EMERGENCY

EFFECTIVE DATE OF STATUTE SOUGHT TO BE STAYED: NOVEMBER 1, 2014

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

(1) LARRY A. BURNS, D.O., on behalf of himself and his patients, Plaintiff/Appellant, vs. (2) TERRY L. CLINE, in his official capacity as Oklahoma Commissioner of Health, (3) CARL B. PETTIGREW, D.O., in his official capacity as President of the Oklahoma State Board of Osteopathic Examiners, and (4) GREG MASHBURN, in his official capacity as District Attorney for Cleveland, Garvin, and McClain Counties, Defendants/Appellees.	#113342 No. _____

APPELLANT'S EMERGENCY MOTION FOR A TEMPORARY INJUNCTION OR, IN THE ALTERNATIVE, AN EMERGENCY STAY OF THE DISTRICT COURT'S ORDER TO PRESERVE THE *STATUS QUO*

Pursuant to 12 Okla. Stat. § 990.4(C), Appellant Larry Burns, D.O., respectfully requests an emergency temporary injunction, or, in the alternative, an emergency stay to preserve the *status quo* during the pendency of his appeal. Dr. Burns moved for a temporary injunction below to enjoin Senate Bill 1848 (2014 Okla. Sess. Law Serv. Ch. 370 (West)) ("S.B. 1848" or "the Act"), which, if allowed to go into effect on November 1, 2014, will deprive Dr. Burns of several rights secured by the Oklahoma Constitution and irreparably harm Dr. Burns and his patients. On October 24, 2014, District Court Judge Bills Graves, with no analysis, held that Dr. Burns failed to establish a likelihood of success on the merits of his

single-subject, special law, and unconstitutional delegation claims. As Dr. Burns established, however, S.B. 1848 offends the rights of all Oklahoma citizens by violating the Oklahoma Constitution's single-subject mandate, targeting physicians who provide abortion and their patients for discriminatory treatment, and unconstitutionally delegating legislative authority to unelected officials. The Act would deprive Dr. Burns of his livelihood and deprive women throughout the state of Oklahoma of access to safe medical care.[1]

For the Court's convenience, Dr. Burns incorporates by reference and attaches his Petition, Defendants' Answer, Dr. Burns's Motion for a Temporary Injunction, Dr. Burns's Memo of Law In Support Of His Motion for a Temporary Injunction, Defendants' Response, Dr. Burns's Reply, and the Transcript of Proceedings below. Dr. Burns incorporates by reference his Petition in Error and his Motion to Retain.

When considering a motion for stay or a temporary injunction, this Court considers: a) a likelihood of success on appeal; b) the threat of irreparable harm if relief is not granted; c) potential harm to the opposing party; d) any risk of harm to the public interest. Okla. Sup. Ct. R. 1.15(c)(2); *Dowell v. Pletcher*, 2013 OK 50, ¶ 7, 304 P.3d 457, 460. The purpose of a temporary injunction is to preserve the *status quo* and prevent the perpetration of a wrong or the doing of an act whereby the rights of the moving party may be materially invaded, injured or endangered. *Okla. Pub. Employees Ass'n v. Okla. Military Dep't*, 2014 OK 48, ¶ 15, 330 P.3d 497, 504.

S.B. 1848 prohibits the performance of an abortion unless a physician with admitting privileges at a general hospital within thirty miles of the facility is present at the facility, and

[1] Judge Graves held that Dr. Burns has standing to assert each of his Constitutional claims, but had no standing to additionally assert those claims on behalf of his patients. Although Judge Graves's holding flies in the face of settled law, it does not impact the analysis of claims presented here under the Oklahoma Constitution. The irreparable harm to the women of Oklahoma may be considered in weighing the risk of harm to the public interest.

exposes abortion providers to criminal and civil penalties. It is composed of six distinct provisions covering different subjects. The admitting privileges provision reads as follows:

> On any day when any abortion is performed in a facility providing abortions, a physician with admitting privileges at a general medical surgical hospital which offers obstetrical or gynecological care in this state within thirty (30) miles of where the abortion is being performed must remain on the premises of the facility to facilitate the transfer of emergency cases if hospitalization of an abortion patient or a child born alive is necessary and until all abortion patients are stable and ready to leave the recovery room.

2014 Okla. Sess. Law Serv. Ch. 370, § 1(B) (West).

Dr. Burns is a doctor of osteopathic medicine, licensed by the State of Oklahoma. Dr. Burns performs first trimester surgical and medication abortions. He has been providing safe abortion care in Norman, Oklahoma for 41 years. Dr. Burns's patients come from all around the state, as well as from neighboring states. Even before S.B. 1848, Dr. Burns was subject to extensive regulations governing patient care, infection control, personnel, emergency protocols, doctor qualifications, recordkeeping, and reporting obligations. At present, as is also required of all physicians who provide outpatient surgical procedures at ambulatory surgical centers, *see* OKLA. ADMIN. CODE § 310:615-5-1(h) (2014), 27 OK Reg. 2536 (2014), Dr. Burns already has a transfer agreement with a physician with hospital privileges at Norman Hospital in the event of an emergency in compliance with OKLA. ADMIN. CODE § 310:600-9-6(9) (2014). Burns Aff. ¶ 7.[2]

Legal abortion is one of the safest medical procedures in the United States;

[2] The Affidavit of Larry A. Burns, D.O., dated October 1, 2014, is annexed as Appendix 2 to Plaintiff's Motion for A Temporary Injunction and for Expedited Briefing and Hearing on That Motion Or, Alternatively, for a Temporary Restraining Order Pending the Outcome of That Motion filed on October 2, 2014 ("Plaintiff's Motion for A Temporary Injunction"), which is found in the Exhibits to the Emergency Motion for Stay at Exhibit 3.

approximately 3 in 10 women will obtain an abortion by the age of 45. Estes Aff. ¶¶ 23.[3] Most abortions can be safely performed in an outpatient setting, and only 1.3% of women in the United States obtaining first trimester surgical abortions experience even minor complications. *Id.* ¶¶ 24, 53. The prevalence of major complications requiring treatment at a hospital is approximately 0.05%. *Id.* ¶ 24. The risks of abortion compare favorably with the risks of other gynecologic and non-gynecologic procedures that are typically performed in office-based settings. *Id.* ¶¶ 18–20. The District Court did not reject this evidence and did not make contrary findings of fact.

Dr. Burns does not currently have admitting privileges because they are not necessary to ensure the health of his patients. Complications are very rare among Dr. Burns's patients. In four decades, only one patient, suffering from prolonged anesthetic effect, was transported by ambulance from the clinic. Burns Aff. ¶ 17. That patient awoke by the time the ambulance arrived, was taken to the hospital for observation, and, when Dr. Burns went to the hospital to check on her, was in good condition and released within three hours of her arrival. *Id.* Dr. Burns provides his patients with a telephone number where they can reach him at all times. Burns Aff. ¶ 11.

In the very rare case in which the patient needs to be treated at a hospital, the quality of care the patient receives will not be affected by whether the abortion provider has admitting privileges at that particular hospital. Estes Aff. ¶¶ 38–39. Emergency room physicians, regardless of whether they perform abortions, are qualified to manage the care of a patient experiencing a complication from an abortion, because such complications are the same as

[3] The Affidavit of Christopher M. Estes, M.D., M.P.H., dated October 1, 2014, is annexed as Appendix 2 to Plaintiff's Motion for A Temporary Injunction, which is found in the Exhibits to the Emergency Motion for Stay at Exhibit 3.

those that would follow a spontaneous miscarriage or other gynecologic surgery. *Id.* Moreover, if a complication requiring emergency treatment occurs after a patient has left the clinic, she should proceed to the nearest emergency room, which would not necessarily or even likely be a hospital at which Dr. Burns may be able to obtain privileges. Burns Aff. ¶ 15; Estes Aff. ¶¶ 40–45. The admitting privileges requirement will not improve the ability of women to receive safe abortion care in Oklahoma. Estes Aff. ¶¶ 48, 53. In fact, the requirement departs from accepted medical practice. *Id.* ¶ 30; Burns Aff. ¶ 19.

S.B. 1848 is composed of six distinct provisions covering different subjects with no common theme or purpose, in violation of the Oklahoma Constitution's single-subject rule. OKLA. CONST. art. V, § 57. In addition to the admitting privileges provision, S.B. 1848 directs the State Board of Health to establish standards for abortion facilities addressing (a) supplies and equipment; (b) the training of physicians assistants and volunteers; (c) the medical screening and evaluation of abortion patients; (d) the performance of abortions and post-procedure follow-up care; and additionally requires (e) facilities performing abortions to report a patient's or a "born-alive child's injury" to the State Board of Health and other professional licensing and regulatory boards. 2014 Okla. Sess. Law Serv. Ch. 370, §§ 1(A), 1(C)–1(G) (West). In *Nova Health Sys. v. Edmondson*, 2010 OK 21, ¶ 1, 233 P.3d 380, 382, this Court struck down a statute regulating abortion, holding that although each provision concerned "freedom of conscience," the statute was "obviously violative" of the single-subject rule because it comprised portions of five bills and involved multiple subjects. The Court admonished:

> We are growing weary of admonishing the Legislature for so flagrantly violating the terms of the Oklahoma Constitution. It is a waste of time for the Legislature and the Court, and a waste of the taxpayer's money. . . .

> [W]e again restate: THE CLEAR LANGUAGE OF THE OKLAHOMA CONSTITUTION REQUIRES THAT ALL LEGISLATIVE ACTS SHALL EMBRACE BUT ONE SUBJECT.

Id. at ¶ 1, 381–82 (emphasis in original). The admitting privileges provision failed to pass as a stand-alone bill and was only enacted when combined with five other unrelated provisions; it is quintessential logrolling. *See In re Initiative Petition No. 382*, 2006 OK 45, ¶¶ 14–15, 142 P.3d 400, 407–408; *Douglas v. Cox Ret. Props., Inc.*, 2013 OK 37, ¶¶ 10–11, 302 P.3d 789, 793–94.

In addition, by requiring only physicians who provide abortion services to obtain hospital admitting privileges, the law targets Dr. Burns and his patients for discriminatory treatment in violation of the constitutional prohibition against special laws. OKLA. CONST. art. V, § 59; *Reynolds v. Porter*, 1988 OK 88, 760 P.2d 816, 822, 824–25. For example, in *Nova Health Sys. v. Pruitt*, No. 2:12-cv-00395, 2012 WL 1034022 (Dist. Ct. Okla. Cnty. Mar. 28, 2012), the court permanently enjoined a mandatory ultrasound requirement that subjected physicians to unique professional burdens, holding that the law improperly addressed only patients and physicians concerning abortions and did not address patients and physicians concerning "other medical care where a general law could clearly be made applicable." Moreover, there is no "valid legislative objective" for singling out physicians who perform abortions from all other doctors who provide outpatient surgical procedures or abortion patients from all other surgical outpatients. *See Reynolds*, 1988 OK 88, 760 P.2d 816, 822. As courts across the country have recognized, admitting privileges statutes like S.B. 1848 do not advance an asserted interest in women's health. *Planned Parenthood Se., Inc. v. Strange*, 2:13CV405-MHT, 2014 WL 3809403, at *41 (M.D. Ala. Aug. 4, 2014) (privileges requirement fell outside the range of standard medical practice and would undermine women's

health by cutting off access); *Planned Parenthood of Wis. v. Van Hollen*, No. 13–cv–465–wmc, 2013 WL 3989238, *14 (W.D. Wis. Aug. 2, 2013) ("[D]efendants are unlikely to establish . . . that there is a reasonable relationship between the admitting privileges requirement and maternal health."); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891, 900 (W.D. Tex. 2013), *rev'd on other grounds*, 748 F.3d 583 (5th Cir. 2014) ("[T]here is no rational relationship between improved patient outcomes and hospital admitting privileges within 30 miles of a facility in which a physician provides abortion services."). Further, admitting privileges laws are not consistent with accepted medical practices. *See* Am. College of Obstetricians and Gynecologists, *Guidelines for Women's Health: A Resource Manual* 433 (3d ed. 2007); ACOG/AMA Amici Curiae Brief, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406 (5th Cir. 2013) (No. 13-51088), 2013 WL 6837500. Similarly, the Oklahoma State Medical Association ("OSMA") opposed S.B. 1848, warning that it "may not reflect the best interest of the patient." Burns Aff. ¶ 19, Ex. A. Rather than advancing women's health, S.B 1848 will have the effect of closing one of three clinics in Oklahoma, drastically reducing the availability of services to women throughout the State, and thereby exposing them to greater health risks. Estes Aff. ¶¶ 50–52; Burns Aff. ¶¶ 34–35.

The Act is also an unconstitutional delegation of legislative authority to hospital boards to determine, without requirements prescribed by the legislature, which physicians can provide abortions. OKLA. CONST. art. IV, § 1; art. V, § 1. Hospital boards grant admitting privileges based on varying requirements that are not related to a physician's qualifications. In fact, in response to Dr. Burns's assertion that admitting privileges are not a proxy for clinical expertise,

the State readily admitted that "we don't particularly care what their [the hospitals'] standards are." Ex. 7 (10/17/14 Hrg.) at 36.

It is a clear violation of the non-delegation doctrine for the legislature to make hospital boards gatekeepers for abortion access in the state. "The formulation of policy is a legislature's primary responsibility," protecting voters' ability to hold policy-makers accountability for the policies they set. *See Democratic Party of Okla. v. Estep*, 1982 OK 106, 652 P.2d 271, 277 n.25. The Legislature's abdication of its responsibility is an affront to all Oklahoma citizens. *See id. at* 277–78; *Oklahoma City v. State ex. rel. Dep't of Labor*, 1995 OK 107, 918 P.2d 26, 29–30.

Finally, although Dr. Burns has applied for admitting privileges at all 16 of the eligible hospitals within 30 miles of his practice, Burns Aff. ¶¶ 22–32, those hospitals are under no obligation to act on his applications within a certain period of time, and it is highly unlikely that he will receive admitting privileges decisions from all hospitals prior to the Act taking effect, in violation of his procedural due process rights. OKLA. CONST. art II, § 7. *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 600 (5th Cir. 2014); *June Med. Servs., LLC v. Caldwell*, No. 3:14-CV-00525-JWD-RLB, 2014 WL 4296679, at *7 (M.D. La. Aug. 31, 2014).

In ruling against Dr. Burns's due process claim, Judge Graves relied on mistakes of fact and law. First, Dr. Burns did not wait "51 days after S.B. 1848 was enacted" before applying to the first hospital. Order Denying Temporary Injunction, Case No. CV-2014-1896, (Filed Oct. 24, 2014) at p. 3. As is evident in Exhibit 3, (Appendix 2, Ex. B), July 18, 2014 is that date on the letter sent by Norman Regional Hospital notifying Dr. Burns that his application was denied; Dr. Burns had applied prior to that date. Second, in *Abbott*, 748 F.3d

583, the Fifth Circuit stayed enforcement of the admitting privileges law until physicians had heard back on all their admitting privileges applications – as long as the applications were submitted *by the effective date of the statute.* Here, Dr. Burns clearly submitted all his applications well before the November 1, 2014 effective date.

With respect to Dr. Burns's showing of irreparable harm, Judge Graves disregarded prevailing legal standard. Oklahoma law defines "irreparable" harm as "incapable of being fully compensated by money damages. . . ." *Tulsa Order of Police Lodge No. 93 v. City of Tulsa*, 2001 OK CIV APP 153, ¶ 28, 39 P.3d 152, 159. If allowed to take effect, the Act would deprive Dr. Burns of several rights secured by the Oklahoma Constitution. Such deprivation of constitutional rights is *per se* irreparable harm. *See Caldwell*, 2014 WL 4296679 at *7 (plaintiffs showed admitting privileges requirement would irreparably injure physicians where challenged law violated due process rights) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (loss of constitutional "freedoms . . . unquestionably constitutes irreparable injury")). Second, if S.B. 1848 is allowed to take effect, Dr. Burns will be forced to close his practice and deprived of his livelihood. *See Okla. Pub. Emps. Ass'n v. Okla. Military Dep't*, 2014 OK 48, ¶ 34, 330 P.3d 497, 509.

Further, there are only two other abortion providers in Oklahoma; one in Oklahoma City and one in Tulsa. Out of the total number of abortions performed in 2013,[4] Dr. Burns performed 44 percent of the procedures. Burns Aff. ¶ 10. If Dr. Burns is forced to stop providing abortions, even assuming both other clinics are able to stay open, they are unlikely to be able to meet the increased demand for medical services. Burns Aff. ¶¶ 34, 35. Women

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[4] *Abortion Surveillance in Oklahoma, 2002-2013 Summary Report*, OKLAHOMA DEPARTMENT OF HEALTH, *available at* http://www.ok.gov/health2/documents/HCI_2002-2013ITOPtrends.pdf (last visited Oct. 1, 2014).

will therefore likely face delays in obtaining abortions, increasing their risk of complications and costs. Estes Aff. ¶ 50. Delay will also mean that some women do not get appointments in time to qualify for a medication abortion. *Id.* Other women may progress beyond the time when legal second trimester abortion is available in Oklahoma. *Id.*

Although legal abortion is a very safe procedure, the risks increase as the pregnancy advances. *Id.* Thus, delays increase the risk of complications, thereby undermining rather than furthering women's health. Estes. Aff. ¶¶ 49–51. For some women, the burdens created by S.B. 1848 may cause them to carry an unwanted pregnancy to term or attempt a self-induced abortion. *Id.* ¶¶ 51–52. These real-life consequences are inevitable if S.B. 1848 substantially reduces access to abortion. *Id.*

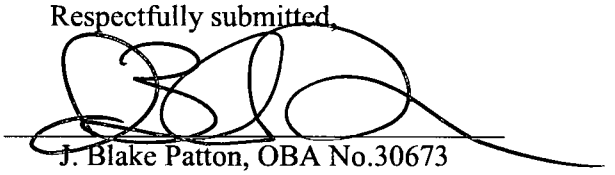
Unlike Dr. Burns and his patients, the Defendants will suffer no harm if a temporary injunction is granted. A temporary injunction would allow Dr. Burns to continue to provide -- and women to receive -- access to abortion from a doctor with an impeccable safety record. This would also preserve the *status quo* while this Court has an opportunity to consider whether the Act runs afoul of the Oklahoma Constitution. *Hastings v. Kelley*, 2008 OK CIV APP 36, ¶ 13, 181 P.3d 750, 753 ("[A] temporary injunction is . . . designed to preserve the . . . status quo until a final determination of the controversy.") Moreover, it is well-settled that the enforcement of an unconstitutional law is contrary to the public interest. *See, e.g., Am. Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999); *Entm't Merchs. Ass'n v. Henry*, No. CIV-06-675-C, 2006 WL 2927884 at *3 (W.D. Okla. Oct. 11, 2006).

For the foregoing reasons, Dr. Burns respectfully requests that this Court enter a temporary injunction or stay of proceedings to preserve the *status quo* and prevent enforcement

of S.B. 1848 during the pendency of this litigation.[5]

Dated: October 27, 2014

Respectfully submitted,



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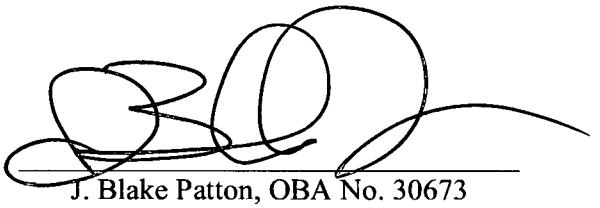
**Out-of-State Attorney Application and Motion to Associate Pending*
***Admitted to Practice by Order dated Oct. 2, 2014*

ATTORNEYS FOR PLAINTIFF

[5] A judgment issuing or refusing to issue an injunction will not be disturbed on appeal unless the lower court has abused its discretion or the decision is clearly against the weight of the evidence. *Dowell v. Pletcher*, 2013 OK 50, 304 P.3d 457, 460. Because the district court misapplied the law and disregarded the uncontroverted evidentiary record in this case, the district court's decision was clearly an abuse of discretion.

APPELLANT'S CERTIFICATE OF COMPLIANCE WITH SUPREME COURT RULE 1.15(c)(1)

Pursuant to Sup. Ct. R. 1.15(c)(1), counsel for Appellant Larry A. Burns, D.O., certifies that it requests this Court to act within less than a week on its application for stay in order to effect the relief requested because, following a hearing on October 17, 2014, Judge Graves took the issue under advisement and did not issue an Order Denying Appellant's Motion for a Temporary Injunction until Friday, October 24, 2014, and the statute at issue is scheduled to take effect on November 1, 2014.

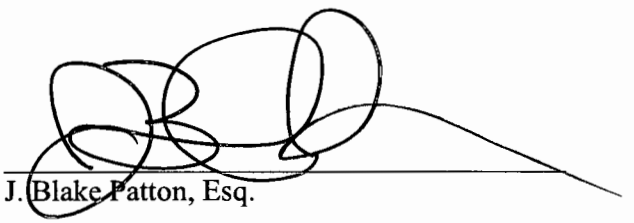


J. Blake Patton, OBA No. 30673
Walding & Patton

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 27th of October, 2014, of a copy of the foregoing was served via U.S. mail, postage prepaid, on the following:

M. Daniel Weitman, Assistant Attorney General
Sarah Greenwalt, Assistant Solicitor General
Oklahoma Attorney General's Office
313 NE 21st Street
Oklahoma City, OK 73105



J. Blake Patton, Esq.

EXHIBIT 1

FILED IN DISTRICT COURT
OKLAHOMA COUNTY

OCT - 2 2014

TIM RHODES
COURT CLERK
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IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

(1) LARRY A. BURNS, D.O., on behalf of himself and his patients,

Plaintiff,

v.

(2) TERRY L. CLINE, in his official capacity as Oklahoma Commissioner of Health;
(3) CARL B. PETTIGREW, D.O., in his official capacity as President of the Oklahoma State Board of Osteopathic Examiners; and
(4) GREG MASHBURN, in his official capacity as District Attorney for Cleveland, Garvin, and McClain Counties,

Defendants.

Case No. CV-2014-1896

Judge Graves

VERIFIED PETITION

1. Plaintiff Larry A. Burns, D.O., by and through his undersigned attorneys, brings this Petition against the above-named Defendants, their employees, agents, and successors in office, and in support thereof alleges the following:

I. PRELIMINARY STATEMENT

2. Dr. Burns, on behalf of himself and his patients, brings this action to challenge the validity of Senate Bill 1848 ("S.B. 1848," the "statute" or the "Act") under the Oklahoma Constitution. Enrolled Senate Bill No. 1848, (2014 Okla. Sess. Law Serv. Ch. 370 (West)) (Attached hereto as Exhibit A.). S.B. 1848 was signed into law by Governor Mary Fallin on

May 28, 2014 and goes into effect on November 1, 2014.

3. S.B. 1848 requires physicians performing abortions in Oklahoma to have admitting privileges at a general hospital within thirty miles of the facility at which the abortion is performed. Violation of the admitting privileges requirement exposes abortion providers to an array of intimidating criminal, civil, and administrative penalties.

4. S.B. 1848 imposes unique burdens on physicians who provide abortions that are not imposed on any other health care providers in Oklahoma. These burdens are inconsistent with accepted medical standards, serve no legitimate state interests, and will force Dr. Burns to close his medical practice. The consequence will be a significant reduction in the number and geographic distribution of medical facilities in the State where women can access abortion care.

5. The statute violates the Oklahoma Constitution in numerous ways. Specifically, it violates (a) the single-subject rule, (b) the special law prohibition, (c) the non-delegation clause, (d) the guarantee of equal protection, and (e) the guarantee of procedural due process. In addition, the statute impermissibly burdens the fundamental substantive due process rights of Dr. Burns's patients to terminate a pregnancy.

6. Plaintiff seeks declaratory and injunctive relief from these constitutional violations.

II. JURISDICTION AND VENUE

7. Jurisdiction is conferred on this Court by OKLA. CONST. art. VII, § 7(a).

8. Dr. Burns's claims for declaratory and injunctive relief are authorized by OKLA. STAT. tit. 12, §§ 1651 and 1381 and by the general equitable powers of this Court.

9. Venue is appropriate under OKLA. STAT. tit. 12, § 133 because the official residence of two of the three Defendants is in Oklahoma County.

III. THE CHALLENGED STATUTE

10. S.B. 1848 requires that "on any day when any abortion is performed in a facility providing abortions, a physician with admitting privileges at a general medical surgical hospital which offers obstetrical or gynecological care in this state within thirty (30) miles of where the abortion is being performed must remain on the premises of the facility to facilitate the transfer of emergency cases if hospitalization of an abortion patient or a child born alive is necessary and until all abortion patients are stable and ready to leave the recovery room" Enrolled Senate Bill No. 1848, § 1(B), 2014 Okla. Sess. Law Serv. Ch. 370 (West). S.B. 1848 was enacted on May 28, 2014.

11. S.B. 1848 also directs the State Board of Health to (a) establish abortion facility supplies and equipment standards; (b) adopt standards relating to the training of physicians assistants and volunteers at facilities providing abortions; (c) adopt standards related to the medical screening and evaluation of each abortion patient; (d) adopt standards related to the performance of the abortion procedure and post-procedure follow-up care; and (e) requires facilities performing abortions to record in writing, within ten days, each incident resulting in a patient's or a "born-alive child's injury" occurring at the facility with the State Board of Health and all appropriate professional licensing and regulatory boards.

12. Violation of S.B. 1848 carries criminal penalties: "Any person who intentionally, knowingly or recklessly, violates the provisions of [S.B. 1848] or any standards adopted by the State Board of Health in accordance with [S.B. 1848] shall be guilty of a felony." *Id.* § 1(J).

13. The statute further provides for substantial civil penalties: "Any violation of this act or any standards adopted under this act may be subject to a civil penalty or fine up to Twenty-five Thousand Dollars ($25,000.00) imposed by the State Board of Health. Each day

of violation constitutes a separate violation for purposes of assessing civil penalties or fines." *Id.* § 1(K).

IV. PARTIES

14. Plaintiff Larry A. Burns, D.O., is a physician who has been licensed to practice medicine in the State of Oklahoma since 1973. As part of his medical practice in Norman, Oklahoma, Dr. Burns provides first-trimester surgical and medication abortions. Dr. Burns's practice is licensed as an abortion facility by the Oklahoma State Department of Health. Although Dr. Burns has applied for admitting privileges at a number of hospitals within 30 miles of his clinic, no hospital to date has granted him admitting privileges. Dr. Burns brings claims on behalf of himself and his patients.

15. Defendant Terry L. Cline is the Oklahoma Commissioner of Health. He oversees the Oklahoma State Board of Health, which issues licenses to facilities at which abortions are performed and oversees compliance with the regulation of such facilities. OKLA. STAT. ANN. tit. 63, § 1-706(A), (B)(1); OKLA. ADMIN. CODE § 310:600-7-3. The Oklahoma State Board of Health is also empowered to impose a civil penalty of $25,000 per day for violations of the admitting privileges requirement. S.B. 1848 § 1(K). He is sued in his official capacity.

16. Defendant Carl B. Pettigrew, D.O., is the President of the Oklahoma State Board of Osteopathic Examiners ("Osteopathic Board"). The Osteopathic Board, among other things, issues medical licenses to physicians trained in schools of osteopathic medicine and has the authority to take disciplinary action against licensees. OKLA. STAT. ANN. tit. 59, § 637; *id.* § 637.1. He is sued in his official capacity.

17. Defendant Greg Mashburn is the District Attorney for District 21, which includes Cleveland County where Norman is located. The district attorney has the power to prosecute

violations of the admitting privileges requirement as a felony. S.B. 1848 § 1(J); OKLA. STAT. ANN. tit. 19, § 215.4.

V. EXISTING REGULATORY FRAMEWORK

18. Prior to the enactment of S.B. 1848, Oklahoma already had in place an extensive set of laws and regulations concerning the performance of abortions, including laws intended to ensure that emergency procedures are in place should a woman suffer from complications during or following an abortion procedure. *See* OKLA. ADMIN. CODE § 310:600-9-6 (2014). For example, abortion facilities are required to establish a protocol for the transfer of patients requiring emergency treatment that cannot be provided on-site. *Id.* § 600-9-6(9). The protocol must include procedures to contact the local ambulance service and expedite the transfer to the receiving hospital. Appropriate clinical patient information must be provided to the receiving facility. *Id.* If the attending physician does not have admitting privileges at a local general hospital, the physician must attest that arrangements have been made with a physician having hospital privileges to receive emergency cases. *Id.*

19. Physicians who perform procedures in ambulatory surgical centers ("ASCs") that are comparable to, and more complicated than, abortion are similarly required to have a written protocol for the transfer of patients requiring emergency treatment that cannot be provided on-site. No physician at an ASC is required to have admitting privileges in order to perform out-patient procedures. *See* OKLA. ADMIN. CODE § 310:615-5-1(h), 27 OK Reg. 2536 (2014).

VI. FACTUAL ALLEGATIONS

20. In the entire State of Oklahoma, there are currently only three health care providers that are licensed to operate facilities where abortions are performed: Reproductive Services of Tulsa, Outpatient Services for Women in Oklahoma City, and Plaintiff Dr. Burns in Norman,

approximately 17 miles from Oklahoma City.

Abortion is Safe

21. Abortion is a very safe procedure. The prevalence of any complication following a first trimester surgical abortion – including minor complications – is approximately 1.3%. The prevalence of major complications requiring treatment at a hospital is approximately 0.05%. Medication abortion is also very safe and has the same symptoms as miscarriage. Because the medication takes hours or days to take effect, a patient will not be in the doctor's office when the abortion occurs.

22. In his 41 years of providing abortions to women in Oklahoma, Dr. Burns has sent only one patient to the emergency room due to complications at the clinic; that patient was suffering from prolonged anesthetic effect. This patient awoke by the time the ambulance arrived and was taken to the hospital for observation. She was released from the hospital and sent home within three hours of her arrival.

Procedural Due Process

23. S.B. 1848 deprives Dr. Burns of procedural due process by failing to afford him adequate time to obtain admitting privileges prior to the statute's effective date.

24. The admitting privileges law was signed by the governor on May 28, 2014, and becomes effective on November 1, 2014. Oklahoma law imposes no time limits on how long a hospital may consider an application for admitting privileges and it is clear, based on Dr. Burns's good faith efforts to comply, that 157 days is not enough time. Not only can it take weeks to file an application -- identifying appropriate hospitals, obtaining applications, gathering supporting documents, and scheduling interviews -- but, once an application is filed, the hospital has no prescribed time limit within which to respond. Although Dr. Burns is

applying for privileges and has applications pending, he does not expect to receive notification regarding several of those applications prior to November 1.

25. Absent a temporary injunction or a temporary restraining order, Dr. Burns will be forced either to stop practicing or face criminal sanctions. Such a denial of his right to practice his profession, when for reasons beyond his control he is unable to come into compliance, amounts to unreasonable governmental interference, in violation of his procedural due process rights under the Oklahoma constitution.

Multiple Subjects Addressed in S.B. 1848

26. As noted above, S.B. 1848 is composed of six distinct provisions that have no common theme or purpose. Legislators voting for the bill could reasonably have favored one of its provisions while opposing another.

S.B. 1848 is an Unconstitutional Special Law That Singles Out

Dr. Burns and His Patients

27. S.B. 1848 arbitrarily singles out less than an entire class of similarly affected persons – physicians who perform outpatient procedures in an office setting – for different and more burdensome regulations than all other health care providers in the state. The admitting privileges mandate is reasonably susceptible of general treatment, yet only physicians who perform abortions are subject to this special law.

28. S.B. 1848 arbitrarily singles out another group that is less than entire class of similarly affected persons – patients seeking outpatient procedures in an office setting. The law imposes this onerous regulation on patients seeking abortions, not on all patients seeking outpatient surgical procedures.

29. Physicians who perform various kinds of surgical procedures outside a hospital

setting are not required to have admitting privileges at the hospitals to which they refer patients for further treatment. Requiring hospital admitting privileges for abortion providers departs from accepted medical practice. Nor is there any valid legislative objective for singling out abortion patients from all other patients. Such differential treatment is not related to the promotion of women's health or any other governmental interest.

30. Because the Act treats similarly situated physicians and patients differently by singling out abortion physicians for regulation, and the admitting privileges requirement is not reasonably and substantially related to a valid legislative objective, it is an unconstitutional special law.

Equal Protection

31. As described above, S.B. 1848 creates an arbitrary classification by singling out physicians who provide abortion services from physicians who provide outpatient surgical procedures and by singling out abortion patients from patients undergoing outpatient surgical procedures.

32. Because the Act creates an arbitrary classification by singling out abortion providers and their patients and is not adequately related to a legitimate government purpose, it violates the equal protection clause.

Unconstitutional Delegation

33. S.B. 1848 delegates to hospital boards the power to decide which doctors may provide essential women's health care but it fails to give specific instructions about the factors a hospital must consider in making that determination. It therefore leaves an important determination to the unrestricted and standardless discretion of unelected bureaucrats.

34. Hospitals, rather than being tasked with making rules of a subordinate character to

carry out the legislature's policy with respect to abortion providers, instead make their admitting privileges decisions in accordance with their own bylaws and interests. Accordingly, hospitals can and do deny physicians admitting privileges for reasons wholly unrelated to clinical expertise. It is a clear violation of the non-delegation doctrine for the legislature to grant to hospital boards the role of gatekeeper for abortion providers, which serves as a de facto determinant of abortion access in the state.

Constitutionally Protected Right to Abortion Compromised

35. Women in Oklahoma face many challenges in accessing abortion. These challenges include poverty, lack of service providers, lack of access to transportation, need for child care, and inability to take time off from work. Requiring Dr. Burns to obtain hospital admitting privileges would force him to close his medical practice, leaving no more than two remaining abortion providers. Without additional capacity at these clinics, it will be significantly more difficult, if not impossible, for many Oklahoma women to exercise their constitutional right to abortion.

VII. CLAIMS FOR RELIEF

First Claim for Relief
(Due Process)

36. The allegations of paragraphs 1 through 35 are incorporated as though fully set forth herein.

37. S.B. 1848 violates the principle of due process of the law, in violation of OKLA. CONST. art. II, § 7, by failing to afford Dr. Burns adequate time to comply prior to the statute's effective date.

Second Claim for Relief
(Single-Subject Rule)

38. The allegations of paragraphs 1 through 35 are incorporated as though fully set forth herein.

39. S.B. 1848 violates OKLA. CONST. art. 5, § 57 because it addresses more than one subject.

Third Claim for Relief
(Special Law)

40. The allegations of paragraphs 1 through 35 are incorporated as though fully set forth herein.

41. S.B. 1848 constitutes an impermissible special law in violation of OKLA. CONST. art. V, § 59 because it singles out less than an entire class of similarly situated persons for different treatment.

Fourth Claim for Relief
(Improper Delegation)

42. The allegations of paragraphs 1 through 35 are incorporated as though fully set forth herein.

43. S.B. 1848 violates the principles of separation of powers and the role of the state legislature, in violation of OKLA. CONST. articles IV and V, respectively, by impermissibly delegating fundamental policy-making authority to hospitals and without adequate directions for the implementation of any declared policy.

