ordinance Appellants/Plaintiffs seek to abolish is founded on federal constitutional principles. The Health Care Facility Ordinance states that,

> This article is enacted to protect, preserve and promote the health, safety, and welfare for the citizens of the City of Jackson through the provision of unobstructed access to, and quiet environs within, Health Care Facilities for the purpose of obtaining medical counseling and treatment for residents and visitors to the City. The City Council recognizes that the exercise of a person's right to protest or counsel against certain medical procedures is a First Amendment activity that must be balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner and that is free from increased health risks such as those associated with shouting or other amplified sound.
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> . . .
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> It is the intent of this article to establish guidelines that will ensure that patients have unimpeded access to medical services that may be conducted in a calm environment while ensuring that the First Amendment rights of those seeking to communicate their message are not impaired. Having found less restrictive alternatives to be ineffective or impractical, the City finds that limited buffer and bubble zones and limitations on amplified sound outside Health Care Facilities established by this article will ensure that patients' rights to safely receive medical services are protected while ensuring that the First Amendment rights of those who seek to communicate their message to their intended audience are not impaired.[10]

It is impossible to resolve Appellants/Plaintiffs' request to reverse the City Council's decision to adopt the Ordinance without analyzing and interpreting the validity

[9] For example, a Westlaw search of cases citing *Hill*, containing the word "buffer" and with headnote(s) relating to "free speech," garners 136 cases. Of that 136, 120 cases were adjudicated in federal courts, while only 16 were before state courts.

[10] Health Care Ordinance, § 86-401.-Purpose, emphasis added.

of an ordinance that itself raises a federal question. While Appellants/Plaintiffs may assert rights under the Mississippi Constitution, they assert those rights in the context of federal questions that should be examined by the District Court.

3. This Court's exercise of jurisdiction does not disturb any congressionally-approved balance of federal and state judicial responsibilities.

Here, the District Court's exercise of jurisdiction cannot open the federal courts to an "undesirable quantity of litigation"[11] because the vast majority of free speech cases seeking to strike down buffer zone laws have been heard by federal courts.[12] Resolution of constitutional claims, including state actions requiring analysis under the Supremacy Clause, are already within the District Court's jurisdiction, therefore, retaining this matter would not open the floodgates of litigation that might overwhelm the federal courts. Rather, a logical analysis of the nature of Appellants/Plaintiffs' claim supports retaining jurisdiction over a case that belongs in federal court.

C. This case is removable based on a federal question regarding the potential conflict between the Mississippi Constitution and the United States Constitution as it relates to the City's Health Care Facility Ordinance.

Appellants/Plaintiffs assert in their Notice of Appeal that the Mississippi Constitution is ". . . more protective of the individual's right to freedom of speech than is the First Amendment of the United States Constitution since [it] makes free speech worthy of religious veneration."[13] The Appellants/Plaintiffs claim that the City's Health Care Facility Ordinance violates their right to free speech under the Mississippi Constitution, and that, but for the Ordinance, they would engage in the speech of "actively

[11] *City of Loveland*, 621 at 465, supra. (citation omitted).
[12] See fn. 10, above.
[13] See, Notice of Appeal, ¶ 35.

encouraging persons . . . not to have an abortion,[14] by approaching persons near the Health Care Facility without the persons' consent;[15] by shouting, when the Appellants/Plaintiffs deem it necessary, at persons patronizing the facility;[16] and by congregating with others near[17] the entrance of the facility.[18]

Thus, on the face of their pleading, Appellants/Plaintiffs assert a claim that their individual rights to free speech, according to the Mississippi Constitution, supersede the Unites States Constitution's substantive due process rights of others that have repeatedly been recognized by the Supreme Court. In fact, the right to freely access facilities that conduct abortions has been codified by Congress in the Freedom of Access to Clinic Entrances Act of 1994. 18 U.S.C. § 248 ("FACE"), which creates criminal and civil penalties for anyone who "by force or threat of force or by **physical obstruction**, intentionally injures, **intimidates or interferes with** or **attempts to** injure, **intimidate or interfere with** any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, **obtaining or providing reproductive health services**." § 248(a)(1), emphasis added; see also, § 248(b)-Penalties. The City's ordinance is directly in line with the federal statute protecting individuals' rights to obtain reproductive health care services.

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[14] Notice of Appeal, ¶ 12.

[15] The Health Care Facility Ordinance creates an eight-foot personal bubble (§ 86-403) to protect individuals accessing health care facilities from unwanted personal contact. Consent, such as a nod, saying "yes" or "ok," would permit another to enter their personal space.

[16] The Ordinance limits loud noise around any medical facility properly marked as a "quiet zone" to limit increased health risks when undergoing medical treatment. § 86-405.

[17] The Ordinance creates a fifteen-foot clearance at health care facility entrances to ensure unobstructed access to the facilities (§ 86-404); how much nearer the Appellants/Plaintiffs intend to congregate without risk of obstructing the entrance is not specified in their Notice of Appeal.

[18] Notice of Appeal, ¶¶ 30 - 32.

Appellants/Plaintiffs argue in their Motion to Remand that no conflict requiring a Supremacy Clause analysis exists because state courts are "absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the Unites States Constitution." See, Motion to Remand at pp. 6 – 7. Appellants/Plaintiffs seem to suggest that the potential conflict identified by the City is limited to a comparison of the more expansive state-created right to its related federally-created right and, because states are permitted to offer greater protection to individual rights, a conflict could not exist and thus could not give rise to a Supremacy Clause question. *Id*. at pp. 6-9.

