IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

PLANNED PARENTHOOD OF GREATER TEXAS SURGICAL HEALTH SERVICES, and on behalf of its patients and physicians, *et al*.,	)	
Plaintiffs,	)	CIVIL ACTION
v.	)	
	)	CASE NO. 1:13-cv-862-LY
GREGORY ABBOTT, Attorney General of Texas, in his official capacity, *et al*.,	)	
Defendants.	)	

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION
AND MEMORANDUM OF LAW IN SUPPORT THEREOF

STATEMENT OF THE CASE

Texas House Bill No. 2 ("the Act") imposes medically unjustified, harmful, and burdensome restrictions that are intended to – and will – dramatically decrease access to abortion across the state and will ultimately prevent many women from obtaining an abortion. *See* Act of July 18, 2013, 83rd Leg., 2nd C.S., ch. 1, Tex. Gen. Laws (attached as Ex. A). To protect the health of their patients, as well as their patients' and their own constitutional rights, Plaintiffs hereby move to preliminarily enjoin the two restrictions of the Act that, if allowed to take effect on October 29, will have the most immediate and severe impact.

First, the requirement that physicians secure admitting privileges at a hospital within 30 miles of where an abortion is performed is medically unnecessary and will force at least one-third of the Texas facilities that today offer abortion to stop providing that care. Services in six cities will be entirely eliminated. Abortions will be unavailable between El Paso and I-35. There are currently only five Texas cities where a woman can get an abortion after 15 weeks; if the Act takes effect, there will be three. And those health centers that can continue to provide abortions will be forced to serve more women with fewer physicians. For women, this will mean increased travel burdens and costs as well as delays that could risk their health. Some women will be unable to obtain an abortion at all and will be forced to carry the pregnancy to term. At least one in three women who would choose an abortion will not be able to because of the admitting privileges requirement.

Second, the Act's unclear restrictions on medication abortion – a safe, private, and effective way to end an early pregnancy – are contrary to standard medical practice and actively harmful to patients. Absent preliminary injunctive relief, the Act will irreparably harm abortion providers and will be devastating to the women seeking those services.

LEGAL AUTHORITIES SUPPORTING THE MOTION

A preliminary injunction should issue based on Plaintiffs' showing that: (1) they have a substantial likelihood of success on the merits; (2) there is a substantial threat of irreparable injury if the injunction is not issued; (3) the threatened injury outweighs any harm that will result if the injunction is granted; and (4) the injunction will not disserve the public interest. *La Union Del Pueblo Entero v. Fed. Emergency Mgmt. Agency*, 608 F.3d 217, 219 (5th Cir. 2010).

I. PLAINTIFFS ARE SUBSTANTIALLY LIKELY TO PREVAIL ON THE MERITS OF THEIR CLAIMS.

A. The Admitting Privileges Requirement Violates the Constitutional Rights of Plaintiffs and Their Patients.

1. *The Admitting Privileges Requirement Cannot Withstand Constitutional Scrutiny Because It Is Medically Unnecessary.*

The "decision whether to bear or beget a child" is one of those "fundamental[]" choices that is "central to the liberty protected by the Fourteenth Amendment." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 834, 851 (1992); *see also Lawrence v. Texas*, 539 U.S. 558, 565 (2003) (The right to abortion has "real and substantial protection as an exercise of [a woman's] liberty under the Due Process Clause."). Moreover, the Supreme Court has repeatedly recognized that carrying a pregnancy to term carries health risks and, in some instances, these risks are greater than those associated with abortion. *See, e.g., Roe v. Wade*, 410 U.S. 113, 163 (1973).

Thus, when a state purports to regulate abortion in the interest of women's health, it is the state's burden to prove that such regulations actually advance that interest. *See e.g., City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 431 (1983) ("If a State . . . undertakes to regulate the performance of abortions . . . the health standards adopted must be legitimately related to the objective the State seeks to accomplish.") (citation and quotation omitted), *rev'd on other grounds*, *Casey*, 505 U.S. 833; *Akron*, 462 U.S. at 430 ("the decisive factor" in upholding recordkeeping and informed consent regulations in *Planned Parenthood of Cent. Mo. v.*

Danforth, 428 U.S. 52 (1976), was that "the State met its burden of demonstrating that these regulations furthered important health-related State concerns"); *see also Casey*, 505 U.S. at 900-01 (recognizing recordkeeping and reporting requirements as "a vital element of medical research" that were "directed to the preservation of maternal health") (internal citation omitted); *Planned Parenthood of Wis., Inc. v. Van Hollen*, No. 13-cv-465-wmc, 2013 WL 3989238, at *12 (W.D. Wis. Aug. 2, 2013) ("[T]he burden falls on the State to demonstrate that the regulation is 'reasonably related' to a legitimate state interest.").

