

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA**

BOSSIER CITY MEDICAL SUITE, INC.; CHOICE INC.)
OF TEXAS D/B/A CAUSEWAY MEDICAL CLINIC;)
DELTA CLINIC OF BATON ROUGE, INC.; MIDTOWN)
MEDICAL, LLC.; WOMEN’S HEALTH CARE CENTER,)
INC.; and JOHN DOE, M.D.,)
) Case No. _____
)
) Plaintiffs,)
)
) v.)
)
)
) BRUCE D. GREENSTEIN, in his official capacity as)
) Secretary of the Louisiana Department of Health)
) and Hospitals,)
)
) Defendant.)

COMPLAINT

Plaintiffs, by and through their undersigned attorneys, bring this complaint¹ against the above-named Defendant, his employees, agents, and successors in office, and in support thereof allege the following:

I. PRELIMINARY STATEMENT

1. Plaintiffs are five medical facilities currently licensed to provide outpatient abortion services in the State of Louisiana, and a physician who performs abortions at some of those facilities.

¹ On September 20, 2010, Plaintiffs filed this action in the United States District Court for the Eastern District of Louisiana. On November 10, 2010, Defendant filed a motion to dismiss the complaint pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the Federal Rules of Civil Procedure alleging, inter alia, that venue is improper in the Eastern District of Louisiana such that this action should be dismissed without prejudice or transferred to the United States District Court for the Middle District of Louisiana. Although Plaintiffs dispute Defendant’s assertions regarding the appropriateness of venue in the Eastern District of Louisiana, Plaintiffs were willing to move the action rather than expend time and resources contesting issues of venue. Thus, on November 17, 2010, Plaintiffs filed a notice pursuant to Fed. R. Civ. Proc. 41(a)(1)(A)(i) voluntarily dismissing the action in the Eastern District of Louisiana without prejudice and are hereby immediately refileing this action in the United States District Court for the Middle District of Louisiana.

2. Plaintiffs bring this civil rights action under the U.S. Constitution and 42 U.S.C. § 1983 to challenge the constitutionality of Act 490, Reg. Session (La. 2010) (codified at La. Rev. Stat. Ann. § 40:2175.6[G]-[I])², which permits the Secretary (“Secretary”) of the Louisiana Department of Health and Hospitals (“Department”) to suspend or revoke the license of an outpatient abortion facility based on any violation of any state or federal law or regulation, and the Department’s “Zero Tolerance Policy,” pursuant to which the Secretary denies outpatient abortion facilities notice of alleged violations and an opportunity to correct them before taking action to suspend or revoke a license.

3. Act 490 and the Zero Tolerance Policy are unconstitutionally vague and deny the Plaintiff medical facilities equal protection of the laws and substantive due process. They also violate the fundamental right of the Plaintiff physician’s patients to terminate a pregnancy.

4. Plaintiffs seek declaratory and injunctive relief from those constitutional deprivations.

II. JURISDICTION AND VENUE

5. Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331, 1343(a)(3).

6. Plaintiffs’ claims for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202; by Rules 57 and 65 of the Federal Rules of Civil Procedure, and by the general legal and equitable powers of this Court.

7. Venue is appropriate under 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to the claim occurred in this district and a substantial part of property that is the subject of the action is situated in this district.

² A copy of Act 490 is annexed hereto as Exhibit 1.

III. PARTIES

8. Plaintiff Bossier City Medical Suite, Inc. (“Bossier City Medical”) is a health care facility in Bossier City, Louisiana, that is licensed by the Department to provide outpatient abortion services.

9. Plaintiff Choice Inc. of Texas d/b/a Causeway Medical Clinic (“Causeway Medical”) is a health care facility in Metairie, Louisiana, that is licensed by the Department to provide outpatient abortion services.

10. Plaintiff Delta Clinic of Baton Rouge, Inc. (“Delta Clinic”) is a health care facility in Baton Rouge, Louisiana, that is licensed by the Department to provide outpatient abortion services.

11. Plaintiff Midtown Medical, LLC (“Midtown Medical”) is a health care facility in New Orleans, Louisiana, that is licensed by the Department to provide outpatient abortion services.

12. Plaintiff Women’s Health Care Center, Inc. (“Women’s Health Care Center”) is a health care facility in New Orleans, Louisiana, that is licensed by the Department to provide outpatient abortion services.

13. Plaintiff John Doe, M.D., is a physician licensed to practice medicine in the State of Louisiana who provides abortion services at some of the licensed outpatient abortion facilities in the State. Dr. Doe sues using a pseudonym to prevent public disclosure of his identity, which would expose him to a substantial risk of harassment, intimidation, and violence by those opposed to the lawful provision of abortion services. Dr. Doe sues on his own behalf and on behalf of his patients seeking professional abortion services.

