E M E R G E N C Y

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

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

(1) OKLAHOMA COALITION FOR REPRODUCTIVE JUSTICE, on behalf of itself and its members; and (2) NOVA HEALTH SYSTEMS, D/B/A REPRODUCTIVE SERVICES, on behalf of itself, its staff, and its patients, Plaintiffs / Appellants, v. (3) TERRY L. CLINE, in his official capacity as Oklahoma Commissioner of Health; and, (4) LYLE KELSEY, in his official capacity as Executive Director of the Oklahoma State Board of Medical Licensure and Supervision, Defendants / Appellees.	)	No. _____

APPELLANTS' 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), Appellants Oklahoma Coalition for Reproductive Justice, on behalf of itself and its members, and Nova Health Systems, d/b/a Reproductive Services, on behalf of itself, its physicians and its patients (collectively, "Appellants"), respectfully request an emergency temporary injunction, or, in the alternative, an emergency stay of enforcement of H.B. 2684, in order to preserve the *status quo* during the pendency of their appeal. House Bill 2684, 2014 Okla. Sess. Law Serv. Ch. 121 (West) ("H.B. 2684" or "the Act") bans the use of the safest and most effective evidence-based protocols for medication abortion. These evidence-based protocols—recommended by the American Medical Association ("AMA") and the American College of Obstetricians and Gynecologists

("ACOG"), and used by Appellant Reproductive Services for over ten years—represent the standard of care. The Act's restrictions on evidence-based medical care violate the Oklahoma Constitution's prohibition against special laws, and its guarantees of equal protection and due process. OKLA. CONST. art. II, § 7; art. V, § 59. Without swift intervention by this Court, the bill will take effect on November 1, 2014, with immediate and harmful effects for women and physicians of this State.

Because the Act will drastically reduce access to medication abortion, which is the most common abortion method for Reproductive Services' patients, Appellants moved the district court to temporarily enjoin H.B. 2684 in its entirety. The district court denied in part and granted in part the motion. The district court denied the temporary injunction as to the core provisions of the Act that restrict physicians to the protocol outlined in the FDA-approved label for Mifeprex (hereinafter "the FDA label mandate") and prohibit the use of evidence-based protocols for mifepristone and misoprostol. District Ct. Order on Temporary Inj. ("Order"), 1-2. The district court enjoined only sections 1(H)(2), (I), and (J) of the Act, provisions that create a private right of action against physicians who violate H.B. 2684's substantive provisions and subject physicians to disciplinary action for failing to file certain required reports. *Id.* This narrow injunction fails to preserve the *status quo* because Reproductive Services and its physicians can still be penalized for violations of the Act's restrictions under other provisions of Oklahoma law that are not subject to the injunction, including license revocation for both physicians and the clinic.

Therefore, as of November 1, 2014, in order to comply with the portions of the law in effect and avoid serious penalties, physicians will be forced to either stop providing medication abortions altogether or follow the outdated and inferior state-mandated protocol. As a result,

some Oklahoma women will lose access to medication abortion altogether; others will be forced to receive medical treatment that is less effective, more burdensome, and more likely to require surgical follow-up; and some will be delayed in accessing abortion (which will, in turn, increase the health risks for those women). Such a result would be wholly inconsistent with this Court's opinions in a recent challenge to a similar restriction, *Cline v. Oklahoma Coalition for Reproductive Justice*, 2013 OK 93, 313 P.3d 253 ("*Cline I*") and *Oklahoma Coalition for Reproductive Justice v. Cline*, 2012 OK 102, 292 P.3d 27. Moreover, the district court's ruling will lead to repetitious, unnecessary litigation of issues already resolved by this Court. Appellants therefore request that this Court enjoin enforcement of H.B. 2684 in its entirety during the pendency of this appeal.