However, the City's Notice of Removal does not assert that states may not impose more expansive rights than those afforded under similar provisions of the federal constitution. Rather, the City identified in its Notice of Removal that, because Appellants/Plaintiffs have explicitly asserted that the Mississippi Constitution affords them individual rights that ***supersede*** the rights of every other citizen under the First, Fifth and Fourteenth Amendments of the United States Constitution, they are requiring the Circuit Court to make a determination under the Supremacy Clause. Notice of Removal at p. 2.

Furthermore, Appellants/Plaintiffs' Motion to Remand explains the propriety of state-created rights as compared to similar federally-created rights that are less restrictive in great detail. In doing so, they overlook the potential conflict identified by the City, and, at the same time, demonstrate the point made in its Notice of Removal. The recurring theme is one of federal courts examining a question involving the interplay between state and federal law under the particular circumstances of the case. That states may enact protections more restrictive than similar federal provisions may be mentioned, but the

court's *evaluation* revolves around the resulting question of conflict that is raised by the state law as it relates to the relevant federal law. (See, e.g., *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980) (examining whether state constitutional first amendment right violated shop owners' rights under the First, Fifth and Fourteenth Amendments of the United States Constitution); *Gomez v. Texas Dep't of Mental Health & Mental Retardation*, 794 F.2d 1018 (5th Cir. 1986) (noting in dicta that the plaintiff-appellant's argument in favor of characterizing his speech according to state constitutional law was irrelevant to the federal question); *Cherry v. Dir. State Bd. of Corr.*, 635 F.2d 414 (5th Cir. 1981) (acknowledging in footnote that federal court reviewing state procedures ends its inquiry once minimum federal standards are met); *Reynolds v. Sims*, 377 U.S. 533 (1964) (examining alleged deprivation of rights related to apportionment of state legislature, pursuant to the state's constitution and federal equal protection clause and noting, **despite the difficulty faced by a federal court adjudicating the state action, when unavoidable conflict between the state and federal constitutions exists, the Supremacy Clause controls**).

The City does not assert that states may not create individual rights that expand those rights granted under the United States Constitution. However, the City does argue that state-created rights cannot be asserted or evaluated in a vacuum, as Appellants/Plaintiffs would have the Circuit Court undertake. Here, a competing federal interest exists that is not addressed by state law, and a legitimate federal question of whether the free speech liberties granted by a state constitution are in conflict with federal constitutional rights and freedoms. These questions, therefore, fall squarely within the purview of the Supremacy Clause.

II. Appellants/Plaintiffs are not entitled to costs and fees.

The award of costs and fees under 28 U.S.C. § 1447(c) "is discretionary and should be granted only where the removing party 'lacked an objectively reasonable basis for seeking removal.'" *Griffith v. Alcorn Research, Ltd.*, 712 Fed.Appx. 406, 409 (5th Cir. 2017), quoting *Martin v. Franklin Capital Corp.*, 542 U.S. 132, 141 (2005).

On the face of Appellants/Plaintiffs' Notice of Appeal, all claims raised issues that arise under federal law. Though the grounds for appeal are couched in claims of state constitutional law violations, the nexus of the analysis is inextricably bound to questions of federal constitutional law. This is evidenced by the overwhelming majority of jurisprudence having been developed in the federal court system for the past thirty years. Because of the controversial nature and ever-changing landscape of this body of law, retaining jurisdiction limits the risk of inconsistency. As such, removal is not only proper, it is necessary.

Moreover, Appellants/Plaintiffs cannot prevail on their claims without addressing the Supremacy Clause question that examines the extent to which individual freedoms granted under the Mississippi Constitution may encroach upon the rights of all others guaranteed under the United States Constitution. Therefore, when asking what this case is "really" about, the reasonable answer is that it is about what rights Appellants/Plaintiffs may assert under the Mississippi Constitution *as they relate* to others' federally protected constitutional rights in the present circumstances. This is not a settled question of law. Rather, the reach of a sidewalk counselor's free speech rights in light of another's, equally valid, constitutional rights is the subject of constant, complex, and evolving litigation. When the additional claim of enhanced protections offered by a state constitution is asserted, the issue is far from settled.

This federal question would present itself on the face of Appellants/Plaintiffs' pleadings even absent their explicit assertion that the Mississippi Constitution affords greater rights of free speech than does the United States Constitution. Notwithstanding, the question, having been raised, has given rise to an objectively reasonable basis for removal, and must be answered in the proper jurisdiction.

CONCLUSION

This Court has original jurisdiction over this matter because Appellants/Plaintiffs' Notice of Appeal presents a federal question, both explicitly and implicitly, that should be addressed by the District Court. Accordingly, the City's removal of the matter was proper. Because the City properly removed this matter to District Court, the Appellants/Plaintiffs' Motion to Remand should be denied, as well as Appellants/Plaintiffs' demand for attorney's fees.

RESPECTFULLY SUBMITTED, this the 3RD day of December, 2019.

CITY OF JACKSON, MISSISSIPPI

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CERTIFICATE OF SERVICE

The undersigned certifies that she has this day transmitted via electronic filing and/or U.S. Mail, a true and correct copy of the foregoing to the following:

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So certified, this the 3RD day of December, 2019.

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