14. Defendant Bruce D. Greenstein is the Secretary of the Department. He is sued in his official capacity.

IV. FACTUAL ALLEGATIONS

A. The Pre-Amendment Statutory and Regulatory Regime Governing Outpatient Abortion Facilities

1. The Department of Health and Hospitals

15. The Department is part of the executive branch of the State of Louisiana. La. Rev. Stat. Ann. § 36:4. The Department, through its offices and officers, is responsible for “the development and providing of health and medical services for the prevention of disease for the citizens of Louisiana.” La. Rev. Stat. Ann. § 36:251.

16. The office of the Secretary of the Department was instituted pursuant to La. Rev. Stat. Ann. § 36:253, which provides that “[t]he secretary shall serve as the executive head and chief administrative officer of the Department of Health and Hospitals and shall have the responsibility for the policies of the department, except as otherwise provided by this Title, and for the administration, control, and operation of the functions, programs, and affairs of the department; provided that the secretary shall perform his functions under the general control and supervision of the governor.” The Secretary of the Department has the authority to “[p]erform the functions of the state relating to [l]icensing of health facilities, including hospitals and nursing homes” La. Rev. Stat. Ann. § 36:254[A](10)(b).

2. The Outpatient Abortion Facility Licensing Law

17. In 2001, the State of Louisiana enacted the Outpatient Abortion Facility Licensing Law, Acts 2001, No. 391, codified at La. Rev. Stat. Ann. §§ 40:2175.1 through 40:2175.6. On June 13, 2001, the Governor of the State of Louisiana approved the law. Prior to that date, there were no specific licensing requirements applicable to outpatient abortion facilities in the State of Louisiana.

18. The Outpatient Abortion Facility Licensing Law authorized the Department to promulgate and publish rules and regulations to provide for the health, safety, and welfare of women in outpatient abortion facilities and for the safe operation of such facilities. La. Rev. Stat. Ann. § 40:2175.2. The Outpatient Abortion Facility Licensing Law specifically provided that those rules “shall be reasonably related to the purpose expressed in this Section and shall not impose a legally significant burden on a woman’s freedom to decide whether to terminate her pregnancy.” *Id.*

19. Although enacted in mid-2001, the Outpatient Abortion Facility Licensing Law specifically provided that “[n]o outpatient abortion facility shall be required to obtain a license under this Part until the initial rules, regulations, and licensing standards are adopted and promulgated in accordance with the Administrative Procedure Act.” La. Rev. Stat. Ann. § 40:2175.5. Thus, the actual licensing of outpatient abortion facilities would not take place until after the Department promulgated rules governing those facilities.

20. Following the promulgation of those rules by the Department, the Outpatient Abortion Facility Licensing Law set forth a procedure for the initial licensing and the re-licensing of outpatient abortion facilities. Specifically, each facility seeking an initial license would submit an application and a licensing fee. The law required that the Department “perform an on-site inspection of the outpatient abortion facility prior to issuance of the initial license.” La. Rev. Stat. Ann. § 40:2175.6[C]. The law directed the Department to “issue a license if, after an on-site inspection, it finds that the outpatient abortion facility meets the requirements established under [the Outpatient Abortion Facility Licensing Law] and the licensing standards adopted in pursuance thereof.” *Id.*

21. The law provides that a “license issued to an outpatient abortion facility shall be valid for one year from the date of issuance, unless revoked prior to that date.” La. Rev. Stat. Ann. § 40:2175.4[C]. Thus, each outpatient abortion facility that received an initial license had to reapply for renewal of its license each year. The law provides that upon receipt of the annual renewal application and the annual renewal licensing fee, the Department is to “determine if the outpatient abortion facility continues to meet the requirements established under [the Outpatient Abortion Facility Licensing Law] and the licensing standards adopted in pursuance thereof.” La. Rev. Stat. Ann. § 40:2175.6[D]. The law gives the Department the right to “perform an on-site inspection upon annual renewal” and provides that “[i]f the outpatient abortion facility continues to meet the requirements established under [the Outpatient Abortion Facility Licensing Law] and the licensing standards adopted in pursuance thereof, a license shall be issued which is valid for one year.” *Id.*

22. For those facilities that were in operation but not yet in compliance with the newly promulgated regulations, the law provided for the issuance of a six-month provisional license. La. Rev. Stat. Ann. § 40:2175.6[E]. The law provided that the “deficiencies which preclude the outpatient abortion facility from being in full compliance must be cited at the time the provisional license is issued.” *Id.* Thus, during the initial licensing period, if an outpatient abortion facility did not meet the requirements promulgated by the Department, the facility would be given notice of those deficiencies and an opportunity to bring itself into compliance.