Requiring any less of the state would be inconsistent with the status of a woman's right to choose as a fundamental right, which is plainly subject to heightened constitutional protection. *See, e.g., Casey*, 505 U.S. at 851 ("Our cases recognize the right . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child . . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.") (citations and quotations omitted). If this protection means anything, it means that a restriction that the state claims advances women's health must actually do so. Therefore, in reviewing abortion restrictions that purportedly protect women's health, the Court's analysis has focused on the extent to which the state can demonstrate that the restriction is: (1) tailored to advance the purported state interest;[1] and (2) consistent with accepted medical practice.[2] Defendants cannot carry this burden as to the

[1] *See, e.g. Danforth*, 428 U.S. at 78-79 (restriction on use of saline amniocentesis held unconstitutional because it did not advance state interest in protecting maternal health); *Bolton*, 410 U.S. at 194 (invalidating requirement that abortions be performed in an accredited hospital when state failed to show that "only hospitals meet its acknowledged interest in insuring the quality of the operation and the full protection of the patient"); *Roe*, 410 U.S. at 165 (state may only impose restrictions on abortion that are "tailored to the recognized state interests").

[2] *See, e.g., Simopoulos v. Virginia*, 462 U.S. 506, 516 (1983) (state is not permitted "to adopt abortion regulations that depart from accepted medical practice"); *Akron*, 462 U.S. at 431 ("The State's discretion to regulate [on the

privileges requirement because they cannot prove that requiring physicians who perform abortions to have privileges within the 30-mile range is medically justified or consistent with standard medical practice.

This is because, as explained in the declaration of Dr. Paul Fine, it is extremely unlikely that an abortion patient will ever need hospital-based care in the first place—less than 0.3% of abortions nationwide result in hospitalization. And in those very rare cases, existing law already requires Plaintiffs to "have a working arrangement with a physician(s) who has admitting privileges at a local hospital in order to ensure the necessary back up for medical complications." 25 Tex. Admin. Code § 139.56. Even in the absence of any sort of formal arrangement, however, referring a patient to an emergency room is more than enough to guarantee patient safety. There is *no* evidence to suggest that a patient cannot or would not be appropriately treated by a trained E.R. physician and/or other specialists on the hospital's own staff. *See* Decl. of Dr. Paul M. Fine ("Fine Decl.") ¶¶ 16, 19, 23-25 (attached as Ex. B).

Plaintiffs' experiences trying to comply with the Act only underscore that the privileges requirement is unrelated to, and therefore unnecessary for, the provision of abortion. For example, many hospitals require that physicians admit a certain number of patients per year in order to maintain privileges. Physicians who primarily provide abortions cannot meet this requirement because complications that require admission to the hospital are so rare following abortion. Decl. of Andrea Ferrigno ("Ferrigno Decl.") ¶ 11 (attached as Ex. C); Decl. of Darrel Jordan, MD ("Jordan Decl.") ¶¶ 5, 8 (attached as Ex. D). Ironically, it is because abortion is so safe that many physicians are unable to obtain privileges.

---

basis of maternal health] does not . . . permit it to adopt abortion regulations that depart from accepted medical practice."); *id.* at 435-37 (relying on the standards of the American College of Obstetricians and Gynecologists, among others, to demonstrate lack of justification for hospitalization requirement).

Nor can Defendants show that the admitting privileges requirement is consistent with medical practice. To the contrary, it rests upon the false premise that a patient needing transfer to a hospital from the abortion facility would necessarily be taken to the hospital where the physician has privileges. This is far from the case, given that EMTs, not doctors, generally choose where to transfer a patient based on their own protocols and the patient's condition. Fine Decl. ¶ 20. Similarly, it falsely presumes that all patients will be in the vicinity of the hospital where her physician has admitting privileges when she experiences a complication; in fact, many women travel to obtain an abortion, and complications may arise after the woman has left the health center. In those circumstances, the patient should not delay care to travel to a hospital where the physician who performed the abortion has admitting privileges. *See id.* ¶ 21-22. The Act recognizes this reality by requiring that women be given "the name and telephone number of the nearest hospital to the home of the pregnant woman at which an emergency arising from the abortion would be treated." Tex. Health & Safety Code § 171.0031(2)(B).

Notably, no similar requirement is imposed on any other outpatient facilities in Texas. For example, physicians who perform surgeries with general anesthesia in their offices do not need admitting privileges, but instead only an agreement with an emergency medical service for hospital transfers, despite the serious risks associated with anesthesia. 22 Tex. Admin. Code § 192.2(j). Even ambulatory surgical centers ("ASCs"), which provide procedures generally more complicated and riskier than abortion, can be licensed without employing doctors with admitting privileges. *See* Fine Decl. ¶ 27, 33; 25 Tex. Admin. Code § 135.4(c)(11).

The admitting privileges requirement also relies on the unsupported presumption that the same physician who provides outpatient care is the only physician competent provide hospital-based care to his or her patients, should such care become necessary. This is contrary to current

medical practice: hospitals today increasingly rely on their own dedicated staff, or "hospitalists." As a result, more and more highly qualified outpatient physicians hand off the care of their patients who are experience complications at the hospital door. *See* Fine Decl. ¶¶ 28-34. The American Congress of Obstetricians and Gynecologists ("ACOG"), which is generally recognized as the entity that sets the standard of care for obstetrics and gynecology, has explicitly stated that admitting privileges are not necessary to the provision of safe abortion and has publicly opposed laws like the Act. ACOG, *Open Letter to Texas Legislators: Get Out of Our Exam Rooms*, July 9, 2013, *available at* http://www.acog.org/About_ACOG/News_Room/ News_Releases/ 2013/Open_Letter_to_Texas_Legislators; *see also* Fine Decl. ¶ 26.[3]