Fifth Claim for Relief
(Equal Protection)

44. The allegations of paragraphs 1 through 35 are incorporated as though fully set forth herein.

45. S.B. 1848 violates the principle of equal protection of the laws, in violation of OKLA. CONST. art. II, § 7, by subjecting the Plaintiff and his patients to an unreasonable classification.

Sixth Claim for Relief
(Right to Terminate a Pregnancy)

46. The allegations of paragraphs 1 through 35 are incorporated as though fully set forth herein.

47. S.B. 1848 violates the right of Plaintiff's patients to terminate a pregnancy, which is protected as an inherent right by OKLA. CONST. art. II, § 2 and as a fundamental right by OKLA. CONST. art. II, § 7.

Seventh Claim for Relief
(Declaratory Judgment – Unconstitutional and Void)

48. The allegations of paragraphs 1 through 35 are incorporated as though fully set forth herein.

49. Because the Act violates the Oklahoma Constitution, declaratory judgment is warranted stating that the Act is unconstitutional and void. The judgment would terminate the controversy giving rise to this proceeding. *See id.*

50. Declaratory judgment is warranted because S.B. 1848 violates Plaintiff's constitutional rights and the constitutional rights of Plaintiff's patients.

Eighth Claim for Relief
(Temporary Injunction and Temporary Restraining Order)

51. The allegations of paragraphs 1 through 35 are incorporated as though fully set forth herein.

52. If S.B. 1848 goes into effect, it will irreparably harm Plaintiff and his patients.

53. Immediate relief is required to prevent and enjoin this harm. Defendants should be temporarily enjoined from enforcing the act.

Ninth Claim for Relief
(Permanent Injunction)

54. The allegations of paragraphs 1 through 35 and 51–53 are incorporated as though fully set forth herein.

55. Because the Act violates the Oklahoma Constitution, warranting declaratory judgment stating that S.B. 1848 is unconstitutional and void, Defendants should be permanently enjoined from enforcing the Act.

VIII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully request that this Court:

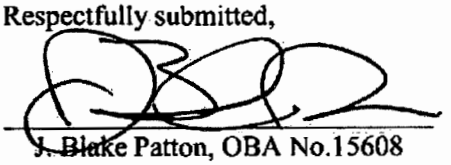
56. Issue a declaratory judgment that S.B. 1848 violates the Oklahoma Constitution and is void and of no effect; and

57. Issue permanent injunctive relief, without bond, restraining Defendants, their employees, agents, and successors in office from enforcing S.B. 1848; and

58. Grant such other and further relief as the Court may deem just and proper, including reasonable attorney's fees and costs.

Dated: October 2, 2014

Respectfully submitted,



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*_Out-of-State Attorney Application and Motion to Associate Forthcoming_
**_Out-of-State Attorney Applications Filed_

ATTORNEYS FOR PLAINTIFF

VERIFICATION

The undersigned Plaintiff has read the contents of the Verified Petition. The undersigned hereby verifies, under penalty of perjury, that the contents of the Verified Petition are true and correct to the best of his present knowledge.

Larry A. Burns, D.O.

BRENDA HANNA NOTARY PUBLIC STATE OF OKLAHOMA

Sworn to before me this 1st day of October 2014

NOTARY PUBLIC

Subscribed and sworn to before me, a Notary Public, in and for the State of Oklahoma, Cleveland County, this 1 day of Oct, 2014.

Notary Public

My Commission expires Aug. 20, 2018

IN THE DISTRICT COURT FOR OKLAHOMA COUNTY
STATE OF OKLAHOMA

(1) LARRY A. BURNS, D.O., on behalf of himself and his patients, Plaintiff, v. (2) TERRY L. CLINE, in his official capacity as Oklahoma Commissioner of Health (3) CARL B. PETTIGREW, D.O., in his official capacity as President of the Oklahoma State Board of Osteopathic Examiners, and (4) GREG MASHBURN, in his official capacity as District Attorney for Cleveland, Garvin, and McClain Counties; Defendants.	)	Case No. CV-2014-1896 Judge Graves

CERTIFICATE OF SERVICE ON OKLAHOMA ATTORNEY GENERAL

Pursuant to Local Rule 37 (D), the undersigned hereby certifies that true and correct copies of the petition, motion, and brief challenging Enrolled Senate Bill No. 1848 were served on the Office of the Oklahoma Attorney General.

Respectfully submitted,

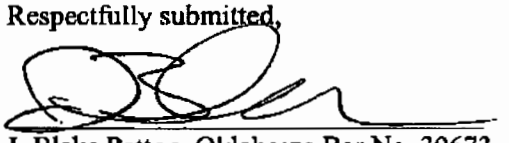

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EXHIBIT A

An Act

ENROLLED SENATE
BILL NO. 1848

By: Treat, Newberry, Allen, Griffin and Echols of the Senate

and

Grau, Christian, Ritze, Kern, Reynolds, Turner, Roberts (Sean), Fisher, Derby, Johnson, Cockroft, Biggs and Walker of the House

An Act relating to public health; directing State Board of Health to establish certain standards; requiring physicians with certain privileges to remain at certain facilities for certain time period; requiring certain training for physicians, physician assistants, and volunteers; requiring medical screenings prior to performance of abortion; providing standards for screenings; requiring offer of examination after abortion; requiring certain facilities to keep certain records; requiring reporting of injuries and death to State Department of Health; requiring filing of incident reports to appropriate boards; providing penalties for performance of abortions without licensure; authorizing certain legal action against certain persons; providing for codification; and providing an effective date.

SUBJECT: Establishment of certain medical procedure standards

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-748 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. The State Board of Health shall establish abortion facility supplies and equipment standards, including equipment required to be immediately available for use in an emergency. Such standards shall, at a minimum:

1. Specify required equipment and supplies, including medications, required for the performance of abortion procedures and for monitoring the progress of each patient throughout the abortion procedure and post-procedure recovery period;

2. Require that the number or amount of equipment and supplies at the facility is adequate at all times to assure sufficient quantities of clean and sterilized durable equipment and supplies to meet the needs of each patient;

3. Specify the mandated equipment and supplies for required laboratory tests and the requirements for protocols to calibrate and maintain laboratory equipment at the abortion facility or operated by facility staff;

4. Require ultrasound equipment in all abortion facilities; and

5. Require that all equipment is safe for the patient and facility staff, meets applicable federal standards, and is checked annually to ensure safety and appropriate calibration.

B. On any day when any abortion is performed in a facility providing abortions, a physician with admitting privileges at a general medical surgical hospital which offers obstetrical or gynecological care in this state within thirty (30) miles of where the abortion is being performed must remain on the premises of the facility to facilitate the transfer of emergency cases if hospitalization of an abortion patient or a child born alive is necessary and until all abortion patients are stable and ready to leave the recovery room.

C. The State Board of Health shall adopt standards relating to the training physician assistants licensed pursuant to the provisions of Section 519.1 of Title 59 of the Oklahoma Statutes and employed by or providing services in a facility providing abortions shall receive in counseling, patient advocacy, and the specific medical and other services.

D. The State Board of Health shall adopt standards related to the training that volunteers at facilities providing abortions shall receive in the specific services that the volunteers provide, including counseling and patient advocacy.

E. The State Board of Health shall adopt standards related to the medical screening and evaluation of each abortion patient. At minimum these standards shall require:

1. A medical history, including the following:

   a. reported allergies to medications, antiseptic solutions, and latex,

   b. obstetric and gynecological history,

   c. past surgeries, and

   d. medication the patient is currently taking;

2. A physical examination, including a bimanual examination estimating uterine size and palpation of the adnexa; and

3. The appropriate preprocedure testing, including:

   a. urine or blood tests for pregnancy, if ordered by a physician,

   b. a test for anemia,

   c. Rh typing, unless reliable written documentation of blood type is available, and

   d. an ultrasound evaluation for all patients who elect to have an abortion. The physician performing the

abortion is responsible for estimating the gestational age of the unborn child based on the ultrasound examination and established standards of obstetrical care and shall write the estimate in the patient's medical record. An original print of each ultrasound examination of the patient shall be kept in the patient's medical record.

F. The State Board of Health shall adopt standards related to the performance of the abortion procedure and post-procedure follow-up care. At minimum these standards shall require:

1. That medical personnel are available to all abortion patients throughout the procedure;

2. The appropriate use of local anesthesia, analgesia, and sedation if ordered by the physician performing the procedure;

3. The use of appropriate precautions, such as the establishment of intravenous access;

4. That the physician performing the abortion procedure monitors the patient's vital signs and other defined signs and markers of the patient's status throughout the procedure and during the recovery period until the patient's condition is deemed to be stable in the recovery room;

5. Immediate post-procedure care and observation in a supervised recovery room for as long as the patient's condition warrants;

6. That the facility in which the abortion procedure is performed arranges for a patient's hospitalization if any complication beyond the management capability of the abortion facility's medical staff occurs or is suspected;

7. That a licensed health-care professional trained in the management of the recovery room and capable of providing cardiopulmonary resuscitation actively monitors patients in the recovery room;

8. That there is a specified minimum time that a patient remains in the recovery room by type of abortion procedure and duration of gestation;

9. That a physician discusses RhO(D) immune globulin with each patient for whom it is indicated and assures it is offered to the patient in the immediate post-operative period or that it will be available to her within seventy-two (72) hours after completion of the abortion procedure. If the patient refuses, a refusal form approved by the State Board of Health shall be signed by the patient and a witness and included in the medical record;

10. Written instructions with regard to post-abortion coitus, signs of possible complications, and general aftercare are given to each patient. Each patient shall have specific instructions regarding access to medical care for complications, including a telephone number to call for medical emergencies;

11. That the physician ensures that a licensed health-care professional from the abortion facility makes a good faith effort to contact the patient by phone, with the patient's consent, within twenty-four (24) hours after procedure to assess the patient's recovery;

12. Equipment and services are located in the recovery room to provide appropriate emergency and resuscitative life-support procedures pending the transfer of the patient or a child born alive in the facility;

13. That a post-abortion medical visit shall be offered to each abortion patient and, if requested, scheduled for two (2) to three (3) weeks after the abortion procedure and shall include a medical examination and a review of the results of all laboratory tests; and

14. That a urine or blood test shall be obtained at the time of the follow-up visit to rule out continued pregnancy. If a continuing pregnancy is suspected, the patient shall be appropriately evaluated; and a physician who performs abortions shall be consulted.

G. Facilities performing abortions shall record each incident resulting in a patient's or a born-alive child's injury occurring at

the facility and shall report incidents in writing to the State Board of Health within ten (10) days of the incident. For the purposes of this subsection, "injury" shall mean an injury that occurs at the facility and creates a serious risk of substantial impairment of a major body organ or function.

H. If a patient's death occurs, other than the death of an unborn child properly reported pursuant to law, the facility performing abortions shall report the death to the State Board of Health no later than the next business day.

I. Incident reports shall be filed with the State Board of Health and all appropriate professional licensing and regulatory boards, including, but not limited to, the State Board of Medical Licensure and Supervision and the Oklahoma Board of Nursing.

J. Whoever operates a facility performing abortions without a valid license shall be guilty of a felony. Any person who intentionally, knowingly, or recklessly violates the provisions of this act or any standards adopted by the State Board of Health in accordance with this act shall be guilty of a felony.

K. Any violation of this act or any standards adopted under this act may be subject to a civil penalty or fine up to Twenty-five Thousand Dollars ($25,000.00) imposed by the State Board of Health. Each day of violation constitutes a separate violation for purposes of assessing civil penalties or fines. In deciding whether and to what extent to impose civil penalties or fines, the State Board of Health shall consider the following factors:

1. Gravity of the violation, including the probability that death or serious physical harm to a patient or individual will result or has resulted;

2. Size of the population at risk as a consequence of the violation;

3. Severity and scope of the actual or potential harm;

4. Extent to which the provisions of the applicable statutes or regulations were violated;

5. Any indications of good faith exercised by facility;

6. The duration, frequency, and relevance of any previous violations committed by the facility; and

7. Financial benefit to the facility of committing or continuing the violation.

L. In addition to any other penalty provided by law, whenever in the judgment of the State Commissioner of Health any person has engaged, or is about to engage, in any acts or practices which constitute, or will constitute, a violation of this act, or any standard adopted in accordance with this act, the Commissioner shall make application to any court of competent jurisdiction for an order enjoining such acts and practices. Upon a showing by the Commissioner that such person has engaged, or is about to engage, in any such acts or practices, an injunction, restraining order, or such other order as may be appropriate shall be granted by such court without bond.

SECTION 2. This act shall become effective November 1, 2014.

Passed the Senate the 22nd day of May, 2014.

Presiding Officer of the Senate

Passed the House of Representatives the 23rd day of May, 2014.

Presiding Officer of the House of Representatives

OFFICE OF THE GOVERNOR

Received by the Office of the Governor this 23rd day of May, 20 14, at 9:08 o'clock P M.

By: Audrey Rockwell

Approved by the Governor of the State of Oklahoma this 28th day of May, 20 14, at 1:42 o'clock P M.

Governor of the State of Oklahoma

OFFICE OF THE SECRETARY OF STATE

Received by the Office of the Secretary of State this 28th day of May, 20 14, at 2:54 o'clock P. M.

By:

EXHIBIT 2

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

(1) LARRY A. BURNS, D.O., on behalf of himself and his patients,	)	
Plaintiff,	)	
v.	)	Case No. CV-2014-1896
(2) TERRY L. CLINE, in his official capacity as Oklahoma Commissioner of Health; (3) CARL B. PETTIGREW, D.O., in his official capacity as President of the Oklahoma State Board of Osteopathic Examiners; and (4) GREG MASHBURN, in his official capacity as District Attorney for Cleveland, Garvin, and McClain Counties,	)	
Defendants.	)	

ANSWER

In Answer to Plaintiff's Petition of October 2, 2014, in the above-captioned matter, Defendants Terry L. Cline, in his official capacity as Oklahoma Commissioner of Health, Carl B. Pettigrew, D.O., in his official capacity as President of the Oklahoma State Board of Osteopathic Examiners, and Greg Mashburn, in his official capacity as District Attorney for Cleveland, Garvin, and McClain counties (collectively "Defendants"), hereby deny each and every allegation set forth in Plaintiff's Petition unless otherwise admitted, and further specifically answer the allegations contained within the Petition as follows:

1. Paragraph 1 merely introduces the action brought by Plaintiff and therefore requires no response. To the extent a response is required, it is denied.

Response to "Preliminary Statement"

2. The allegations set forth in ¶ 2 regarding Enrolled Senate Bill No. 1848, (2014 Okla. Sess. Law Serv. Ch. 370 (West)) ("SB 1848" or "the Act") are admitted.

3. Defendants admit that violation of the admitting privileges requirement results in penalties, but deny Plaintiff's assertion in ¶ 3 that those penalties are "intimidating."

4. Defendants deny the statements and allegations set forth in ¶¶ 4-5.

5. Paragraph 5 contains only legal conclusions to which no response is required. To the extent a response is necessary, the allegations are denied.

6. Defendants admit Plaintiff's statement in ¶ 6 that Plaintiff seeks declaratory and injunctive relief, but deny that there are any constitutional violations.

Response to "Jurisdiction and Venue"

7. Defendants admit the statement set forth in ¶ 7.

8. Defendants admit that courts generally have the authority to issue declarative and injunctive relief pursuant to Okla. Stat. tit. 12, §§ 1651 and 1381. However, to the extent Plaintiff argues he is entitled to such relief, the statement in ¶ 8 is denied.

9. The allegation in ¶ 9 is admitted.

Response to "The Challenged Statute"

10. The allegations set forth in ¶¶ 10-13 are admitted.

Response to "Parties"

11. The Defendants are without sufficient knowledge to admit or deny the allegations set forth in ¶ 14 and therefore deny the same.

12. Defendants admit the allegations set forth in ¶¶ 15-17.

Response to "Existing Regulatory Framework"

13. Defendants admit the allegations set forth in ¶ 18.

14. Defendants deny the Plaintiff's statements and assertions set forth in ¶ 19.

Response to "Factual Allegations"

15. Defendants admit the allegation set forth in ¶ 20.

16. The allegations set forth in ¶ 21 are denied.

17. The Defendants lack sufficient information to admit or deny the allegations set forth in ¶ 22, and therefore deny the same.

18. Paragraph 23 contains only a conclusion of law and therefore no response is required. To the extent a response is necessary, Defendants deny the allegation set forth therein.

19. The first sentence of ¶ 24 is admitted. Defendants also admit that SB 1848 does not impose time limits within which a hospital must determine whether a physician receives admitting privileges. The remainder of ¶ 24 is denied.

20. Defendants deny the allegations set forth in the first sentence of ¶ 25. The last sentence in ¶ 25 contains only legal conclusions and therefore requires no response. To the extent a response is required, those legal conclusions are denied.

21. Paragraphs 26-28 contain only conclusions of law and therefore require no response. To the extent a response is required, Defendants deny the allegations set forth therein.

22. Defendants admit the first sentence in ¶ 29. The remaining allegations set forth in ¶ 29 are denied.

23. Paragraphs 30-33 contain only legal conclusions, and therefore no response is required. To the extent a response is required, those legal conclusions are denied.

24. Defendants admit Plaintiff's statement in ¶ 34 that hospitals can grant admitting privileges according to their own bylaws. However, Defendants lack sufficient knowledge to admit or deny that hospitals can and do deny physicians admitting privileges for reasons unrelated to clinical expertise. Therefore, such statements are denied. The remainder of ¶ 34 contains legal conclusions to which no response is required. To the extent a response is required, those remaining allegations are denied.

25. The allegations set forth in ¶ 35 are denied.

Response to "First Claim for Relief"

The Defendants incorporate by reference all preceding paragraphs.

26. Paragraph 36 merely references and incorporates all previous paragraphs. Those allegations and statements have already been responded to individually, and therefore no response is required here.

27. The allegation forth in ¶ 37 is a legal conclusion. To the extent a response is required, the allegation is denied.

Response to "Second Claim for Relief"

The Defendants incorporate by reference all preceding paragraphs.

28. Paragraph 38 merely references and incorporates all previous paragraphs. Those allegations and statements have already been responded to individually, and therefore no response is required here.

29. Paragraph 39 states a legal conclusion. To the extent a response is required, that allegation is denied.

Response to "Third Claim for Relief"

30. Paragraph 40 merely references and incorporates all previous paragraphs. Those allegations and statements have already been responded to individually, and therefore no response is required here.

31. The allegation set forth in ¶ 41 is a legal conclusion. To the extent a response is required, the allegation is denied.

Response to "Fourth Claim for Relief"

32. Paragraph 42 merely references and incorporates all previous paragraphs. Those allegations and statements have already been responded to individually, and therefore no response is required here.

33. The allegation set forth in ¶ 43 is a legal conclusion. To the extent a response is required, that allegation is denied.

Response to "Fifth Claim for Relief"

34. Paragraph 44 merely references and incorporates all previous paragraphs. Those allegations and statements have already been responded to individually, and therefore no response is required here.

35. Paragraph 45 states a legal conclusion, to which no response is required. To the extent a response is required, that legal conclusion is denied.

Response to "Sixth Claim for Relief"

36. Paragraph 46 merely references and incorporates all previous paragraphs. Those allegations and statements have already been responded to individually, and therefore no response is required here.

37. The allegation in ¶ 47 states a legal conclusion and therefore no response is required. To the extent a response is required, that allegation is denied.

Response to "Seventh Claim for Relief"

38. Paragraph 48 merely references and incorporates all previous paragraphs. Those allegations and statements have already been responded to individually, and therefore no response is required here.

39. Paragraphs 49-50 contain only conclusions of law to which no response is required. To the extent a response is required, those conclusions of law are denied.

Response to "Eighth Claim for Relief"

40. Paragraph 51 merely references and incorporates all previous paragraphs. Those allegations and statements have already been responded to individually, and therefore no response is required here.

41. The allegations and statements in ¶¶ 52 and 53 are legal conclusions. To the extent a response is required, those allegations and statements are denied.

Response to "Ninth Claim for Relief"

42. Paragraph 54 merely references and incorporates all previous paragraphs. Those allegations and statements have already been responded to individually, and therefore no response is required here.

43. Paragraph 55 contains only a conclusion of law, and therefore requires no response. To the extent a response is required, that conclusion of law is denied.

Response to "Prayer for Relief"

44. Defendants deny the allegations and averments contained in ¶¶ 56-58 and deny that Plaintiff is entitled to any relief whatsoever.

Affirmative Defenses

For further answer or defense, Defendants allege and state that Plaintiff has failed to state a claim upon which relief can be granted, and that this court lacks subject matter jurisdiction to decide this case.

Respectfully submitted,

M. DANIEL WEITMAN, OBA# 17412
Assistant Attorney General
SARAH GREENWALT, OBA#31566
Assistant Solicitor General
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Litigation Division
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Email: sarah.greenwalt@oag.ok.gov
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 22ND day October, 2014, a true and correct copy of the foregoing document by U.S. mail and a courtesy copy via email to the following persons:

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STATE OF OKLAHOMA
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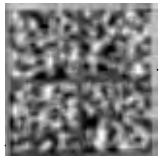

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EXHIBIT 3

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

FILED IN DISTRICT COURT
OKLAHOMA COUNTY

OCT - 2 2014

TIM RHODES
COURT CLERK

(1) LARRY A. BURNS, D.O., on behalf of himself and his patients, Plaintiff, v. (2) TERRY L. CLINE, in his official capacity as Oklahoma Commissioner of Health (3) CARL B. PETTIGREW, D.O., in his official capacity as President of the Oklahoma State Board of Osteopathic Examiners, and (4) GREG MASHBURN, in his official capacity as District Attorney for Cleveland, Garvin, and McClain Counties; Defendants.	Case No. 75 Judge Graves CV-2014-1896

PLAINTIFF'S MOTION FOR A TEMPORARY INJUNCTION AND FOR EXPEDITED BRIEFING AND HEARING ON THAT MOTION OR, ALTERNATIVELY, FOR A TEMPORARY RESTRAINING ORDER PENDING THE OUTCOME OF THAT MOTION

Pursuant to 12 Okla. Stat. § 1382, Plaintiff Larry A. Burns, D.O., hereby moves this court for a temporary injunction restraining Defendants, their employees, agents, and successors, and all others acting in concert or participation with them, from enforcing any of the provisions contained in recently enacted Senate Bill 1848 ("S.B. 1848"). To aid in reaching a decision on the motion before the Act takes effect on November 1, 2014, Dr. Burns also moves for an expedited hearing and briefing. Alternatively, Dr. Burns seeks a temporary

restraining order to preserve the *status quo* during the Court's determination of the temporary injunction motion. The grounds for the motion are as follows:

1. Plaintiff Larry A. Burns, D.O., is a physician licensed to practice medicine in the State of Oklahoma. As part of his medical practice in Norman, Oklahoma, Dr. Burns provides first-trimester surgical and medication abortions. Dr. Burns's clinic is licensed as an abortion facility by the Oklahoma State Department of Health.

2. S.B. 1848 requires physicians performing abortions in Oklahoma to have admitting privileges at a general hospital within thirty (30) miles of the facility at which the abortion is performed. In addition, S.B. 1848 exposes abortion providers to an array of intimidating criminal, civil, and administrative penalties to which no other similarly situated health care providers in the State are exposed.

3. S.B. 1848 targets abortion providers, physicians, and patients for the imposition of unique burdens that are not imposed on other physicians performing outpatient surgical procedures in Oklahoma or other outpatient surgical patients. These burdens are inconsistent with accepted medical standards, serve no state interests, and will force Dr. Burns to close his medical practice, one of only three medical facilities in the State where women can access safe and legal abortion.

4. Dr. Burns is likely to prevail on the merits of his claim that S.B. 1848 deprives him of due process of law. Dr. Burns and his patients are also likely to prevail on their claims that S.B. 1848 must be struck down as a violation of the single-subject rule; that S.B. 1848 is an impermissible special law; and that S.B. 1848 is an unconstitutional delegation of authority.

5. In the absence of a temporary injunction, Dr. Burns and those whose interests he represents will suffer irreparable harm. S.B. 1848 will irreparably injure Dr. Burns by violating

several of his rights secured by the Oklahoma Constitution and forcing him to close his clinic, depriving him of his livelihood. Further, Dr. Burns operates one of only three abortion providers in the state. Even assuming the other two clinics are able to stay open, the immediate reduction in services caused by the closure of his clinic will likely cause women to experience delay or be entirely precluded from accessing abortion and will irreparably injure women's health.

6. While Dr. Burns and women seeking abortion in Oklahoma would suffer irreparable harm if S.B. 1848 were to take effect, Defendants would suffer no harm if a temporary injunction were granted. To the contrary, enjoining the Act would preserve the *status quo*, allowing Dr. Burns to continue offering needed and constitutionally protected healthcare services to women in Oklahoma. The public interest would be served by the issuance of a temporary injunction.

7. Accordingly, Dr. Burns meets the standard for preliminary injunctive relief. *Daffin v. State ex rel. Oklahoma Dept. of Mines*, 2011 OK 22, ¶ 7, 251 P.3d 741, 745.

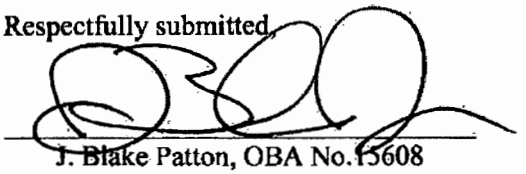
8. Dr. Burns's counsel will attempt immediate service of the motion on Defendants via fax and/or e-mail once the petition and motion have been filed and the case number has been assigned, and will further attempt to notify Defendants by telephone of the motion as soon as possible.

9. Dr. Burns respectfully requests expedited briefing and hearing on this motion so that it may be decided before the Act takes effect on November 1, 2014. Alternatively, Dr. Burns respectfully requests that the Court issue a temporary restraining order to preserve the *status quo* pending the determination of Dr. Burns's motion for temporary injunction.

10. In support of the instant motion, Dr. Burns submits the accompanying memorandum of law, with exhibits, the Affidavit of Christopher M. Estes, MD, MPH, with exhibits (attached hereto as Appendix 1), the Affidavit of Larry A. Burns, D.O., with exhibits (attached hereto as Appendix 2).

Dated: October 2, 2014

Respectfully submitted,



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**Out-of-State Attorney Application and Motion to Associate Forthcoming*
***Out-of-State Attorney Applications Filed*

ATTORNEYS FOR PLAINTIFF

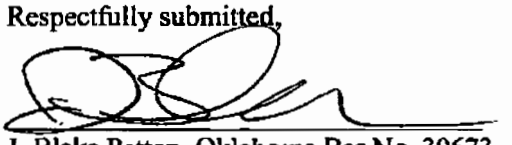
IN THE DISTRICT COURT FOR OKLAHOMA COUNTY
STATE OF OKLAHOMA

(1) LARRY A. BURNS, D.O., on behalf of himself and his patients, Plaintiff, v. (2) TERRY L. CLINE, in his official capacity as Oklahoma Commissioner of Health (3) CARL B. PETTIGREW, D.O., in his official capacity as President of the Oklahoma State Board of Osteopathic Examiners, and (4) GREG MASHBURN, in his official capacity as District Attorney for Cleveland, Garvin, and McClain Counties; Defendants.	Case No. CV-2014-1896 Judge Graves

CERTIFICATE OF SERVICE ON OKLAHOMA ATTORNEY GENERAL

Pursuant to Local Rule 37 (D), the undersigned hereby certifies that true and correct copies of the petition, motion, and brief challenging Enrolled Senate Bill No. 1848 were served on the Office of the Oklahoma Attorney General.

Respectfully submitted,



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APPENDIX 1

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

(1) LARRY A. BURNS, D.O., on behalf of himself and his patients, Plaintiff, v. (2) TERRY L. CLINE, in his official capacity as Oklahoma Commissioner of Health (3) CARL B. PETTIGREW, D.O., in his official capacity as President of the Oklahoma State Board of Osteopathic Examiners, and (4) GREG MASHBURN, in his official capacity as District Attorney for Cleveland, Garvin, and McClain Counties, Defendants.	)	Case No. CV-2014-1896 Judge Graves

DECLARATION OF CHRISTOPHER M. ESTES, M.D., M.P.H.

STATE OF FLORIDA)
) ss.
COUNTY OF MIAMI-DADE)

CHRISTOPHER M. ESTES, M.D., M.P.H., being duly sworn, deposes and says:

1. I am a physician licensed to practice medicine in Florida. I am Board Certified by the American Board of Obstetrics and Gynecology. I hold a B.S. in Biology from the University of Miami, College of Arts and Sciences, an M.D. from the University of Miami, Miller School of Medicine ("UMMSM"), and an M.P.H. in Epidemiology from Columbia University, Mailman School of Public Health. I am also a member of the American College of Obstetricians and Gynecologists and the American Society of Reproductive Medicine, and a Junior Fellow of the Society of Family Planning.

2. I completed my residency in obstetrics and gynecology ("ob-gyn") at UMMSM, and I completed the Ryan Fellowship in Family Planning at Columbia University/New York Presbyterian Hospital. As part of the Ryan Fellowship, I received training in abortion from experts in the field. We practiced in a tertiary care referral center and provided abortions to patients referred to us by other physicians who needed a higher level of care due to various obstetrical and medical conditions. I participated in the training of residents and medical students throughout my time in fellowship.

3. At UMMSM and at Jackson Memorial Hospital in Miami, Florida, as well as during my medical residency in New York, I have attended thousands of births and delivered thousands of babies.

4. I was recently appointed as the Chief Medical Officer of Planned Parenthood of South Florida and the Treasure Coast (PPSFTC), which operates nine health care centers across southern Florida. In that role, I am responsible for numerous aspects of medical care at PPSFTC, including the overall quality of our care and risk management, and compliance with medical standards. In addition, I serve as the Director of Ultrasound Services and the Director of Laboratory Services at PPSFTC.

5. I also have clinical duties at PPSFTC and provide my patients with the full range of gynecologic care, including comprehensive family planning, cancer screening, testing for sexually transmitted diseases, gynecologic surgery, pre-natal care, surgical abortion services through 14 weeks from a woman's last menstrual period (LMP) and medication abortion through 63 days LMP.

6. Until earlier this year, I was an assistant professor in the ob-gyn department at UMMSM in Miami, Florida, where I served as the Medical Director for Reproductive Health

Services. In this role, I was responsible for the conduct of a tertiary care, referral-based family planning clinic. This clinic offers the full scope of family planning care, including surgical abortion up to 24 weeks LMP, and receives referrals from as far away as the Panhandle of Florida, as well as from the Caribbean, and Central and South America. Residents in the clinic during every session received training in abortion as a required portion of our residency program in obstetrics and gynecology. I was also until recently the Director of the Third Year Clerkship in Obstetrics and Gynecology and the Co-Coordinator for the Second Year Medical Students Reproduction and Endocrinology module at UMMSM. I supervised the instruction of medical students in all aspects of obstetrics and gynecology and was responsible for the content of their curriculum at our medical school. The students regularly attended the Reproductive Health Clinic to learn about and participate in all aspects of family planning, including medication and surgical abortion.

7. As the Medical Director for Reproductive Health Services at UMMSM, I received referrals from other physicians to care for women with medical conditions that necessitated my high level of expertise. In that role, I was one of only a few providers in the Southeast with the skills and access to facilities to care for women who need abortions and are at high risk for complications. I also specialized in the contraceptive and reproductive health needs of women with complicated medical histories.

8. Although I am now Chief Medical Officer of PPSFTC, I remain on the faculty of UMMSM with a voluntary appointment. I continue to serve as an on-call physician on the labor and delivery floor at the hospital and continue to teach ob-gyn residents. And, as before, I still cover the labor floor at Jackson Memorial Hospital, where I attend births and deliver babies regularly.

9. My *curriculum vitae*, which sets forth my experience and credentials more fully, is annexed hereto as Exhibit A.

10. The opinions in this declaration are my expert opinions, which are based on my education, training, practical experience as an ob-gyn and an abortion provider, my attendance at professional conferences, review of relevant medical literature, and conversations with other medical professionals. All of the opinions provided in this declaration are based on my personal knowledge.

11. I have reviewed Oklahoma S.B. 1848 (S.B. 1848), including the admitting privileges requirement, which mandates that all physicians who perform abortions must have "admitting privileges at a general medical surgical hospital which offers obstetrical or gynecological care in this state within thirty (30) miles of where the abortion is being performed."

12. The Oklahoma admitting privileges requirement departs from accepted medical practice and no reliable evidence of which I am aware supports the claim that this requirement will improve the safety of abortion procedures or promote women's health. Instead, if the requirement decreases access to legal abortion in Oklahoma, it will put the health of Oklahoma women women at risk.

13. Roughly 90 percent of all abortions performed in the United States occur during the first trimester of pregnancy (up to 13.6 weeks LMP) [1] and the majority of abortions occur at eight weeks LMP or less.

14. In general, two methods of performing abortions are used in the United States: surgical ahortion and medication abortion. Abortion is a very safe procedure; large research

[1] Henshaw SK and Finer LB, The accessibility of abortion services in the United States, 2001, Perspectives on Sexual and Reproductive Health, 2003, 35(1):16-24.

studies typically find that the overall hospitalization rate for first and second trimester abortion is less than 0.3%.

15. Surgical abortion involves the use of instruments to evacuate the contents of the uterus. Despite the term "surgical," an abortion does not involve an incision. Instead, it entails insertion of instruments into the uterus through the vagina. As such, it is a minimally invasive procedure.

16. A first trimester abortion procedure is typically performed in a room with an examination table, on which the patient will lie on her back with her hips and knees flexed and thighs apart and with her feet or legs in stirrups similar to a routine gynecologic examination. After gently stretching open the patient's cervix using graduated dilators, the physician will insert a suction cannula through the cervix into the uterus to empty its contents. The procedure typically lasts two to ten minutes.

17. Surgical abortions performed in outpatient clinics generally do not entail the use of general anesthesia. Instead, the vast majority of such abortions can be safely and comfortably performed with local anesthesia. A local anesthetic is typically applied directly to the cervix. At the patient's request and for the patient's comfort, oral medication like Valium or Xanax can also be provided. Many clinics will also offer intravenous (IV) moderate sedation, sometimes called conscious sedation. These types of sedation are commonly used in other medical and dental offices to alleviate pain and anxiety during procedures. The risks associated with oral sedation or IV moderate sedation are minimal and are orders of magnitude less than general anesthesia administered in an operating room setting.

18. From my own experience as an ob-gyn providing medical care to women for well

over a decade, I know that surgical abortion is similar to other gynecologic procedures I provide to my patients in terms of risks, complications, invasiveness, instrumentation, and duration. For example, first-trimester surgical abortions are, technically, nearly identical to diagnostic or therapeutic dilation and curettage ("D&C") on a non-pregnant woman and surgical completion of a spontaneous miscarriage; both of these procedures involve opening the cervix and evacuating the uterus with instruments. Surgical abortion is also similar to hysteroscopy procedures (using a small camera to look inside of the uterus).