1. Factual Background and Procedural History

Appellants moved for a temporary injunction to enjoin the Act's enforcement on the grounds that it violates the special laws, equal protection, and due process provisions of the Oklahoma Constitution. Following a hearing on the motion where oral arguments were heard, the district court entered its Order, denying in part and granting in part Appellants' motion. Order at 1-2. The district court determined that Appellants had not met the four-factor test for a temporary injunction and that, based on the evidence presented in the affidavits, they had not established a likelihood of success on the merits of their claims. *Id.* However, the Order does not separately address Appellants' likelihood of success on their special laws, equal protection, and due process claims.[1] *See id.* The district court ruled that the Act's substantive provisions

[1] Inexplicably, the district court found that Appellants had established a likelihood of success on the claim that sections 1(H)(2), (I), and (J) are special laws, presumably under Article V, section 46 of the Oklahoma Constitution. That provision was pled in the complaint, but was not one of the grounds on which Appellants sought a temporary injunction.

could take effect, but enjoined the provisions providing for civil liability and certain licensing consequences for a physician's failure to file a required report. *Id.* With the restriction on evidence-based protocols set to take effect, Reproductive Services and its physicians will be forced to adhere to the FDA label mandate or subject themselves to a host of other statutory and regulatory consequences. *See* OKLA. STAT. tit. 63, § 1-706(B) (providing that Commissioner can suspend or revoke a facility's license for any violation of tit. 63, art. 7, under which the provisions of H.B. 2684 fall); OKLA. ADMIN. CODE § 310:600-7-3 (implementing tit. 63, § 1-706(B) as to abortion facility licenses); OKLA. STAT. tit. 59, § 503, amended by 2014 Okla. Sess. Law Serv. Ch. 176 (H.B. 2791) (effective Nov. 1, 2014) (providing that State Board of Medical Licensure and Supervision may suspend, revoke or order any other appropriate sanctions against the license of any physician for unprofessional conduct); OKLA. STAT. tit. 59, § 509 (defining "unprofessional conduct" for which a physician may be disciplined); OKLA. ADMIN. CODE 435:10-7-4 (implementing tit. 59, § 509).

At the hearing, the district court acknowledged that allowing H.B. 2684 to take effect will alter the *status quo*. Currently in Oklahoma, women seeking an abortion during the first nine weeks of pregnancy (as measured from a woman's last menstrual period or "LMP") can choose a surgical or medication abortion. Affidavit of Marilyn Eldridge ("Eldridge Aff.") ¶ 7.[2] The medication abortion protocol offered by Reproductive Services involves a combination of two prescription drugs, mifepristone and misoprostol. *Id.* at ¶ 9. Reproductive Services' physicians administer these drugs according to an evidence-based protocol that differs in

[2] The Affidavit of Marilyn Eldridge can be found at Exhibit 3 to this motion (annexed as Appendix 2 to Plaintiffs' district court motion for a temporary injunction, filed on September 30, 2014).

several respects from the protocol outlined in the FDA-approved label for Mifeprex:[3] it allows for 1) a lower dose of mifepristone, and therefore a reduced rate of mifepristone's side effects; 2) self-administration of misoprostol, reducing the need for travel and allowing women to complete the abortion at home or in another safe, controlled environment; and 3) availability of medication abortion for women up to nine weeks (63 days) LMP, which is important because many women do not detect their pregnancies until close to seven weeks (49 days) LMP, the cut-off imposed by the FDA label mandate. Eldridge Aff. ¶¶ 9, 15; Affidavit of Daniel Grossman, M.D. ("Grossman Aff.") ¶¶ 32, 36-40.[4] Because evidence-based protocols are safer, more effective, effective later in a pregnancy, less costly, and less burdensome than the FDA label mandate, they have been endorsed by leading medical organizations including the AMA, ACOG, and the World Health Organization. *Cline I*, 2013 OK 93, ¶ 21, 313 P.3d at 261; Amicus Brief submitted by the AMA and ACOG in *Planned Parenthood Ariz. Inc. v. Humble*, 753 F.3d 905 (9th Cir. 2014), at 6-9, *available at* http://cdn.ca9.uscourts.gov/datastore/general/2014/04/23/14-15624%20Amicus%20by%20OB-GYN.pdf (hereinafter "AMA/ACOG Amicus Br.").