Given the inherent safety of abortion, and the evidence demonstrating that the privileges requirement is totally unnecessary, Defendants cannot meet their burden of showing that the requirement actually advances women's health. Accordingly, Plaintiffs are likely to succeed on their claim that the privileges requirement is unconstitutional. *See, e.g.*, *Akron*, 462 U.S. at 435-37 (striking down requirement that second-trimester abortions take place in hospitals because evidence showed that early second-trimester abortions may be performed as safely in outpatient clinics); *Danforth*, 428 U.S. at 77-78 (invalidating ban on saline abortions because, *inter alia*, saline was the most commonly used method of post-first trimester abortion nationally).[4]

2. *The Admitting Privileges Requirement Will Have the Effect of Posing an Undue Burden on Women Seeking Abortions.*

Even if Defendants could prove that the Act advances maternal health, a law with the "effect of placing a substantial obstacle in the path of a woman seeking an abortion of a

[3] ACOG's standards are routinely relied upon by courts evaluating abortion safety regulations. *See e.g.*, *Akron*, 462 U.S. at 435-37.

[4] Although *Casey* overruled "those parts of *Danforth* and *Akron* which . . . are inconsistent with *Roe*'s statement that the State has a legitimate interest in promoting the life or the potential life of the unborn," 505 U.S. at 870, *Casey* did not overrule *Danforth* or *Akron* with respect to provisions that were enacted to further women's health.

nonviable fetus" is not "a permissible means of serving [a] legitimate end[]." *Casey*, 505 U.S. at 877; *see also Akron,* 462 U.S. at 438 (even if acting in the interest of maternal health, the state may not impose "a heavy, and unnecessary, burden on women's access to a relatively inexpensive, otherwise accessible, and safe abortion procedure").

Courts have not hesitated to conclude that a measure like this one that forces "a substantial portion of a state's abortion providers to stop offering such procedures creates a substantial obstacle to a woman's right to have a pre-viability abortion, thus constituting an undue burden under *Casey*." *Okpalobi v. Foster*, 190 F.3d 337, 357 (5th Cir. 1999 (citation omitted), *rev'd en banc on other grounds*, 244 F.3d 405 (5th Cir. 2001); *accord Tucson Woman's Clinic v. Eden* 379 F.3d 531, 542 (9th Cir. 2004) (fact-finder could conclude that regulation "limiting the supply of abortion providers" in the state "imposes a substantial obstacle"); *Planned Parenthood Se. v. Bentley*, No. 2:13cv405–MHT, 2013 WL 3287109, at *4 (M.D. Ala. June 28, 2013) (preliminarily enjoining admitting privileges requirement that threatened to close clinics because closures would add onus of distance and travel costs and, "for a significant number of women, this distance would be no mere encumbrance, but an insurmountable barrier to obtaining an abortion."); *Jackson Women's Health v. Currier*, No. 3:12cv436–DPJ–FKB, 2013 WL 1624365, at *5 (S.D. Miss. April 15, 2013) (plaintiffs likely to succeed on claim that admitting privileges requirement would impose substantial obstacle on women seeking abortion); *Planned Parenthood of the Heartland v. Heineman*, 724 F. Supp. 2d 1025, 1044-46 (D. Neb. 2010) (measure that would deter most providers from performing abortions imposes a substantial obstacle on access to abortion care); *Planned Parenthood of Kan. v. Drummond*, No. 07-4164-CV, 2007 WL 2811407, at *7-8, 10 (W.D. Mo. Sept. 24, 2007) (finding likelihood of success where, *inter alia*, law could have the effect of "shutting

down Missouri's only abortion facilities located outside the St. Louis area").

The privileges requirement will impose a substantial obstacle in the path of women seeking abortion. It will force over a third of the state's licensed facilities that provide abortion to stop providing that care. It will cause the sole abortion facilities in Lubbock, Waco, Killeen, Harlingen, and McAllen to cease providing abortions and all three providers in Fort Worth to stop, thereby completely eliminating access in those cities and forcing women—especially those in west Texas—to travel enormous distances, in some cases over 400 miles, to access abortion. Women who live west of Interstate 35 and east of El Paso will have no real access. And women who need abortions after 15 weeks will be forced to travel to Houston or Dallas, as the ASCs offering care in Fort Worth and Austin must stop and the one in San Antonio will have extremely limited capacity—all due to the privileges requirement. Ferrigno Decl. ¶ 21-22; Jordan Decl. ¶ 14; Decl. of Angela Martinez ¶ 11 ("Martinez Decl.") (attached as Ex. E).

At least 1 in 12 women seeking abortions will be forced to travel over 100 miles to a provider, which the legislature has already acknowledged is a distance that is unduly burdensome. *See* Decl. of Dr. Joseph E. Potter ¶ 6 ("Potter Decl.") (attached as Ex. F); *see also* Tex. Health & Safety Code § 171.012 (waiving in-person pre-abortion counseling for women living more than 100 miles from a provider). This increased travel burden will put abortion out of reach for some women. A significant number of Plaintiffs' patients have poverty-level incomes. Many either do not have cars or already struggle to pay for gas and childcare, on top of the costs of the abortion itself. Some women will simply not be able to travel great distances to an abortion provider, and therefore will be forced to carry the pregnancy to term or may attempt to self-induce. Those women who can make it to an abortion provider may experience significant delays in obtaining care as they struggle to scrape together additional funds for their

additional travel or make arrangements for rides, childcare, and additional time off from work. *See* Ferrigno Decl. ¶ 22; Martinez Decl. ¶¶ 5-6, 11; Potter Decl. ¶ 16.