19. Surgical abortion is also comparable to non-gynecologic procedures in terms of risk, invasiveness, instrumentation, and duration, such as gastrointestinal endoscopy, certain dental procedures, and liposuction.

20. Many other non-gynecologic surgical procedures that are typically performed in office-based settings are considerably more complex and invasive than abortion. These include certain oral and cosmetic surgeries, and colonoscopies.

21. Medication abortion involves the use of medications to terminate a pregnancy. The medications most commonly used for this purpose are mifepristone and misoprostol. Mifepristone (also known as "RU-486" or by its trade name, Mifeprex) terminates a pregnancy by blocking progesterone, a naturally produced hormone that prepares the lining of the uterus for a fertilized egg and helps maintain pregnancy. Without progesterone, the pregnancy cannot continue; the supportive lining of the uterus breaks down, and the embryo detaches from it. Misoprostol (also known as a prostaglandin or by its trade name, Cytotec) causes the uterus to contract and expel the embryo or fetus and other products of conception. These same medications are offered as a treatment option to women who have a spontaneous miscarriage with retained tissue.

22. Medication abortion requires no anesthesia or sedation. Oral medications prescribed by the provider are sufficient to alleviate any pain associated with medication abortion.

23. Legal abortion is one of the safest medical procedures in the United States, and it is quite common. Approximately 3 in 10 women will obtain an abortion by the age of 45.[2]

24. Abortion is a very low risk medical procedure. Complications from legal abortion are very rare and major complications are extremely rare, well below 1.0%. A recent large study found that the overall prevalence of any complication of first-trimester surgical abortion – including minor complications – is 1.3%. The prevalence of major complications requiring treatment at a hospital was 0.05%.[3]

25. The types of complications that may occur following a surgical abortion include retained tissue, infection, bleeding and injury of the uterus or cervix (perforation or laceration). The same complications, except for surgical injuries, can occur after a medication abortion. Bleeding after an abortion is not always a sign of a complication, because some bleeding is expected after both surgical and medication abortions.

26. The vast majority of the complications associated with abortion – such as excessive bleeding (hemorrhage) and infection – can be appropriately and safely managed in the clinic setting. Women with bleeding may be treated on an outpatient basis with uterotonics (medications that increase the tone of uterine contractions and reduce bleeding). Women with infections may be treated on an outpatient basis with oral and/or injected

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[2] Jones RK & Kavanaugh M, Changes in abortion rates between 2000 and 2008 and lifetime incidence of abortion. Obstet. & Gynecol. 2011; 117:1358.

[3] Weitz TA, Taylor D, Desai S, et al. Safety of aspiration abortion performed by nurse practitioners, certified nurse midwives, and physician assistants under a California legal waiver. Am J Public Health 2013;103:454-61.

antibiotics.

27. Likewise, most cases of cervical laceration are managed in the clinic setting with either cauterization or by suturing the laceration. The majority of cases of uterine perforation are treated by observation and expectant management; they usually do not require repair or additional surgery to treat as they will heal spontaneously. Cases of incomplete abortion with retained tissue are generally managed in the clinic through repeat aspiration and uterotonic medications if needed.

28. During my years working at UMMSM, I was called on a few occasions to the emergency room ("ER") to assist in treating women who had recently obtained abortions. Most of the women I saw in the ER could have been safely treated in a clinic setting, but their symptoms simply occurred outside clinic operating hours. Further, some of these women were not experiencing complications at all and were having normal symptoms following an abortion. Most post-abortion patients who arrive at the ER are treated as outpatients by ER doctors or the on-call ob-gyn and released.

29. Major complications from abortions performed in a clinic are extremely rare. These rare complications include hemorrhage not responsive to medication or re-evacuation of the uterus; uterine perforation involving damage to other organs or vascular structures; or severe complications related to anesthesia, such as a seizure or aspiration. Patients experiencing these complications should be transferred to a hospital for appropriate treatment, which might include blood transfusion, uterine artery embolization, or major abdominal surgery such as hysterectomy.

Oklahoma's Admitting Privileges Requirement Is At Odds With Accepted Medical Practice and Will Not Make Legal Abortion in Oklahoma Safer

30. Having hospital admitting privileges is not related to competence in abortion.

Both the American Medical Association ("AMA") and the American Congress of Obstetricians and Gynecologists ("ACOG") have stated that there is no sound medical basis for requiring abortion providers to obtain hospital admitting privileges.

31. The trend in medicine today is toward specialization of physicians who practice in outpatient settings and physicians who practice in hospitals. Most hospitals have their own dedicated staff physicians. These "hospitalists" often provide only inpatient care. For example, obstetrician hospitalists, called "laborists," provide inpatient obstetric care during delivery, while a community obstetrician, or even a nurse practitioner or midwife, provides prenatal care and treats the pregnant woman during the pregnancy.

32. Even where a hospital's staff physicians are not solely hospitalists, if a pregnant woman experiences a complication, like pre-eclampsia or preterm labor, that requires emergency care, she will often be cared for in the hospital by the physician specialist on call and not her regular physician.

33. Also, many physicians who practice in an office setting, such as internal medicine and family practice physicians, will not hold admitting privileges at a hospital because they do not expect to treat their patients in a hospital setting. Instead, these physicians provide their patients with primary care and outpatient management of acute and chronic medical problems, but rely on hospital-based physicians to provide any care needed in a hospital. Such physicians are often working with patients that can be considered at risk of needing hospitalization. Examples include patients who have a history of heart attack, stroke, poorly controlled diabetes, renal failure or severe hypertension.

34. It is an established part of medicine today that physicians cover for each other and refer to other physicians as necessary to treat a patient. Also, for a physician to be properly

trained and qualified to perform the procedures he or she performs, he or she must be able to recognize any and all potential complications, even though he or she may not have the skills to manage certain complications. All physicians, at some point, must (and should) refer their patients to another specialist, or a subspecialist, to ensure quality of care.

35. A good example of this is the gastroenterologist who regularly performs colonoscopy and polyp removal in an outpatient setting. Complications from colonoscopy such as heavy bleeding or perforation are managed by a colorectal surgeon, not the gastroenterologist. Moreover, management of these serious complications is performed in a hospital-based, operating room setting. Nonetheless, colonoscopies are routinely performed in outpatient settings and any complications can be treated safely after transferring the patient to the emergency room, without the need for the gastroenterologist to have admitting privileges at the hospital to which the patient was transferred.

36. Similarly, an internist or family doctor who is treating a patient with a history of stroke may need to emergently transfer a patient out of their clinic. If the patient suffers an acute episode while in the physician's office, the appropriate care will include sending the patient to the closest hospital emergency room; likewise the cardiac patient who has a heart attack in his cardiologist's waiting room. As with all emergency cases, whether the patient's own physician has admitting privileges at the hospital where the patient is taken is completely irrelevant to the care the patient will receive in the ER. As a physician who has served "on call" duty on hundreds of occasions for the emergency room of the University of Miami Hospital, it would never occur to me to ask whether a patient's treating physician had admitting privileges because it simply does not matter.

37. Referring a patient to an ER to manage complications that arise from outpatient

procedures is common in the ob-gyn field. I have treated patients who have come to the hospital because of complications from a variety of gynecologic surgeries performed in outpatient settings, and I provide high quality care to those patients regardless of whether the physician who performed the procedure has admitting privileges. For example, hysteroscopy and diagnostic dilation and curettage on non-pregnant women and surgical management of spontaneous miscarriage are frequently performed in outpatient settings. If there are complications, such as a uterine perforation, the patient will be transferred to the hospital OR (operating room) and may need follow-up surgery that I would perform without regard to the admitting privileges status of another doctor.

38. It is crucial to understand that it is extremely unlikely that an abortion patient will experience a serious complication at the clinic that requires emergent hospitalization. But in the very rare case in which the patient needs to be transferred by ambulance to a hospital from the clinic, the quality of care that the patient receives will not be affected by whether the abortion provider has admitting privileges at that particular hospital. Emergency room physicians, regardless of whether they perform abortions, are qualified to manage the care of a patient experiencing a complication from an abortion, because such complications are the same as those that would follow a spontaneous miscarriage or other gynecologic surgery. Emergency rooms are also prepared to involve the care of an on-call specialist where necessary.

39. In the extremely rare event of a grave emergency, the protocol for the responding emergency medical technicians is to transport the patient to the nearest hospital that is accepting patients. Continuity of care can be maintained by direct telephone communication between the abortion provider and the ER physician; it is not dependent on whether the

abortion provider has admitting privileges. Such direct telephone contact is standard medical practice and serves to ensure that the ER physician is aware of the extent of the complication, prior treatment, and medication received. Additionally it is standard procedure to send a copy of the patient's medical records with the patient being transferred to a hospital by ambulance.

40. Admitting privilege requirements also will not help those abortion patients who experience complications after they have left the clinic. Even if the abortion provider has privileges at a local hospital, if the patient requires emergency care and has contacted the clinic for assistance, the proper course of action is to instruct the patient to go to the hospital emergency room closest to the patient.

41. Particularly when a patient travels a substantial distance for abortion, the closest hospital is often *not* the hospital where the abortion provider has privileges. For example, I have admitting privileges at both the University of Miami Hospital and Jackson Memorial Hospital. If a patient of mine had an emergency subsequent to an abortion procedure I performed at PPSFTC's clinic located in Wellington, Florida, I would instruct her to go to the hospital emergency room nearest to her, rather than ask her to travel two hours south to Miami simply because I have admitting privileges there. If the patient were able to travel that distance without distress, I would instead ask her to return to the clinic in Wellington the next day so that she could be treated there rather than admit her to the hospital.

42. Indeed, the distances many women travel to obtain an abortion truly render the admitting privileges requirement futile. As explained above, abortion complications are very rare. But when they arise, they usually occur after a patient has been discharged from a clinic and returned home. Indeed, complications following a medication abortion almost

always occur after the patient has left the clinic because the medications used to induce the abortion take time to exert their effects. For example, if a medication abortion patient experiences heavy bleeding that requires hospital treatment, it will typically occur days after the patient had taken the medication.

43. If a woman who lives outside the area where she obtained an abortion experiences a complication that requires hospital treatment, it makes no sense for her to be treated at a hospital near the abortion clinic just because her abortion provider has admitting privileges there. She should go to the hospital emergency room that is closest to her home. In an emergency or potential emergency situation, no physician or emergency medical technician would countenance a patient traveling farther than necessary just to get to a hospital where her provider has privileges.

44. For example, if a woman traveled several hours to Norman, Oklahoma for an abortion and experienced a complication when she returned home, the fact that the physician who performed the procedure had privileges at a Norman or Oklahoma City hospital would not make it medically appropriate for the woman to travel those hours to return there rather than seeking immediate care at a hospital near her home.

45. Even for the rare patient who experiences serious complications, the requirement that her abortion provider have admitting privileges at a hospital near the clinic does not confer on her any additional safety benefit. A physician with expertise in abortion may not have the relevant expertise to treat the complication the patient is experiencing. A woman with a cardiac or lung condition may need treatment from a cardiologist or pulmonologist. A woman in sepsis will have to be admitted into the intensive care unit and treated by an intensivist, an internal medicine specialist and/or an infectious disease specialist. A woman

with an embolism would need treatment by a hematologist. I rely on my colleagues to assist me in the management of these complications and conditions, just as they rely on me to evaluate gynecologic pathology that they might encounter during surgery they perform. Given how specialized the practice of medicine has become, particularly in hospital settings, such transfers to the appropriate specialists are common and necessary across medicine.

46. It bears repeating that it is only rarely that an abortion patient, after discharge, goes to a hospital emergency room because of concerns or complications. And in the overwhelming majority of those cases, she is treated in the ER without being admitted to the hospital. ER physicians are qualified to evaluate and treat most complications of abortion. The skills needed to do so are the same as those needed for the treatment of miscarriages, which are often treated in hospital emergency rooms. If additional care is necessary, the on-call physicians at the hospital can provide it.

47. Finally, the credentialing process of a hospital can be at least in part a business decision. To my knowledge, most hospitals considering granting privileges to a physician will ask the physician to estimate the number and types of procedures the doctor intends to perform at that hospital. Most hospitals want physicians with admitting privileges to admit a certain number of patients into the hospital each year. Because abortions are exceptionally safe, a physician specializing in that procedure will rarely perform procedures in the hospital or admit a patient into the hospital. If that physician applies for privileges and reports that he expects to perform zero to one procedure at the hospital in the coming year, the hospital may decide not to grant admitting privileges for that reason.

48. Given current medical practice and procedure, the admitting privileges requirement will do absolutely nothing to improve the quality of care for women. In short,

the admitting privileges requirement of S.B. 1848 has absolutely no medical justification.

Access to Legal Abortion is Crucial for the Public Health

49. It is extraordinarily important for women to have meaningful access to legal abortion. Women of childbearing age who do not have access to legal abortion face significantly increased risks of death and poor health outcomes. Laws that make abortion harder to access have the greatest impact on the poorest patients. For example, when women are forced to travel long distances for abortion services, the costs escalate quickly. Many women will delay obtaining an abortion until they can find the money for the procedure, as well money for transportation, lodging, and child care.

50. Moreover, a burdensome admitting privileges requirement – a requirement which has no medical justification – will reduce the availability of physicians who perform abortions, causing increased delays for women seeking an abortion. My understanding is that an immediate consequence of this law is that at least one of the three abortion providers in the State of Oklahoma will shut its doors, resulting in a drastic reduction in services to women and causing extensive delays in obtaining an appointment. Although legal abortion is a very safe procedure, the risks and costs increase as the pregnancy advances. Delaying abortion until later in pregnancy increases the risk of complications. Delay may also mean the unavailability of medication abortion, the progress of an unwanted pregnancy beyond first trimester, or the progress of an unwanted pregnancy beyond the time when legal second trimester abortion is available in Oklahoma.

51. Some women, deprived of access to legal abortion, forgo the abortions they would have obtained if they could and, instead, carry unwanted pregnancies to term. These women are exposed to increased risks of major complications from childbirth, including death, and they and their newborns are at much greater risk of complications during pregnancy and after

delivery.

52. When safe, legal abortion is unavailable or difficult to access, some women turn to illegal and unsafe methods to terminate unwanted pregnancies, often causing women great suffering or death. Such real-life consequences are inevitable in Oklahoma if the admitting privileges requirement substantially reduces women's access to legal abortion.

53. As I discussed above, abortion is a common medical procedure that nearly one third of all American women will need by the time they are 45. Women need access to legal abortion as an essential part of their primary care. Laws that restrict access to legal abortion with no corresponding benefit to women's health will only hurt women.

54. In my expert opinion, S.B. 1848 will do nothing to help make abortion safer or to help women's health. If S.B. 1848 is not barred from taking effect, it will reduce women's access to legal abortion and will endanger their health.

Christopher M. Estes, MD, MPH

Sworn to before me this 1st
day of October, 2014.

NOTARY PUBLIC

BARBARA BEARY MORRISSETTE
MY COMMISSION # EE 835939
EXPIRES: October 3, 2016
Bonded Thru Budget Notary Services

EXHIBIT A

Christopher M. Estes MD, MPH
Curriculum Vitae

CONTACT INFORMATION

Address: 2300 North Florida Mango Road
West Palm Beach, FL 33409

Email: Christopher.Estes@ppsoflo.org

EXPERIENCE

Planned Parenthood of South Florida and the Treasure Coast — **8/2014 – Present**

- *Position:* Chief Medical Officer
- *Roles:*
  - Supervise medical operations of 9 clinics across South Florida, from Martin to Miami-Dade County
  - Oversee Quality and Risk Management Program
  - Oversee implementation and compliance with Planned Parenthood's National Standard and Guidelines
  - Oversee all Ultrasound and Laboratory Services provided at clinics
  - Supervise and Oversee all medical providers (MD, ARNP, CNM)
  - Facilitate ongoing education of all medical providers
  - Supervise and Oversee all medical education activities (medical students and residents)
  - Assist and Support Legislative Advocacy projects with Florida Association of Planned Parenthood Affiliates
  - Assist and Support Education and Community Outreach projects

University of Miami, Miller School of Medicine Dept. of Obstetrics and Gynecology — **8/2007 - Present**

- *Appointment/Rank:* Voluntary Professor — 8/2014 – Present
- *Department Committees (As Voluntary Professor):*
  - Residency Program Admissions Committee — 8/2014 – Present
  - Residency Program Evaluation Committee — 8/2014 – Present
  - Dept. of Obstetrics and Gynecology Education Committee — 8/2014 – Present
- *Other Educational Activities*
  - Faculty Advisor, Medical Students for Choice — *7/2009* - Present
  - Faculty Advisor, OB/GYN Interest Group — *10/2010* - Present
- *Appointment/Rank:* Assistant Professor — 8/2007 – 6/2014
- *Roles (As Assistant Professor):*
  - Medical Director, Reproductive Health Services — 7/2008 – 6/2014
  - Director, 3rd Year Clerkship in Obstetrics and Gynecology — 10/2010 – 6/2014
  - Course Coordinator, Reproductive System, Endocrine Module (*MD Track)* — 3/2009 – 5/2014

- Course Coordinator, Reproductive System, Endocrine Module (*MD/MPH Track*) 2/2012 – 5/2014

- *University Committees (As Assistant Professor):*
  - Academy of Medical Educators, Steering Committee 8/2012 – 6/2014
  - University of Miami Hospital Ethics Committee 4/2011 – 6/2014
  - UMMSM Honors Program in Medical Education Admissions Committee 9/2010 – 6/2014
  - University of Miami Hospital Quality Review Committee 7/2010 – 6/2014
  - UMMSM Basic Science Advisory Committee 10/2010 – 6/2014
  - UMMSM Clinical Curriculum Advisory Committee 10/2010 – 6/2014
  - Center of Excellence for Laparoscopic and Minimally Surgery at UMMSM, Medical Advisory Board 2/2010 – 9/2013
  - UMMSM Continuing Medical Education Advisory 12/2010 – 1/2012
- *Department Committees (As Assistant Professor)*
  - Residency Program Admissions Committee 8/2007 – 6/2014
  - Education and Grand Rounds Committee 8/2007 – 6/2014
  - Obstetrics and Gynecology Practice Committee 5/2009 – 6/2014

Columbia University/New York Presbyterian Hospital **7/2005 – 6/2007**
Department of Obstetrics and Gynecology
- Ryan Fellowship in Family Planning
- *Program Director:* Carolyn Westhoff, MD, MSc

University of Miami/Jackson Memorial Hospital **7/2001 – 6/2005**
Department of Obstetrics and Gynecology
- Internship/Residency in Obstetrics and Gynecology
- *Program Director:* Victor H. Gonzalez-Quintero, MD, MPH

HIGHER EDUCATION

University of Miami, College of Arts and Sciences **9/1994 – 5/1997**
- *Degree:* BS, Biology

University of Miami, Miller School of Medicine: **7/2007 – 5/2001**
- *Degree:* MD

Columbia University, Mailman School of Public Health: **9/2005 – 5/2007**
- *Degree:* MPH, Epidemiology

CERTIFICATION & LISCENSURE:

Diplomat, American Board of Obstetrics and Gynecology **1/2010 - Present**

Medical Licenses
- Florida, Number: ME 99617 7/2007 – Present
- New York, Number: 236498 7/2005 – 7/2007

Hospital Appointments

• University of Miami Hospital	8/2007 – Present
• Jackson Memorial Hospital	8/2007 – Present

BLS/ACLS 8/2001 – Present

SERVICE ACTIVITIES

National Boards and Committees

• National Abortion Federation, Board of Trustees	4/2013 – Present

Regional and Local Activities

• Florida Alliance of Planned Parenthood Affiliates Lobby Days	3/2008-9, Present
• Medical Director, Lotus House Clinic	9/2010 – 6/2014
• Gynecology Director and Attending Physician UMMSM DOCS Clinics	12/2007 – 7/2014

LEGAL ADVOCACY CONSULTING

Expert Witness

• Center for Reproductive Rights, Representing Hope Medical Group for Women; opposing Louisiana Act No. 620 (House Bill No. 388)	8/2014
• Center for Reproductive Rights, Representing Jackson Women's Health Organization, opposing Mississippi House Bill 1390	2/2013

Amicus Briefs

- Assisted ACLU Reproductive Freedom Project in writing Amicus Briefs to Supreme Court of the United States
  - Ayotte v. Planned Parenthood of Northern New England,126 S.Ct. 961 — 2006
  - Carhart v. Gonzalez, 413 F.3d 791 (8th Cir. 2005), cert. granted 126 S. Ct. 1314 — 2006

PROFESSIONAL CONSULTING ACTIVITIES

• Bayer, Consultant	9/2013 – Present
• Merck, Consultant and Nexplanon Trainer	9/2012 - Present
• Genesis Medicus, Consultant	10/2011 – Present
• Teva Women's Health, Consultant	9/2010 – Present
• Conceptus, Consultant and Essure Trainer	11/2009 – 5/2013
• Covidien/ValleyLab, Consultant and Clinical Mentor	6/2008 – 10/2011

PUBLICATIONS

Book Chapters

1. Aesthetic and Functional Surgery of the Female Genital Tract: Salgado C, Redett R, eds.; **Estes C**, Bishop J, Fein L, 'Function of the Female Genitalia and Orgasmic Response'; Nova Science Publishers, NY, 2014.

2. Gynecology for the Primary Care Physician, Second Edition: Stovall, Ling, Zite, Chuang, Tillmans, eds.; **Estes C**, : 'Amenorrhea'; Current Medicine Group, 2007.

Refereed Journal Articles

1. Salgado, CJ, **Estes, CM**, Tang, JC, Reed HM, Alvarez-Villaba C, Sun Z, 'Use of dermal-fat grafts for augmentation of labia majora in a transgendered woman'; Journal of Sexual Medicine, *in press 2013*.

2. Beasley A, **Estes CM**, Guerrero J, Westhoff, CW, 'The effect of obesity and low dose oral contraceptives on carbohydrate and lipid metabolism'; Contraception, 85(5): 456-52, 2012.

3. **Estes CM**, Potter J, 'Intrauterine Contraception for women Living with HIV'; HIV CareLink, Vol. 11(7), 2010.

4. Lupi CS, **Estes CM**, Broome MA, Schreiber NM, 'Conscientious refusal in reproductive medicine: An educational intervention'; AJOG, 2009, 201 (5): 502 e1-7.

5. **Estes C**, Ramirez J, Westhoff C, Tiezzi L, 'Self-pregnancy testing in an urban family planning clinic: Promising results to a new approach for contraceptive follow up'; Contraception: 2008(1):40-43.

6. **Estes C**, Westhoff C: 'Contraception for the transplant patient' (Review, 27 refs), Seminars in Perinatology, 2007, 31:372-77.

- **Other Published Works**

1. **Estes C**, Comment: 'Response to Surti, et al.: 'Pregnancy and liver transplantation'; Liver Int., 29(3): 475, 2009.

2. **Estes C**: Comment: Virginity is not defined by anatomy. BJOG 114: 1379, 2007.

3. Opinion Editorial: 'How Abortion Ruling Will Cut Off Doctors' Hands', **Christopher M. Estes, MD**, New York Daily News, April 22, 2007.

4. Norris PM, Kamat A, **Estes C**, Medina C, Pietro P, Whitted W: Contraceptive failure in overweight patients taking combination oral contraceptive pills (abstract). Contraception 68:143, 2003.

FUNDED RESEARCH

- Natera, PreNatus, PI
  Christopher M. Estes, MD, MPH
  Amount: Funded per subject enrolled
  Dates: April 2013 – June 2014
  Topic: 'Prenatal genetic diagnosis using free fetal DNA in mother's sera'

- University of Miami Miller School of Medicine, Institute for Women's Health
  PI: Christopher M. Estes, MD, MPH
  Amount: $50,000
  Dates: March 2008- March 2009
  Topic: 'Progestin-only contraception in the post-partum period: metabolic and bone density effects'

- Ryan Fellowship in Family Planning PI: Carolyn Westhoff, MD, MSc
  Fellow: Christopher M. Estes, MD, MPH
  Amount: $25,000
  Dates: February 2006- February 2007
  Topic: 'Self pregnancy testing in an urban family planning clinic'

- Ryan Fellowship in Family Planning PI: Carolyn Westhoff, MD, MSc
  Fellow: Christopher M. Estes, MD, MPH
  Amount: $50,000
  Dates: June 2006- June 2007
  Topic: 'Glucose tolerance among normal and obese women taking oral contraceptive pills'

EDITORIAL RESPONSIBILITIES

- **Submission Reviewer**
  - American Journal of Obstetrics and Gynecology
  - British Journal of Obstetrics and Gynecology
  - Contraception
  - Journal of Women's Health
  - American Journal of Public Health

PROFESSIONAL MEMBERSHIPS

- American College of Obstetricians and Gynecologists (ACOG) 2001 – Present
- National Abortion Federation 2004 – Present
- Physicians for Reproductive Health 2006 – Present
- Society of Family Planning, Junior Fellow 2007 – Present

HONORS AND AWARDS

- Medical Students For Choice National Faculty 11/2012

Mentor Award

- George Paff Award
  - *Awarded by students of UMMSM to best teaching faculty*
  - Class of 2013 4/2012
  - Class of 2005 4/2004
- Alpha Omega Alpha, Medical Honor Society 6/2005
- Society of Laparoendoscopic Surgeons Resident Award 6/2005
- Organon Resident Research Award 6/2004
- William Little Best Resident Research Award 4/2003

INVITED LECTURES

- 'Medical and Surgical Management of Early Pregnancy Failure', Grand Rounds, UMMSM, Dept. of Family Medicine (Local Meeting) 6/2014
- 'A Brief History of Medicine: Transitions in Thought and Practice', Grand Rounds, UMMSM Dept. of Family Medicine (Local Meeting) 3/2014
- 'Teaching Evidence Based Medicine: An effective model for a longitudinal, cross-clerkship curriculum'; Southern Group on Educational Affairs, Annual Meeting (Regional Meeting) 3/2014
- 'Teaching Professionalism to Medical Students: The Role of Family Planning Rotations', Ryan Program Webinar (National) 3/2014
- 'MVA Workshop: First Trimester Abortion Technique' Medical Students for Choice, Annual Meeting (National Meeting) 11/2013
- 'Developing Systems for Financial Oversight'; Ryan Residency Training Program, Annual Meeting (National Meeting) 10/2013
- 'No-Scalpel Vasectomy: Introducing an underutilized method of contraception into your clinic', Ryan Program Webinar (National) 4/2013
- South Florida TransCon: 'Comprehensive Transgender care: Update in the latest evidence', Fort Lauderdale, FL (Regional Meeting) 4/2013
- 'A History of Abortion In America: From the 19th Century To 40 Years after Roe'; UMMSM Dept. of Family Medicine 11/2012

Grand Rounds, Miami, FL (Local Meeting)

- 'Contraception For the Medically Complicated Patient'; UMMSM Dept. of Internal Medicine, Grand Rounds, Miami, FL (Local Meeting) 11/2012

- 'No Scalpel Vasectomy: Permanent, Effective Contraception In 5 Minutes or Less'; Medical Students for Choice Annual Meeting, St. Louis, MO (National Meeting) 11/2012

- 'Salpingectomy vs. Laparoscopic Tubal Ligation for Sterilization and Prevention of Ovarian Cancer: An Interactive Debate'; ASRM, Annual Meeting, San Diego, CA (National Meeting) 10/2012

- 'Opt-out Policies and Abortion Training in Obstetrics and Gynecology Residency Programs', APGO/CREOG Annual Meeting, Orlando, FL (National Meeting) 3/2012

- 'Emergency Contraception: A Review and A New Pill' Department of Family Medicine, Grand Rounds, UMMSM Miami, FL (Local Meeting) 11/2011

- 'Update in Emergency Contraception', Roundtable ASRM Annual Meeting, Orlando, FL (National Meeting) 10/2011

- 'Integrating Family Planning Into the Third Year Obstetrics and GynecologyClerkship', Ryan Program Webinar (National) 6/2011

- 'Emergency Contraception: A Review and A New Pill', Continental Continental OB/GYN Society, Annual Meeting, Naples, FL (Regional Meeting) 5/2011

- 'Mifepristone and Misoprostol for Medical Abortion', Department of Family Medicine Grand Rounds, UMMSM, Miami, FL (Local Meeting) 12/2010

- 'No-Scalpel Vasectomy: How to provide permanent, effective contraception in 10 Minutes or less', Medical Students for Choice, Northeast Regional Meeting, New York, New York (Regional Meeting) 2/2010

- 'Contraception for Adolescent Women', University of California, Irvine, Dept. of Obstetrics and Gynecology, Grand Rounds Irvine, CA (Local Meeting) 10/2009

- 'Hormonal Contraception and Bone Mineral Denisty', UMMSM Dept. of Endocrinology, Grand Rounds, Miami, FL (Local Meeting) 10/2009

- 'Post-partum Contraception', UMMSM Dept. of Family Medicine Grand Rounds, Miami, FL (Local Meeting) 9/2009

- 'Update in Hormonal Contraception', UMMSM Dept. of Family Medicine, Grand Rounds, Miami, FL (Local Meeting) 1/2009

- 'Early Pregnancy Failure: Management and Complications', Emory University, Dept. of Obstetrics and Gynecology, Grand Rounds, Atlanta, GA (Local Meeting) 9/2008

- 'Innovations in Contraception', EXCEL CME, South Florida Obstetrics and Gynecology Conference, Miami, FL (Regional Meeting) 9/2008

- 'Cultural Humility and Family Planning Services for Adolescents', Miami Children's Hospital, Dept. of Pediatrics, Grand Rounds Miami, FL (Local Meeting) 5/2008

- 'Innovations in Contraception', University of Miami Institute for Women's Health, Grand Rounds, Miami, FL (Local Meeting) 4/2008

- 'Family Planning in Central America: The challenge of the Urban Poor', Medical Students for Choice, Annual Meeting, St. Louis, MO (National Meeting) 4/2008
- 'No-Scalpel Vasectomy Workshop: How to provide permanent, effective contraception in 10 minutes or less', Medical Students for Choice, National Meeting, St. Louis, MO (National Meeting) 4/2008

- 'Innovations in Contraception', Bays Medical Society, Annual Meeting, Pensacola, FL (Regional Meeting) 1/2008

- 'Innovations in Contraception', St. Barnabas Medical Center, Dept. of Obstetrics and Gynecology, Grand Rounds New York City, NY (Local Meeting) 10/2007

- 'Cultural Humility and Adolescent Reproductive Health Care', St. Joseph's Hospital, Department of Family Medicine, Grand Rounds New York City, NY (Local Meeting) 4/2007

- 'Planificación Familiar: Nuevas técnicas y sus usos para mejorar el salud publico y la vida de nuestras pacientes', Conferencia de Planificación Familiar, Instituto de Medicina y SeguroSocial – HGO #4, México, DF (International Meeting) 3/2007

- 'VPH: Epidemiología, Patología, Vacuna y el Impacto en la Salud en la Salud Publico', Conferencia Departamental Obstetricia-Ginecología, IMSS- HGO #4, México, DF (Local Meeting) 3/2007

- 'Management of Abortion Complications', Long Island Jewish Jewish Hospital, Dept. of Obstetrics and Gynecology, Grand 1/2007

Rounds, Long Island, NY (Local Meeting)

- 'Management of Abortion Complications', St. Barnabas Medical Center, Dept. of Obstetrics and Gynecology, Grand Rounds New York City, NY (Local Meeting) 9/2006

- 'Medical and Surgical Management of Early Pregnancy Failure', UMMSM, Dept. of Obstetrics and Gynecology, Grand Rounds Miami, FL (Local Meeting) 9/2006

- ACOG, Annual Clinical Meeting Luncheon Presentation Luncheon Presentation: 'What's new in contraception', Washington, DC (National Meeting) 5/2006

- 'Lecture and Teaching Lab: Manual Vacuum Aspiration for First Trimester Abortion', Medical Students For Choice, Northeast Regional Meeting, New York City, NY (Regional Meeting) 10/2005

PRESENTATIONS

- 'Influencing Medical Students' Attitudes towards IUC Use on the Third Year OB/GYN Clerkship', Poster Presentation, ACOG Annual Clinical Meeting; Chicago, IL (National Meeting) 4/2014

- National Abortion Federation, Annual Meeting: 'Advocacy Partnerships: The role of physicians in legal and policy advocacy' New York City, NY (National Meeting) 4/2013

- APGO/CREOG Annual Meeting, Workshop Presentation: 'Student journal clubs: An effective method for longitudinal Instruction of Evidence Based Medicine in the third year clerkships' Fernandina Beach, FL (National Meeting) 1/2011

- APGO/CREOG Annual Meeting, Poster Presentation: 'Correlates of comfort with ethically challenging medical Interventions: A Survey of third year medical students', Chicago, IL (National Meeting) 3/2010

- ACOG, Annual Clinical Meeting, Poster Presentation: 'Self Esteem, Substance Use, Sexual Activity and Body Piercing in Young Women', Philadelphia, PA (National Meeting) 5/2004

- NAF, Annual Meeting, Poster Presentation: 'A Case of Spontaneous Ovarian Hyperstimulation Syndrome in a Twin Gestation Immediately Following an Elective Abortion', New Orleans, LA (National Meeting) 4/2004

- ACOG, District IV Annual Meeting, Oral Presentation: 'Self Esteem, Substance Use, Sexual Activity and Body Piercing in Young Women", San Juan, Puerto Rico (Regional Meeting) 9/2003

- ARHP, Annual Conference, Poster Presentation: 'Contraceptive Poster Presentation: 'Contraceptive Failure in Overweight Patients Taking Combination Oral Contraceptive Pills', San Diego, CA (National Meeting) 9/2003

- University of Miami Department of Obstetrics and Gynecology: William Little Alumni Conference, Oral Presentation: 'Serous and Clear Cell Adenocarcinoma- A review of the literature and the Jackson Memorial Hospital experience', Miami, FL (Local Meeting) 5/2002

APPENDIX 2

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

(1) LARRY A. BURNS, D.O., on behalf of himself and his patients, Plaintiff, v. (2) TERRY L. CLINE, in his official capacity as Oklahoma Commissioner of Health (3) CARL B. PETTIGREW, D.O., in his official capacity as President of the Oklahoma State Board of Osteopathic Examiners, and (4) GREG MASHBURN, in his official capacity as District Attorney for Cleveland, Garvin, and McClain Counties, Defendants.	)	Case No. CV-2014-1896 Judge Graves

AFFIDAVIT OF LARRY A. BURNS, D.O.

STATE OF OKLAHOMA)
) ss.
COUNTY OF CLEVELAND)

LARRY A. BURNS, D.O., being duly sworn, deposes and says:

1. I am a doctor of osteopathic medicine and a provider of abortion services. I have been licensed to practice medicine in the State of Oklahoma since 1973.