23. Once the initial license was issued, the law further provided a procedure for the suspension or revocation of a license, and appeal from such a decision. La. Rev. Stat. Ann. § 40:2175.6[G]. The law provided that the procedure for such actions “shall be the same as provided for the licensing of hospitals as contained in R.S. 40:2110.” The statute applicable to

hospitals, and incorporated by reference as applicable to outpatient abortion facilities, states that the Department “may deny, suspend or revoke a license in any case in which [the Secretary] finds that there has been a *substantial failure* of the applicant or licensee to comply with the requirements of this Part or the rules, regulations and minimum standards adopted by the [Department].” La. Rev. Stat. Ann. § 40:2110[A] (emphasis added). That statute provides certain fundamental protections.

24. First, the statute requires that any action by the Department to deny, suspend or revoke a license will be based only upon a finding of a “substantial failure” to comply. *Id.* Thus, the statute includes a threshold as to the nature and degree of non-compliance that can justify the denial, suspension or revocation of a license.

25. Second, such a substantial failure to comply can lead to a denial, suspension, or revocation only if the failure to comply is in connection with the Hospital Licensing Law (in the case of hospitals) or in connection with the rules, regulations, and minimum standards adopted by the Department. *Id.* Thus, the statute clearly defines the universe of laws or regulations for which the substantial failure to comply could give rise to the suspension or revocation of a license.

26. Third, the statute gives a licensee the right to appeal *suspensively* from the action to an impartial three member board. La. Rev. Stat. Ann. §§ 40:2110[B], 40:2009.7[C]. Thus, the action of the Department is suspended during the pendency of any appeal so that the decision may be carefully reviewed by the impartial three member board.

27. Fourth, the statute gives a licensee the right to appeal *suspensively* from the decision of the impartial three member board to the district court for the parish of East Baton Rouge, which will review the appeal *de novo*. La. Rev. Stat. Ann. § 40:2110[C].

28. Of course, the statute does not prevent the Department from taking emergency action where the safety and welfare of the public is truly in immediate or imminent danger. Under the Louisiana Administrative Procedure Act, if the Department finds “that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order” the Department has the right to order “summary suspension of a license . . . pending proceedings for revocation or other action.” La. Rev. Stat. Ann. § 49:961. Although the Department has long had the right to order such summary suspension of a license, it could do so only if “prior to the institution of any agency proceedings” it provided “notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee [received] an opportunity to show compliance with all lawful requirements for the retention of the license.” *Id.*

3. The Health Care Facilities and Licensing Enforcement Law

29. The same act that enacted the Outpatient Abortion Facility Licensing Law also amended the statute regarding health care facilities and licensing enforcement so that the enforcement statute would apply to outpatient abortion facilities. Acts 2001, No. 391, effective August 15, 2001 (amending La. Rev. Stat. Ann. § 40:2199[A].)

30. The enforcement statute applies broadly to all types of health care providers and medical facilities licensed or certified by the Department, including but not limited to an “adult day health care facility, substance abuse/addiction treatment facility, ambulatory surgery center, case management facility, urine drug screening facility, mobile cholesterol screening facility, end stage renal disease facility, supplier of portable X-ray services, home health agency, hospice, hospital, ICF/DD facility, [or an] outpatient abortion facility.” *Id.*

31. The enforcement statute specifically provides procedures that will apply prior to the assessment of fines for failure to comply with Department regulations. Recognizing the

fundamental right to have an opportunity to receive notice of any deficiencies and an opportunity to correct the deficiency, the statute specifically defines a violation to occur where, “[a]s a result of a licensure or certification survey, [the facility] is determined by an agency to be in violation of one or more conditions of licensure or certification and has *failed to correct such conditions of violation within the time prescribed by law or by the agency.*” La. Rev. Stat. Ann. § 40:2199[A](3)(a) (emphasis added).

32. The statute sets forth a schedule of civil fines by class of violation ranging in descending order of seriousness from Class A violations, which are “[v]iolations that create a condition or occurrence relating to the operation and maintenance of a facility, which result in death or serious harm to a resident or client,” La. Rev. Stat. Ann. § 40:2199[B](2)(a), to Class E violations which are “[v]iolations for failure of a facility to submit a statistical or financial report in a timely manner as required by regulation,” La. Rev. Stat. Ann. § 40:2199[B](2)(e).