Others may be delayed because the health centers that are able to continue to provide abortions will see a sharp increase in their patient volume – a 25% or greater increase in five out of seven counties where abortions will still be provided. For example, in Dallas, twice as many women can be expected to seek abortion as there is provider availability. Potter Decl. ¶ 12b. This will cause serious delays in scheduling appointments. Moreover, for those women who will be able to obtain care, they may be pushed further into their pregnancy, which increases both the risk of complications, Fine Decl. ¶ 13, and the cost of the procedure. Perhaps most disturbing, because a third of providers must stop providing abortions and those that remain will have to cut their capacity, the availability of abortion statewide will be decimated. One in three Texas women who will seek an abortion will be unable to obtain one: out of the approximately 68,900 women who are expected to seek an abortion annually in Texas, a full 22,286 will not be able to do so because of the privileges law. Potter Decl. ¶ 12.

All of this demonstrates that the Act unduly burdens women seeking abortions. *See Tucson Woman's Clinic*, 379 F.3d at 542 (increased costs and delays can impose an undue burden); *Planned Parenthood Se.*, 2013 WL 3287109, at *4 ("As a majority of the plaintiffs' patients are poor and many do not have access to a car, it appears that, for a significant number of women, this distance will be no mere encumbrance, but an insurmountable barrier to obtaining an abortion."). Indeed, it was because of these very burdens, which have no medical benefit and will instead harm women, that district courts in Wisconsin, Mississippi, and Alabama all recently enjoined similar admitting privileges requirements. *See Planned Parenthood of Wisc.*, 2013 WL 3992907, at *7-8; *Planned Parenthood Se.*, 2013 WL 3287109,

at *6; *Jackson Women's Health*, 2013 WL 1624365, at *5. This Court should do the same.

3. The Act's Requirement That Physicians Performing Abortions Have "Active Admitting Privileges" Is Unconstitutionally Vague.

The Act requires a physician performing an abortion to have "*active* admitting privileges." (Act, § 2.) The word "active" is impermissibly vague in this context because a doctor of common intelligence would be unable to tell whether it refers to a particular class of hospital staff membership often called "Active" or to admitting privileges that are current and unexpired.

"The Fourteenth Amendment's guarantee of Due Process proscribes laws so vague that persons of common intelligence must necessarily guess at their meaning and differ as to their application." *Women's Med. Ctr. of Nw. Houston v. Bell*, 248 F.3d 411, 421 (5th Cir. 2001) (quotation marks, brackets, and citations omitted). Vague laws are constitutionally infirm because they fail to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly" and because "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982) (citation omitted). Vagueness is particularly troublesome here because "the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights." *Colautti v. Franklin*, 439 U.S. 379, 391 (1979); *see also Women's Med. Ctr.*, 248 F.3d at 422 (because abortion is "a constitutionally protected right that has been a traditional target of hostility, standardless laws and regulations . . . open the door to potentially arbitrary and discriminatory enforcement").

The Act's requirement of "active admitting privileges" is vague because "active" is a term of art with respect to hospital staff membership. Numerous hospitals in Texas use the word "Active" to denote a particular category of medical staff that is generally reserved for staff who practice primarily or exclusively at the hospital, have full voting rights and commensurate

responsibilities, and serve as "on-call" emergency doctors. Most hospital bylaws also have additional categories of staff, such as Courtesy or Consulting, whose admitting privileges can be "active" in that they are current and unexpired and they confer the power to admit patients, but who do not have the additional obligations of "Active" staff." *See* Fine Decl. ¶¶ 35-38.

The Act leaves physicians who do not have "Active" staff membership unable to determine how to comply with the law, and consequently subjects them to arbitrary and discriminatory enforcement of a criminal law.[5] Accordingly, it is unconstitutionally vague.

4. The Act Violates Plaintiffs' Procedural Due Process Rights Because it Does Not Afford Enough Time to Comply with the Privileges Requirement.

The Act's privileges requirement also violates Plaintiffs' right to procedural due process because it fails to give them sufficient time to comply. The requirement takes effect 91 days after the Act's passage, but Texas law permits hospitals to take as much as 170 days from the time an application is received to notify a physician whether or not privileges are granted. *See* Tex. Health & Safety Code § 241.101(k). Thus, regardless of its other constitutional flaws, the privileges requirement must be preliminarily enjoined until physicians *know* if they can comply.

Procedural due process claims are assessed under a two-step inquiry: whether the plaintiff (1) has "identif[ied] a protected life, liberty, or property interest," and (2) is deprived of that interest without due process of law. *Phillips v. Vandygriff*, 711 F.2d 1217, 1221-22 (5th Cir. 1983). Plaintiffs readily meet the first step, given that the Supreme Court has repeatedly recognized that "the right to hold specific private employment and to follow a chosen profession

[5] The impact of this uncertainty is significant. Many physicians who currently provide abortions may hold or be eligible to obtain privileges that allow them to admit patients as a member of the courtesy staff, but do not qualify to join the "Active" staff for a variety of reasons, including that they do not have an adequate number of admissions per year. Ferrigno Decl. ¶¶ 11-12; Jordan Decl. ¶ 5. While the admitting privileges requirement is unnecessary to ensure that patients receive appropriate care in the first place, any interpretation of the Act that would preclude physicians who are able to admit patients in the event of an emergency from nonetheless providing abortions would make the law even more irrational and would increase the burdens discussed in Section I.A.2, *supra*.

free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts" of the Due Process Clause. *Greene v. McElroy*, 360 U.S. 474, 492 (1959); *see also Phillips*, 711 F.2d at 1222 ("[A] person has a liberty interest in pursuing an occupation.").