2. I obtained my undergraduate degree from Northeast Missouri State Teachers College, which is now known as Truman State. I obtained my D.O. degree from Kirksville College of Osteopathic Medicine at A.T. Still University.

3. After I obtained my medical degree, I completed a one-year internship at Hillcrest Hospital in Oklahoma City. My internship included an obstetric and gynecological rotation.

4. During my internship, and for approximately 18 months following my internship, I had admitting privileges at Hillcrest Hospital in Oklahoma City. I did not renew my privileges because it was unnecessary for my practice.

5. My internship concluded on June 30, 1973, just five months after *Roe v. Wade*. After my internship, I worked for seven months at an abortion clinic in Tulsa. Witnessing the dire need many women had for abortion, and the scarcity of physicians providing this essential reproductive service, I decided to open my medical practice and specialize in first trimester abortions. I have operated my practice in Norman since February 1974.

6. I decided not to pursue a residency following my internship because my chosen area of specialization – first trimester abortions – did not require a residency or Board certification. A prerequisite for Board certification is the completion of a hospital residency program.

7. My practice is licensed by the State Department of Health as an abortion facility. Throughout the years, I have complied with mounting regulations including, but not limited to, those related to the architecture of my medical office, infection control, patient care, personnel, emergency protocols, recordkeeping, and reporting. In addition, I have extensive equipment and supplies in my office both to monitor my patients' health and handle emergencies. Furthermore, I have an agreement with a physician affiliated with a nearby hospital for him to admit any patient of mine in the event of an emergency.

8. I have 41 years of experience providing first trimester abortions in Oklahoma. I provide my patients with surgical abortions and medication abortions. I also provide follow-up care and birth control to my patients. If a patient presents with a high-risk profile, or her pregnancy has advanced beyond the first trimester, I refer the patient to the appropriate specialist, often outside the state.

9. If a woman's pregnancy has advanced beyond the first trimester, there are many fewer physicians with the expertise to perform the abortion safely. As the pregnancy advances further into the second trimester, the risks and costs of the procedure rise. Adding to the costs of second-trimester abortions are the travel, meals, and lodging, often for several days in states with a waiting period, as well as forgone wages and child care expenses during the woman's absence from home. Some patients I have referred to providers outside Oklahoma have been unable to have an abortion because they could not afford these costs.

10. My medical practice is one of only three in the entire state that performs abortions. My patients come from throughout Oklahoma and neighboring states. Each year for the past forty years, I have helped between 2,000 and 3,000 women in need of an abortion. In 2013, I performed abortions for 2,046 women. If I were not providing women with the reproductive health care they need, it would be difficult for the other two providers in Oklahoma to absorb so many additional patients. The waiting time for appointments would rise, as would the risks and costs to patients. Some women, close to the end of their first trimester, would be unable to access abortion at all in Oklahoma.

11. I instruct every patient of mine to contact me if they have any questions or complications after the abortion. I provide a telephone number where I can be reached 24 hours a day, 7 days a week, and tell my patients not to hesitate to call. I also schedule a follow-up appointment for each patient.

12. I perform abortions in my facility without the use of general anesthesia. Instead I administer a barbiturate intravenously to induce a state of conscious sedation. None of my patients have required intubation during or after an abortion.

13. Complications from medication abortion are very rare. But when there are complications, they invariably occur after the patient has left my office. This is because the patient ingests tablets at my office, and then additional tablets at home. The medication

protocol does not cause an abortion until hours or sometimes days later. Complications from medication abortion include infection, unusual bleeding and incomplete abortion (retained tissue). I can treat these conditions in my office.

14. Complications from surgical abortion are also very rare. The possible complications include infection, incomplete abortion (retained tissue), damage to the cervix, and uterine perforation. Most complications, with the exception of some uterine perforations, can be treated in the office.

15. If an abortion patient were to contact me with any concern, I would assess the situation over the phone and, if warranted, ask her to come to my office for treatment. If the patient lived far away, I would assess the situation over the phone and, if warranted, instruct her to contact her physician or visit a nearby urgent care center. If the patient were having an emergency, regardless of where she lived, I would instruct her immediately to go to the closest hospital emergency room.

16. Since I opened my practice in 1974, I have had very few patients who had to spend the night in a hospital. Among my patients, the most common complication requiring hospitalization is unusual bleeding. This complication presents in the same manner as a miscarriage (spontaneous abortion), which hospital emergency rooms frequently encounter and are equipped to treat. If such a patient is admitted to the hospital, it is usually for observation, not treatment.

17. In my 41 years of private practice, I have had to call for an ambulance only once from my office – and that was when a patient was suffering from prolonged anesthetic effect. That patient awoke by the time the ambulance arrived. She was taken to the hospital for observation. I came to the hospital to check on her condition, which was good, and the patient was then released within three hours of her arrival.

18. I have read S.B. 1848 which, among other things, would require that I obtain admitting privileges at a hospital within 30 miles of my clinic in order to continue providing first-trimester abortions.

19. The Oklahoma State Medical Association ("OSMA") has condemned S.B. 1848, warning that it will "result in the legislature and unelected bureaucrats at the Department of Health interfering in the physician/patient relationship and crafting more burdensome regulations that ... may not reflect medical science or the best interest of the patient." See Exhibit A.

20. I understand that S.B. 1848 is scheduled to go into effect on November 1, 2014.

21. In anticipation of the effective date, I have applied, or made best efforts to apply, for admitting privileges at every hospital with an obstetrics and gynecology department within 30 miles of my clinic.

22. I contacted Kathy Warren, Credential Specialist at Norman Regional Hospital to obtain admitting privileges there. On or about July 18, 2014, I received a letter from the hospital stating that it would not grant me admitting privileges because I had not completed a three-year residency program, which is a prerequisite for privileges there. See Exhibit B.

23. On August 13, 2014, I applied to Integris Health Oklahoma for admitting privileges at its four local hospitals – Baptist Medical Center, Canadian Valley Regional Hospital, Lakeside Women's Hospital, and Southwest Medical Center. I filled out the online pre-application to get an application. Because the pre-application indicated that board certification or board eligibility was required, I sent a letter to Integris asking for a waiver of the board certification requirement. On August 29, I spoke with Deani Collins, Director of Integris Health Central Verification. Ms. Collins advised me that the hospital waived the board certification requirement only for hard-to-recruit specialists. Ms. Collins then sent me a letter to the same effect. See Exhibit C.

24. On September 2, 2014, I sent a letter to Deaconess Hospital requesting an application for admitting privileges. On September 8, I received the application. On September 9, I spoke to Leigh Ann Gibson, Credential Specialist at Deaconess Hospital and explained my situation. Later that day, Ms. Gibson sent me a letter that acknowledged my inquiry and stated that my application must be accompanied by, among other things, proof of board certification. See Exhibit D. On September 16, I followed up with Ms. Gibson, who informed me that I should not apply because I "wouldn't get anywhere" without board certification.

25. On August 14, 2014, I requested an application for admitting privileges at Grady Memorial Hospital. I subsequently spoke to a staff member who told me that (a) I would need a coverage agreement with two physicians at the hospital; (b) Grady had only two ob-gyns on staff, and (c) she did not believe either physician would agree to a coverage agreement. Moreover, this staff member told me that I should not apply for privileges because my practice would fail to meet the minimum number of admissions per year, which is six. On September 6, I followed up and was told that my letter requesting admitting privileges was referred to the hospital's legal department.

26. On September 9 and 10, 2014, I contacted Mercy Hospital in Oklahoma City and was told to speak to Nancy Willis, Director of Regional Medical Staff Services. I left voice mail messages for Ms. Willis. On September 10, I sent a letter requesting an application for admitting privileges at Mercy, and on September 12, I received a denial letter stating that I was not eligible to apply. On September 17, at my request, Ms. Willis sent me the provision in the hospital's bylaws that state that board certification is required as a prerequisite for admitting privileges.

27. On August 13, 2014, I spoke to Carolyn Hill in the credentials department at Midwest Regional Medical Center. She said that for the most part Midwest uses its own doctors; it

uses outside doctors for some specialties, but not in ob-gyn. Nonetheless, I requested an application on September 2. On September 9, I sent a letter requesting an application. Ms. Hill got back to me and advised me that the application is 120 pages long. On September 15, I called Ms. Hill, who told me that physicians at Midwest do not need to be board certified to obtain admitting privileges, but must admit a minimum of six patients per year into the hospital. Ms. Hill advised me not to apply if I could not meet that requirement.

28. On August 14, 2014, I contacted Tina Mueller, Credential Specialist at Northwest Surgical Hospital and at Community Hospital. She advised me that the two hospitals specialize in orthopedics, family practice, and pain management. On August 20, I contacted Ms. Mueller, and she agreed to send me an application for admitting privileges. I followed up, and on September 11, I received an admitting privileges application. I am presently working on the application, which is more than 100 pages long.

29. On September 10, 2014, I requested an application for admitting privileges at the Oklahoma City VA Medical Center. On September 11, I spoke with Susan Miller, Credential Specialist, to follow up on my letter. On September 16, Ms. Miller advised me that she had given my letter to Shea Bandy, Chief of Staff of the Hospital, who told her, in substance, that he wanted to handle it because of the politics involved. On September 26, I e-mailed Dr. Bandy to inquire about the status of my request; I have not yet heard back.

30. On August 21, 2014, I inquired about applying for admitting privileges at Oklahoma University Medical Center. On August 27, I received a preliminary application to get an admitting privileges application. I followed up with Mindy Boggs, Credentials Coordinator. She sent me the hospital bylaws on September 16, and noted that the bylaws require board certification as a prerequisite for admitting privileges.

31. On September 9, 2013, I spoke with and e-mailed Pam Logan, Credential Specialist, at St. Anthony, which runs both St. Anthony Hospital and Purcell Municipal Hospital. On

September 13, I discussed the pre-application process with Ms. Logan, and sent her a letter. On September 16, I requested the hospital bylaws, which I received on September 17. I then spoke with Tina Hill, Credentialing Analyst, who sent me a questionnaire. Ms. Hill noted that I must have a physician at St. Anthony to cover my patients; I do not know any physicians at St. Anthony. Ms. Hill further advised me that board certification is required to obtain admitting privileges at either hospital. Notwithstanding these obstacles, I completed and sent my questionnaire to St. Anthony. On September 26, I called Ms. Logan and confirmed that St. Anthony had received it, as well as my $200 application fee.

32. On August 14, 2014, I sent a letter requesting an application for admitting privileges at Summit Medical Center. I contacted Summit again on September 26 and am still awaiting receipt of the application.

33. To my knowledge, there is no requirement that the hospitals process my applications within a circumscribed time frame.

34. There are only two other abortion providers in Oklahoma; one in Oklahoma City and one in Tulsa. I do not know whether or not the clinic in Oklahoma City will remain open once the admitting privileges requirement of S.B. 1848 goes into effect. Based on the demographics of my patients, I have grave concerns whether some of them will have the means to travel to the clinic in Tulsa, or whether that clinic has the capacity to handle the increased demand. I fear the closure of my practice will cause significant delay, and thereby increase health risks to women. If the delays and obstacles are significant, some of my patients will be unable to obtain a timely abortion and may be forced to carry an unwanted pregnancy to term.

35. If I am unable to obtain admitting privileges at any of these hospitals by November 1,

I will be forced to shutter my clinic on that date, and Oklahoma women will have one fewer safe place to turn to for the care they need.

36. I have read the contents of the petition and the memorandum of law in support of the motion for an injunction in this case, and state under the penalty of perjury that they are true and correct to the best of my present knowledge.

LARRY A. BURNS, D.O.

Sworn to before me this 1st day of October, 2014.

NOTARY PUBLIC

Subscribed and sworn to before me, a Notary Public, in and for the State of Oklahoma, Cleveland County, this 1 day of Oct, 2014.

Notary Public

My Commission expires Aug 20, 2018

BRENDA HANNA NOTARY 14007334 EXP 8/20/18 PUBLIC STATE OF OKLAHOMA

EXHIBIT A

OKLAHOMA STATE MEDICAL ASSOCIATION

February 16, 2014

Re: OSMA opposition to SB 1848

Dear Senator:

On behalf of the Oklahoma State Medical Association and its 4,000+ physician and medical student members, I am writing to express our opposition to the proposed committee substitute for SB 1848 and to urge you to reject it when it is considered in the Senate Health and Human Services Committee on Monday.

The OSMA has members on both sides of the abortion debate and we do not take a position on the legality of abortion. However, as long as it remains a legal medical procedure, we oppose legislation or regulations that would implement a standard of care or override a physician's medical judgment. The proposed language of SB 1848 would result in the Legislature and unelected bureaucrats at the Department of Health interefering in the physician/patient relationship and crafting more burdensome regulations that do nothing to reduce the number of abortions and may not reflect medical science or the best interest of the patient.

Please vote to reject the committee substitute on SB 1848

Thank you for your consideration.

Sincerely,

Robert McCaffree, MD

President

Oklahoma State Medical Association

313 Northeast 50th • Oklahoma City, Oklahoma 73105 • (405) 601-9571 • (800) 522-9452 • Fax (405) 601-9575 • www.okmed.org

EXHIBIT B

Norman Regional
HEALTH SYSTEM

901 North Porter Avenue Box 1308
Norman, OK 73070-1918

405.307.1000
NormanRegional.com

July 18, 2014

Larry Burns, D.O.
2453 Wilcox Drive
Norman, Oklahoma 73069

Re: NRHS Medical Staff Preapplication Form

Dear Dr. Burns:

We have received your Request for Application/Pre-application Form for appointment to the NRHS Medical Staff.

As indicated in the Pre-application Form, Section 5.3.13 of the NRHS Medical Staff Bylaws requires applicants for appointment to all Medical Staff categories, other than the Active Affiliate category, to have successfully completed a medical or osteopathic residency program of at least three (3) years. Your pre-application form indicates that you do not meet this requirement. Thus, you are not eligible for appointment to the Active Medical Staff of NRHS and your application request cannot be further processed.

Pursuant to Section 8.1 of the NRHS Medical Staff Bylaws, and because you do not meet a minimum objective criteria for appointment to the Medical Staff, the procedural rights set forth under Article XI do not apply in your situation.

Thank you for your interest in joining the NRHS Medical Staff. Please let me know if you have any questions regarding this matter.

Sincerely,

David D. Whitaker, FACHE
Chief Executive Officer

EXHIBIT C

INTEGRIS

3300 Northwest Expressway Street
Oklahoma City, OK 73112-4481
405-949-3011
www.integris-health.com

August 29, 2014

Larry A. Burns, DO
2453 Wilcox Drive
Norman, OK 73069

Dear Doctor Burns:

Thank you for your interest in INTEGRIS. In response to your letter, our Medical and Dental Staff Bylaws require board certification or board preparedness with the intent of setting for the boards with a scheduled date. In answer to your question, is that requirement ever waived, only in cases of hard to recruit specialties. You would not therefore meet minimum qualifications for staff privileges.

Sincerely,

Deanie Collins

Deanie Collins, Director
INTEGRIS Health
Central Verification Services

EXHIBIT D

DEACONESS

September 9, 2014

Dear Provider:

We have initiated a credentialing process in response to your request for information regarding medical staff membership at Deaconess Hospital. The enclosed requests for separate credentialing process information and documents, and such information and documents created in response to the enclosed request, are being generated during the course of a "peer review process", as defined by Oklahoma Statute, Title 63, Section 1-1709.1 (A), and are private, confidential, and privileged pursuant to Oklahoma Statute, Title 63, Section 1-1709.1 (B).

Before completing the application, please read the enclosed "Instructions for Completing the Deaconess Hospital Medical Staff Application" form. The form provides specific instructions and information that will aid in the proper completion of the application. As noted in these instructions, **an application cannot be presented to the Credentials Committee for consideration without complete information requested.**

In addition to the completed application, the following items **must** be attached:

- **A check in the amount of $200.00 made payable to Deaconess Hospital**
- **CV and a letter stating your purpose for requesting privileges.**
- **A passport-quality photo in a jpg file emailed to** leigh.gibson@deaconessokc.com
- **Board certification is required per Medical Staff Bylaws. Provide documentation of certification or include intentions for board certification completion.**
- **Copy of Driver's License**
- **Copies of certificates for all malpractice carriers for the past 5 years**

During the processing of your application, you have the right to review and/or correct information you submitted and the right to request the status of your application. When your application is determined to be complete, it will be presented to the Credentials Committee to review and make recommendation on your request for medical staff membership and privileges. The recommendation is then referred to the Executive Committee of the Medical Staff and then to the Executive Committee of the Governing Board for final disposition. If surgical privileges are granted, they will be individually granted subject to sufficient support or supervision. If your request for staff membership is approved, your preceptors will be contacted and asked to review your activities in the Hospital. After a sufficient length of time they will be asked to inform the Credentials Committee of your performance and make a recommendation as to whether you need further supervision.

Please note that at the time staff membership is granted, your name may be added to the Emergency Room call schedule, as required by your specialty.

We welcome your request for staff membership and appreciate your interest in Deaconess Hospital. You may contact the Medical Staff office at 604-4207 if we may be of further service.

Sincerely,

Leigh Anne Gibson
Credentialing Specialist
leigh.gibson@deaconessokc.com
405-601-9892 (fax)

Enclosures

EXHIBIT 4

FILED IN DISTRICT COURT
OKLAHOMA COUNTY

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

OCT - 2 2014

TIM RHODES
COURT CLERK
75

(1) LARRY A. BURNS, D.O., on behalf of himself and his patients,

Plaintiff,

v.

(2) TERRY L. CLINE, in his official capacity as Oklahoma Commissioner of Health
(3) CARL B. PETTIGREW, D.O., in his official capacity as President of the Oklahoma State Board of Osteopathic Examiners, and
(4) GREG MASHBURN, in his official capacity as District Attorney for Cleveland, Garvin, and McClain Counties;

Defendants.

Case No. CV-2014-1796

Judge Graves

~~CV-2014-1896~~

PLAINTIFF'S VERIFIED MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR A TEMPORARY INJUNCTION AND FOR EXPEDITED BRIEFING AND HEARING ON THAT MOTION OR, ALTERNATIVELY, FOR A TEMPORARY RESTRAINING ORDER

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I. Introduction

This case challenges the validity of Senate Bill 1848 (2014 Okla. Sess. Law Serv. Ch. 370 (West)) ("S.B. 1848" or "the Act"). S.B. 1848 addresses multiple subjects in violation of the Oklahoma Constitution's single-subject mandate, targets abortion patients and physicians who perform abortions for the imposition of unjustified regulations, deprives Dr. Burns of due process, and is an unconstitutional delegation of legislative authority. S.B. 1848 is scheduled to take effect November 1, 2014.

S.B. 1848 requires physicians performing abortions in Oklahoma to have admitting privileges at a general hospital within thirty miles of the facility at which the abortion is performed, and exposes abortion providers to criminal and civil penalties.

Plaintiff Larry Burns, D.O., has been providing safe abortion care in Oklahoma for over four decades. Dr. Burns does not currently have admitting privileges because they are not necessary to ensure the health of his patients, but he has now submitted applications for privileges to several hospitals. Those hospitals are under no obligation, however, to act on his applications within a certain period of time, and it is highly unlikely that he will receive all admitting privileges decisions prior to the Act taking effect. Thus, despite his best efforts to comply, Dr. Burns may be unable to do so. Burns Aff. ¶¶ 21–32.

Both the American Medical Association ("AMA") and the American Congress of Obstetricians and Gynecologists ("ACOG") have stated that there is no sound medical basis for requiring abortion providers to obtain local hospital admitting privileges. Similarly, the Oklahoma State Medical Association ("OSMA") opposed S.B. 1848, warning that it "may not reflect the best interest of the patient." Burns Aff. ¶ 19, Ex. A.

If allowed to take effect, S.B. 1848 will irreparably harm Dr. Burns and his patients by forcing him to close his practice, significantly reducing the number of abortion providers in Oklahoma, and causing women to experience delay in, or be entirely precluded from, accessing abortion. Burns Aff. ¶¶ 9–10, 34–35; Estes Aff. ¶¶ 50–52.

Dr. Burns, on behalf of himself and his patients, seeks a temporary injunction, pursuant to OKLA. STAT. tit. 12, § 1382, to preserve the *status quo* and prevent enforcement of the Act during the pendency of this litigation. Dr. Burns also requests expedited consideration or, alternatively, a temporary restraining order pending resolution of the temporary injunction motion.

II. Statement of Facts

A. S.B. 1848

S.B. 1848 is composed of six distinct provisions covering different subjects that have no common theme or purpose. The admitting privileges provision reads as follows:

> On any day when any abortion is performed in a facility providing abortions, a physician with admitting privileges at a general medical surgical hospital which offers obstetrical or gynecological care in this state within thirty (30) miles of where the abortion is being performed must remain on the premises of the facility to facilitate the transfer of emergency cases if hospitalization of an abortion patient or a child born alive is necessary and until all abortion patients are stable and ready to leave the recovery room.

2014 Okla. Sess. Law Serv. Ch. 370, § 1(B) (West). In addition to the admitting privileges provision, S.B. 1848 directs the State Board of Health to establish standards for abortion facilities addressing (a) supplies and equipment; (b) the training of physicians assistants and volunteers; (c) the medical screening and evaluation of abortion patients; (d) the performance of abortions and post-procedure follow-up care; and additionally requires (e) facilities

performing abortions to report a patient's or a "born-alive child's injury" to the State Board of Health and other professional licensing and regulatory boards. *Id.* §§ 1(A), 1(C)–1(G).

B. Abortion is Among the Safest of Medical Procedures

Plaintiff Larry A. Burns is a doctor of osteopathic medicine, licensed by the State of Oklahoma. Dr. Burns performs first trimester surgical and medication abortions. He has been providing safe abortion care in Norman, Oklahoma for 41 years. Dr. Burns's patients come from all around the state, as well as from neighboring states. Even before S.B. 1848, Dr. Burns was subject to extensive regulations governing patient care, infection control, personnel, emergency protocols, doctor qualifications, recordkeeping, and reporting obligations.

Legal abortion is one of the safest medical procedures in the United States; approximately 3 in 10 women will obtain an abortion by the age of 45. Estes Aff. ¶¶ 23, 52. Most abortions can be safely performed in an outpatient setting, and only 1.3% of women in the United States obtaining first trimester surgical abortions experience even minor complications. *Id.* ¶¶ 24, 53. The prevalence of major complications requiring treatment at a hospital is approximately 0.05%. *Id.* ¶ 24. The risks of abortion compare favorably with the risks of other gynecologic and non-gynecologic procedures that are typically performed in office-based settings. *Id.* ¶¶ 18–20.

Complications are very rare among Dr. Burns's patients. In four decades, only one patient, suffering from prolonged anesthetic effect, was transported by ambulance from the clinic. Burns Aff. ¶ 17. That patient awoke by the time the ambulance arrived, was taken to the hospital for observation, and, when Dr. Burns went to the hospital to check on her, was in good condition and released within three hours of her arrival. *Id.* Dr. Burns provides his patients with a telephone number where they can reach him at all times. Burns Aff. ¶ 11.

The rare complications that do occur are almost all resolved at the clinic. Nonetheless, Dr. Burns has established procedures to provide optimal care in the event of a complication and complies with OKLA. ADMIN. CODE § 310:600-9-6(9) (2014), which requires that an abortion physician either have admitting privileges or that arrangements have been made with a physician having hospital privileges to receive emergency cases. Burns Aff. ¶ 7.

In the very rare case in which the patient needs to be treated at a hospital, the quality of care the patient receives will not be affected by whether the abortion provider has admitting privileges at that particular hospital. Estes Aff. ¶¶ 38–39. Emergency room physicians, regardless of whether they perform abortions, are qualified to manage the care of a patient experiencing a complication from an abortion, because such complications are the same as those that would follow a spontaneous miscarriage or other gynecologic surgery. *Id.* Moreover, if a complication requiring emergency treatment occurs after a patient has left the clinic, she should proceed to the nearest emergency room, which would not necessarily or even likely be a hospital at which Dr. Burns may be able to obtain privileges. Burns Aff. ¶ 15; Estes Aff. ¶¶ 40–45. The admitting privileges requirement will not improve the ability of women to receive safe abortion care in Oklahoma. Estes Aff. ¶¶ 48, 53. In fact, the requirement departs from accepted medical practice. *Id.* ¶ 30; Burns Aff. ¶ 19.

C. Dr. Burns's Efforts to Comply with the Admitting Privileges Requirement

1. Each Hospital Establishes its Own Criteria for Admitting Privileges

Under S.B. 1848, Dr. Burns's ability to continue providing abortions depends on the individual admitting privileges decisions rendered by hospital boards. Burns Aff. ¶¶ 22–32. Hospitals may grant or deny privileges based upon multiple criteria, many of which are not correlated with a physician's expertise in a particular procedure, and hospitals are under no regulatory obligation to act on applications within a certain period of time. *Id.*

2. Dr. Burns Has Applications Pending at Area Hospitals

Dr. Burns has pursued admitting privileges at all 16 of the hospitals within 30 miles of his practice that are "general medical surgical hospital[s]" that offer obstetrical or gynecological care. *Id.* To date, one hospital has formally denied his request because he has not completed a residency program. *Id.* ¶¶ 22. Nine other hospitals have advised him that he cannot get privileges without board certification. *Id.* ¶¶ 23, 24, 26, 30, 31. Two hospitals have informed Dr. Burns that he is not eligible for privileges because he would fail to admit at least six patients per year. *Id.* ¶¶ 25, 27.

Of the remaining four hospitals: one hospital has referred Dr. Burns's request for an application to its Chief of Staff; two have recently provided applications that Dr. Burns will submit prior to November 1; and one other hospital has not yet responded to Dr. Burns's repeated requests for an application. *Id.* ¶¶ 28, 29, 32. Thus, despite his best efforts, it is highly unlikely that Dr. Burns will be able to comply with the admitting privileges requirement before the Act takes effect on November 1.

3. S.B. 1848 Will Irreparably Harm Dr. Burns's Patients

There are only two other abortion providers in Oklahoma; one in Oklahoma City and one in Tulsa. Out of the total number of abortions performed in 2013,[1] Dr. Burns performed 44 percent of the procedures. Burns Aff. ¶ 10. If Dr. Burns is forced to stop providing abortions, even assuming both other clinics are able to stay open, they may not be able to meet the increased demand for medical services. Burns Aff. ¶¶ 34, 35. Women will therefore likely face delays in obtaining abortions, increasing their risk of complications and costs. Estes Aff.

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[1] *Abortion Surveillance in Oklahoma, 2002-2013 Summary Report*, OKLAHOMA DEPARTMENT OF HEALTH, *available at* http://www.ok.gov/health2/documents/HCI_2002-2013ITOPtrends.pdf (last visited Oct. 1, 2014).

¶ 50. Delay will also mean that some women do not get appointments in time to qualify for a medication abortion. *Id.* Other women may progress beyond the time when legal second trimester abortion is available in Oklahoma. *Id.*

Although legal abortion is a very safe procedure, the risks increase as the pregnancy advances. *Id.* Thus, delaying abortion until later in pregnancy increases the risk of complications. *Id.* Some women, deprived of access to legal abortion, carry unwanted pregnancies to term. *Id.* ¶ 51; Burns Aff. ¶ 34. These women are exposed to increased risks of major complications from childbirth. Estes Aff. ¶ 51. Other women may turn to illegal and unsafe methods to terminate unwanted pregnancies. *Id.* ¶ 52. These real-life consequences are inevitable if S.B. 1848 substantially reduces access to abortion. *Id.*

III. Argument

A. Temporary Injunctive Relief Standard

"The purpose of a temporary injunction is to preserve the status quo and prevent the perpetuation of a wrong or the doing of an act whereby the rights of the moving party may be materially invaded, injured or endangered." *Okla. Pub. Emps. Ass'n v. Okla. Military Dep't*, 2014 OK 48, ¶ 15, 330 P.3d 497, 504. In ruling on a motion for temporary injunctive relief, the Court considers four factors: (1) the applicant's likelihood of success on the merits; (2) irreparable harm to the applicant if injunctive relief is denied; (3) relative effect on the other interested parties; and (4) public policy concerns arising out of the issuance of injunctive relief, or whether the injunction is in the public interest. *Daffin v. State ex rel. Okla. Dep't of Mines*, 2011 OK 22, ¶ 7, 251 P.3d 741, 745; *Dowell v. Pletcher*, 2013 OK 50, ¶ 7, 304 P.3d 457, 460. As set forth below, each factor weighs in favor of granting temporary injunctive relief.

B. Plaintiff Is Likely to Succeed on the Merits of his Claims

1. Dr. Burns is Likely to Succeed on the Claim that S.B. 1848 Deprives Him of Due Process of Law.

S.B. 1848 deprives Dr. Burns of procedural due process by affording him inadequate time to obtain admitting privileges prior to the statute's effective date. Article II, Section 7 of the Oklahoma Constitution provides that, "No person shall be deprived of life, liberty, or property, without due process of law." Dr. Burns has a protected liberty and property interest in the right "to follow a chosen profession free from unreasonable governmental interference." *Greene v. McElroy*, 360 U.S. 474, 492 (1959). *See also City of Jenks v. Stone*, 2014 OK 11, ¶ 7, 321 P.3d 179, 181–82 (property right in employment is protected by due process clause of federal constitution) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985)).

The admitting privileges law was signed by the governor on May 28, 2014, and becomes effective on November 1, 2014. Oklahoma law imposes no time limits on how long a hospital may consider an application for admitting privileges, and it is clear, based on Dr. Burns's good faith efforts to comply, that 157 days is not enough time. Although Dr. Burns is applying for privileges and has applications pending, he does not expect to receive notification regarding several of those applications prior to November 1.

Absent a temporary injunction or a temporary restraining order, Dr. Burns will be forced either to stop practicing or face criminal sanctions. Such a denial of his right to practice his profession, when for reasons beyond his control he is unable to come into compliance, is the epitome of "unreasonable governmental interference," and Dr. Burns has shown a substantial likelihood of success warranting injunctive relief. Other courts have recently reached similar conclusions. *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 600 (5th Cir. 2014) (holding that admitting privileges requirement could not be enforced against abortion providers who applied for admitting privileges, but were

awaiting a response from a hospital); *June Med. Servs., LLC v. Caldwell*, No. 3:14-CV-00525-JWD, 2014 WL 4296679, at *7 (M.D. La. Aug. 31, 2014) (temporary restraining order granted where physicians could not comply with admitting privileges law before effective date).

2. Dr. Burns and His Patients are Likely to Succeed on the Claim that S.B. 1848 Violates the Single-Subject Rule.

S.B. 1848 addresses six distinct subjects with no readily apparent common theme or purpose. Under the Oklahoma Constitution, "Every act of the Legislature shall embrace but one subject, which shall be clearly expressed in its title." OKLA. CONST. art. V, § 57. The rule has two purposes: (1) to ensure that the legislators of Oklahoma are adequately notified of the potential effect of the legislation; and (2) "to prevent 'logrolling,' the practice of assuring the passage of a law by creating one choice in which a legislator . . . is forced to assent to an unfavorable provision to secure passage of a favorable one, or conversely, forced to vote against a favorable provision to ensure that an unfavorable provision is not enacted." *Nova Health Sys. v. Edmonson*, 2010 OK 21, ¶ 1, 244 P.3d 380, 381; *Douglas v. Cox Ret. Props., Inc.*, 2013 OK 37, ¶ 4, 302 P.3d 789, 792.

Oklahoma courts apply a "germaneness" test to determine whether an act complies with the single-subject rule, requiring that its provisions be germane, relative, and cognate to a readily apparent common theme or purpose. *See Douglas*, 2013 OK 37, ¶ 6, 302 P.3d at 793; *Nova Health Sys.*, 2010 OK 21, ¶ 1, 233 P.3d at 382; *In re Initiative Petition No. 382*, 2006 OK 45, ¶ 9, 142 P.3d 400, 405. "[T]he issue is not how similar or 'related' any two provisions in a proposed law are, or whether one can articulate some rational connection between the provisions of a proposed law," *In re Initiative Petition No. 382*, 2006 OK 45, ¶ 14, 142 P.3d at 408, "but whether it appears that the proposal is misleading or. . . those voting on the law would be faced with an all-or-nothing choice." *Douglas*, 2013 OK 37, ¶ 6, 301 P.3d at 792–93.

Oklahoma Courts have repeatedly rejected attempts to satisfy the single subject rule by inventing a broad label to cover multiple-subject bills. In *Nova Health Sys.*, 2010 OK 21, ¶ 1, 233 P.3d at 382, the Oklahoma Supreme Court struck down a statute regulating abortion, holding that although each provision concerned "freedom of conscience," the statute was "obviously violative" of the single-subject rule because it comprised portions of five bills and involved multiple subjects. The Court admonished:

> We are growing weary of admonishing the Legislature for so flagrantly violating the terms of the Oklahoma Constitution. It is a waste of time for the Legislature and the Court, and a waste of the taxpayer's money. . . .
>
> [W]e again restate: THE CLEAR LANGUAGE OF THE OKLAHOMA CONSTITUTION REQUIRES THAT ALL LEGISLATIVE ACTS SHALL EMBRACE BUT ONE SUBJECT.

Id. at ¶ 1, 381–82 (emphasis in original). *See also Davis v. Edmondson*, No. CJ-2009-9154, 2010 WL 1734636 (Dist. Ct. Okla. Cnty. Mar. 2, 2010) (statute banning sex-selective abortions and imposing new reporting requirements violated the single-subject rule); *Okla. Coal. for Reprod. Justice v. Okla. State Bd. of Pharm.*, No. CV-2013-1640, slip op. at 2 (Dist. Court. Okla. Jan. 29, 2014) (*see* Appendix 1) (statute restricting distribution of emergency contraception and regulating health insurance violated the single subject rule).

Here, although S.B. No. 1848's proffered subject is the "[e]stablishment of certain medical procedure standards," 2014 Okla. Sess. Law Serv. Ch. 370 (West), it is quintessential logrolling. In addition to requiring admitting privileges, the statute addresses five additional subjects. The Act directs the State Board of Health to develop standards on (1) supplies and equipment; (2) training physician's assistants and volunteers; (3) medical screening and evaluation; and (4) the abortion procedure and post-procedure follow-up care. In addition, the statute (5) creates record keeping and reporting requirements. *Id.*

S.B. 1848 contains multiple subjects that are not "germane, relative, and cognate to a readily apparent common theme and purpose." *See Davis*, 2010 WL 1734636. Although each provision relates to regulating abortion in some manner, a legislator could reasonably be in favor of standards for medical screening and evaluation without supporting the requirement for admitting privileges. *See Nova Health Sys.*, 2010 OK 21, ¶ 1, 233 P.3d at 382; *Davis*, 2010 WL 1734636; *Douglas*, 2013 OK 37, ¶¶ 10–11, 302 P.3d at 793–94.