In 2012 and again in 2013, this Court addressed a constitutional challenge to H.B. 1970, which banned all off-label use of abortion-inducing drugs, including the most common evidence-based protocols targeted by H.B. 2684. In explaining its reasoning for striking H.B. 1970 as unconstitutional and answering certified questions by the United States Supreme Court, this Court emphasized that prohibiting evidence-based protocols for medication

[3] Mifeprex is the commercial name for mifepristone.

[4] The Affidavit of Daniel A. Grossman, M.D., can be found at Exhibit 3 to this motion (annexed as Appendix 4 to Plaintiffs' district court motion for a temporary injunction, filed on September 30, 2014).

abortion is "completely at odds with the standard that governs the practice of medicine" and "could serve no purpose other than to prevent women from obtaining abortions and to punish and discriminate against those who do." *Cline I*, 2013 OK 93, ¶ 21, 313 P.3d at 262 (citation omitted).[5]

In their motion for a temporary injunction before the district court, Appellants argued that, based on this Court's decisions in *Cline I*, the State should be precluded from re-litigating the issue of whether restrictions on evidence-based protocols for medication abortion serve any legitimate state interest. Pls.' Mem. in Supp. of Mot. for Temporary Inj. at 8-11. Yet the Order fails to address Appellants' issue preclusion argument. Moreover, because the district court did not separately analyze and address each of Appellants' claims, it is impossible to know what, if any, precedential weight the district court assigned to this Court's prior decisions when analyzing Appellants' likelihood of success on the merits of each claim.

II. Standard for Temporary Injunction

This Court has the authority to preserve the *status quo* and prevent irreparable injury by entering a temporary injunction while it considers the merits of this appeal. Oklahoma law provides: "If a temporary or permanent injunction is denied or dissolved, the trial or appellate court, in its discretion, may restore or grant an injunction during the pendency of the appeal . . . upon such terms as to bond or otherwise as it considers proper for the security of the rights of the parties." 12 OKLA. STAT. § 990.4(C). When considering a motion for a 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

[5] In addition, this Court made a number of relevant findings about the FDA approval process for new drug applications, the role of off-label uses in the practice of medicine, and the superiority of evidence-based protocols over the FDA label protocol, *see infra* at Section III.A.

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 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. Employees Ass'n v. Okla. Military Dep't*, 2014 OK 48, ¶ 15, 330 P.3d 497, 504.[6]

III. Argument

A. Likelihood of Success on the Merits

Appellants are likely to succeed on the merits of their claims that the Act violates the Oklahoma Constitution's special laws, equal protection, and due process provisions.

Proper application of the doctrine of issue preclusion to this case establishes that there is no health justification for banning evidence-based medication abortion protocols. Issue preclusion prevents the parties from re-litigating an issue of fact or law that has already been decided in a prior litigation, where the party against whom preclusion is asserted was a party to the prior action, the issue was actually adjudicated and necessary to the outcome of the prior matter, and the precluded party had a full and fair opportunity to litigate the issue. *See Nat'l Diversified Bus. Servs., Inc. v. Corporate Fin. Opportunities, Inc.*, 1997 OK 36, ¶ 11, 46 P.2d 662, 666-67; *Durham v. McDonald's Restaurants of Okla., Inc.*, 2011 OK 45, ¶ 5, 256 P.3d 64, 66-67. Each factor is met here.

In *Cline I, these* Defendants had a *full and fair* opportunity to litigate *this* issue by

[6] 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*, 2013 OK 50, ¶ 5, 304 P.3d at 460. Because the district court misapplied the law and disregarded the overwhelming weight of the evidence in this case, the district court's decision was clearly an abuse of discretion.