Plaintiffs likewise meet the second step. "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994) (explaining basis for presumption against retroactive legislation). "[A]ny law that requires you to do something by a certain date must give you adequate time to do it; otherwise, the law would be irrational and arbitrary for compliance with it would be impossible." *Campbell v. Bennett*, 212 F. Supp. 2d 1339, 1343 (M.D. Ala. 2002).

Here, Plaintiffs simply do not have enough time to comply with the law. Not only can it take weeks to file an application—identifying appropriate hospitals, obtaining applications, and gathering supporting documents—but, once an application is filed, the hospital has 170 days to respond. Ferrigno Decl. ¶ 10; Jordan Decl. ¶¶ 7, 12.[6] Although Plaintiffs expeditiously applied for privileges and have numerous applications pending, in many cases, Plaintiffs have not received, and do not expect to receive, notification as to whether those applications will be granted prior to October 29. Ferrigno Decl. ¶ 22; Jordan Decl. ¶¶ 7, 13.

Absent an injunction, Plaintiffs will be forced either to stop practicing or face criminal sanctions. Courts have not hesitated to find a due process violation under these circumstances. *See Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 611-13 (6th Cir. 2006) (immediate shut-down of abortion provider violated procedural due process); *Hodes & Nauser, MD's, PA, v. Moser*, No. 11-2365-CM at 40:16-19 (D. Kan. Jul. 1, 2011) (temporarily enjoining abortion

[6] Plaintiffs' attempts to secure privileges are further complicated by the fact that they do not know what the privilege requirement entails. *See* Section I.A.3, *supra*.

facility requirements where plaintiffs not given enough time to comply).

B. The Medication Abortion Restrictions Violate the Constitutional Rights of Plaintiffs and Their Patients.

The Act dramatically restricts women's access to medication abortion, which is a safe, private way of terminating an early pregnancy.[7] Like the admitting privileges requirement, the medication abortion restrictions are both impermissibly vague and violate women's Fourteenth Amendment rights because they fail to promote women's health and impose an undue burden by making a common, safe early abortion method inaccessible for many women throughout the state. Moreover, the restrictions are unconstitutional as applied to women with gestational ages greater than 49 days LMP for whom a medication abortion is necessary, in their doctor's appropriate medical judgment, to protect their lives or health.

1. The Medication Abortion Restrictions Are Impermissibly Vague

The Act requires that a mifepristone medication abortion "satisf[y] the protocol tested and authorized by" the U.S. Food and Drug Administration as outlined in the drug's final printed label ("FPL"). Tex. Health & Safety Code § 171.063(a)(1). But the FPL protocol is both outdated and inferior in many ways to the evidence-based protocol used today, including: it can only be used through 49 days LMP instead of 63; it has a higher failure rate, greater need for surgical completion, and increased side effects; and it is more costly and less convenient. *See* Fine Decl. ¶¶ 39-47.

The legislature appears to have intended that physicians be allowed to follow ACOG's clinical guidelines (which give their highest level of recommendation to an alternative evidence-based protocol) by referencing those Guidelines in the Act. *See* Tex. Health & Safety Code

[7] Medication abortion is most often available in Texas through 63 days after the first day of the woman's last menstrual period ("LMP"). *See* Fine Decl. ¶ 10.

§ 171.063(b). But the words of the Act call that into question. That is because the Act is limited to allowing physicians to follow the "dosage amount" in the ACOG guidelines, but ACOG endorses a full *regimen* that includes a route of administration for the misoprostol (the second medication in the regimen) and a gestational age range. Fine Decl. ¶¶ 59-60.

Read literally, the Act allows physicians only to prescribe the "dosage amounts" in the ACOG guidelines, but without the route of administration in those guidelines – a combination that is a completely untested regimen not endorsed by ACOG or any other medical literature, and which therefore, cannot be used responsibly. *See id.* ¶¶ 58-61, 63. Presumably, the Legislature meant the ACOG provision to have meaning, but there is no way for a physician to know what that meaning is. *Contra Texas Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 637 (Tex. 2010) ("Courts do not lightly presume that the Legislature may have done a useless act." (quotation omitted)).[8] Because the Act leaves physicians guessing about what this provision means and subjects them to arbitrary enforcement – at risk of loss of their licenses – it violates their rights to due process. *See* Section I.A.3, *supra*.

2. The Medication Abortion Restrictions Cannot Withstand Constitutional Scrutiny Because They Are Medically Unnecessary.

The Act requires an outdated, inferior protocol and bans medication abortion entirely after 49 days LMP. It also requires women who choose it to make extra, unnecessary visits to the health center. Fine Decl. ¶¶ 66-68. Rather than advance women's health, as Defendants must prove for these restrictions to be upheld, the medication abortion provisions actively *harm* women and are a dramatic departure from accepted medical practice. *See* Section I.A.1, *supra*.