The legislative history bears this out. A prior admitting privileges bill, H.B. 2418, was proposed earlier in the same session. The bill used language nearly identical to S.B. 1848 to require admitting privileges.[2] H.B. 2418 passed in the House, but not the Senate. It was only when the admitting privileges provision was combined with an omnibus bill including five other plainly different subjects that the provision passed both houses. As in *In re Initiative Petition No. 382*, S.B. 1848 was passed amidst a "national discussion on the proper limitations on the power of" the government to restrict the fundamental right to abortion and was "clearly an attempt at logrolling." *See* 2006 OK 45, ¶ 15, 142 P.3d at 408. Legislators who favored one of the provisions of S.B. 1848 could not have voted to enact one part of the bill without voting to enact the other, unrelated provisions as well. *See Fent v. State ex rel. Okla. Capitol Improvement Auth.*, 2009 OK 15, ¶ 23, 214 P.3d 799, 807.

Because S.B. 1848 contains multiple, unrelated subjects, which were joined together through the precise legislative process the single-subject rule was designed to prevent, it is plainly unconstitutional. By violating the Oklahoma Constitution's clear parameters on the passage of legislation, it offends the rights of Dr. Burns, his patients, and all Oklahoma citizens.

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[2] In addition, H.B. 2418 stated: "No person shall perform or induce an abortion upon a pregnant woman subsequent to the end of the first trimester of her pregnancy, unless such abortion is performed or induced in a general hospital." Engrossed 2013 OK H.B. 2418 (Feb. 27, 2014), *available at* http://webserver1.lsb.state.ok.us/cf_pdf/2013-14%20ENGR/hB/HB2418%20ENGR.PDF.

Accordingly, Dr. Burns and his patients have a strong likelihood of success on the merits of the claim that S.B. 1848 violates OKLA. CONST. art. V, Section 57.

3. There is a Strong Likelihood of Success on the Merits of the Claim that S.B. 1848 is an Unconstitutional Special Law That Singles Out Both Dr. Burns and His Patients.

By singling out abortion for unique treatment, and requiring only physicians who provide abortions to have admitting privileges, S.B. 1848 also violates Article V, Section 59 of the Oklahoma Constitution, which provides that: "Laws of a general nature shall have a uniform operation throughout the State, and where a general law can be made applicable, no special law shall be enacted." The Oklahoma Supreme Court has adopted a three-pronged test for determining whether a statute violates this prohibition: (1) whether the statute is a special or general law, (2) whether, if the statute is a special law, a general law is applicable, and (3) whether, if a general law is not applicable, the statute is a permissible special law. *See Grant v. Goodyear Tire & Rubber Co.*, 2000 OK 41, ¶ 4, 5 P.3d 594, 597; *Reynolds v. Porter*, 1988 OK 88, 760 P.2d 816, 822. If a law is special under the first prong, and it fails *either* the second or third prong of the test, it is unconstitutional. *Reynolds*, 1988 OK 88, 760 P.2d at 822.

Under the first prong of the test, a court must determine whether a law is a special or general law. *Id.* "A statute relating to all persons or things of a class is a general law." *Id.* In contrast, "[s]pecial laws are those which single out less than an entire class of similarly affected persons or things for different treatment." *Id.* (statute that singled out medical malpractice claims from all actionable tort claims is a special law); *Grant*, 2000 OK 41, ¶¶ 5–6, 5 P.3d at 597 (amendment to worker's compensation statute singling out disabled employees for different treatment is a special law).

S.B. 1848 plainly constitutes a special law because it arbitrarily singles out physicians who provide abortion services from all other physicians, compelling them to obtain admitting privileges, while physicians who perform other types of outpatient surgical procedures, many of which are more invasive and involve greater risk, *see* Estes Decl. ¶¶ 18–20, are, at most, merely required to have a transfer agreement with a local hospital.[3] The law also imposes this onerous regulation on women seeking abortions, not all patients seeking outpatient surgical procedures. Because the Act treats similarly situated physicians and patients differently by singling out abortion physicians for regulation, it is a special law. *See Reynolds*, 1988 OK 88, 760 P.2d at 822.

Under the second prong of the test, a court must determine "if the subject of the legislation is reasonably susceptible of general treatment or if, on the other hand, there is a special situation possessing characteristics impossible of treatment by general law." *Reynolds*, 1988 OK 88, 760 P.2d at 822. For example, in *Nova Health Sys. v. Pruitt*, No. 2:12-cv-00395, 2012 WL 1034022 (Dist. Ct. Okla. Cnty. Mar. 28, 2012), the court permanently enjoined a mandatory ultrasound requirement that subjected physicians to unique professional burdens, holding that the law improperly addressed only abortion patients and physicians and did not address "other medical care where a general law could clearly be made applicable."

Here, as in *Nova Health Sys. v. Pruitt,* the legislature could impose the admitting privileges requirement on all medical providers providing outpatient procedures, and all patients seeking outpatient surgical procedures, rather than solely on abortion providers and

[3] Under the Oklahoma State Department of Health regulations entitled "Minimum Standards for ASC's" require: "A formal transfer agreement must be in effect between the ambulatory surgical center and a general hospital located not more than a twenty minute travel distance from the center, or all physicians performing surgery in the ambulatory surgical center must have admitting privileges at such a hospital." *See* OKLA. ADMIN. CODE § 310:615-5-1(h) (2014), 27 OK Reg. 2536 (2014).

their patients. *See* 2012 WL 1034022. Whereas before, abortion providers, like other outpatient surgical providers, were not required to have admitting privileges,[4] S.B. 1848 singles abortion physicians out for regulation. Alternatively, the State could subject all physicians who perform outpatient surgical procedures without admitting privileges to the penalties set forth in S.B. 1848. There is no basis for this "arbitrary and irrational" classification. *Orthopedic Hosp. of Okla. State Dep't of Health*, 2005 OK CIV. APP. 43, ¶ 15, 118 P.3d 216, 223. Because S.B. 1848 is a special law and is reasonably susceptible to general treatment, it is unconstitutional. *Reynolds*, 1988 OK 88, 760 P.2d at 822.

Alternatively, the special law claim also succeeds under the third prong of the test, under which a court must determine "if the special legislation is reasonably and substantially related to a valid legislative objective." *Id.* at 822. If the proffered objective of the legislation is not valid, or if the legislation is not likely to advance the proffered objective, then the legislation is impermissible. *Id.* at 824–25. "[T]he classification must be reasonable and pertain to some peculiarity in the subject of the legislation, and there must be some distinctive characteristic upon which different treatment is reasonably founded." *EOG Res. Mktg., Inc., v. Okla. State Bd. of Equalization*, 2008 OK 95, ¶ 20, 196 P.3d 511, 521.

Here, there is no "valid legislative objective" for singling out physicians who perform abortions from all other doctors or abortion patients from all other patients. *See Reynolds*, 1988 OK 88, 760 P.2d at 822. As in *Reynolds*, the Legislature failed to produce a "legislative declaration supported by documented findings" that physicians who perform abortions are

[4] Abortion facilities are required to establish a written protocol for the transfer of patients requiring emergency treatment. The protocol must include procedures to contact the local ambulance service and expedite the transfer to the receiving hospital. Appropriate clinical patient information must be provided to the receiving facility, and if the attending physician does not have admitting privileges at a local general hospital, the physician must attest that arrangements have been made with a physician having hospital privileges to receive emergency cases. *See* OKLA. ADMIN. CODE § 310:600-9-6(9) (2014). Dr. Burns complies with this requirement.

distinguishable from physicians performing similar outpatient procedures. *Id.* at 825 (holding statute unconstitutional where there was no evidence that the narrow class carved out by the statute was unique or related to goal of minimizing health care costs).

Moreover, as courts across the country have recognized, admitting privileges statutes like S.B. 1848 do not advance an asserted interest in women's health. *Planned Parenthood Se., Inc. v. Strange*, 2:13CV405-MHT, 2014 WL 3809403, at *41 (M.D. Ala. Aug. 4, 2014) (privileges requirement fell outside the range of standard medical practice and would undermine women's health by cutting off access); *Planned Parenthood of Wis. v. Van Hollen*, No. 13–cv–465–wmc, 2013 WL 3989238, *14 (W.D. Wis. Aug. 2, 2013) ("[D]efendants are unlikely to establish . . . that there is a reasonable relationship between the admitting privileges requirement and maternal health."); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891, 900 (W.D. Tex. 2013), *rev'd on other grounds*, 748 F.3d 583 (5th Cir. 2014) ("[T]here is no rational relationship between improved patient outcomes and hospital admitting privileges within 30 miles of a facility in which a physician provides abortion services."). Further, admitting privileges laws are not consistent with accepted medical practices. *See* Am. College of Obstetricians and Gynecologists, *Guidelines for Women's Health: A Resource Manual* 433 (3d ed. 2007); ACOG/AMA Amici Curiae Brief, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406 (5th Cir. 2013) (No. 13-51088), 2013 WL 6837500. Rather, S.B 1848 will have the effect of closing one of three clinics in Oklahoma, drastically reducing the availability of services to women throughout the State, and thereby exposing them to greater health risks. Estes Aff. ¶¶ 50–52; Burns Aff. ¶¶ 34–35.

For these reasons, Dr. Burns and his patients have a strong likelihood of success on his claim that S.B. 1848 violates OKLA. CONST. art. V, Section 59.

4. Dr. Burns and His Patients are Likely to Succeed on The Claim that S.B. 1848 is an Unlawful Delegation of Legislative Authority

S.B. 1848 unlawfully delegates to hospital boards the determination of whether Dr. Burns will continue to practice and whether Oklahoma women have access to abortion. *See* OKLA. CONST. art. IV, § 1; art. V § 1. The Oklahoma Constitution prevents the legislature from "abdicat[ing] its responsibility to resolve fundamental policy making by delegating that function to others or by failing to provide adequate directions for the implementation of its declared policy." *Democratic Party of Okla. v. Estep*, 1982 OK 106, 652 P.2d 271, 277 n.23. This doctrine distinguishes between "[t]he power to determine the policy of the law," which cannot be delegated, and "the power to make rules of a subordinate character in order to carry out that policy and apply it to varying conditions," which can be delegated. *Harris v. State ex rel. Okla. Planning & Res. Bd.*, 1952 OK 459, 251 P.2d 799, 803 (citation omitted). A statute that neither sets forth a legislative policy nor creates clear standards for execution of a legislative policy is constitutionally void, in part because it transfers the primary responsibility of the elected officials in the legislature to unelected officials whose accountability to the electorate is much diminished. *Estep*, 652 P.2d at 276–78 & 277 n.25 (striking down a statutory campaign finance scheme that articulated no legislative policy to govern the statutorily created commission's activities or rulemaking).

Even where a policy is articulated, the legislature must not delegate the task of implementing its policy without clear standards and safeguards. *See Oklahoma City v. State ex. rel. Dep't of Labor*, 1995 OK 107, 918 P.2d 26, 29–30 (holding delegation was improper where the statute provided no standards to guide the U.S. Department of Labor in exercising

authority and providing no mechanism to challenge determinations); *accord In re Initiative Petition No. 366*, 2002 OK 21, ¶¶ 17-18, 46 P.3d 123, 128–29 (initiative petition unconstitutionally delegated authority by leaving the fundamental policy-making function to the unbridled discretion of unelected state authorities).

As in *Oklahoma City*, Dr. Burns has no meaningful redress should the hospitals deny him privileges, as Oklahoma courts rarely subject hospital admitting privileges decisions to any sort of judicial scrutiny. *See Medcalf v. Coleman*, 2003 OK CIV APP 53, ¶¶ 12–14, 71 P.3d 53, 55–56 (holding the trial court lacked jurisdiction to review a private hospital's revocation of a doctor's privileges; "judicial tribunals are not equipped to review the action of hospital authorities in selecting or refusing to appoint members of the medical staffs"). *See also Hallmark Clinic v. N.C. Dep't of Human Res.*, 380 F. Supp. 1153, 1158 (E.D.N.C. 1974) (striking down written transfer agreement or admitting privileges requirement for abortion providers because "the state . . . placed no limits on the hospital's decision to grant or withhold a transfer agreement, or even to ignore a request for one.").

Further, S.B. 1848 delegates to hospital boards the power to decide which doctors may provide essential women's health care – but it fails, just as the statute at issue in *Oklahoma City* failed – to give specific instructions about the factors a hospital must consider in making that determination. 1995 OK 107, 918 P.2d at 29. Thus, it "leaves an important determination to the unrestricted and standardless discretion of unelected bureaucrats." *Id.* at 30.

Hospitals – rather than being tasked with making rules of a subordinate character to carry out the legislature's policy with respect to abortion providers – instead apply their own admitting privileges rules in accordance with their own bylaws and interests. Estes Aff. ¶ 47; Burns Aff. ¶¶ 25, 27. Accordingly, hospitals can and do deny physicians admitting privileges

for reasons unrelated to clinical expertise. For example, business considerations play a significant factor for many hospitals, and applications for privileges commonly ask how many patients a doctor has performed in the hospital in the past year, and how many patients a doctor anticipates admitting into the hospital in the coming year. *Id. See Planned Parenthood of Wis. v. Van Hollen*, 738 F.3d 786, 792 (7th Cir. 2013) (criteria for granting admitting privileges include the number of patient admissions, quality of services, revenue generated, and membership in a particular practice group or academic faculty) (citing Elizabeth A. Weeks, "The New Economic Credentialing: Protecting Hospitals from Competition by Medical Staff Members," 26 *J. Health L.* 247, 249–52 (2003)). Precisely because abortion is exceedingly safe, Dr. Burns would admit "zero to one" patients per year, and a hospital may conclude that granting Dr. Burns privileges is not in its business interest.

Further, several hospitals that have denied privileges to Dr. Burns require that physicians be board-certified or board-eligible – a status that does not equate to clinical competency. Estes Aff. ¶¶ 30, 47. Dr. Burns long ago had hospital admitting privileges, but having specialized in providing abortions for over 40 years, he did not seek to maintain privileges he did not need. Burns Aff. ¶¶ 3–6. Likewise, after Dr. Burns completed medical school and his internship, he did not seek a hospital residency or board certification because it was unnecessary for pursuing his chosen specialty. *Id.* Now that many hospitals require its doctors to have completed a residency and/or obtained board certification as a prerequisite for granting admitting privileges, Dr. Burns does not qualify. Burns Aff. ¶¶ 22–24, 26, 30. That does not, however, make him any less qualified to perform safe abortions.

S.B. 1848 violates both components of the non-delegation doctrine: it contains neither an articulation of legislative policy nor any standards for hospitals to implement a policy goal.

It is a clear violation of the non-delegation doctrine for the legislature to make hospital boards gatekeepers for abortion access in the state. "The formulation of policy is a legislature's primary responsibility," protecting voters' ability to hold policy-makers accountability for the policies they set. *Estep*, 1982 OK 106, 652 P.2d at 277 n.25. The Legislature's abdication of its responsibility is an affront to all Oklahoma citizens. For these reasons, Dr. Burns and his patients have a strong likelihood of success on his claim that S.B 1848 is an unconstitutional delegation of legislative authority.

C. Absent Injunctive Relief, Dr. Burns and His Patients Will Suffer Irreparable Harm

Oklahoma law defines "irreparable" harm as "incapable of being fully compensated by money damages. . . ." *Tulsa Order of Police Lodge No. 93 v. City of Tulsa*, 2001 OK CIV APP 153, ¶ 28, 39 P.3d 152, 159. Here, if allowed to take effect, S.B. 1848 will cause irreparable harm by violating Dr. Burns's constitutional rights and those of his patients, forcing him to close his practice, and thereby harming women seeking abortions.

If allowed to take effect, the Act would deprive Dr. Burns of several rights secured by the Oklahoma Constitution. First, because it is likely impossible for Dr. Burns to secure admitting privileges before the law goes into effect, it violates his constitutional right to due process. That violation is exacerbated by the Legislature's decision to single out abortion providers in violation of the prohibition on special laws and unconstitutional delegation of authority to hospital administrators. Further, the Legislature's blatant violation of the single-subject rule is an affront to every Oklahoma voter. Such deprivation of constitutional rights is *per se* irreparable harm. *See Caldwell*, 2014 WL 4296679 at *7 (plaintiffs showed admitting privileges requirement would irreparably injure physicians where challenged law violated due process rights) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (loss of constitutional

"freedoms . . . unquestionably constitutes irreparable injury")); *see also Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) ("When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."); *Entm't Merchs. Ass'n v. Henry*, No. CIV-06-675-C, 2006 WL 2927884 at *2 (W.D. Okla. Oct. 11, 2006) (enforcing state law would irreparably harm plaintiffs by violating their constitutional rights).

Second, if S.B. 1848 is allowed to take effect, Dr. Burns will be forced to close his practice. The Oklahoma Supreme Court has held that far less drastic employment consequences constitute irreparable harm. *See Okla. Pub. Emps. Ass'n v. Okla. Military Dep't*, 2014 OK 48, ¶ 34, 330 P.3d 497, 509 (imposition of an unauthorized conditional wage increase irreparably harmed those who lost merit system protections).

Further, there are only two other abortion providers in Oklahoma; one in Oklahoma City and one in Tulsa. Out of the total number of abortions performed in 2013,[5] Dr. Burns performed 44 percent of the procedures. Burns Aff. ¶ 10. Even assuming both other clinics are able to stay open, they are unlikely to meet the immediate increased demand. Estes Aff. ¶ 50; Burns Aff. ¶¶ 10, 34–35. The closure of Dr. Burns's clinic may therefore cause significant delays for women seeking abortions and cause some to travel significantly greater distances to obtain services. Burns Aff. ¶ 34; Estes Aff. ¶¶ 49–52. While abortion is a very safe procedure, the risks increase with gestational age. Estes Aff. at ¶¶ 49–51; Burns Aff. ¶ 9. Thus, delays increase the risk of complications, thereby undermining rather than furthering women's health. Estes. Aff. ¶¶ 49–51. For some women, the burdens created by S.B. 1848 may cause them to carry an unwanted pregnancy to term or attempt a self-induced abortion.

[5] *Abortion Surveillance in Oklahoma, 2002-2013 Summary Report*, OKLAHOMA DEPARTMENT OF HEALTH, *available at* http://www.ok.gov/health2/documents/HCI_2002-2013ITOPtrends.pdf (last visited Oct. 1, 2014).

Id. ¶¶ 51–52. Accordingly, absent temporary injunctive relief, Dr. Burns and his patients will suffer irreparable harm.

D. The Balance of Equities and the Public Interest Weighs in Favor of a Temporary Injunction

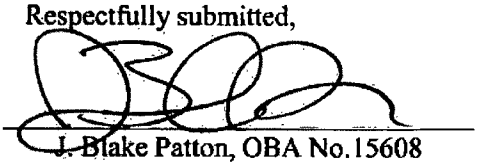
Unlike Dr. Burns and his patients, the Defendants will suffer no harm if a temporary injunction is granted. The only possible disadvantage to the Defendants is delayed enforcement of the Act. A temporary injunction would allow Dr. Burns to continue to provide -- and women to receive -- access to abortion from a doctor with an impeccable safety record. This would also preserve the *status quo* while this Court has an opportunity to consider whether the Act runs afoul of the Oklahoma Constitution. *Hastings v. Kelley*, 2008 OK CIV APP 36, ¶ 13, 181 P.3d 750, 753 ("[A] temporary injunction is . . . designed to preserve the . . . status quo until a final determination of the controversy."); *Okla. Pub. Emps. Ass'n.*, 2014 OK 48, ¶ 15, 330 P.3d at 504 ("A temporary injunction protects a court's ability to render a meaningful decision on the merits of the controversy."). Moreover, it is well-settled that the enforcement of an unconstitutional law is contrary to the public interest. *See, e.g., Am. Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999); *Entm't Merchs. Ass'n*, 2006 WL 2927884 at *3. Accordingly, the public interest weighs heavily in favor of granting temporary injunctive relief.

IV. Conclusion

For the foregoing reasons, Dr. Burns respectfully requests that this Court hear this motion on an expedited basis, issue a temporary injunction to preserve the *status quo* and prevent enforcement of S.B. 1848 during the pendency of this litigation, or in the alternative, issue a temporary restraining order.

Dated: October 2, 2014

Respectfully submitted,



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***Out-of-State Attorney Applications Filed*

ATTORNEYS FOR PLAINTIFF

VERIFICATION

The undersigned Plaintiff has read the contents of the Verified Memorandum of Law. The undersigned hereby verifies, under penalty of perjury, that the contents of the Verified Memorandum of Law are true and correct to the best of his present knowledge.

Larry A. Burns, D.O.

BRENDA HANNA NOTARY PUBLIC STATE OF OKLAHOMA

Sworn to before me this 1st day of October 2014

NOTARY PUBLIC

Subscribed and sworn to before me, a Notary Public, in and for the State of Oklahoma, Cleveland County, this 1 day of Oct, 2014.

Notary Public

My commission expires Aug 20, 2019

IN THE DISTRICT COURT FOR OKLAHOMA COUNTY
STATE OF OKLAHOMA

(1) LARRY A. BURNS, D.O., on behalf of himself and his patients, Plaintiff, v. (2) TERRY L. CLINE, in his official capacity as Oklahoma Commissioner of Health (3) CARL B. PETTIGREW, D.O., in his official capacity as President of the Oklahoma State Board of Osteopathic Examiners, and (4) GREG MASHBURN, in his official capacity as District Attorney for Cleveland, Garvin, and McClain Counties; Defendants.	)	Case No. CV-2014-1896 Judge Graves

CERTIFICATE OF SERVICE ON OKLAHOMA ATTORNEY GENERAL

Pursuant to Local Rule 37 (D), the undersigned hereby certifies that true and correct copies of the petition, motion, and brief challenging Enrolled Senate Bill No. 1848 were served on the Office of the Oklahoma Attorney General.

Respectfully submitted,

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APPENDIX 1

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

OKLAHOMA COALITION FOR REPRODUCTIVE JUSTICE, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. CV-2013-1640
OKLAHOMA STATE BOARD OF PHARMACY, et al.	)	Judge Lisa T. Davis
Defendants.	)	

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiffs' Motion for a Summary Judgment comes on for hearing on January 23, 2014. The Plaintiffs appeared by David Brown, Tiseme Zegeye, Martha M. Hardwick, and Anne Zachritz. All Defendants, represented by the office of Attorney General E. Scott Pruitt, appeared by Patrick R. Wyrick, Solicitor General, and Cara N. Rodriguez, Assistant Solicitor General. After reviewing Plaintiffs' Motion for Summary Judgment, Plaintiffs' Memorandum of Law in Support of their Motion for Summary Judgment, Defendants' Response in Opposition to Plaintiffs' Motion for Summary Judgment and Defendants' Cross-Motion for Summary Judgment, Defendants' Memorandum of Law in Support of their Response in Opposition to Plaintiffs' Motion for Summary Judgment and Defendants' Cross-Motion for Summary Judgment, Plaintiffs' Memorandum of Law in Opposition to Defendants' Cross-Motion for Summary Judgment and in Further Support of Plaintiffs' Motion for Summary Judgment, and Defendants' Reply to Plaintiffs' Memorandum of Law in Opposition to Defendants' Cross-Motion for Summary

Judgment, and having heard oral argument, the Court hereby **GRANTS** Plaintiffs' motion and **DENIES** Defendants' motion.

Plaintiffs have demonstrated that there are no material facts in dispute and House Bill 2226, codified at OKLA. STAT. tit. 59, § 369 and OKLA. STAT. tit. 63, § 313A, violates the single subject rule of Article V Section 57 of the Oklahoma Constitution. Therefore,

IT IS HEREBY ORDERED:

1. House Bill 2226, codified at OKLA. STAT. tit. 59, § 369 and OKLA. STAT. tit. 63, § 313A, is declared unconstitutional and is void and of no effect.

2. The Defendants, their employees, agents, and successors in office are hereby permanently enjoined from enforcing the provisions of House Bill 2226.

IT IS SO ORDERED.

Dated: 1/28, 2014

LISA DAVIS

The Honorable Lisa T. Davis

Approved as to form:

By: _____

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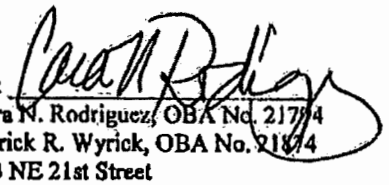
By: 
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EXHIBIT 5

CASE NO. CV-2014-1896

**IN THE DISTRICT COURT OF OKLAHOMA COUNTY75
STATE OF OKLAHOMA**

LARRY A. BURNS, D.O., on behalf of himself and his patients,

Plaintiff,

v.

TERRY L. CLINE, in his official capacity as Oklahoma Commissioner of Health; CARL B. PETTIGREW, in his official capacity as President of the Oklahoma State Board of Osteopathic Examiners; and GREG MASHBURN, in his official capacity as District Attorney for Cleveland, Garvin, and McClain Counties,

Defendants.

DEFENDANTS' RESPONSE TO MOTION FOR TEMPORARY INJUNCTION

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October 14, 2014

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IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

(1) LARRY A. BURNS, D.O., on behalf of himself and his patients, Plaintiff, v. (2) TERRY L. CLINE, in his official capacity as Oklahoma Commissioner of Health; (3) CARL B. PETTIGREW, D.O., in his official capacity as President of the Oklahoma State Board of Osteopathic Examiners; and (4) GREG MASHBURN, in his official capacity as District Attorney for Cleveland, Garvin, and McClain Counties, Defendants.	)	Case No. CV-2014-1896

DEFENDANTS' RESPONSE TO MOTION FOR TEMPORARY INJUNCTION

INTRODUCTION

According to the most recent available data, around 1.06 million abortions were performed in the United States in 2011 alone.[1] Plaintiff states that of those 1.06 million abortions, approximately 1.3% would have resulted in some complication requiring treatment. Estes Aff. ¶ 24. While 1.3% looks small as a percentage, that number is large when translated to the number of women that will actually be affected - which is approximately 13,780. That is not an insignificant number and reveals a serious public health concern.

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1 Jones RK and Jerman J, Abortion Incidence and Service Availability in the United States, 2011, *Perspectives on Sexual and Reproductive Health*, 2014, 46(1):3-14. Found at http://www.guttmacher.org/pubs/journals/psrh.46e0414.pdf.

Senate Bill 1848, 2014 Okla. Sess. Law Serv. Ch. 370 (West) ("SB 1848" or the "Act") is the Legislature's recognition of and attempt to combat this public health concern by ensuring that doctors provide safe and effective treatment to women receiving these procedures. The Act does so by providing for the establishment of standards for supplies and equipment used, standards for training physician assistants and volunteers, standards relating to the medical screening and evaluation of patients, and standards relating to the performance of the abortion procedure and post-procedure. The Act also requires a facility to record each incident resulting in injury to the patient or born-alive child, report patient deaths, and requires a physician with admitting privileges to be on the premises during a procedure. Each of these sections ensures abortion procedures are conducted under the safest conditions.

Plaintiff challenges the constitutionality of SB 1848, alleging that it deprives him of due process, violates the single subject rule and rule against special laws, and improperly delegates legislative functions to hospitals. Plaintiff also requests this Court issue a temporary injunction, or in the alternative, issue a temporary restraining order. For the following reasons, this Court should deny that motion.

ARGUMENTS AND AUTHORITIES

I. PLAINTIFF DOES NOT HAVE STANDING TO ASSERT RIGHTS ON BEHALF OF HIS PATIENTS.

It is well settled that a plaintiff cannot vicariously assert the constitutional rights of someone else. *Barzellone v. Presley, 2005 OK 86, fn. 32, 126 P.3d 588; Forest Oil Corp. v. Corporation Comm'n, 1990 OK 58, fn. 31, 807 P.2d 774.* In *Oklahoma Education Ass'n. v. State*, 2007 OK 30, 158 P.3d 1058, the Oklahoma Education Association (the OEA) and several school districts sued the State of Oklahoma, claiming that the Oklahoma Legislature had failed to

adequately fund public education in violation of Oklahoma students' equal protection rights (amongst other claims). The Oklahoma Supreme Court flatly rejected the OEA's and school districts' attempt to assert a claim based on the equal protection rights of Oklahoma students:

> The plaintiffs assert injury to the rights of Oklahoma's students. The OEA has not established that any of its members are Oklahoma students. Although some of the members of the OEA may be parents of Oklahoma students, this is insufficient to establish the OEA's standing to assert injury to the students' rights. The OEA has failed to meet its burden to show that any of its members have a right of their own to assert injury to the rights of Oklahoma's students. As the OEA's members cannot vicariously assert injury to the constitutional rights of Oklahoma's students, neither can the OEA ... [likewise] [t]he plaintiff school districts have failed to present us with any authority to show that they have standing to assert the violation of the constitutional rights of students generally across this state.

Id. at ¶ 12, 14, 1064 (emphasis added).

Plaintiff does not appear to be raising his patients' right to abortion in his Motion for Temporary Injunction. However, to the extent that he is, Plaintiff lacks standing to assert claims based on those rights - individual rights that belong not to him, but rather to others not before the Court. Therefore, to the extent that Dr. Burns is attempting to assert that his patients are losing a substantive right to terminate a pregnancy, that claim is improper. *See* Pl.'s Pet. 2.

II. PLAINTIFF CANNOT MEET HIS BURDEN OF PROVING AN ENTITLEMENT TO AN EXTRAORDINARY REMEDY LIKE AN INJUNCTION.

The Court may issue a temporary injunction only after the plaintiff has shown by clear and convincing evidence that: (1) he is likely to ultimately succeed on the merits, (2) he will suffer irreparable harm if the request is denied, (3) on balance, he is at risk of suffering a greater hardship than other affected parties, and (4) there are no countervailing public policy concerns that would warrant denial of the request. *Daffin v. State ex. rel Oklahoma Dept. of Mines*, 2011 OK 22, ¶ 7, 251 P.3d 741, 745 (citing *Tulsa Order of Police Lodge No. 93 v. City of Tulsa*, 2001 OK Civ APP 153, 39 P.3d 152). Injunctive relief is an extraordinary remedy which "is not to be

lightly granted," *Amoco Production Co. v. Lindley*, 1980 OK 6, ¶ 50, 609 P.2d 733, 745, and which should be denied when the expectation of future injury is "too speculative." *Quinn v. City of Tulsa*, 1989 OK 112, ¶ 59, 777 P.2d 1331, 1341. Merely providing that "injury may possibly result from the acts sought to be prevented" or that one has "fear or apprehension" of injury is never enough to justify an injunction; a plaintiff must prove that it is "at least a reasonable probability" that they will be injured if an injunction is not issued. *Sunray Oil Co. v. Cortez*, 1941 OK 77, ¶ 7, 112 P.2d 792, 796 (quoting *Simons et al. v. Fahnestock et al.*, 182 Okla. 460, 78 P.2d 388). Defendants assert that Plaintiff has failed to meet the standard necessary for granting a preliminary injunction and this Court should deny his request.

III. PLAINTIFF IS NOT LIKELY TO SUCCEED ON THE MERITS.

A. Plaintiff is not likely to succeed on the merits of his due process claim.

Plaintiff claims that he is deprived of a property interest without due process of law because the law does not give him time to acquire admitting privileges, for reasons he claims are "out of his control." However, this claim is belied by the fact that out of the 16 hospitals from which he has sought admitting privileges, 12 have given him a response — denial. The problem isn't that the law isn't "giving him enough time" but rather he isn't getting the answer he wants from the hospitals. Further, the denials aren't completely out of his control. He admits that he once had privileges at a local hospital, but allowed them to lapse. The denials he is receiving is not because of anything the State has done, but instead are based on things that he alone could cure (i.e., getting board certification).

Plaintiff relies on two cases in his Memoranda of Law in support of his proposition that he has not been given enough time to procure admitting privileges and therefore his due process rights were violated. First, Plaintiff cites to *Planned Parenthood of Greater Texas Surgical*

Health Services v. Abbott, 748 F.3d 583 (5th Cir. 2014). In *Abbott*, the court grappled with an abortion law similar to the law which is about to go into effect in Oklahoma. The law required that doctors who perform abortions have admitting privileges at a hospital within 30 miles of their clinic. The court, after holding that this admitting requirement did not substantially burden a woman's right to an abortion and after determining that the law did not unconstitutionally delegate policy making to the hospitals (claims made by Dr. Burns in this lawsuit), turned its attention to both substantive and procedural due process. The Court found a rational basis for the Texas legislature's decision to require admitting privileges for abortion doctors. The Court further found that Texas law provided a grace period of over 100 days and thus did not infringe plaintiff's substantive due process rights. *Id.* at 596. The court stated that a grace period of over 100 days was, on its face, a sufficient grace period as to satisfy due process, *Id.* at 600, and held that because in Texas a hospital has 170 days from the date of application to make a determination regarding admitting privileges, 100 days grace period was in practice not enough time for an abortion doctor who timely applied for admitting privileges to receive a response. Therefore, the court held that the law could not be enforced against doctors who had **timely** applied for privileges but were awaiting a decision. *Id.* [2]

Here, SB 1848 was signed by Governor Mary Fallin on May 28, 2014 with an effective date of November 1, 2014. This gave Plaintiff 157 days to apply for privileges and get responses from hospitals. According to Plaintiff's own testimony, he did not apply for admitting privileges

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[2] The other case cited by Plaintiff, *June Medical Services, LLC v. Caldwell*, 2014 WL 4296679 (M.D.La. 2014) (unpublished) did not examine the procedural due process standard but instead found an agreement of the parties on the issue. *Id.* at 7. "The first element (whether there is a substantial likelihood that plaintiffs will prevail on the merits) is easily met by turning to *Abbott*, *supra*, **and the concessions of the parties regarding same.**" (emphasis added).

to a single hospital until July 18th, 51 days after HB 1848 was enacted and signed into law. *Aff. of Larry Burns* at ¶22. Then Plaintiff waited another month, or until August 13, before he applied to a second hospital. *Aff. of Larry Burns* at ¶23. In effect, this means that Plaintiff waited 77 days before he got serious about applying for admitting privileges. If Plaintiff has not heard back from all places he applied, that is his own fault.

Further, SB 1848 does not require that Plaintiff have admitting privileges at a hospital, it only requires that someone on the premises of his clinic have admitting privileges. SB 1848 at §1(B). Plaintiff has not testified nor has he demonstrated that he has made any attempt to locate or hire a physician with admitting privileges who can be on premises when abortions are performed. This was a key piece of evidence in the *Abbott* case where plaintiff testified that he had tried to get doctors with admitting privileges to join his practice. *Abbott*, 748 F.3d at 592. No such evidence exists here. Plaintiff has simply waited too long to apply to hospitals for admitting privileges and has taken no steps to find doctors with admitting privileges who can be on site when abortions are performed. The law does not violate Plaintiff's procedural due process rights as he would have had plenty of time to apply for privileges and certainly had time to locate a physician with admitting privileges, he just chose not to.