presenting evidence that restrictions on evidence-based protocols for medication abortion serve the State's interest in protecting the health and safety of women seeking abortion.[7] The district court considered, and ultimately rejected, the State's evidence as unpersuasive. *Okla. Coal. for Reprod. Justice v. Cline*, No. CV-2011-1722, slip op. at 2-3 (Okla. Cnty. District Ct. May 11, 2012). While this Court construed H.B. 1970 to ban the off-label use of any abortion-inducing drug, it affirmed the district court's conclusion that restrictions on evidence-based protocols for medication abortion do not serve the State's purported interest in protecting women's health, a conclusion *necessary* to the Court's ultimate holding. *See Cline I*, 2013 OK 93, ¶ 27, 313 P.3d at 262. This Court endorsed the district court's finding that an FDA label mandate is "**so completely at odds with the standard that governs the practice of medicine** that it can serve no purpose other than to prevent women from obtaining abortions and to punish and discriminate against those who do." *Id.* (emphasis in original) (citation omitted). In addition, in answering the certified questions, this Court made a number of relevant findings, including that: i) "evidence-based regimens are common, permissible, and can be required by good medical practice," *id.*, 2013 OK 93, ¶ 10, 313 P.3d at 258; ii) the Mifeprex regimen requires "a dosage level [of mifepristone] no longer considered medically necessary," *id.*, 2013 OK 93, ¶ 25, 313 P.3d at 262; and iii) ACOG and WHO "have endorsed [] alternate regimens as safer and more effective than the now-outdated regimen provided for in mifepristone's FDA-approved label," *id.*, 2013 OK 93, ¶ 21, 313 P.3d at 261.

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[7] *See, e.g.*, Defs.' Appellate Br. in *Cline I*, at 4, arguing that "[t]he district court did not take into account the State's legitimate interest in protecting the health and safety of women seeking an abortion, and disregarded undisputed evidence showing that otherwise healthy, young women had died after getting a medical abortion pursuant to a non FDA-approved protocol," and that the district court, "by making a finding of fact (that off-label protocols are 'safer and more effective' than the FDA-approved protocol) . . . improperly weigh[ed] and reject[ed] the State's evidence."

These findings, which are entitled to preclusive effect, are highly relevant to each of Appellants' three claims and their likelihood of success on the merits. H.B. 2684 bans the most common evidence-based protocols for medication abortion, previously recognized by this Court as safer and more effective than the outdated FDA label mandate, and like H.B. 1970, it lacks any health justification. But even if this Court does not find issue preclusion to apply here, or chooses not to reach the question, this Court's determinations in *Cline I* are nevertheless binding authority and clearly support a finding that Appellants have demonstrated a likelihood of success on the merits of each claim raised in this motion, as a matter of law.

Appellants have demonstrated a likelihood of success on the merits of their claim that the Act is a special law where a general law could be made applicable. H.B. 2684 is a special law because it "single[s] out less than an entire class of similarly affected persons or things for different treatment." *Reynolds v. Porter*, 1988 OK 88, 760 P.2d 816, 822. The Act singles out doctors who provide, and women who receive, abortion by limiting their access to scientific advances and evidence-based medicine. As this Court observed in *Cline I*, "[a]bortion is the only area of medicine where it appears the Oklahoma Legislature has seen fit to restrict a physician's use of certain practices." *Cline I*, 2013 OK 93, ¶ 25, n. 21, 313 P. 3d at 262. The use of FDA-approved prescription drugs is certainly susceptible of general treatment; the Legislature could have restricted all physicians from providing FDA-approved medications in an evidence-based manner. The Act is also an impermissible special law because, per this Court's clear precedents, it is not "reasonably and substantially related to a valid legislative objective." *Grant v. Goodyear Tire & Rubber Co.*, 2000 OK 41, ¶ 9, 5 P.3d 594, 598. In fact, banning evidence-based practices for medication abortion "can serve no purpose other than to prevent women from obtaining abortions and to punish and discriminate against those who

do." *Cline I*, 2013 OK 93, ¶ 27, 313 P. 3d at 262 (citation omitted).

To the extent the district court accepted the State's argument that abortion is in a category by itself and therefore merits specialized treatment, it erred as a matter of law. One could identify unique qualities of any subject matter or area, but those unique qualities do not justify a special law unless they are connected to the goals of the legislation itself. *Goodyear Tire & Rubber Co.*, 2000 OK 41, ¶ 9, 5 P.3d at 598. The special concerns related to the State's interest in fetal life, *see* Defs.' Resp. to Mot. for Temporary Inj. at 14, have nothing to do with H.B. 2684's underlying purpose, which the Legislature clearly indicated was to protect women's health. *See* H.B. 2684 § 1(A). As this Court explained in its prior opinion, Oklahoma law generally embraces evidence-based practices, and there is simply no health justification for treating medication abortion differently where the evidence-based protocols have been demonstrated by scientific research to be superior. *Cline I*, 2013 OK 93, ¶ 21-22, 313 P. 3d at 260-61.