As Dr. Fine explains, it is standard medical practice for women with gestational ages

[8] It makes no sense that the legislature would endorse only the "dosage amount" in the ACOG guidelines. Presumably, if ACOG makes good recommendations, they all should be allowed. Nor is there any reason for only allowing those guidelines "as [they] existed on January 1, 2013." If the ACOG guidelines are deemed safe, why ban the recommendation of a newer guideline that would be based on newer research? Fine Decl. ¶ 62.

through 63 days LMP who choose medication abortion to make one or two trips to the health center and see a physician only once (in Texas, some women must come an extra time and meet with a doctor, due to the 24-hour counseling law). Women take mifepristone in the presence of the physician, but self-administer the second medication, misoprostol, at a location of their choosing. A regimen like this has been endorsed by ACOG as well as the World Health Organization and the Royal College of Obstetricians and Gynecologists. Fine Decl. ¶¶ 47-48.

The Act not only departs from widely accepted practice, it harms women by subjecting them to a less effective procedure that puts them at greater risk of needing surgery, as well as increasing potential side effects. In particular, requiring women to come to the health center for the second medication, misoprostol, hurts them. The current practice, in which the woman administers misoprostol at home, allows the procedure to be more private. Perhaps more importantly, because she may begin to bleed and cramp shortly after the misoprostol, it allows her to experience those symptoms in a comfortable place with the support of loved ones. Under the Act, women would lose all of these benefits and be forced to experience those side effects either at the clinic or during their journey home.[9] There is also no possible medical justification for banning medication abortion after 49 days LMP: hundreds of thousands of American women have safely had a medication abortion from 50 through 63 days LMP, and the process has been proven safe and effective through 70 days. *Id.* ¶¶ 45-47, 64, 68-69.

Put simply, the Act turns back the clock 20 years on medical research, experience, and advancement. Given the proven safety of the regimen Plaintiffs use and the total lack of medical evidence supporting the Act's restrictions, Defendants cannot meet their burden of proof of

[9] Even if there were some justification for requiring women to return to take the misprostol, there is none for requiring a physician – and certainly not the same physician – to administer it. Medications prescribed by physicians are routinely and safely administered by other trained health professionals. *Id.* ¶ 67.

demonstrating that the Act's medication abortion provisions further women's health.

3. The Medication Abortion Restrictions Place Substantial Obstacles in the Path of Women Seeking Abortions.

Even if Defendants could show that these restrictions promote women's health (which they cannot), the Act places substantial obstacles in the path of women seeking abortions, and thus is not "a permissible means of serving [a] legitimate end[]." *Casey*, 505 U.S. at 877; *see also Akron*, 462 U.S. at 438.

Here, the Act cannot survive because it bans a common method of first trimester abortion entirely after 49 days LMP. Medication abortion accounts for approximately one third of the abortions performed by Plaintiffs, and approximately half of women eligible for medication abortion (*i.e.*, those with gestational ages through 63 days LMP) choose that procedure. Fine Decl. ¶ 49.[10] The Supreme Court has held that a ban that reaches a commonly used second trimester method imposes an impermissible burden. *See Stenberg v. Carhart*, 530 U.S. 914, 945-46, 924 (2000) (finding that a ban on "partial-birth abortion" imposed an "undue burden upon a woman's right to make an abortion decision" because it reached D&E, "the most commonly used" second trimester procedure); *Danforth*, 428 U.S. at 78 (invalidating a ban on saline amniocentesis abortion, which was at the time the "most commonly used method" of second-trimester abortion); *see also Gonzales v. Carhart*, 550 U.S. 124, 135, 156 (2007) (federal ban on "partial-birth abortion" upheld because it would not "prohibit the vast majority of D&E abortions," "the usual abortion method" in the second trimester).

For women with gestational ages after 49 days LMP, the Act bans a common method of abortion used only early in the first trimester, when most abortions are performed. *See* Texas

[10] In 2010 (the most recent year for which statistics are available), medical, non-surgical abortions accounted for 24.4 percent of abortions at all gestational ages statewide. http://www.dshs.state.tx.us/chs/vstat/vs10/nabort.shtm. However, this method is increasingly popular. Fine Decl. ¶ 49.

Dep't of State Health Servs., *Induced Terminations of Pregnancy* (June 28, 2012), http://www.dshs.state.tx.us/chs/vstat/vs10/nabort.shtm (86.7 percent of all abortions among Texas residents in 2010 occurred at ten weeks or earlier). Moreover, unlike the ban upheld in *Gonzales*, where the methods at issue were both surgical, here, the Act would leave women with no comparable alternative. Women with gestational ages past 49 days LMP who would have chosen to take only medications will be forced to have surgical instruments inserted into their bodies. *See* Fine Decl ¶¶ 7, 50-54. Such a ban is an undue burden.[11]

Even for women with gestational ages through 49 days, the burdens the Act imposes in terms of extra, unnecessary trips to the health center and increased costs will put medication abortion out of reach for many – especially young women, low-income women, and victims of domestic violence. Even if some women could follow the regimen the Act requires, their increased burdens come with absolutely no medical benefit. *See* Fine Decl. ¶¶ 70-72.[12] This medically unnecessary requirement unduly burden women seeking abortions. *See Planned Parenthood of Wisconsin*, 2013 WL 3989238, at *16-17 (discussing the burdens of additional travel, "including payment for childcare and overnight accommodations and lost earnings"); *Planned Parenthood Se.*, 2013 WL 3287109, at *4 (closure of clinics would increase travel costs and distance; "for a significant number of women, this distance will be no mere encumbrance, but an insurmountable barrier to obtaining an abortion").