B. Plaintiff is not likely to succeed on the merits of his single subject claim.

Otherwise known as the "single subject rule," Article V, § 57 of the Oklahoma Constitution provides that "[e]very act of the Legislature shall express but one subject, which shall be clearly expressed in its title . . . ." Okla. Const. art. V, § 57. This rule serves two purposes: first, it ensures that Oklahoma legislators "are adequately notified of the potential effect of the legislation," and second, it prevents logrolling. *Nova Health Sys. v. Edmondson*, 2010 OK 21, ¶ 2, 233 P.3d 380, 381. This rule is designed "to prevent fraudulent and

surreptitious legislation without unreasonably imperiling or annulling proper legislation." *In re Initiative Petition No. 347 State Question No. 639*, 1991 OK 55, ¶ 16, 813 P.2d 1019, 1027. In looking at whether legislation violates this provision, courts apply a germaneness test that requires the subject of the legislation to be "germane, relative, and cognate to a readily apparent common theme and purpose." *Fent v. State ex rel. Okla. Capitol Improvement Auth.*, 2009 OK 15, ¶ 16, 214 P.3d 789, 805.

A comparison of cases analyzing legislation under this provision make clear that SB 1848 meets this test and is "germane, relative, and cognate to a readily apparent common theme and purpose."

For example, in *Douglas v. Cox Retail Properties, Inc.*, 2013 OK 37, 302 P.3d 789, the Court considered a tort reform bill containing "90 sections, encompassing a variety of subjects that [did] not reflect a common, closely akin theme or purpose." *Id.* at ¶ 7, 302 P.3d at 793. Forty-five of those sections created entirely new acts scattered throughout *eleven* separate titles. While the bill's defenders argued that the bill related entirely to the general theme of "lawsuit reform," *Id.* at ¶ 8, 10, 302 P.3d at 793, the Supreme Court of Oklahoma pointed out that the various acts covered topics as wide-ranging as the liability of firearm manufacturers, school discipline, seat belt use, and livestock activities. *Id.* at ¶¶ 8-9, 302 P.3d at 793. The Court accordingly found that the bill encompassed more than one subject.

Similarly, in *Fent v. State ex rel. Oklahoma Capitol Improvement Authority* ("*Oklahoma Capitol Improvement Authority*"), the Supreme Court of Oklahoma easily found that a statute involving a Cultural Center, a Conservation Commission, and a River Parks Authority were not singularly related to the subject of "water or some type of flood control." 2009 OK 15, ¶¶ 23-23, 214 P.3d at 807. Indeed, the Court found that the challenged legislation placed "something for

Oklahoma City, something for Tulsa, and something for the rest of the State" under the auspices of one bond. *Id.* at ¶ 23, 214 P.3d at 807.

In a case involving a special appropriations bill that appropriated money to sixteen different state agencies, the Oklahoma Supreme Court similarly found that the bill contained provisions that were far from "germane," and declared it in violation of the single-subject rule because of the disparate nature of the agencies involved in the appropriations. *Fent v. State ex rel. Office of State Finance*, 2008 OK 2, ¶ 30, 184 P.3d 467, 478.

Likewise, in *Campbell v. White*, 1993 OK 89, 856 P.2d 255, two special appropriations bills were found in violation of the single-subject rule:

> Senate Bill 142 is identified as an act relating to state cultural entities. Although a number of its provisions are directed to state agencies whose primary objective might be considered cultural development, it contains provisions which cannot be characterized as 'cultural.' Section 16 of the act reappropriates monies originally designated for the Oklahoma Department of Tourism and Recreation to provide the state match to federal Bureau of Reclamation Fund Program Funds. ***The bill also provides for reappropriation of funds relating to the development of an industrial airpark economic study. It restricts the closing of state parks, and it provides for the establishment of an intern program for the State Regents for Higher Education. These provisions have no relationship to the subject of cultural entities*** identified by the State Officials as the single subject of S.B. 142.
>
> The heading of S.B. 725 providing that it is "an act relating to state business regulatory agencies" presents a topic almost as broad as the one identified, and disapproved, in *Johnson*-"state government." ***Included within the regulatory scheme are headstart programs and a detailed list of money received for asbestos abatement. A program providing for early education of children and one requiring an accounting of funds received to abate a health hazard, although regulatory in nature, do not fit within the rubric of 'state business regulatory agencies.'*** They cannot be considered to come under the topic of business as do provisions for the Banking Department and the Commission on Consumer Credit.

Id. at ¶¶ 15-16, 260-61 (emphasis added). Again, because of the entirely disparate nature of the various provisions contained in the two bills, this Court found the bills in violation of the single-subject rule.

SB 1848 suffers from none of the flaws evident the legislation discussed above. Instead, it is more like the legislation determined by the Supreme Court of Oklahoma to pass the germaneness test. For example, in *Thomas v. Henry,* the Court held that twelve provisions in a bill, scattered across *numerous* statutory titles — much more than SB 1848 which is limited in scope to one statute in one title — and accomplishing a broad spectrum of legislative purposes, all related to the "common theme of discouraging illegal immigration." 2011 OK 53, ¶¶ 30-31, 260 P.3d 1251, 1261-62. Thus, even a bill containing provisions as wide-ranging as those, which varied from criminalizing activity, to creating new marginal income tax rates, to creating a new unit within the Department of Public Safety, and to defining new standards of eligibility for post-secondary benefits like scholarships, financial aid, and resident tuition, did *not* violate the single-subject rule because they were all germane to the common theme of discouraging illegal immigration.

Similarly, in *Rupe v. Shaw*, 1955 OK 223, ¶ 10, 286 P.2d 1094, 1099, this Court upheld a special appropriations bill that both appropriated funds to the Oklahoma Planning and Resources Board and authorized the building of a new dam on a state waterway. *Rupe* thus illustrates the great deference given to the judgment of the Legislature in including provisions within a single bill. As *Rupe* counsels, even a bill funding one state agency (the Oklahoma Planning and Resources Board) while at the same time authorizing a different agency (the Oklahoma Game and Fish Commission) to build a dam can be considered as covering only a single subject, where it appears the Legislature viewed the provisions as related. *Id.*

Fent and *Campbell* thus teach that the plurality of subject need be quite egregious for a violation of the rule to be found. A special appropriations bill involving sixteen different state agencies serving sixteen different state functions does not pass muster (*Fent*), but a bill involving multiple agencies and statutory titles does, when all the provisions relate to the common purpose of discouraging illegal immigration (*Henry*). A bill simultaneously addressing economic studies of industrial airparks and intern programs for the State Regents does not pass muster (*Campbell*), while a bill funding one agency while authorizing another agency to build a dam that might help the first agency carry out its statutory mandate does (*Rupe*).

When SB 1848 is viewed against the backdrop of this Court's single-subject jurisprudence, the constitutionality of the bill becomes apparent. SB 1848 has as its subject "Establishment of certain medical procedure standards." The title of the Act then details the manner in which the sections relate to abortion procedures. Each and every section of the bill relates specifically to the regulation of abortion providers and the procedures which must be utilized by these providers. The Act does not encompass the type of disparate subjects at issue in the *Douglas*, *Fent* and *Campbell* cases. Rather, it more closely tracks a single subject as did the bill deemed constitutional by the *Henry* and *Rupe* Courts.

Finally, as to Plaintiffs' logrolling claims, logrolling is relevant only to the extent that one piece of unpopular legislation has been rolled into popular legislation *on an entirely different subject*. *Campbell*, 1993 OK 89, at ¶ 7, 856 P.2d at 258 (defining log-rolling as "the enactment of legislation through the combination of unpopular causes with popular legislation on an entirely different subject"). A review of the statute at issue reveals that each section is related to the same subject. The Court cannot strike down a statute as an unconstitutional log roll when the statute does not violate the single subject rule. Plaintiff would like this Court to strike down the

statute because it permits the State Board of Health to promulgate more than one rule. This, however, is not how the single subject rule is applied. So long as all of the sections relate to the same subject, the bill is constitutional. In this case, there is no question that each section of SB 1848 is germane to the subject of abortion. Plaintiff's claim that SB 1848 violates the single subject rule must fail.

C. Plaintiff is not likely to succeed on the merits of his special law claim.

Article V, § 59 of the Oklahoma Constitution provides that "[l]aws of a general nature shall have a uniform operation throughout the State, and where a general law can be made applicable, no special law shall be enacted." Okla. Const. art. V, § 59. This section generally allows the legislature to pass special laws when a general law is not applicable. *Reynolds v. Porter*, 1988 OK 88, ¶ 13, 760 P.2d 816, 822. The Court asks three questions when analyzing a statute under Article V, § 59: (1) whether the statute constitutes a special or general law, (2) if the statute is a special law, whether a general law is applicable, and (3) if a general law is not applicable, whether the statute is nevertheless a permissible special law. *Id.*

1. Because abortion is a unique medical procedure that affects two lives instead of one, SB 1848 is not a special law.

Whether the statute is a special or general law turns on what the affected class is. *Id.* at ¶ 14, 760 P.2d at 822. General laws are those statutes that "relat[e] to all persons or things of a class," while special laws are those that "relat[e] to particular persons or things of a class." *Id.* A special law "single[s] out less than an entire class of similarly affected persons or things for different treatment." *Id.*; *see also Grant v. Goodyear Tire & Rubber Co.*, 2000 OK 41, ¶ 5, 5 P.3d 594, 597.

Plaintiff defines the relevant class as all physicians performing outpatient surgical procedures. However, this classification fails to recognize the major distinctions between different types of outpatient surgical procedures. Of course there are recognizable differences between outpatient surgeries such as dental surgeries, colonoscopies, facelifts, or cataract surgeries. Each of these types of outpatient procedures requires an evaluation individually to determine what the safest procedures and emergency protocols would be. But an even more fundamental difference exists between all other outpatient surgical procedures and abortions—the number of lives at stake. *See* 63 O.S.Supp.2012, § 1-730(A)(4) ("'Unborn child' means the unborn offspring of human beings from the moment of conception . . ."). When a doctor performs an abortion, that doctor must take into consideration the lives of *both* the woman and the unborn child. Because of this, abortion is clearly a distinct surgical outpatient procedure requiring individualized regulation. Therefore, SB 1848 did not single out physicians who provide abortion services in such a manner that it violated the special laws provision. SB 1848 applies generally to the class of physicians who perform abortions.

2. Abortion procedures are unique and are therefore incapable of general treatment.

Even if the Court was to find that SB 1848 did, in fact, constitute a special law, a general law is inapplicable. In answering the second question in the special laws analysis, courts "must determine if the subject of the legislation is reasonably susceptible of general treatment, or if there is a special situation possessing characteristics impossible of treatment by general law." *Grant*, 2000 OK 41, ¶ 8, 5 P.3d at 597-98; *Reynolds*, 1988 OK 88, 760 P.2d at 822. Courts look to the "nature and objective of the legislation as well as the conditions and circumstances under

which the statute was enacted" in making this determination. *Reynolds*, 1988 OK 88, ¶ 15, 760 P.2d at 822.

Abortion procedures are incapable of general treatment. The types of complications associated with abortion procedures are unlike those that can occur from complications of a root canal or facelifts. For instance, the Mayo Clinic lists the following risks associated with dental implant surgery: infection, injury to surrounding teeth or blood vessels, nerve damage, or sinus problems.[3] While these risks are serious, they do not often involve a trip to the emergency room. Risks associated with abortion procedures, on the other hand, can include blood clots, hemorrhage, incomplete abortions, infection, and injury to the cervix and other organs.

Further, abortions are unique procedures that involve the balances of distinct interests - the interest of the State in ensuring the safety of abortion procedures for the safe and effectiveness of the procedure, and the monitoring of the lives of both the woman and the unborn child. This is clearly the type of special situation contemplated by *Grant* and *Reynolds* that is incapable of treatment by a general law.

3. The State's interest in providing quick and effective emergency room access and continuity of care is a valid, legislative objective.

Lastly, "[u]nder the third prong, [the court] must determine if the statute is reasonably and substantially related to a valid legislative objective." *Lafalier*, 2010 OK 48, & 35, 237 P.3d 181, 195; *see also Reynolds*, 1988 OK 88, ¶ 16, 760 P.2d at 822. "For a special law to be permissible, there must be some distinctive characteristic warranting different treatment that furnishes a practical and reasonable basis for discrimination." *Grant*, 2000 OK 41, & 10, 5 P.3d

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[3] Tests and Procedures: Dental Implant Surgery, *Risks*, Mayo Clinic. Found at http://www.mayoclinic.org/tests-procedures/dental-implant-surgery/basics/risks/prc-20009052 (accessed October 9, 2014).

at 598. It is only where "there is neither a distinctive characteristic upon which a different treatment may reasonably be founded nor one which furnishes a practical and real basis for discrimination" that the distinction should be found arbitrary. *Id.*

The Legislature had a clear and real basis for requiring admitting privileges for a physician on the premises of the abortion facility—the desirable protection of abortion patients' health. *See Planned Parenthood v. Abbott*, No. 13-51008 (5th Cir. Mar. 27, 2014). This basis was recognized by the United States Court of Appeals for the Fifth Circuit when it stated:

> In response to Planned Parenthood, Dr. John Thorp, a board-certified Ob/Gyn, offered the most comprehensive statement of the requirement's rationale:
>
> > There are four main benefits supporting the requirement that operating surgeons hold local hospital admitting and staff privileges: (a) it provides a more thorough evaluation mechanism of physician competency which better protects patient safety; (b) it acknowledges and enables the importance of continuity of care; (c) it enhances inter-physician communication and optimizes patient information transfer and complication management; and (d) it supports the ethical duty of care for the operating physician to prevent patient abandonment.

Id. at 592. The Court agreed with the testimony provided by the State and found that the Texas Legislature had "acted within its prerogative to regulate the medical profession by heeding these patient-centered concerns and requiring abortion practitioners to obtain admitting privileges at a nearby hospital." *Id.* at 595. That Court found its conclusion to be "consistent with rulings from the Fourth and Eighth Circuits sustaining admitting-privileges regulations similar to the one at issue here." *Id.* (citing *Greenville women's Clinic v. Comm'r, S.C. Dep't of Health & Env. Control*, 317 F.3d 357, 360, 363 (4th Cir. 2002) (holding a similar South Carolina regulation to be "so obviously beneficial to patients"); *Women's Health Ctr. of W. Cnty., Inc. v. Webster*, 871

F.2d 1377, 1381 (8th Cir. 1989) (ruling that a Missouri statute requiring abortion providers to have admitting privileges "furthers important state health objectives").

Just as in *Planned Parenthood*, the Oklahoma Legislature enacted SB 1848 with the same rational basis — concern for adequate patient care for abortion procedures. Physicians with admitting privileges are more acquainted with which specialists to consult with for a certain complication than those physicians not admitted to know which specialist at a hospital to consult when a patient presents with serious complications. Further, many hospitals require credentialing for admittance. This requirement adds another layer of protection for patient safety.

D. Plaintiff is not likely to succeed on the merits of his delegation claim.

Article 4, Section 1, and Article 5, Section 1 of the Oklahoma Constitution provide the basis for Oklahoma's non-delegation doctrine. Article 4 addresses the separation of the three branches of government. Article 5, Section 1 charges the Legislature with policymaking for the state. The non-delegation doctrine prevents the Legislature from abdicating its policy-making role by delegating its authority to an agency. The Legislature must establish its policies and set out definite standards for the exercise of any agency's rulemaking power. The non-delegation doctrine applies to enactments by the people in the same manner it applies to enactments by the Legislature.

Oklahoma law does prohibit the legislature from delegating its policy making authority to others. *In re Initiative Petition No. 366*, 2002 OK 21, 46 P.3d 123, 128-29 (Based on section 1 of article V, it is a well-settled rule that "the legislature must not abdicate its responsibility to resolve fundamental policy making...."). *Tulsa Cnty. Deputy Sheriff's Fraternal Order of Police, Lodge No. 188 v. Bd. of Cnty. Comm'rs of Tulsa Cnty.*, 2000 OK 2, 995 P.2d 1124, 1128. Constitutional prohibition against delegation of legislative power rests on the premise that

legislature must not abdicate its responsibility to resolve fundamental policy making by delegating that function to others or by failing to provide adequate directions for implementation of its declared policy. *City of Oklahoma City v. State ex rel. Oklahoma Dept. of Labor*, Okla., 918 P.2d 26 (1995).

Again, in the *Abbott* case which is relied upon by Plaintiff, the non-delegation doctrine was raised. The Court found that the unlawful delegation claim failed because merely involving the independent action of a private hospital poses no more of a delegation problem than the requirement that a physician be licensed by an independent medical licensing board. *Id.* at 600. See also: *Women's Health Clinic Center of West County, Inc. v. Webster*, 871 F.2d 1377, 1382 (8th Cir. 1989) (requiring doctors to submit for admitting privileges to private hospitals does not violate the non-delegation doctrine). The nondelegation doctrine is a separation of powers doctrine. *In re Oklahoma Capitol Imp. Authority*, 2003 OK 59, 80 P.3d 109. In this case, the legislature has not delegated any of its policy making authority to any other branch or agency.

Plaintiff argues that the Legislature is unlawfully delegating the determination of whether Dr. Burns will continue to practice, and whether Oklahoma women will have access to abortion, to hospital boards. However, there is no improper delegation here, because there is no delegation of power at all. In enacting SB 1848, the Legislature was not intending to regulate how hospitals grant admitting privileges, and then delegating the actual decision-making to the hospitals. Rather, the Legislature was only interested in furthering its policy objective that abortion providers have admitting privileges — it's of no consequence to the Legislature how a hospital makes those decisions. The Legislature wasn't trying to "delegate" anything.

Here, the Legislature has already articulated its policy — when a doctor performs an abortion, there must be a physician with admitting privileges on the premises. This Legislative

policy is clearly articulated. There was no delegation of Legislative power. The decision as to when to allow a physician to have admitting privileges is up to each individual hospital. The Legislature has no desire to involve itself in how that process is carried out.

Plaintiff alleges that hospital boards will be the "gatekeepers" for abortion access in the state. Pl.'s Mtn. 18. But the decision as to whether to become board certified or whether to retain admitting privileges once they are obtained, is up to each doctor.

VI. THE HARM ALLEGED BY PLAINTIFF IS SPECULATIVE, AT BEST.

Plaintiff says the harm that will occur is out of his control, which isn't entirely accurate. Further the Act states that Dr. Burns himself need not have admitting privileges, but that he need only hire someone to be on the premises while the procedure is being performed. Plaintiff has not demonstrated that he is unable to find a physician with admitting privileges to be on premises and has not demonstrated that he will be unable to do so by November 1st.

V. THE BALANCE OF THE EQUITIES AND PUBLIC INTEREST WEIGH IN FAVOR OF DENYING THE TEMPORARY INJUNCTION.

Abortion is a unique procedure that involves not one — but two — lives. *See* 63 O.S.Supp.2012, § 1-730(A)(4). While Plaintiff downplays the risk inherent in this medical procedure, there is no question that it runs the risk of great bodily harm and pain to at least one of the lives at stake. Further, as has been shown above, while the risk to the mother is low when compared to more complicated procedures, the risk to the mother is not insignificant with over 13,000 patients each year having complications from abortions. To lessen the risk of undue bodily harm, pain and complications, the people through their elected officials impose a reasonable regulation on the doctors providing this procedure. The Court's enjoinder of this law endangers the lives of patients, both the mother and unborn child, and subverts the will of the

people that the people who perform these procedures be regulated. Ultimately, this is the balancing on one person's medical practice (which he has not demonstrated that he has been proactive about maintaining) and the health and will of the public. The health and will of the public should win out.

CONCLUSION

This Court should overrule Plaintiff's Motion for Temporary Injunction and grant any other relief that the Court finds to be just and equitable.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day October, 2014, a true and correct copy of the foregoing document by U.S. mail and a courtesy copy via email to the following persons

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EXHIBIT 6

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

(1) LARRY A. BURNS, D.O., on behalf of himself and his patients, Plaintiff, v. (2) TERRY L. CLINE, in his official capacity as Oklahoma Commissioner of Health (3) CARL B. PETTIGREW, D.O., in his official capacity as President of the Oklahoma State Board of Osteopathic Examiners, and (4) GREG MASHBURN, in his official capacity as District Attorney for Cleveland, Garvin, and McClain Counties; Defendants.	Case No. CV-2014-1896 Judge Graves

PLAINTIFF'S REPLY IN SUPPORT OF HIS MOTION FOR A TEMPORARY INJUNCTION AND FOR EXPEDITED BRIEFING AND HEARING ON THAT MOTION OR, ALTERNATIVELY, A TEMPORARY RESTRAINING ORDER

I. Dr. Burns has Standing To Assert the Constitutional Rights of His Patients

Defendants' argument that Dr. Burns lacks standing to raise the rights of his patients flies in the face of nearly 50 years of U.S. Supreme Court precedent, which explicitly recognizes that an abortion provider has standing to challenge restrictions and to assert claims on behalf of women seeking abortions. *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S 416, 440 n.30 (1983) (collecting cases). This precedent guides the Oklahoma Supreme Court in issues of standing. *Toxic Waste Impact Grp., Inc. v. Leavitt*, 1994 OK 148, 890 P.2d 906, 910 n.7; *Hendrick v. Walters*, 1993 OK 162, 865 P.2d 1232, 1236 n.14. The reasons identified by the Supreme Court in support of third party standing in this context -- that physicians who provide abortions have a sufficiently close relationship with their patients and are thus "uniquely qualified to litigate the constitutionality of the State's interference with" the abortion decision, and that there are several obstacles preventing women from bringing their own claims, including concerns about anonymity and potential mootness, *Singleton v. Wulff*, 428 U.S. 106, 117–18 (1976) -- apply here with equal force, and Defendants' argument to the contrary should be rejected.

II. Dr. Burns Is Likely to Succeed on His Due Process Claim

In arguing that Dr. Burns's due process claim fails because he did not apply for admitting privileges as soon as S.B. 1848 was enacted, Defendants mistakenly rely on *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583 (5th Cir. 2014). There, the Court enjoined enforcement of a similar privileges requirement as to all physicians who had applications pending prior to the effective date of law, regardless of when the applications were submitted relative to the date of the law's enactment. *Id.* at 600. This Court should afford Dr. Burns the same procedural due process rights and enjoin enforcement of S.B.

1848 while his applications remain pending. *See also June Med. Servs., LLC v. Caldwell*, No. 3:14-CV-00525-JWD-RLB, 2014 WL 4296679, at *7 (M.D. La. Aug. 31, 2014).

III. S.B. 1848 Violates the Single-Subject Rule

In arguing that S.B. 1848 does not violates the single subject rule, Defendants fail to apply the germaneness test required by Oklahoma courts. Defendants' argument that "the plurality of subject need be quite egregious for a violation of the rule to be found," Defs.' Br. at 10, is simply not the law.[1] Regardless of whether the Legislature includes ninety unrelated subjects, *see, e.g., Douglas v. Cox Ret. Props., Inc.*, 2013 OK 37, 302 P.3d 789, or just two, *see e.g., In re Initiative Petition No. 382*, 2006 OK 45, 142 P.3d 400, the same germaneness test applies.

Defendants completely ignore cases in which Oklahoma courts have struck down multiple-subject abortion regulations. In *Nova Health Sys. v. Edmondson*, 2010 OK 21, ¶ 1, 233 P.3d 380, 381–82, the Oklahoma Supreme Court held that a statute composed of five separate provisions regulating abortion was "obviously violative" of the single-subject rule. (The bill at issue in *Nova* is attached as Appendix 1.) *See also Davis v. Edmondson*, No. CJ-2009-9154, 2010 WL 1734636 (Dist. Ct. Okla. Cnty. Mar. 2, 2010) (statute banning sex-selective abortions and imposing reporting requirements); *Okla. Coal. for Reprod. Justice v. Okla. State Bd. of Pharm.*, No. CV-2013-1640, slip op. at 2 (Dist. Court. Okla. Jan.

[1] Defendants' reliance for this argument on *Rupe v. Shaw*, 1955 OK 223, 286 P.2d 1094, is misplaced, as the Oklahoma Supreme Court has since rejected its approach in favor of the germaneness test. *See, e.g., Thomas v. Henry*, 2011 OK 53, ¶ 27, 260 P.3d 1251, 1260 (explaining that the Oklahoma Supreme Court has long since rejected "the broad, expansive theme approach to the single-subject requirement" it once employed in favor of the germaneness test); *see also In re Initiative Petition No. 382*, 2006 OK 45, ¶¶ 13–14, 142 P.3d at 407–408 (distinguishing *Rupe*). Defendants are also mistaken that the bill challenged in *Thomas v. Henry* was "deemed constitutional." *See* Defs.' Br. at 9. A provision of the bill limiting eligibility for reduced university tuition was deemed an *unconstitutional* violation of the single subject rule. 2011 OK 53, ¶¶ 29–31, 260 P.3d at 1261–62.

29, 2014) (*see* Appendix 2) (statute restricting emergency contraception and regulating health insurance).

The unconstitutional choice presented to the legislature by S.B. 1848 is precisely the type of all-or-nothing choice the single subject rule was designed to prevent. *See In re Initiative Petition No. 382*, 2006 OK 45, ¶¶ 14–15, 142 P.3d at 407–408; *Fent v. State ex rel. Okla. Capitol Improvement Auth.*, 2009 OK 15, ¶ 23, 214 P.3d 799, 807. Legislators who favored certain provisions of S.B. 1848 were forced to vote to enact the admitting privileges provision in order to enact other provisions of S.B. 1848 or vice versa. When the very same admitting privileges restriction was proposed as a stand-alone bill during the same legislative session,[2] it failed to pass. It was only enacted when combined in an omnibus bill with five other unrelated provisions.

IV. S.B. 1848 Is an Unconstitutional Special Law

Oklahoma courts have repeatedly held that laws, like S.B. 1848, that single out one type of medical procedure for regulation are special laws. *Reynolds v. Porter*, 1988 OK 88, 760 P.2d 816, 822; *Orthopedic Hosp. of Okla. State Dep't of Health*, 2005 OK CIV APP 43, ¶ 15, 118 P.3d 216, 223; *Nova Health Sys. v. Pruitt*, No. 2:12-cv-00395, 2012 WL 1034022 (Dist. Ct. Okla. Cnty. Mar. 28, 2012) (mandatory ultrasound requirement that subjected physicians who provided abortion to unique professional burdens violated the prohibition against special laws because it failed to address "other medical care where a general law could clearly be made applicable.").

Defendants contend that the special law claim fails because the presence of the State's interest in potential life makes abortion unique. Defs.' Br. at 13. Even if this proposition were

[2] Engrossed 2013 OK H.B. 2418 (Feb. 27, 2014), *available at* http://webserver1.lsb.state.ok.us/cf_pdf/2013-14%20ENGR/hB/HB2418%20ENGR.PDF.

correct, which it is not, the presence of a doctor with admitting privileges is not rationally related to any interest the state may assert in potential life.

Defendants further argue that every outpatient surgical procedure requires an individual evaluation to determine the safest procedures and emergency protocols. *See* Defs.' Br. at 12. However, the state has not created a statutory scheme for every type of outpatient surgical procedure; rather, it has one general standard for all doctors performing outpatient surgical procedures and a separate, more onerous standard for doctors performing for abortion.

Finally, Defendants contend that the admitting privileges requirement protects women's health, but courts across the country, as well as the American College of Obstetricians and Gynecologists, have recognized that admitting privileges do not serve patient health. *See Planned Parenthood Se., Inc. v. Strange*, 2:13CV405-MHT, 2014 WL 3809403, at *41 (M.D. Ala. Aug. 4, 2014); *Planned Parenthood of Wis. v. Van Hollen*, No. 13–cv–465–wmc, 2013 WL 3989238, *14 (W.D. Wis. Aug. 2, 2013); Am. College of Obstetricians and Gynecologists, *Guidelines for Women's Health: A Resource Manual* 433 (3d ed. 2007).

V. S.B. 1848 Violates the Non-Delegation Clause

Hospital boards can deny, and have denied, Dr. Burns admitting privileges for reasons unrelated to his qualifications to provide abortion care. Indeed, precisely because Dr. Burns's patients experience so few complications, Dr. Burns does not meet the minimum number of patients who must be admitted per year to meet the business needs of local hospitals. The varying requirements applied by the hospitals demonstrate beyond doubt that the legislature did not prescribe the criteria hospital boards should use when determining whether to grant privileges. The legislature has given hospital boards unfettered discretion to, in effect, determine whether women in Oklahoma can exercise their fundamental constitutional rights.

Defendants' reliance on the Fifth Circuit's decision in *Abbott*, 748 F.3d 583, to rebut Dr. Burns's non-delegation claim is misplaced because the Oklahoma Constitution provides broader protection against unconstitutional delegation than federal law. *Democratic Party of Okla. v. Estep*, 1982 OK 106, 652 P.2d 271, 277–78.

VI. Dr. Burns and His Patients Will Suffer Irreparable Harm and the Balance of Equities Favors Temporary Injunctive Relief

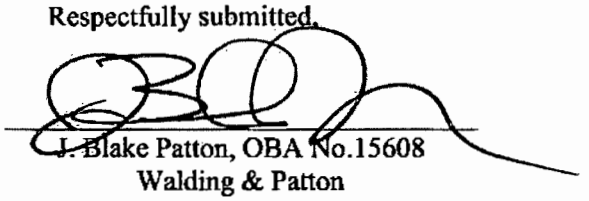
The multiple constitutional violations that would result from enforcement of S.B. 1848 constitute *per se* irreparable harm. *See Caldwell*, 2014 WL 4296679 at *7 (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Further, if S.B. 1848 is allowed to take effect, it will deprive Dr. Burns of his livelihood, which is precisely the type of harm that cannot be fully compensated by money damages. *See Tulsa Order of Police Lodge No. 93 v. City of Tulsa*, 2001 OK CIV APP 153, ¶ 28, 39 P.3d 152, 159. Defendants assert without any legal or factual basis that S.B. 1848 will diminish the risk of "undue bodily harm, pain, and complications." Defs.' Br. at 17. The uncontroverted evidence in the record is that the admitting privileges requirement will harm women's health by a cutting off access to an experienced physician with an impeccable safety record. *See* Estes Aff. ¶¶ 42, 45, 48, 50–52; Burns Aff. ¶¶ 8–17. Thus, Dr. Burns has established irreparable harm as to both himself and his patients, and, moreover, that the balance of equities tips sharply in his favor.

CONCLUSION

For the reasons stated above, Dr. Burns respectfully requests that this Court grant his motion for a temporary injunction, or in the alternative, a temporary restraining order.

Dated: October 16, 2014

Respectfully submitted,



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**Out-of-State Attorney Application and Motion to Associate Forthcoming*
***Admitted to Practice by Order dated Oct. 2, 2014*

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 16th day of October, 2014 true and correct copies of the foregoing were sent via e-mail and U.S. mail to the following:

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Litigation Division
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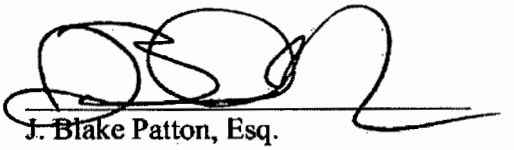
Counsel for Defendants



J. Blake Patton, Esq.

APPENDIX 1

An Act

ENROLLED SENATE
BILL NO. 1878

By: Lamb, Williamson, Barrington, Jolley, Mazzei, Brown, Ford, Crain, Wilcoxson, Coates, Laughlin, Justice, Sykes, Bingman, Johnson (Mike), Reynolds, Brogdon, Myers, Coffee and Aldridge of the Senate

and

Peterson (Pam), McCullough, Banz, Billy, Cooksey, Denney, Duncan, Hamilton, McNiel, Reynolds, Steele, Sullivan, Terrill, Thompson, Thomsen, Tibbs, Trebilcock, Worthen and Wright of the House

An Act relating to public health and safety; creating the Freedom of Conscience Act; providing short title; defining terms; prohibiting employers from discriminating against certain persons for refusing to perform specified acts based on certain beliefs; making certain provisions inapplicable under certain circumstances; providing defense; prohibiting forced participation in specified acts by certain persons under certain circumstances; providing immunity from liability; providing for equitable relief and damages; providing statute of limitations; defining terms; prohibiting the sale or distribution of mifepristone except by a physician in certain circumstances; requiring compliance with certain federal laws; requiring the preparation of written report in certain circumstances; providing for inspection of certain reports; providing for confidentiality of certain persons; specifying

exceptions; providing for civil action; authorizing attorney fees; providing for certain punishment; authorizing sanctions by certain licensing boards; mandating certain sign posting for facilities that perform, induce, or prescribe for abortions or where the means for an abortion are provided; specifying wording of sign; specifying typeface of sign; specifying areas of sign posting; establishing penalty for noncompliance; providing for certain disclosure to minors; providing for certain certification by minors; authorizing certain civil actions; amending Section 6, Chapter 200, O.S.L. 2005, as amended by Section 2, Chapter 161, O.S.L. 2007 (63 O.S. Supp. 2007, Section 1-738.1), which relates to definitions; defining term; requiring performance of an ultrasound and explanation of the ultrasound prior to a pregnant woman having an abortion; providing for aversion of eyes from ultrasound; excepting compliance with requirement in a medical emergency; providing for certification; requiring retention of records; providing penalty for false certification; providing for damages; authorizing injunctive relief; specifying persons who may bring action for noncompliance with act; providing penalty; providing penalties for noncompliance with injunction; authorizing private right of action; providing for revocation of license or certificate; stating legislative intent; defining terms; prohibiting recovery of damages in certain circumstances for wrongful birth and wrongful life actions; excepting specific circumstances; providing for codification; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-728 of Title 63, unless there is created a duplication in numbering, reads as follows:

This act shall be known and may be cited as the "Freedom of Conscience Act".

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-728.1 of Title 63, unless there is created a duplication in numbering, reads as follows:

As used in the Freedom of Conscience Act:

1. "Health care facility" means any public or private organization, corporation, authority, partnership, sole proprietorship, association, agency, network, joint venture, or other entity that is involved in providing health care services, including a hospital, clinic, medical center, ambulatory surgical center, private physician's office, pharmacy, nursing home, university hospital, medical school, nursing school, medical training facility, inpatient health care facility, or other place where health care services are provided;

2. "Human embryo" means a human organism that is derived by fertilization, parthenogenesis, cloning, or any other means from one or more human gametes or human diploid cells;

3. "In vitro human embryo" means a human embryo, whether cryopreserved or not, living outside of a woman's body;

4. "Participate in" means to perform, practice, engage in, assist in, recommend, counsel in favor of, make referrals for, prescribe, dispense, or administer drugs or devices or otherwise promote or encourage; and

5. "Person" means any individual, corporation, industry, firm, partnership, association, venture, trust, institution, federal, state or local governmental instrumentality, agency or body or any other legal entity however organized.