Appellants also have shown a likelihood of success on the merits of their equal protection claim. The due process clause of the Oklahoma Constitution, Article II, Section 7, "affords protection against unreasonable or unreasoned classifications serving no important governmental objectives." *Fair Sch. Fin. Council of Okla., Inc. v. Oklahoma*, 1987 OK 114, n.48, 746 P.2d 1135, 1148 n.48 (internal quotation marks and citation omitted); *see also Butler v. Jones ex rel. State ex rel. Okla. Dep't of Corr.*, 2013 OK 105, ¶ 11, 321 P.3d 161, 166-67, *reh'g denied*. Legislative classifications, at a minimum, must "rationally further a legitimate state interest." *Butler*, 2013 OK 105, ¶ 12, 321 P.3d at 167. As explained above, H.B. 2684 singles out physicians who provide, and women who receive, medication abortion from among the larger group of physicians and patients involved in all other aspects of medical care. As

this Court held, such a distinction is unsupportable: H.B. 2684 bears no rational relationship to protecting women's health.

Finally, Appellants are likely to succeed on the merits of their due process claim under the undue burden standard that this Court may apply for purposes of this motion.[8] H.B. 2684's restrictions impose a substantial obstacle for women seeking an abortion because the Act bans the most common method of abortion for all of Reproductive Services' patients who are between 49 and 63 days LMP, subjects Oklahoma women to an outdated and inferior protocol, exposes them to elevated risks to their health, and requires them to ingest three times the amount of medication than is medically necessary. Grossman Aff. ¶¶ 35-41.

A likelihood of success on the merits of any one of these claims is sufficient to satisfy this prong of the temporary injunction standard, and Appellants have shown a likelihood of success on the merits of all three as a matter of law.

B. Irreparable Harm

Absent immediate injunctive relief to stop all provisions of H.B. 2684 from taking effect, women and physicians in Oklahoma will suffer immediate and irreparable harm. The Act deprives Appellants and those whose interests they represent of their constitutional rights under the special laws, equal protection, and due process provisions of the Oklahoma

[8] The district court in *Cline I* found that the due process clause of the Oklahoma Constitution protects the right to bodily integrity and to terminate a pregnancy as fundamental. *Okla. Coal. for Reprod. Justice*, No. CV-2011-1722, slip op. at 2-3. Strict scrutiny is the appropriate level of review for laws that interfere with fundamental constitutional rights under the Oklahoma Constitution. At a minimum, however, the Oklahoma Constitution protects the right to decide whether to continue a pregnancy to the same degree as the federal constitution, and federal jurisprudence applies an undue burden standard. *See Messenger v. Messenger*, 1992 OK 27, 827 P.2d 865, 872. While Appellants do not waive their argument that strict scrutiny is the appropriate standard, they have shown a strong likelihood of success on the merits of their due process claim even under the undue burden standard.

Constitution, and such deprivations are *per se* irreparable harm. *See generally* 11A Charles Alan Wright, et al., FED. PRAC. & PROC. § 2948.1 (3d ed. West 2014); *accord Entm't Merchants Ass'n v. Henry*, No. CIV-06-675-C, 2006 WL 2927884 at *2 (W.D. Okla. Oct. 11, 2006). As explained above, H.B. 2684 also threatens women's health and safety. Adherence to the FDA label mandate would harm women by forcing them to use a treatment protocol with a higher rate of failure, ingest triple the amount of mifepristone as necessary, endure more side effects, and make an unnecessary return trip to the clinic.[9] Appellants have shown this immediate and serious risk of harm as a matter of law: given this Court's conclusions in *Cline I* and the overwhelming weight of medical authorities,[10] it is beyond dispute that evidence-based protocols are superior to the outdated FDA label mandate. Further, women beyond 49 days LMP will suffer irreparable harm because they will be deprived of the medication abortion option altogether.