[11] While the Sixth Circuit upheld a similar law on different factual record, *see Planned Parenthood Southwest Ohio Region v. DeWine*, 696 F.3d 490 (6th Cir. 2012), the Oklahoma Supreme Court recognized that a similar law would be an undue burden. *See Okla. Coal. for Reproductive Justice v. Cline*, 292 P.3d 27 (Okla. 2012), *cert. granted*, 133 S. Ct. 2887 (2013); *see also MKB Management Corp. v. Burdick*, No. 09-2011-CV-02205 (N. Dak. Dist. Ct. July 15, 2013) (invaliding similar law) (available at http://rhrealitycheck.wpengine.netdna-cdn.com/wp-content/uploads/2013/07/2013-07-15_MKBvBurdick_Perm_Injunction.pdf).

[12] Staffing all of these extra, unnecessary visits will be difficult for providers too, forcing some to stop offering medication abortion entirely. Fine Decl. ¶ 71; Martinez Decl. ¶ 10.

4. The Medication Abortion Restrictions Threaten Women's Health and Lives.

For more than 40 years, the Court has held that a state may not restrict access to abortions that are "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Roe v. Wade*, 410 U.S. 113, 165 (1973); *see also Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 327-28 (2006); *Casey*, 505 U.S. at 879. The medication abortion restrictions fail this basic tenet because they ban medication abortion after 49 days LMP, even when it would have significant safety advantages for the woman.

For women with certain medical conditions, a surgical abortion can carry greater risk of both complications and failure than a medication abortion. These women include those who have an anomaly of the reproductive and genital tract, such as large uterine fibroids or cervical stenosis, which makes surgical abortion difficult or impossible. Fine Decl. ¶¶ 55-56, 65. The Act would deny these women past 49 days a procedure that has significant safety advantages for them, which is unconstitutional. *See Gonzales*, 550 U.S. at 161 ("The prohibition in the Act would be unconstitutional, under precedents we here assume to be controlling, if it 'subject[ed] [women] to significant health risks.'") (quoting *Ayotte*, 546 U.S. at 327-28); *Casey*, 505 U.S. at 880 (concluding that if restriction "forecloses the possibility" of abortion "despite some significant risks," it would be invalid; upholding Pennsylvania law only because it had been interpreted such that it "would not *in any way* pose a significant threat to the life or health of a woman") (emphasis added) (citation and internal quotation marks omitted); *see also Planned Parenthood Cincinnati Region v. Taft*, 444 F.3d 502, 511-12 (6th Cir. 2006) (affirming in part preliminary injunction against law that banned mifepristone medication abortion after 49 days LMP for failing to adequately protect women's health). Thus, at a minimum, the medication abortion restrictions must be enjoined as applied to those women for whom a medication abortion is necessary, in appropriate medical judgment, to protect their lives or health.

II. ALL OTHER REQUIREMENTS FOR PRELIMINARY INJUNCTIVE RELIEF ARE SATISFIED.

Plaintiffs have demonstrated that absent an injunction, they and their patients will suffer irreparable injury as it is well established that the threatened violation of constitutional rights constitutes irreparable injury. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury."); *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981) (irreparable injury found when women's privacy rights were threatened). Indeed, when a constitutional right is threatened, no further showing of injury is needed. *See id.* at 338.

But here, beyond the impact on their rights, the effect of the Act on Plaintiffs' patients will be devastating and irreparable. There will be no providers between El Paso and I-35, or in Lubbock, Waco, Killeen, Harlingen, McAllen, and Fort Worth. The availability of abortions after 15 weeks will be dramatically reduced. Today, there are six ASCs that provide abortions located in five cities; if the Act takes effect, there will be two available, located in Dallas and Houston, with a third in San Antonio offering extremely limited care. *See* Ferrigno ¶¶ 21-22; Jordan Decl. ¶ 14; Martinez Decl. ¶ 11. Women will have to travel further, at greater cost and risk to their health, because although abortion is an extremely safe procedure, it is safer the earlier it is provided. For many women these burdens will be too great and they will attempt to self-induce an abortion and/or be forced to carry to term. Even those women who are still able to access abortion will likely be delayed, at risk to their health, as many providers will have to curtail their practices and those centers that can stay open will have to serve more women with fewer providers. *See* Potter Decl. ¶¶ 13-18. Many women who would choose medication abortion will be denied the procedure entirely while others must follow an outdated, inferior, and more burdensome regimen. *See* Fine Decl. ¶¶ 64-72.

In contrast, Defendants face little, if any, injury, from issuance of an injunction. The injunction sought will impose no affirmative obligation, administrative burden, or cost upon Defendants. It will serve only to maintain the status quo while the Court assesses the constitutionality of the Act. Abortion providers will continue to be subject to substantial medical regulation, including regulation of their procedures for addressing complications. Even if Defendants could show they faced some potential injury, it would certainly be outweighed by the threatened injuries to Plaintiffs and their patients. Indeed, government officials benefit from an injunction against unconstitutional enforcement of a law, for the same reason that the public interest is served by preventing constitutional violations. *See infra*.