SECTION 3. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-728.2 of Title 63, unless there is created a duplication in numbering, reads as follows:

An employer shall not discriminate against an employee or prospective employee by refusing to reasonably accommodate the

religious observance or practice of the employee or prospective employee, unless the employer can demonstrate that the accommodation would pose an undue hardship on the program, enterprise, or business of the employer, in the following circumstances:

1. An abortion as defined in Section 1-730 of Title 63 of the Oklahoma Statutes. The provisions of this section shall not apply if the pregnant woman suffers from a physical disorder, physical injury, or physical illness which, as certified by a physician, causes the woman to be in imminent danger of death unless an abortion is immediately performed or induced and there are no other competent personnel available to attend to the woman. As used in this act, the term "abortion" shall not include the prescription of contraceptives;

2. An experiment or medical procedure that destroys an in vitro human embryo or uses cells or tissue derived from the destruction of an in vitro human embryo;

3. An experiment or medical procedure on an in vitro human embryo that is not related to the beneficial treatment of the in vitro human embryo;

4. An experiment or medical procedure on a developing child in an artificial womb, at any stage of development, that is not related to the beneficial treatment of the developing child;

5. A procedure, including a transplant procedure, that uses fetal tissue or organs that come from a source other than a stillbirth or miscarriage; or

6. An act that intentionally causes or assists in causing the death of an individual by assisted suicide, euthanasia, or mercy killing.

SECTION 4. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-728.3 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. No health care facility is required to admit any patient or to allow the use of the health care facility for the purpose of performing any of the acts specified in Section 3 of this act.

B. A physician, physician's assistant, registered nurse, practical nurse, pharmacist, or any employee thereof, or any other person who is an employee of, member of, or associated with the staff of a health care facility in which the performance of an activity specified in Section 3 of this act has been authorized, who in writing, refuses or states an intention to refuse to participate in the activity on moral or religious grounds shall not be required to participate in the activity and shall not be disciplined by the respective licensing board or authorized regulatory department for refusing or stating an intention to refuse to participate in the practice with respect to the activity.

C. A physician, physician's assistant, registered nurse, practical nurse, pharmacist, or any employee thereof, or any other person who is an employee of, member of, or associated with the staff of a health care facility is immune from liability for any damage caused by the refusal of the person to participate in an activity specified in Section 3 of this act on moral or religious grounds.

SECTION 5. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-728.4 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. No health care facility, school, or employer shall discriminate against any person with regard to admission, hiring or firing, tenure, term, condition, or privilege of employment, student status, or staff status on the ground that the person refuses or states an intention to refuse, whether or not in writing, to participate in an activity specified in Section 3 of this act, if the refusal is based on religious or moral precepts.

B. No person shall be required to:

1. Participate in an activity specified in Section 3 of this act if the individual's participation in the activity is contrary to the person's religious beliefs or moral convictions;

2. Make facilities available for an individual to participate in an activity specified in Section 3 of this act if the person

prohibits the activity from taking place in the facilities on the basis of religious beliefs or moral convictions; or

3. Provide any personnel to participate in an activity specified in Section 3 of this act if the activity is contrary to the religious beliefs or moral convictions of the personnel.

SECTION 6. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-728.5 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. For the purposes of this section, "damages" do not include noneconomic damages, as defined in Section 1-1708.1C of Title 63 of the Oklahoma Statutes.

B. A person who is adversely affected by conduct that is in violation of the Freedom of Conscience Act may bring a civil action for equitable relief, including reinstatement or damages, or both reinstatement and damages. An action under this subsection may be commenced against the state and any office, department, independent agency, authority, institution, association, or other body in state government created or authorized to be created by the state constitution or any law. In an action under this subsection, the court shall award reasonable attorney fees to a person who obtains equitable relief, damages, or both. An action under this subsection shall be commenced within one (1) year after the cause of action accrues or be barred.

SECTION 7. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-729 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. As used in this section:

1. "Federal law" means any law, rule, or regulation of the United States or any drug approval letter of the United States Food and Drug Administration that governs or regulates the use of RU-486, mifepristone, for the purpose of inducing abortions;

2. "Personal identifying information" means any information designed, commonly used or capable of being used, alone or in conjunction with any other information, to identify a person; and

3. "Physician" means a doctor of medicine or osteopathy legally authorized to practice medicine in this state.

B. No person shall knowingly give, sell, dispense, administer, prescribe or otherwise provide RU-486, also known as mifepristone, for the purpose of inducing an abortion in a pregnant female, unless the person who gives, sells, dispenses, administers, prescribes or otherwise provides the RU-486, mifepristone, is a physician who satisfies all the criteria established by federal law that a physician must satisfy in order to provide RU-486, mifepristone, for inducing abortions.

C. No physician who provides RU-486, mifepristone, for the purpose of inducing an abortion shall knowingly fail to comply with the applicable requirements of any federal law that pertain to follow-up examinations or care for any female for whom RU-486, mifepristone, is provided for the purpose of inducing an abortion.

D. 1. If a physician provides RU-486, mifepristone, for the purpose of inducing an abortion and if the physician knows that the female who uses the RU-486, mifepristone, for the purpose of inducing an abortion experiences during or after the use of RU-486, mifepristone, an incomplete abortion, severe bleeding, or an adverse reaction to the RU-486, mifepristone, or is hospitalized, receives a transfusion, or experiences any other serious event, the physician shall promptly provide a written report of the incomplete abortion, severe bleeding, adverse reaction, hospitalization, transfusion, or serious event to the State Board of Medical Licensure and Supervision or State Board of Osteopathic Examiners. The Board shall compile and retain all reports it receives pursuant to this subsection. Except as otherwise provided in this subsection, all reports the Board receives under this subsection are public records open to inspection pursuant to the Oklahoma Open Records Act; however, the Board shall not release the name or any other personal identifying information regarding a person who uses or provides RU-486, mifepristone, for the purpose of inducing an abortion and who is the subject of a report the Board receives under this subsection.

2. No physician who provides RU-486, mifepristone, to a pregnant female for the purpose of inducing an abortion as

authorized under subsection B of this section shall knowingly fail to file a report required under paragraph 1 of this subsection.

E. Subsection B of this section shall not apply to any of the following:

1. A pregnant female who obtains or possesses RU-486, mifepristone, for the purpose of inducing an abortion to terminate her own pregnancy;

2. The legal transport of RU-486, mifepristone, by any person or entity and the legal delivery of the RU-486, mifepristone, by any person to the recipient. This paragraph shall not apply to any conduct related to the RU-486, mifepristone, other than its transport and delivery to the recipient; or

3. The distribution, provision, or sale of RU-486, mifepristone, by any legal manufacturer or distributor of RU-486, mifepristone, provided the manufacturer or distributor made a good-faith effort to comply with any applicable requirements of federal law regarding the distribution, provision, or sale.

F. Any female upon whom an abortion has been performed without this section having been complied with, the father of the unborn child who was the subject of the abortion, if the father was married to the woman who received the abortion at the time the abortion was performed, or the maternal grandparent of the unborn child, may maintain an action against the person who performed the abortion in knowing or reckless violation of this section for actual and punitive damages. Any female upon whom an abortion has been attempted in knowing or reckless violation of this section may maintain an action against the person who attempted to perform the abortion for actual and punitive damages.

G. If judgment is rendered in favor of the plaintiff in any action described in this section, the court shall also render judgment for a reasonable attorney fee in favor of the plaintiff against the defendant. If judgment is rendered in favor of the defendant and the court finds that the plaintiff's suit was frivolous and brought in bad faith, the court shall also render judgment for a reasonable attorney fee in favor of the defendant against the plaintiff.

H. Any person who violates this section, upon conviction, shall be guilty of a felony. If the offender is a professionally licensed health care provider, in addition to any other sanction imposed by law for the offense, the offender is subject to sanctioning as provided by law by the licensing board having administrative authority over that professionally licensed person.

SECTION 8. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-737.1 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. Any private office, freestanding outpatient clinic, or other facility or clinic in which abortions, other than abortions necessary to prevent the death of the pregnant female, are performed, induced, prescribed for, or where the means for an abortion are provided shall conspicuously post a sign in a location defined in subsection C of this section so as to be clearly visible to patients, which reads:

> Notice: It is against the law for anyone, regardless of his or her relationship to you, to force you to have an abortion. By law, we cannot perform, induce, prescribe for, or provide you with the means for an abortion unless we have your freely given and voluntary consent. It is against the law to perform, induce, prescribe for, or provide you with the means for an abortion against your will. You have the right to contact any local or state law enforcement agency to receive protection from any actual or threatened physical abuse or violence.

B. The sign required pursuant to subsection A of this section shall be printed with lettering that is legible and shall be at least three-quarters-of-an-inch boldfaced type.

C. A facility in which abortions are performed, induced, prescribed for, or where the means for an abortion are provided that is a private office or a freestanding outpatient clinic shall post the required sign in each patient waiting room and patient consultation room used by patients on whom abortions are performed, induced, prescribed for, or who are provided with the means for an abortion. A hospital or any other facility in which abortions are performed, induced, prescribed for, or where the means for an

abortion are provided that is not a private office or freestanding outpatient clinic shall post the required sign in each patient admission area used by patients on whom abortions are performed, induced, prescribed for, or by patients who are provided with the means for an abortion.

SECTION 9. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-737.2 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. Any private office, freestanding outpatient clinic or other facility or clinic that fails to post a required sign in knowing, reckless, or negligent violation of this act shall be assessed an administrative fine of Ten Thousand Dollars ($10,000.00). Each day on which an abortion, other than an abortion necessary to prevent the death of the pregnant female, is performed, induced, prescribed for, or where the means for an abortion are provided in a private office, freestanding outpatient clinic or other facility or clinic in which the required sign is not posted during any portion of business hours when patients or prospective patients are present is a separate violation.

B. An action may be brought by or on behalf of an individual injured by the failure to post the required sign. A plaintiff in an action under this subsection may recover damages for emotional distress and any other damages allowed by law.

C. The sanctions and actions provided in this section shall not displace any sanction applicable under other law.

SECTION 10. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-737.3 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. If the pregnant female is a minor, the attending physician shall orally inform the female that no one can force her to have an abortion and that an abortion cannot be performed, induced, prescribed for, or that the means for an abortion cannot be provided unless she provides her freely given, voluntary, and informed consent.

B. The minor female shall certify in writing, prior to the performance of, induction of, receiving the prescription for, or provision of the means for the abortion, that she was informed by the attending physician of the required information in subsection A of this section. A copy of the written certification shall be placed in the minor's file and kept for at least seven (7) years or for five (5) years after the minor reaches the age of majority, whichever is greater.

SECTION 11. AMENDATORY Section 6, Chapter 200, O.S.L. 2005, as amended by Section 2, Chapter 161, O.S.L. 2007 (63 O.S. Supp. 2007, Section 1-738.1), is amended to read as follows:

Section 1-738.1 As used in Sections 1-738.1 through 1-738.5 of this title:

1. "Abortion" means the term as is defined in Section 1-730 of this title;

2. "Attempt to perform an abortion" means an act, or an omission of a statutorily required act, that, under the circumstances as the actor believes them to be, constitutes a substantial step in a course of conduct planned to culminate in the performance of an abortion in this state in violation of this act;

3. "Board" means the State Board of Medical Licensure and Supervision;

4. "Medical emergency" means the existence of any physical condition, not including any emotional, psychological, or mental condition, which a reasonably prudent physician, with knowledge of the case and treatment possibilities with respect to the medical conditions involved, would determine necessitates the immediate abortion of the pregnancy of the female to avert her death or to avert substantial and irreversible impairment of a major bodily function arising from continued pregnancy;

5. "Physician" means a person licensed to practice medicine in this state pursuant to Sections 495 and 633 of Title 59 of the Oklahoma Statutes;

6. "Probable gestational age of the unborn child" means what, in the judgment of the physician, will with reasonable probability be the gestational age of the unborn child at the time the abortion is planned to be performed;

7. "Stable Internet web site" means a web site that, to the extent reasonably practicable, is safeguarded from having its content altered other than by the State Board of Medical Licensure and Supervision; ~~and~~

8. "Unborn child" means the term as is defined in Section 1-730 of this title; and

9. "Woman" means a female human being whether or not she has reached the age of majority.

SECTION 12. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-738.3b of Title 63, unless there is created a duplication in numbering, reads as follows:

A. Any abortion provider who knowingly performs any abortion shall comply with the requirements of this section.

B. In order for the woman to make an informed decision, at least one (1) hour prior to a woman having any part of an abortion performed or induced, and prior to the administration of any anesthesia or medication in preparation for the abortion on the woman, the physician who is to perform or induce the abortion, or the certified technician working in conjunction with the physician, shall:

1. Perform an obstetric ultrasound on the pregnant woman, using either a vaginal transducer or an abdominal transducer, whichever would display the embryo or fetus more clearly;

2. Provide a simultaneous explanation of what the ultrasound is depicting;

3. Display the ultrasound images so that the pregnant woman may view them;

4. Provide a medical description of the ultrasound images, which shall include the dimensions of the embryo or fetus, the presence of cardiac activity, if present and viewable, and the presence of external members and internal organs, if present and viewable; and

5. Obtain a written certification from the woman, prior to the abortion, that the requirements of subsection B have been complied with; and

6. Retain a copy of the written certification prescribed by paragraph 5 of this subsection. The certification shall be placed in the medical file of the woman and shall be kept by the abortion provider for a period of not less than seven (7) years. If the woman is a minor, then the certification shall be placed in the medical file of the minor and kept for at least seven (7) years or for five (5) years after the minor reaches the age of majority, whichever is greater.

C. Nothing in this section shall be construed to prevent a pregnant woman from averting her eyes from the ultrasound images required to be provided to and reviewed with her. Neither the physician nor the pregnant woman shall be subject to any penalty if she refuses to look at the presented ultrasound images.

D. Upon a determination by an abortion provider that a medical emergency, as defined in Section 1-738.1 of Title 63 of the Oklahoma Statutes, exists with respect to a pregnant woman, the provider shall certify in writing the specific medical conditions that constitute the emergency. The certification shall be placed in the medical file of the woman and shall be kept by the abortion provider for a period of not less than seven (7) years. If the woman is a minor, then the certification shall be placed in the medical file of the minor and kept for at least seven (7) years or for five (5) years after the minor reaches the age of majority, whichever is greater.

E. An abortion provider who willfully falsifies a certification under subsection D of this section shall be subject to all penalties provided for under Section 13 of this act.

SECTION 13. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-738.3c of Title 63, unless there is created a duplication in numbering, reads as follows:

A. An abortion provider who knowingly violates a provision of Section 12 of this act shall be liable for damages as provided in this section and may be enjoined from such acts in accordance with this section in an appropriate court.

B. A cause of action for injunctive relief against any person who has knowingly violated a provision of Section 12 of this act may be maintained by the woman upon whom an abortion was performed or attempted to be performed in violation of this act; any person who is the spouse, parent, sibling or guardian of, or a current or former licensed health care provider of, the female upon whom an abortion has been performed or attempted to be performed in violation of this act; by a district attorney with appropriate jurisdiction; or by the Attorney General. The injunction shall prevent the abortion provider from performing further abortions in violation of this act in the State of Oklahoma.

C. Any person who knowingly violates the terms of an injunction issued in accordance with this section shall be subject to civil contempt, and shall be fined Ten Thousand Dollars ($10,000.00) for the first violation, Fifty Thousand Dollars ($50,000.00) for the second violation, One Hundred Thousand Dollars ($100,000.00) for the third violation, and for each succeeding violation an amount in excess of One Hundred Thousand Dollars ($100,000.00) that is sufficient to deter future violations. The fines shall be the exclusive penalties for such contempt. Each performance or attempted performance of an abortion in violation of the terms of an injunction is a separate violation. These fines shall be cumulative. No fine shall be assessed against the woman on whom an abortion is performed or attempted.

D. A pregnant woman upon whom an abortion has been performed in violation of Section 12 of this act, or the parent or legal guardian of the woman if she is an unemancipated minor, as defined in Section 1-740.1 of Title 63 of the Oklahoma Statutes, may commence a civil action against the abortion provider for any knowing or reckless violation of this act for actual and punitive damages.

E. An abortion provider who performed an abortion in violation of Section 12 of this act shall be considered to have engaged in unprofessional conduct for which the provider's certificate or license to provide health care services in this state may be suspended or revoked by the State Board of Medical Licensure and Supervision or the State Board of Osteopathic Examiners.

SECTION 14. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-741.11 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. It is the intent of the Legislature that the birth of a child does not constitute a legally recognizable injury and that it is contrary to public policy to award damages because of the birth of a child or for the rearing of that child.

B. For the purposes of this section:

1. "Abortion" means the term as is defined in Section 1-730 of Title 63 of the Oklahoma Statutes;

2. "Wrongful life action" means a cause of action that is brought by or on behalf of a child, which seeks economic or noneconomic damages for the child because of a condition of the child that existed at the time of the child's birth, and which is based on a claim that a person's act or omission contributed to the mother's not having obtained an abortion; and

3. "Wrongful birth action" means a cause of action that is brought by a parent or other person who is legally required to provide for the support of a child, which seeks economic or noneconomic damages because of a condition of the child that existed at the time of the child's birth, and which is based on a claim that a person's act or omission contributed to the mother's not having obtained an abortion.

C. In a wrongful life action or a wrongful birth action, no damages may be recovered for any condition that existed at the time of a child's birth if the claim is that the defendant's act or omission contributed to the mother's not having obtained an abortion.

D. This section shall not preclude causes of action based on claims that, but for a wrongful act or omission, maternal death or injury would not have occurred, or handicap, disease, or disability of an individual prior to birth would have been prevented, cured, or ameliorated in a manner that preserved the health and life of the affected individual.

SECTION 15. This act shall become effective November 1, 2008.

Passed the Senate the 9th day of April, 2008.

Presiding Officer of the Senate

Passed the House of Representatives the 2nd day of April, 2008.

Presiding Officer of the House of Representatives

OFFICE OF THE GOVERNOR

Received by the Governor this 10th day of April, 2008, at 3:51 o'clock P M.

By: [signature]

Approved by the Governor of the State of Oklahoma the _____ day of _____, 20___, at _____ o'clock _____ M.

_____
Governor of the State of Oklahoma

OFFICE OF THE SECRETARY OF STATE

Received by the Secretary of State this 17th day of April, 2008, at 12:35 o'clock P. M.

By: [signature]

APPENDIX 2

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

OKLAHOMA COALITION FOR REPRODUCTIVE JUSTICE, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. CV-2013-1640
OKLAHOMA STATE BOARD OF PHARMACY, et al.	)	Judge Lisa T. Davis
Defendants.	)	

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiffs' Motion for a Summary Judgment comes on for hearing on January 23, 2014. The Plaintiffs appeared by David Brown, Tiseme Zegeye, Martha M. Hardwick, and Anne Zachritz. All Defendants, represented by the office of Attorney General E. Scott Pruitt, appeared by Patrick R. Wyrick, Solicitor General, and Cura N. Rodriguez, Assistant Solicitor General. After reviewing Plaintiffs' Motion for Summary Judgment, Plaintiffs' Memorandum of Law in Support of their Motion for Summary Judgment, Defendants' Response in Opposition to Plaintiffs' Motion for Summary Judgment and Defendants' Cross-Motion for Summary Judgment, Defendants' Memorandum of Law in Support of their Response in Opposition to Plaintiffs' Motion for Summary Judgment and Defendants' Cross-Motion for Summary Judgment, Plaintiffs' Memorandum of Law in Opposition to Defendants' Cross-Motion for Summary Judgment and in Further Support of Plaintiffs' Motion for Summary Judgment, and Defendants' Reply to Plaintiffs' Memorandum of Law in Opposition to Defendants' Cross-Motion for Summary

Judgment, and having heard oral argument, the Court hereby **GRANTS** Plaintiffs' motion and **DENIES** Defendants' motion.

Plaintiffs have demonstrated that there are no material facts in dispute and House Bill 2226, codified at OKLA. STAT. tit. 59, § 369 and OKLA. STAT. tit. 63, § 313A, violates the single subject rule of Article V Section 57 of the Oklahoma Constitution. Therefore,

IT IS HEREBY ORDERED:

1. House Bill 2226, codified at OKLA. STAT. tit. 59, § 369 and OKLA. STAT. tit. 63, § 313A, is declared unconstitutional and is void and of no effect.

2. The Defendants, their employees, agents, and successors in office are hereby permanently enjoined from enforcing the provisions of House Bill 2226.

IT IS SO ORDERED.

Dated: 1/28, 2014

LISA DAVIS

The Honorable Lisa T. Davis

Approved as to form:

By: _____

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*Admitted to Practice by Order dated August 9, 2013.

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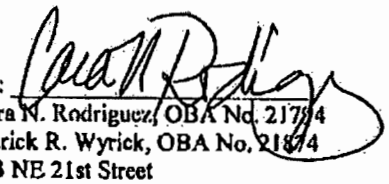
Attorney General of the State of Oklahoma

By: 
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ATTORNEYS FOR DEFENDANTS

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

(1) LARRY A. BURNS, D.O., on behalf of himself and his patients,	)	
Plaintiff,	)	
	)	Case No. CV-2014-1896
v.	)	
(2) TERRY L. CLINE, in his official capacity as Oklahoma Commissioner of Health; (3) CARL B. PETTIGREW, D.O., in his official capacity as President of the Oklahoma State Board of Osteopathic Examiners; and (4) GREG MASHBURN, in his official capacity as District Attorney for Cleveland, Garvin, and McClain Counties,	)	
Defendants.	)	

MOTION FOR LEAVE TO FILE RESPONSE BRIEF OUT OF TIME

COME NOW the Defendants and move this Honorable Court for an order permitting them to file their Response to Plaintiff's Motion for Temporary Injunction out of time. In support hereof, Defendants show the Court:

1. Plaintiff filed and served his Petition and Motion for Preliminary Injunction on October 2, 2014;

2. Defendants seek to file their response on October 14, 2014, only 12 days after service of the Petition and Motion;

3. The hearing on Plaintiff's Motion for Temporary Injunction is October 17, 2014;

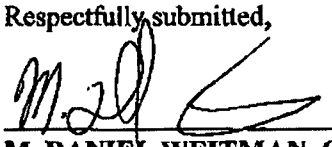
4. Pursuant to Local Rule 37(C), all briefs in response to motions must be filed and delivered to the assigned judge within 5 days of the hearing or the response will be stricken.

Adherence to this rule would have left Defendants with insufficient time to properly respond to Plaintiff's motion;

5. Counsel for the Defendants has spoken to counsel for Plaintiff and is authorized to advise that Plaintiff has no objection to Defendants filing their response on October 14, 2014. Plaintiff will file his reply on October 16, 2014 to which Defendants have no objection.

WHEREFORE, premises considered, Defendants pray that this honorable Court grant them leave to file their Response to Plaintiff's Motion for Temporary Injunction on October 14, 2014.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day October, 2014, a true and correct copy of the foregoing document was sent via email to the following persons:

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IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

(1) LARRY A. BURNS, D.O., on behalf of himself and his patients, Plaintiff, v. (2) TERRY L. CLINE, in his official capacity as Oklahoma Commissioner of Health; (3) CARL B. PETTIGREW, D.O., in his official capacity as President of the Oklahoma State Board of Osteopathic Examiners; and (4) GREG MASHBURN, in his official capacity as District Attorney for Cleveland, Garvin, and McClain Counties, Defendants.	Case No. CV-2014-1896

ORDER

NOW on this 14th day of October, 2014, the matter of Defendants' Motion for Leave to File Response Brief Out of Time comes on before the undersigned Judge of the District Court. The Court, being advised in the premises and hearing agreement of the parties finds and orders that Defendants' Motion should be and is hereby SUSTAINED. Defendants are permitted to file their Response to Plaintiff's Motion on October 14, 2014. Plaintiff will file his reply on October 16, 2014.

_____
Judge of the District Court

Approved:

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EXHIBIT 7

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

(1) LARRY A. BURNS, D.O., on behalf of himself and his patients, Plaintiff,	)	
v.	)	Case No.
(2) TERRY L. CLINE, in his official capacity as Oklahoma Commissioner of Health	)	CV-2014-1896
(3) CARL B. PETTIGREW, D.O., in his official capacity as President of the Oklahoma State Board of Osteopathic Examiners, and	)	
(4) GREG MASHBURN, in his official capacity as District Attorney for Cleveland, Garvin, and McClain Counties; Defendants.	)	

* *

TRANSCRIPT OF PROCEEDINGS
HAD IN THE SEVENTH JUDICIAL DISTRICT
ON THE 17TH DAY OF OCTOBER, 2014
BEFORE THE
HONORABLE BILL GRAVES,
DISTRICT JUDGE
VOLUME 1 OF 1

* *

ALEXA J. BABCOCK, CSR, RPR, RMR
Official Court Reporter

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I N D E X

REPORTED BY:

ALEXA J. BABCOCK, CSR, RPR, RMR

Official Court Reporter

[On October 17, 2014, with counsel and the Court present, the following transpired in open court proceedings:]

THE COURT: Thank you. Be seated.

Good morning.

MR. PATTON: Good morning, your Honor.

MS. JAROSLAW: Good morning, your Honor.

MS. HARDWICK: Good morning.

MR. WEITMAN: Good morning

THE COURT: Let's see, I think, Alexa probably would like your appearances here before we start. I'm always instructed that way, so we'll start off on the right foot and --

MS. JAROSLAW: Your Honor, it's Ilene Jaroslaw from the Center For Reproductive Rights representing Dr. Burns on his behalf and his patients. With me at counsel table is Genevieve Scott also with the Center, Blake Patton, and Martha Hardwick.

THE COURT: Okay.

Okay. I met Ms. Hardwick.

MR. WEITMAN: Your Honor, for the Defendants, I'm Dan Weitman, Assistant Attorney General. And with me is Sarah Greenwalt, also Assistant Attorney General.

THE COURT: Okay. All right. Only in my mind I had it opposite, I had it wrong, I guess, but -- and

Ms. Hardwick is over there, it should have given me a clue.

[Laughter.]

All right. Mr. Patton's motion here, I believe?

MR. PATTON: Yes, your Honor. I'm associated with Ms. Jaroslaw --

THE COURT: Are you related to my hero, General Patton?

MR. PATTON: I'm not.

THE COURT: Oh, okay.

MR. PATTON: I'm not. Maybe just an uncle, perhaps, but nothing direct.

THE COURT: I just got through reading *Killing Patton* by O'Reilly -- it's a pretty good book.

MR. PATTON: Or -- a good one?

I can't claim any relation, unfortunately.

THE COURT: He, he kind of makes you wonder if he was really murdered.

MR. PATTON: Well -- interesting.

But yes, Ms. Jaroslaw will be handling the argument, your Honor.

THE COURT: Okay. All right. You may speak from there, or use the microphone -- whichever you want.

MS. JAROSLAW: Thank you, Your Honor.

[Pause.]

THE COURT: There must be something big going on

here today, Nolan Clay shows up. That's --

[Laughter.]

MR. CLAY: Thank you, Your Honor. Can I sit in the jury box so I can hear better?

THE COURT: -- you may. You may.

MR. CLAY: Thank you.

[Pause. The Court has an off-the-record discussion with the court reporter. The mike system is set-up in the courtroom. The proceedings continued:]

THE COURT: It's "Jaroslaw" [pronouncing], right?

MS. JAROSLAW: Yes, that's right, your Honor.

THE COURT: Okay.

All right. You may proceed. Thank you.

MS. JAROSLAW: Thank you.

Good morning. May it please the Court. I represent Dr. Burns who challenges the constitutionality of Senate Bill 1848. This statute, it addresses multiple subjects in violation of Oklahoma's single-subject mandate.

Further, the admitting privileges provision targets only abortion patients, and abortion physicians, for onerous and unjustifiable requirements. And as such, it constitutes a special law prohibited by the Oklahoma Constitution.

Further, by leaving it to hospital boards to determine who can provide abortions here in the State of

Oklahoma, S.B. 1848 unconstitutionally delegates legislative authority to hospital boards that are not answerable to the electorate.

And finally, because there's no time limit within which hospitals must act on admitting privileges applications, S.B. 1848, should it go into effect on November 1st, will deprive Dr. Burns of his constitutional, procedural due process rights. And for all these reasons, your Honor, we seek a preliminary injunction, and in the alternative, a Temporary Restraining Order.

I would like to address each of the provisions, in turn, that this statute violates.

THE COURT: Hey, I will say that I have read your briefs, the, your initial brief and the reply brief, as well as the response brief by the Attorney General, so I'm not altogether ignorant of what you're wanting to do.

MS. JAROSLAW: Nor would I --

THE COURT: Yet.

MS. JAROSLAW: -- expect that, your Honor.

THE COURT: Uh-huh. Okay.

MS. JAROSLAW: Would your Honor prefer to ask questions, or shall I go through --

THE COURT: No, you go right ahead --

MS. JAROSLAW: -- the various factors --

THE COURT: -- if I think of something --

MS. JAROSLAW: -- thank you.

THE COURT: -- I'll ask you.

MS. JAROSLAW: First, in order to get --

THE COURT: It probably would be better if I just kept my mouth shut and listened to what you've got to say.

MS. JAROSLAW: -- first, in order to get a preliminary injunction, we have to show a strong likelihood of success on the merits. And I will go through why we have a strong likelihood of succeeding in showing S.B. 1848 to be unconstitutional.

Next, the Plaintiff has to show irreparable harm if injunctive relief is denied, and I will address that as well.

The balancing in terms of the relative effect on the Defendants.

And finally, what is in the public interests.

I'd like to talk about the substantive issues and why Dr. Burns has a strong likelihood of prevailing on the merits that S.B. 1848 is unconstitutional under Oklahoma law.

First, with respect to due process, Dr. Burns has made diligent efforts to apply to approximately sixteen [16] hospitals, all the hospitals --

THE COURT: Are you talking about -- pardon me -- procedural due process, or what they're now calling,

"substantive due process"?

MS. JAROSLAW: -- I'm talking about procedural due process with respect to Dr. Burns.

THE COURT: Okay.

MS. JAROSLAW: Because he's made good efforts to comply with the law.

THE COURT: Okay.

MS. JAROSLAW: But because the hospitals have no deadline within which to have to rule on these admitting privileges applications, it's uncertain when he'll hear from the remaining hospitals. And to enforce this against Dr. Burns on November 1st before he's heard from all of the hospitals would deprive him of procedural due process.

Dr. Burns specifically has a very strong likelihood of success on the merits with regard to the single-subject rule. And S.B. 1848 addresses no fewer than six different and distinct subjects. There's, of course, the admitting privileges requirement. It addresses standards for supplies and equipment, which is the second.

Standards for training physicians assistants and volunteers -- which is the third.

Medical screening and evaluation procedures -- which is the fourth.

Protocols for the abortion procedure and follow-up care -- the fifth.

And additional recordkeeping and reporting requirements -- which is the sixth.

And just as an example of how this touches on different subjects and -- and there would be myriad examples -- but to cite one, there's a provision regarding if a woman tests negative for Rh Factor in her blood type. There are certain protocols that have to be followed, and certain medications that can be provided to the woman, so that if she has future pregnancies, because she's Rh Negative, she won't react if the fetus is Rh Positive. And, and I just note parenthetically it's something Dr. Burns does anyway. That's an important thing to do, it's the standard of care in the medical community. It's very important, but it's very separate and distinct from admitting privileges. And in fact, this violates the single-subject rule in some very obvious ways. In the single-subject rule, the idea is that there won't be logrolling in the legislature. That is, you won't have legislators faced with an all-or-nothing choice to approve the entire package, because there's something that they want to pass, even though they're against something else that they don't want to pass.

THE COURT: They still do that in the legislature?

MS. JAROSLAW: Yeah, I'm afraid so. As recently as this year I think the Oklahoma Supreme Court had something to say about that. The Oklahoma Supreme Court's

pretty adamant about the legislature following this rule. And it seems they're at loggerheads about this.

THE COURT: I used, I used to serve out there is all -- I'm just making a joke. But --

MS. JAROSLAW: Well, yeah, it, it -- it does come up, your Honor.

And, and what's remarkable here is we don't have to speculate, we don't have to say, "Well, you know, maybe someone's in favor of this Rh Negative Rule, and not admitting privilege" -- we don't have to speculate. And the reason for that is in the very same legislative session, there was a House Bill Number 2418; 2418 was an admitting privileges law. That admitting privileges law died on the vine, it did not get sufficient support, it did not pass the legislature, it just, it just died. And that was the single --

THE COURT: What did that involve --

MS. JAROSLAW: It --

THE COURT: -- did it involve abortion or --

MS. JAROSLAW: -- it involved abortion.

THE COURT: Oh.

MS. JAROSLAW: -- it, it -- the admitting privileges requirement that we're focusing on today, that was the, the -- the single-subject of 2418. And, and that didn't go anywhere in the same legislative session.

Subsequent in the late, in that late legislative session, all these other provisions, some of which a legislature could reasonably -- a legislator could reasonably agree with, some they may not agree with, they might have mixed views and have to balance whether they're going to vote for or against -- but it was all rolled in one, these five additional provisions. And so 2418 we know didn't have the support to pass on its own. And then when there was this logrolling to add in other provisions perhaps less controversial, then the legislators passed it. And that's exactly what the Oklahoma Constitution prohibits. In, in -- on point is the *Nova* case where the Oklahoma Supreme Court struck down a statute that, that was composed of five different provisions. They all had to do with abortion -- all of them, every single one. But there were five separate and distinct provisions regulating abortion. And in the words of the Oklahoma Supreme Court, this law -- which they struck down -- was, quote, obviously violative of the single-subject rule. And I submit to the Court that S.B. 1848 is no different than, than the law that was submitted in *Nova* in that it constitutes logrolling and an unconstitutional violation of the single-subject rule.

THE COURT: So you're saying that none of these other items that were in the bill were really related to abortion cases, or admittance to a hospital like the

doctor's required to under the bill?

MS. JAROSLAW: None of them are related to the admitting privileges requirements. They, like I said, there are provisions, if somebody wants to volunteer at one of these clinics there are, there are provisions to enact regulations about how to train volunteers, or how to train physicians assistants. There are provisions about how a medical history is to be taken before the procedure. As I said, this Rh Negative testing and a protocol regarding that. And again, it would be hard to imagine somebody being against Rh Negative protocols because that's already the standard of care. But all of these things that sound good -- but they're already being done -- of course. A legislator could reasonably think, "Wow, I, I want those protocols in place, and if the price of it is voting for the whole bill to be admitting privileges, I'll vote for it." And, and this is not in the realm of the speculative because given an opportunity to pass 2418, H.R. 2418 -- the legislature did not do that.

I'd like to turn, now, to the fact that, that Dr. Burns has a strong likelihood of prevailing --

THE COURT: One more --

MS. JAROSLAW: -- sure.

THE COURT: -- I thought of -- I was going to ask you a question. You mentioned about "volunteers" --

MS. JAROSLAW: Yes.

THE COURT: -- in your argument as one of the areas that additional items they had in the bill?

MS. JAROSLAW: Yes.

THE COURT: Was that, was that volunteers for what?

MS. JAROSLAW: Volunteers who wished to work in a clinic. So, for example, the medical school, here, in Oklahoma City they, there's a, there are clubs like "Medical Students For Choice", and some of them may wish to volunteer at a clinic. There may be interns who wish to volunteer, college students, and this law, among other things, would provide for regulations regarding how to train physicians assistants and volunteers.

THE COURT: Okay. All right. Thank you.

MS. JAROSLAW: Sure.