In addition, enforcement of the Act threatens Reproductive Services and its physicians with irreparable harm, and the limited injunction entered by the district court fails to protect Reproductive Services and its physicians from the serious penalties they are subject to under the Act's substantive provisions, including license suspension and disciplinary action. *See* OKLA. STAT. tit. 63, § 1-706(B); OKLA. ADMIN. CODE § 310:600-7-3; OKLA. STAT. tit. 59, §

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[9] The district court apparently determined, based upon the affidavit of Dr. Donna Harrison offered by the State, that there is some factual dispute as to whether evidence-based protocols are indeed safer and more effective as compared to the FDA label mandate. This Court, on a similar factual record that included the opinions of Dr. Harrison, correctly concluded that evidence-based protocols have been endorsed by leading medical organizations including ACOG and WHO, and represent the standard of care. *Cline I*, 2013 OK 93, ¶ 21, 313 P.3d at 260-61.

[10] *See* AMA/ACOG Amicus Br.; Grossman Aff. ¶¶ 34-41; American College of Obstetricians and Gynecologists, Practice Bulletin No. 143: Medical Management of First-Trimester Abortion (March 2014), attached as Exhibit B to the Grossman Aff.

503, amended by 2014 Okla. Sess. Law Serv. Ch. 176 (H.B. 2791) (effective Nov. 1, 2014); OKLA. STAT. tit. 59, § 509; OKLA. ADMIN. CODE 435:10-7-4.

C. Lack of Any Injury to Opposing Party

The State would suffer no harm if a temporary injunction were granted; indeed, a temporary injunction would preserve the *status quo* while this Court reviews the district court's decision. As the district court pointed out, the Legislature passed this measure in April 2014, but set the enforcement date at November 1, 2014. The State will suffer no harm by a brief additional delay to weigh the Act's constitutionality.

D. No Risk of Harm to the Public Interest

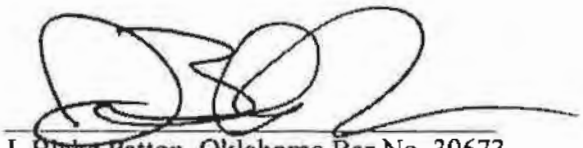
The public interest will be served by a temporary injunction. It is well-settled that enforcement of an unconstitutional law is contrary to the public interest. *See, e.g., Entm't Merchants Ass'n*, No. CIV-06-675-C, 2006 WL 2927884 at *3; *Am. Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999). Appellant Reproductive Services has been providing medication abortion using evidence-based protocols for over a decade with an excellent safety record. Eldridge Aff. ¶¶ 7, 19. The public interest lies in the continued protection of constitutional rights and the prevention of harm to women's health.

IV. Conclusion

Based on the foregoing, Appellants respectfully request that this Court enter a temporary injunction on an emergency basis, or, in the alternative, an emergency stay of the Order to preserve the *status quo*.

Dated: October 29, 2014

Respectfully submitted,



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**Admitted to Practice by Order dated September 30, 2014.*

ATTORNEYS FOR PLAINTIFFS / APPELLANTS

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

Pursuant to Sup. Ct. R. 1.15(c)(1), counsel for Appellants certify that they are requesting this Court to act within less than a week on its application for stay in order to effect the relief requested because the bill at issue, H.B. 2684, which is unconstitutional and threatens to cause Appellants and those whose interests they represent irreparable injury, is set to take effect on November 1, 2014, absent an injunction from this Court. The district court issued an order denying in part and granting in part Appellants' motion for a temporary injunction on October 29, 2014.

J. BLAKE PATTON

CERTIFICATE OF SERVICE

I, Blake Patton, hereby certify that on the 29th day of October, 2014, a true and correct copy of the foregoing Emergency Motion for a Temporary Injunction, Or, In the Alternative, an Emergency Stay of the District Court's Order to Preserve the *Status Quo* and Certificate of Compliance were hand delivered to the following:

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