Finally, preliminarily enjoining the Act will serve the public interest. The "public interest [is] not disserved by an injunction preventing [the] implementation" of a law that violates constitutional rights. *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996). That is particularly true where, as here, enforcement of the Act will have devastating effects on women across the state. Moreover, the public does not have an interest in allowing government officials to interfere with constitutional rights. *See Deerfield Med. Ctr.*, 661 F.2d at 338-39. The constitutional rights of Plaintiffs and their patients are threatened by the Act's enforcement, and the only way to ensure that Plaintiffs and their patients' rights will not be denied is to enter a preliminary injunction, which this Court should do, without bond. *See, e.g.*, *Doctor's Assocs., Inc. v. Stuart*, 85 F.3d 975, 985 (2d Cir. 1996) (no bond required where a preliminary injunction will not impose any monetary damage on Defendants).

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully ask this Court to issue a preliminary injunction, without bond.

Dated: October 1, 2013

Respectfully submitted,

/s/ *R. James George, Jr.*

R. James George, Jr.
Texas State Bar No. 07810000
Elizabeth von Kreisler
Texas State Bar No. 24047273
Rico Reyes
Texas State Bar No. 24032999
George Brothers Kincaid & Horton LLP
1100 Norwood Tower
114 West 7th Street
Austin, TX 78701
(512) 495-1400
(512) 499-0094 Facsimile
jgeorge@gbkh.com
evonkreisler@gbkh.com
rreyes@gbkh.com

Attorneys for all Plaintiffs

Helene T. Krasnoff*
Alice Clapman*
Planned Parenthood Federation of America
1110 Vermont Avenue, N.W., Suite 300
Washington, D.C. 20005
(202) 973-4800
helene.krasnoff@ppfa.org
alice.clapman@ppfa.org

Attorneys for Planned Parenthood Plaintiffs

Janet Crepps*
Esha Bhandari*
Jennifer Sokoler*
Center for Reproductive Rights
120 Wall Street, 14th Floor
New York, NY 10005
(864) 962-8519 (Janet Crepps)
(917) 637-3600 (Bhandari & Sokoler)
jcrepps@reprorights.org
ebhandari@reprorights.org
jsokoler@reprorights.org

Attorneys for Plaintiffs Whole Woman's Health, Austin Women's Health Center, Killeen Women's Health Center, Southwestern Women's Surgery Center, West Side Clinic, Inc., Alan Braid, M.D., Lamar Robinson, M.D., and Pamela J. Richter, D.O.

Brigitte Amiri*
Renée Paradis*
American Civil Liberties Union Foundation
Reproductive Freedom Project
125 Broad Street, 18th Floor
New York, NY 10004
(212) 519-7897
bamiri@aclu.org
rparadis@aclu.org

Rebecca L. Robertson**
Texas Bar No. 00794542
American Civil Liberties Union of Texas
1500 McGowen Street, Suite 250
Houston, TX 77004
(713) 942-8146
rrobertson@aclutx.org

Attorneys for Plaintiffs Routh Street Women's Clinic, Houston Women's Clinic, and Southwestern Women's Surgery Center

*Application for admission *pro hac vice* forthcoming
**Application for admission to the Western District of Texas pending

CERTIFICATE OF SERVICE

I certify that on this 1st day of October, 2013, I electronically filed a copy of above document with the Clerk of the Court using the CM/ECF system, which will send notification to the following counsel of record. Service was otherwise performed in the manner indicated:

Jonathan F. Mitchell
Solicitor General
Arthur C. D'Andrea
Assistant Solicitor General
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Attorney for Gregory Abbott, David Lakey, M.D., Mari Robinson

David Escamilla
314 West 11th Street, Room 300
Austin, Texas 78701
via hand delivery & U.S. Mail

Craig Watkins
133 North Riverfront Boulevard, LB 19
Dallas, Texas 75207
via hand delivery & U.S. Mail

Devon Anderson
Criminal Justice Center
1201 Franklin Street
Houston, Texas 77002
via hand delivery & U.S. Mail

Matthew Powell
Lubbock County Court House
904 Broadway Street, 2nd Floor
Lubbock, Texas 79408
via hand delivery & U.S. Mail

James E. Nichols
Bell County Justice Center
1201 Huey Road
Belton, Texas 76513
via hand delivery & U.S. Mail

Joe Shannon, Jr.
Tim Curry Criminal Justice Center
401 West Belknap Street
Fort Worth, Texas 76196-0201
via hand delivery & U.S. Mail

René Guerra
100 North Closner Blvd., Room 303
Edinburg, Texas 78539-3563

via hand delivery
& U.S. Mail

Susan D. Reed
101 West Nueva Street, 4th Floor
San Antonio, Texas 78205-3406

via hand delivery
& U.S. Mail

Abelino Reyna *via hand delivery*
219 North 6th Street, Suite 200
Waco, Texas 76701

& U.S. Mail

Jaime Esparza
El Paso County Courthouse
500 E. San Antonio Ave., Room 201
El Paso, Texas 79901-2419

via hand delivery

& U.S. Mail

/s/ R. James George, Jr.
R. JAMES GEORGE, JR.