I submit Dr. Burns also has a strong likelihood of success on the merits on his claim that 1848 is an unconstitutional special law, because it singles out Dr. Burns and his patients. There's a three-part test in determining whether a law violates the Oklahoma Constitution with regard to special laws.

THE COURT: Uh-huh.

MS. JAROSLAW: The Court must first determine whether a law is a special or general law -- and we submit

it is a special law.

The Court must determine if the subject of the legislation is reasonably susceptible to general treatment and -- and we submit it is, and I'll get to that in a moment.

And finally if, if the law has, has a -- regulates a specific subclass, whether that legislation advances a valid legislative objective. And we submit that it does not. And I'll go through each of those three factors.

First, is this a special law? 1848 is a special law because it singles out physicians who provide abortions from all other physicians. Likewise, it singles out physicians who provide abortion on an outpatient basis -- abortion surgery from all other physicians who provide outpatient surgery; some of which do procedures, outpatient, that are much more risky such as gastroenterological procedures, endoscopies, colonoscopies are much more risky. And those physicians are not subject to this special treatment and special regulation.

There are some general laws, for instance, if you're a physician who does outpatient surgery, you have to have a transfer agreement with a local hospital to facilitate the transfer of patients. Dr. Burns complies with that, and presumably GIs who do colonoscopies or, or dentists who do a root canal, or ENTs who do ear, eye, nose

and throat surgery outpatient; they're all required to have these transfer agreements. And that's a valid, general law. But here, physicians who provide one particular type of surgery -- abortion -- are singled out from all the other surgeons who provide outpatient surgery for this special law to have admitting privileges. And, and it's, it imposes very onerous regulations that affect doctors, and in this case, Dr. Burns -- a doctor with an impeccable health and safety record -- it affects them disproportionately such that it will drive them out of business, which I also submit is, is by design. But it's an unconstitutional special law for singling-out abortion providers.

Next the Court must determine if the subject of the legislation is reasonably susceptible of general treatment. And I submit that it is for the reasons set forth in, in our papers which I won't rehash here -- admitting privileges, the, the Plaintiff submits that admitting privileges are not necessary for outpatient surgeries. However, *if* the Oklahoma legislature said, "every single physician who does outpatient surgery has to have admitting privileges at a local hospital," we wouldn't be able to claim this as a special law.

This is susceptible of general treatment. But instead, it was targeted by design to one specific type of physician, treating one specific type of outpatient, and for

that reason, it violates the Oklahoma Constitution.

Finally, we're addressing the third prong of this test. S.B. 1848 --

THE COURT: And you're saying that it does because of it being a special law -- that violates the Oklahoma Constitution?

MS. JAROSLAW: -- I, I submit that, your Honor, yes.

THE COURT: Among other things?

MS. JAROSLAW: Yes. That's correct, your Honor.

THE COURT: Oh, okay.

MS. JAROSLAW: And the third prong of, the Court --

THE COURT: The case of the *Abbott* case --

MS. JAROSLAW: Yes.

THE COURT: -- from Texas, in the 5th, this Circuit's been cited -- in that case did Texas have the same laws as Oklahoma does as to special laws and --

MS. JAROSLAW: No, your Honor, it was brought in federal court, so we did not make any Texas State claims regarding the special law. I believe that the Defendants sought --

THE COURT: -- but Texas does have such a law on the --

MS. JAROSLAW: -- I, I -- actually, your Honor I,

I do not know --

THE COURT: -- okay.

MS. JAROSLAW: -- Texas State law with regard to special law. I do know that because the Court where we brought the action was Federal District Court, we did not raise Texas State law claims -- only federal claims.

THE COURT: Okay. Is *Abbott* the Attorney General in Texas, now?

MS. JAROSLAW: Yes, your Honor --

THE COURT: I thought he was, yeah.

MS. JAROSLAW: -- I believe he's running for Governor as well.

THE COURT: Okay. All right. Thank you.

MS. JAROSLAW: With regard to whether 1848 is nonetheless admissible because it advances a proffered objective of the legislature: First, it's not clear what the proffered objective is. And what we hear from the Defendants in their introduction is that their proffered objective is woman's health. And what we hear on their section of their brief regarding special law is that it's to protect a state's interests in, in potential life, or something to that effect. However, if that is the case, and the Defendants are claiming that it's a permissible law and not an unconstitional special law because of the state's interests in potential life, then admitting privileges

really has absolutely no rational basis whatsoever because requiring a physician to have admitting privileges within 30 miles will do nothing to advance any interests in potential life. Dr. Burns performs procedures only up through the first-trimester of abortion. And there's no viability question, there are no close issues, there are no close questions. And requiring him to have privileges advances nothing with regard to *that* interest.

If the argument is, instead, that the special law is to advance woman's health, well, first of all, there are many areas to advance women's health. All women over the age of 50, for example, should have a colonoscopy. Well then why aren't women protected there by admitting privileges if it's such a valuable thing to have? And the answer to that is it's not valuable. And we don't just have my client's position on that, we have The American Medical Association, and "ACOG", the leading organization for obstetricians and gynecologists who are on record stating that admitting privileges do nothing to promote women's health. And in fact, through their consequences, do quite the opposite, and they endanger women's health.

We also have --

THE COURT: How is that?

MS. JAROSLAW: -- well, they endanger women's health in the following ways, your Honor. If, let's look,

be specific with the, with the record we have. Dr. Burns provides 44 percent of the abortions in the State of Oklahoma. He only provides them up to the first-trimester. If he shuts down on November 1st, the other two clinics in the state will not be able to absorb the immediate capacity. What that means is wait times will increase, costs will increase, wait times may increase such that women are no longer in the first-trimester and have to have more complicated, more risky, and more expensive procedures. The costs to getting to the two remaining clinics -- and that's assuming they continue to, to operate, which is not at all clear, we just don't know on this record. But assuming they continue to operate, women would no longer have a low-cost option of the first-trimester abortion through Dr. Burns, but they would have to jockey for an appointment maybe weeks ahead of time. And while abortion is an extremely safe procedure, only 0.03 percent of abortions result in any kind of hospitalization, the risks go up as the gestational age --

THE COURT: They cited a figure --

MS. JAROSLAW: -- increases.

THE COURT: -- they cited a figure on the, they -- the Attorney General did, of 13,000 women --

MS. JAROSLAW: Of 1.3 --

THE COURT: -- were, I guess injured, or had

problems through an abortion needed --

MS. JAROSLAW: Yes, may I address that --

THE COURT: -- more help.

MS. JAROSLAW: -- your Honor?

THE COURT: Sure. Go ahead.

MS. JAROSLAW: First of all, the statistic is misleading in many ways. It, it takes all the women who have had abortions in the entire United States, multiplied by 1.3 percent, and then it says how many women should be protected. But it, it bears mentioning that Oklahoma is not the United States, and the relative number is closer to 4,000 rather than the numbers cited in the brief.

More to the point: The 1.3 percent constitutes all complications including minor complications. A minor complication, for example, might include, you know, a great deal of cramping where the woman has to come to the hospital, perhaps an incomplete abortion, there's still tissue left in the uterus. Interesting, your Honor, is that those symptoms which make up the bulk of the difference between the 1.3 percent and the 0.03 percent, most of those symptoms are identical to symptoms of a miscarriage. And nobody doubts that if a woman -- forget a doctor with an in-privilege, a woman with no doctor who presents at an emergency room in the middle of a miscarriage, she will be tended to. Hospital emergency rooms deal with miscarriages

all the time; sadly, it's a very, very common thing to happen to women.

The, so the vast majority of this 1.3 percent, all but the 0.03 percent are things that hospitals see every day as a result of what they call in the medical profession, "spontaneous abortion", which is the same as "miscarriage". So, the same procedures one would do -- a D&C to evacuate the uterus, avoid infection, give I.V. antibiotics, the same things that you would do in a miscarriage situation when a woman presents at a hospital, you would do in an abortion situation. And nobody asks the woman if she has a doctor, or a doctor with admitting privileges, or anything of the kind. And hospitals are very well equipped to deal with this because they see it extremely commonly.

So I think that figure is misleading. The, the real number should be 0.03 percent of, of 4,000 women. And I think when you look at Dr. Burns's record over 41 years, it's even better than that. He's had to have one patient in his career go to the emergency room, and that's because she did not promptly wake up from the anesthesia. He immediately called 9-1-1, he waited until they arrived. By the time 9-1-1 arrived, the ambulance arrived, Dr. Burns walked with her to the ambulance, she was already conscious, she was already awake. This, the -- the sedation had worn off, but out of prudential concern she was taken to the

hospital.

Subsequently, Dr. Burns took himself to the hospital to see how his patient was doing. She spent three hours there in observation, and she was released -- she was fine. This is Dr. Burns's record.

Does he have women who have complications? Of course. But again, they're in the 1.3 percent number, that ballpark that we're talking about -- the cramping, the bleeding, you know, a mild infection where they have to take antibiotics, nothing that is particularly different from a miscarriage situation.

[Pause.]

Next, I'd like to address why S.B. 1848 was an unconstitutional delegation by the legislature to unelected, unreviewable hospital boards in making legislation. The legislator -- legislature, here, did not say that there are certain requirements, certain rational requirements that providers must meet. They said they have to have admitting privileges. What is interesting, though, is there's no single standard for admitting privileges. We have seen in Dr. Burns's experience, many of them do require board certification, many of them do require a, a 3-year long residency, others require a minimum admission of at least six patients per year; because Dr. Burns is so good at what he does, he won't admit patients. Others have different

requirements like they only take physicians who are on the faculty of a medical school, or are employed as hospital employees, it's more of an evolvent hospitalist model that, that -- that we submitted in our expert affidavit.

There are many, many reasons a hospital may not extend admitting privileges. They may not need someone with that specialty on staff. They may have all the doctors they need, they may not, frankly, want to put a toe in the water with this abortion case, with this abortion situation. They may choose for publicity reasons, or religious reasons, or just for a desire not to have publicity and protestors -- that they don't want to extend admitting privileges. They can basically apply whatever standards they choose, and unlike the legislators, the members of a hospital board are not accountable to the electorate. If we don't like the way they're making their decisions, we can't publicize that and vote them out.

So, this was an unconstitutional delegation to hospitals to essentially serve as the gatekeepers of who can provide abortion services in Oklahoma, and who cannot. And I would add, that they were appointed gatekeeper of abortion services -- a constitutionally-protected right -- without asking for that. I mean, it's not something they seek to do, it's not part of their objectives as a hospital, it's not part of their mission. But the legislature,

instead, said, "No, we're going to let the hospitals decide who will and will not have privileges." And what we see is that this is going to have a, a -- disastrous consequences for the women of Oklahoma if allowed to be implemented, it's quite likely that one of the safest providers of abortion in the state -- and I would venture probably in the region -- who has been doing nothing but first-trimester abortions since 1973, and *Roe v. Wade* was on the books, he would be put out of the business. You know, you may say, "Well, why doesn't he have board certification?" At the time when he was licensed to practice medicine in the State of Oklahoma when he finished his internship, it was not required to have board certification for this specialty. And the Defendants are somewhat *glibly* -- he didn't have the, you know, he -- that was his fault because he didn't keep up his privileges. But that's, of course, absurd to think that forty-one years ago he could anticipate a law like this and need to maintain privileges at a hospital -- which by the way, doesn't exist anymore at Hillcrest Hospital -- that he would need to maintain those privileges in anticipation of a law, you know, decades to come. And for over four decades without this law on the books he had, it's undisputable that he has been a very safe and compassionate health provider for women.

[Pause.]

I just want to say one last word on that delegation argument, to the extent the Defendants look to *Abbott* and the delegation argument there. *Abbott's* completely in opposite, because *Abbott* was applying federal delegation law, which is completely different from Oklahoma State delegation law. So it does not control or even guide this Court.

I'd like to turn now to the issue of irreparable harm, because this Court must consider whether, absent an injunction, Dr. Burns and his patients will suffer irreparable harm.

First of all, it is well-settled law that the violation of constitutional rights is, "per se", irreparable harm. Because Dr. Burns is unlikely to obtain privileges before the law goes into effect, and maybe ever, his due process rights would be violated. In Oklahoma, Dr. Burns has a constitutional right to practice profession and earn a living. And from much less drastic labor consequences, the Oklahoma Supreme Court said: "There are due process rights that attach to one's interests in employment."

The Oklahoma Constitution is further violated by the legislature's decision to single out abortion providers and abortion patients in violation of the prohibition on special laws. Again, constitutional right, per se -- per se irreparable harm.

And of course, as I discussed earlier, the Oklahoma Constitution is further violated by the legislature's blatant violation of the single-subject rule. And again, that violation is, per se, irreparable harm.

The other irreparable harm, and here is where Dr. Burns also stands in the shoes of his patients -- is that poor women will essentially be cut off from their constitutional right by the integrity and the right to abortion. You know, to face reality, any woman of means can fly to New York or Toronto or London or California and have an abortion. And, and -- and let's be serious about what this law is doing, it's putting the constitutional right of abortion --

THE COURT: Let, let me ask you on that --

MS. JAROSLAW: -- out of the reach of poor women.

THE COURT: -- on that subject, the Defendant has, or the Defendants have raised the issue that Dr. Burns wouldn't have standing to assert rights for people who are not part of the lawsuit.

MS. JAROSLAW: Well, I'm glad your Honor raised that.

According to the Oklahoma Supreme Court, there are two cases that are cited in our brief *Toxic Waste Impact* and *Hendrick v. Walters*. And they discuss standing. And in doing so, they say that Oklahoma standing law is parallel

or similar to federal law on standing. And we have a huge body of federal law on standing with regard to doctors and other medical providers being permitted to bring abortion claims, or reproductive rights claims on behalf of their patients. In 1965 in *Griswold v. Connecticut* that involved birth control, it wasn't the married couple or, or several married couples that sued for the right to access birth control in Connecticut -- rather, that case was brought by a reproductive health services organization that had, as its clients, married couples who were seeking access to birth control. And the Supreme Court recognized that those medical providers can bring that claim on behalf of their patients.

Of course, everybody knows *Roe v. Wade* and --

THE COURT: Who was *Griswold* in the case?

MS. JAROSLAW: -- excuse me?

THE COURT: Who was *Griswold* in the case, in the --

MS. JAROSLAW: You know, I'd actually have to look whether *Griswold* -- it's *Griswold v. Connecticut*, so I know that it was brought by the executive director and the medical director of a reproductive health services organization, I do not know if one of their names was "Griswold". But I know it was the executive director and the medical director who were the Plaintiffs in that case --

and not married couples.

And of course, we all know *Roe v. Wade* and *Doe v. Bolton*, the companion cases of '73, very-well settled. More recently in 1976 with the cite -- with the full citations in our brief, *Singleton v. Wulff*, *Planned Parenthood v. Danforth* in '76 -- both of those in '76, *City of Akron* in 1983, and I believe that there are string cites in the brief -- it's very well-settled that doctors, healthcare providers, healthcare clinics may have, may bring these actions on behalf of themselves and their patients. And because *Toxic Waste Impact* and *Hendrick v. Walters* incorporates federal U.S. law regarding standing, makes reference to that is what they look to for guidance. Your Honor, I submit that Dr. Burns has standing here, as well.

[Pause.]

I'd like to conclude at this point and note that both the A.M.A. and the American Congress of Obstetricians and Gynecologists, as well as numerous courts throughout the United States as cited in our briefs, have determined that there is absolutely no sound medical basis for these admitting privileges requirements. The Oklahoma State Medical Association warned that the provisions may not reflect the best interests of the patient. There's no question that irreparable harm will ensue if 1848 is

enforced. We have serious constitutional violations. 1848 will shut down Oklahoma women's access to safe, compassionate care, and thus, effectively depriving them of their constitutional rights. Poor women will not be able to get an appointment in time, the expense will rise if they get a later appointment, and the risks that we've heard so much about, the risks are backloaded to later a gestational age; in other words, getting an abortion at seven [7] weeks is exceedingly safe with a vanishingly small risk. But if you're delayed by eight or ten weeks in getting an appointment and scrounging up the money to travel and, and -- and have a later-term abortion which is always more expensive, that is going to increase the risk to women.

So in sum, your Honor, I respectfully request that the Court enjoin 1848, because there's a strong likelihood that the Plaintiff will prevail on the merits in this case, and that the Court will find this is an unconstitutional special law, it violates the single-subject rule and non-delegation rules of the Oklahoma Constitution, and it deprives the Plaintiff of his due process rights.

Your Honor, if there are no further questions, I'll sit down.

THE COURT: All right, thank you.

MS. JAROSLAW: Thank you, Your Honor.

THE COURT: So, Mr. Weitman?

MR. WEITMAN: Yes.

THE COURT: Ms. Greenwalt is your co-counsel?

MR. WEITMAN: Yes, sir.

THE COURT: Okay. Go ahead.

[Pause.]

MR. WEITMAN: First, I'd like to address something that, that counsel brought up towards the end of her argument, your Honor, and that is the woman's right to an abortion. While that's raised in the lawsuit, it's not raised in the Motion For Temporary Injunction, it's not one of the issues raised by the Plaintiff in that motion and shouldn't be considered by this Court with, in regards to the Temporary Injunction.

Now there, there was some discussion about the numbers, here. We said, "Well, you know, there's 13,000 potential women per year based on, on abortion numbers who, who have complications." Plaintiff says there's 4,000 who have complications in the State of Oklahoma, which we submit is not an insignificant number. But if you look even at the bigger picture using Plaintiffs' own numbers, they claim that three out of ten women in their lifetime before age of 45 are going to have an abortion, your Honor, that's 30 percent [30%]. The latest census says 154 million [154,000,000] women in this country. Once you break down the math, we have in excess of six-hundred [600,000] women

in this country who have had, or will have complications from abortion in their lifetime. That's quite significant. And the legislature certainly has an interest in dealing with an issue where, in this country over six-hundred thousand [600,000] women are going to have complications.

Now, the Plaintiff is a doctor who operates a clinic in Norman, Oklahoma, which is 17 miles from Oklahoma City. Seventeen [17] miles is not an incredibly long distance and, and the Plaintiffs don't claim that the Oklahoma City Clinic is going to close down due to this law -- in fact, just the opposite. The Plaintiffs claim that the Oklahoma City Clinic is going to overflow, it's going to have an overload of patients. So really, the only one being affected by this law is Dr. Burns, the Plaintiff. Now --

THE COURT: He has a, clinics in, in Oklahoma City and Tulsa -- and Norman?

MR. WEITMAN: Well, my understanding is he has a clinic in Norman, there is another abortion clinic in Oklahoma City --

THE COURT: Oh.

MR. WEITMAN: -- which is operated by somebody else.

THE COURT: Oh, okay.

MR. WEITMAN: Which apparently, at least from what we can tell from what's been argued that those, the doctors

at that clinic are going to be able to comply with Senate Bill 1848.

Now there are -- according to the Plaintiff -- sixteen [16] hospitals within 30 miles of Dr. Burns. Of course he waited 51 days -- he had 157 days from the date the legislation's passed until the day it goes into effect. He waited in excess of 50 days to make his first application for admitting privileges to a hospital, and then he waits almost an additional month after that to even make his second application to a hospital. But yet he's now applied to the hospitals within 30 miles, and 12 of them have given him an answer, "No." He can't seem to get qualified for admitting privileges to a hospital. I don't know if this is -- well, I, I would submit that this probably has more to do with his qualifications than it does any type of defect in the law.

Now, I don't want to go through my brief, you know, word-for-word, this Court has read it. I just kind of want to hit some high points. And I'm sorry, your Honor, I left a document --

THE COURT: Yes. Go ahead and get it.

MR. WEITMAN: -- at the table, here.

[Pause, off-the-record discussion between counsel. The proceedings continued:]

MR. WEITMAN: Your Honor, I'd like to start by

addressing the Plaintiff's single-subject argument. Senate Bill 1848 which is attached to the amended -- or the Plaintiffs' petition, your Honor, is a 7-page bill all-encompassed within one statute, it doesn't, the, the, the sections and subsections of the Bill do not flow into separate titles and separate statutes like we sometimes see coming out of the legislature, which our Supreme Court really likes to strike down a lot. This is, this is all contained within one statute. Okay?

[As recited by counsel in court:]

Section 1. The State Board of Health shall establish abortion facility supplies and equipment standards.

1-B. On any day when any abortion is performed in a facility providing abortions, a physician with admitting privileges shall be present.

1-C. The State Board of Health shall adopt standards relating to the training of physician assistants employed by or providing services in a facility providing abortions.

1-D. The State Board Of Health shall adopt standards related to the training that volunteers at facilities providing abortions.

1-E. The State Board of Health shall

adopt standards related to the medical screening and evaluation of each abortion patient."

I could go through every one of these sections, and subsections, they all relate to regulating standards for abortion clinics, and abortion procedures. They are clearly germane, they are clearly related to one another, and this does not violate a single-subject rule.

Due process. Plaintiff brings that up, they say that Dr. Burns didn't have enough time to comply with Senate Bill 1848, now his clinic's going to have to close. Well, a couple of things there. First, I touched on this before, he had 157 days. How much time does he have to have? I mean, we're going on six months there -- between five and six months. How much time does he have to have? We don't know -- we think Plaintiffs' answer is, "Well, there is no amount of time. I can never comply with the law, and therefore my due process rights are always violated." He's had 157 days, he wasted in excess of 50 of those, I, I don't think that this rises to the level of a due process violation.

As well, the law requires that he have somebody on premises who has admitting privileges. He does not have to have admitting privileges, himself, he could have somebody on the premises who has admitting privileges. There is nothing in the record that indicates that he's even

attempted to comply with the law in that manner. We don't think his due process rights have been violated.

Non-delegation? That's kind of a slippery, kind of a slippery doctrine in Oklahoma because it's not well drawn out in Oklahoma case law. But just from reading the statutes, your Honor, you can see that nothing is being delegated here. No power is being delegated to these hospital boards; they have always had the authority to determine who they're going to admit, or who they're going to give admitting privileges to in their hospitals. The purpose of Senate Bill 1848 is not to regulate the hospitals, we don't particularly care what their standards are. We're not delegating to them any type of authority. And for that reason, there is no delegation problem.

Finally, your Honor the, the Plaintiff complains that this a special law. Well, special law, of course, turns on how the Court is going to define the class that's affected by this law. The class that's affected by this law are abortion providers, your Honor. The Plaintiff would like you to extend that class to all physicians. Well, we think that's far too broad, and the reason being is that abortion is unlike any other subject. Abortion involves two lives -- the legislature has defined the fetus as a life. An abortion involves two lives; unlike any other procedure that there is, you know, that they talk about in these

outpatient procedures, it's not like a colonoscopy, it's not like, you know, a, a tonsilectomy -- I don't even know if they do those anymore. But it's not like any other procedures. So the class that's being regulated, here, are abortion providers. And every abortion provider is treated the same under this law. So it's not a special law and it, it treats everybody in the class that the law seeks to regulate, the same. Now, even if this Court thinks that the class should be broader and should be all physicians, the legislature still has a rational basis for applying this law only to abortion providers. And I talked about that earlier on, your Honor, in excess of six-hundred thousand [600,000] women who have had, or will have complications from abortions. Of course the legislature has an interest in setting down some reasonable regulation for requiring that the Board of Health issue rules and regulations guiding how abortion providers are going to conduct their business.

Your Honor, in sum, we don't think Plaintiff has met their burden of showing a substantial likelihood of success. The legislature, of course, in the State of Oklahoma represents the will of the people of the State of Oklahoma, and they have passed this piece of legislation. And unless Plaintiff has, has shown a clear violation -- which we don't think they have -- this Court should let the statute go into effect.

Thank you.

THE COURT: I have one question. In your brief you challenged Dr. Burns's standing. Since this, he is an abortionist and this involves that sort of practice, wouldn't he have standing in that regard?

MR. WEITMAN: Well, we think that he has standing on his own behalf, but whether or not he has standing to challenge this law on his patients' behalf, we're not so certain. We don't think that the, the law of standing in Oklahoma is nearly as clean-cut as the Plaintiffs seem to think it is. There is associational standing. All of these Planned Parenthood cases, I mean, these are associations and there are specific tests that apply to those. But then we have the OEA case where we had teachers trying to raise the rights of students. And the Supreme Court said, "No, you can't do that. If the students have constitutional rights, they have to raise those themselves." Is there a huge difference, teacher-pupil relationship, doctor-patient relationship? We submit that essentially -- well, we submit that those are similar relationships. And if a teacher can't raise an interest of a pupil, then a doctor does not have standing to raise an interest of a patient.

THE COURT: Okay. Are you saying that issue might have been left to the states?

MR. WEITMAN: I'm sorry?

THE COURT: Are you saying the issue of standing might have been left to the states --

MR. WEITMAN: Well, I --

THE COURT: -- in their case?

MR. WEITMAN: -- each, each state, obviously, your Honor, each state makes its own laws regarding standing. I mean, in Oklahoma we have a, a large body of taxpayers standing law which does not exist in the federal government. Where the government is expending money to enforce a law, a taxpayer has a right to come to court to challenge that law -- that doesn't exist in, in federal law. So states can make their own laws regarding standing.

THE COURT: All right. Thank you.

MR. WEITMAN: Thank you.

MS. JAROSLAW: May I have --

THE COURT: Anything further?

MS. JAROSLAW: -- may I have a five-minute reply, your Honor?

THE COURT: You may.

MS. JAROSLAW: Thank you.

[Pause.]

THE COURT: Just five minutes? Okay.

[Laughter.]

MS. JAROSLAW: We'll see how many questions I get.

[Pause.]

I just want to address some of those issues briefly.

To distinguish why, with regard to standing. A clinic or an abortion provider is in a very different position; string rights and locations, contrasted with teachers - similar rights of students, is that students remain students for many years. Pregnant women seeking abortion are focusing the reference on having abortion. And whether Dr. Burns's clinic is open on November 1st or November 2nd, those women who would have abortions in November, if they know they're pregnant now, will be focusing on having an abortion now. It's because of this unique status of pregnancy where, you know, you're pregnant or you're not pregnant -- that women do not, are not defined by their status of pregnancy for several years of their life consecutively as say teachers would be, or taxpayers.

So, I think courts have recognized that when it comes to medical health, specifically medical conditions where there are very large concerns of privacy, there are concerns that come up and that patient has to focus in a very time-sensitive way, it's impractical to expect a, a pregnant woman to be one of the Plaintiffs for the duration of the case.

I'd like to move to some of the other arguments my adversary raised, specifically with special law. They place

great reliance on the fact, on their assertion that abortion involves two lives. Taking that assertion at face-value, it, there's still -- it, it still is baffling to discern what the relationship between the fact that there may be a second life involved is with having admitting privileges requirement because what, what the state considers this second life is not viable. Having admitting privileges will do nothing. It, it -- admitting privileges can only have some asserted basis, some colorable basis if you're talking about the health of the woman. It doesn't make any sense if you're talking about the, the fetus that is the subject of the abortion. It just doesn't, it doesn't make any logical sense.

I'd like to turn, now, to the single-subject argument, and I'm not going to do a, a dramatic reading of the entire statute to show all the details. It is seven pages, I think we showed in our reply brief of five pages you can say a lot in a few pages.

THE COURT: Are you saying the unborn child's a non-entity?

MS. JAROSLAW: I'm saying "legally" there is no rational basis between admitting privileges and an interest in a fetus or unborn child; there's just, there's no connection. It's, as I said, Dr. Burns performs abortions through the first-trimester, and I cannot even conceive of a

scenario where the State's interests in that other potential life is advanced by admitting privileges. It, it doesn't, they make no sense.

With regard to the single-subject rule, the State has said that this statute all relates to the standards for abortion procedures and standards. And that is true that everything touches on the subject of abortion in some broad sense. However, I'd like to point out that enrolled Bill 1878, which the Oklahoma Supreme Court struck down as violating the single-subject law, all colorably had something to do with abortion, you know, in some regard. There wasn't something about abortion and something about highway building -- it was all colorably about abortion, but whether it's colorably about some umbrella title isn't the test. It's, it's germaneness and whether these regulate very distinct things that a legislator might say, "I want to vote for this aspect, but not that aspect. So I'll vote for the whole thing and hold my nose about the other aspect because I want some other part of the statute to be enacted." And the whole purpose of the single-subject rule is to prevent this logrolling. And given the unique legislative history here, unlike all the other cases, we don't even have to conjecture whether some legislators voted for one thing and not another. We know that the single -- we know that the Admitting Privileges Statute, H.B. 2418,

just died on the vine because it didn't have enough support. It could only get support by adding on all of these other provisions.

Next, I think counsel makes light of the admitting privileges requirement when he says, "Wow, you know, Dr. Burns doesn't have to get privileges, he could just have another doctor on the premises with privileges." But I submit to the Court that's completely absurd to think that Dr. Burns would hire a full -- or would be able to hire a full-time doctor with hospital admitting privileges to do nothing but read books and watch television in his office. To hire a full-time medical doctor at full salary to not provide abortions. I mean, to do that is so absurd it would clearly amount on a tax, an unlawful tax on Dr. Burns to continue his practice. It's just, it's a completely absurd scenario. And that just can't be done. You're not going to find well-qualified physicians with admitting privileges at hospitals being willing to sit around the office and do the New York Times Crossword Puzzle, or watch daytime soaps, or full-salary just because he has admitting privileges.

And it kind of drives home how ridiculous all of this is because when counsel said that, "Well, you know, maybe Dr. Burns didn't get privileges because he's not qualified." That, that -- that's rather insulting and ignorant of the, the facts in the record. Dr. Burns has an

impeccable health record. There are many other easier specialties he could have gone into that I'm sure would have paid him more, and given him a lot less grief. He had the courage to do this, but not only the courage, he's had the compassion, and he's withstood protests, and he's done it because it's right since 1973. Nobody has challenged his health record.

The reason that he cannot be board-certified -- because that was raised by counsel, I will, I will explain that. To be board-certified in obstetrics and gynecology you have to have done in the last couple of years a certain number of procedures in hyster -- you have to have done hysterectomies, vaginal deliveries, Cesarean Sections, other, you know, hyper capnograms, you have to be able to do all kinds of obstetric and gynecological procedures which Dr. Burns did in medical school in the early '70s, he did as an intern in 1972, 1973 -- he did all of those procedures. But he has specialized and been excellent at the care he's provided in one single procedure. And he knows his limits, when he sees an ectopic pregnancy he refers the woman to the appropriate specialist. When he sees the gestational age is longer than the first-trimester, he refers the woman to the proper specialist. He is good at what he does. But does, do, do you want a doctor who does nothing but first-trimester abortions doing, you know, hysterectomies

and Cesarean deliveries, and all the rest?
No. He is good at what he does, and having board certification is simply not a proxy for clinical expertise. There's *nothing* in the record to suggest Dr. Burns doesn't have clinical expertise. A board certification is entirely a different animal.

And with regard to some hospitals --

THE COURT: Why do you think he was rejected by these other hospitals --

MS. JAROSLAW: -- well --

THE COURT: -- that, that were mentioned?

MS. JAROSLAW: -- two of the hospitals rejected him because he could not commit to admitting six [6] patients per year. So, rather than being not qualified enough, what happens is Dr. Burns doesn't have enough complications from his patients to admit -- if he admitted six [6] patients a year he wouldn't be very good at what he does. But if he admitted six [6] patients a year, he might get admitting privileges at some of these hospitals that don't require board certification.

Also, some hospitals, they have to make business decisions -- "Is this good for the hospital? Is this something we want the hospital to be, to be doing?" And they may make perfectly rational decisions given their hospital's best interests. But that doesn't correlate with

clinical expertise and whether he's qualified to do this procedure. And God-forbid if he had any of the parade of terribles that are catalogued in the Defendants' brief -- a perforated uterus or what-not, you wouldn't want, he, he would know enough to get an ambulance and make sure that patient gets to an emergency room. When, when somebody doing a colonoscopy perforates a bowel, you don't want that GI repairing a torn bowel, you want a surgeon who does that every day of the week. And that GI would send that patient to the nearest hospital where the specialists could get to work immediately.

The, there's no proxy between board certification, between hospital admitting privileges and whether Dr. Burns can do what he does. And I want to add one other, other thing because counsel mischaracterized, or perhaps misunderstood what I said in my initial argument. I did not say there are going to be two remaining clinics; we do not know. I suspect one in Tulsa may continue operating, I don't know at what capacity. But we honestly don't know, and there's certainly nothing in the record that tells us the status of that Oklahoma City Clinic at all. I believe the doctor currently there doesn't have privileges -- but that's not in the record and I don't have personal knowledge, and I would not ask the Court to rely on it. I say it only to emphasize the fact that we do not know the

status of that other clinic. I simply said, "*Assuming* that they both get admitting privileges, they would not be able to absorb the impact." And I don't think it's fair, in reality, to assume that they will continue operating. We just don't know.

Your Honor, if there are no further questions, we'll rest on our papers.

THE COURT: All right. Thank you very much.

MS. JAROSLAW: Thank you.

THE COURT: Thank you.

All right. You have nothing else --

MR. WEITMAN: We have nothing else, Judge.

THE COURT: -- Mr. Weitman? All right.

All right, thank you. I appreciate your learned arguments, and I've read your briefs, you, both sides did an excellent job on your briefs I thought -- good brief writers.

I, I've read them as I said, but I think I would like to look at some of the cases, which I haven't done yet, that you've cited in the briefs. And so I'll take it under advisement until I have a chance to do that. And I'll, of course you'll, you'll be notified, or you will get a copy of the order when I make one.

MS. JAROSLAW: Thank you, Your Honor. May, may I respectfully request an expedited decision sometime next

week?

THE COURT: I'll shoot for that.

MS. JAROSLAW: All right, thank you so much.

THE COURT: I'm not going to wait until November 1.

All right. Anything else?

MR. WEITMAN: Not from the Defendants, your Honor.

THE COURT: All right, thank you very much.

MS. JAROSLAW: Thank you, Your Honor.

MR. PATTON: Thank you, Your Honor.

MR. WEITMAN: Thank you, your Honor.

[End of proceedings conducted this date.]

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

(1) LARRY A. BURNS, D.O., on behalf of himself and his patients, Plaintiff,	)	
v.	)	Case No.
(2) TERRY L. CLINE, in his official capacity as Oklahoma Commissioner of Health	)	CV-2014-1896
(3) CARL B. PETTIGREW, D.O., in his official capacity as President of the Oklahoma State Board of Osteopathic Examiners, and	)	
(4) GREG MASHBURN, in his official capacity as District Attorney for Cleveland, Garvin, and McClain Counties;	)	
Defendants.	)	

CERTIFICATE OF CERTIFIED SHORTHAND REPORTER

I, Alexa J. Babcock, Certified Shorthand Reporter and Official Court Reporter for Oklahoma County, do hereby certify that the foregoing transcript in the above-styled case is a true, correct and complete transcript of my shorthand notes of the PROCEEDINGS HAD in said cause.

Dated this 18th day of October, 2014.

ALEXA J. BABCOCK, CSR/RPR/RMR
and Official Reporter in
and for the State of Oklahoma