33. Lying on the continuum of seriousness in between Class A and Class E violations are Class C violations, which are “[v]iolations that create a condition or occurrence relating to the operation and maintenance of a facility which create a potential for harm by directly threatening the health, safety, rights, or welfare of a resident or client.” La. Rev. Stat. Ann. § 40:2199[B](2)(c). Class C violations are punishable by fines that “shall not exceed one thousand dollars for the first violation and shall not exceed two thousand dollars per day for repeat violations.” *Id.* Again, the statute recognizes a facility’s right to cure Class C violations and thereby cut off the accrual of civil fines for each day that the condition is not remedied.

34. With respect to outpatient abortion facilities, the Department has recently taken the position—in connection with Hope Medical Group for Women (“Hope Medical”), which is not a party to this action—that a Class C violation is grounds for permanent revocation of a facility’s

license and, as part of its Zero Tolerance Policy, that the facility is not entitled to an opportunity to cure the alleged deficiency. Upon information and belief, the Department has never taken the position with respect to any other type of licensed medical facility regulated by the Department that a Class C violation provides grounds for permanent revocation or immediate suspension without providing an opportunity to cure.

4. The Department Rules Governing Outpatient Abortion Facilities

35. In mid-2003, almost two years after the enactment of the Outpatient Abortion Facility Licensing Law, the Department promulgated regulations governing outpatient abortion facilities. *See* La. Admin. Code §§ 48:I.4401 through 48:I.4423, Promulgated by the Department of Health and Hospitals, Office of the Secretary, Bureau of Health Services Financing, L.R. § 29:705 (May 2003). Since their promulgation by the Department under the Administrative Procedure Act, these rules as written and published in the administrative code have not changed.

36. For the first time, in accordance with the Outpatient Abortion Facility Licensing Law, outpatient abortion facilities were then required to submit applications for an initial license to operate and go through the licensing process set forth in the statute. The Department regulations set forth procedures for the initial licensing process. La. Admin. Code § 48:I.4403.

37. After the initial license had been granted, the Department regulations further provide that “[o]n-site inspections may be performed to investigate complaints in accordance with R.S. 40:2009.13-2009.20 and perform follow-up surveys as deemed necessary to ensure compliance with these licensing standards.” *Id.* Thus, outpatient abortion facilities could expect routine inspections following the initial on-site inspection process.

38. Since mid-2003, the licensed outpatient abortion facilities in Louisiana have been governed by the regulations promulgated by the Department to apply to the operations of such facilities, including annual licensing provisions, on-site inspections, and until recently, the right

to cure any deficiencies identified during those on-site inspections to bring themselves into full compliance.

B. The 2010 Amendments to the Outpatient Abortion Facility Licensing Law

39. On June 22, 2010, the State of Louisiana enacted Act No. 490, which amended and revised section 2175.6 of the Outpatient Abortion Facilities Licensing Law to remove the earlier statutory provision subjecting outpatient abortion facilities to the same standards as hospitals for license denial, revocation or suspension.

40. As amended, the statute states that “the secretary of the department may deny a license, may refuse to renew a license, or may revoke an existing license, if an investigation or survey determines that the application or licensee is in violation of any provision” of the regulations governing outpatient abortion facilities, “or in violation of any other federal or state law or regulation.” Thus, unlike La. Rev. Stat. Ann. § 40:2110[A] applicable to hospitals, which requires “a *substantial failure* of the applicant or licensee to comply” with specific statutory and regulatory provisions, La. Rev. Stat. Ann. § 40:2175.6[G] applicable to outpatient abortion facilities dispenses with the “substantial failure” requirement. On its face, La. Rev. Stat. Ann. § 40:2175.6[G] provides that any failure to comply with the Outpatient Abortion Facilities Licensing Law or the Department regulations promulgated thereunder, regardless of the severity or nature of the failure to comply or the duration of noncompliance, will provide a basis for permanent revocation of the facility’s license. For instance, with respect to patient records, the Department regulations require that “[s]afeguards shall be established to maintain confidentiality and protection from fire, water, or other sources of damage,” La. Admin. Code § 48:I.4415, such that, on the face of the statute, an outpatient abortion facility that did not have its patient records in sufficiently watertight containers could, at the discretion of the Secretary of the Department, have its license permanently revoked.

41. As amended, the statute goes further. On its face, the statute authorizes the Department to revoke a facility's license for a violation of any "federal or state law or regulation," which by its own terms could include any of the myriad federal or state laws or regulations. *See, e.g.*, La. Rev. Stat. Ann. § 23:15. Posting of labor laws ("Every employer shall keep conspicuously posted in or about the premises wherein any worker is employed, a printed copy or abstract of those labor laws which the executive director may designate, in a form to be furnished by the executive director."); U.S.C. § 6655. Failure by corporation to pay estimated income tax (imposing penalties for late payment of corporate income taxes). The potentially applicable state or federal laws or regulations are practically innumerable. On the face of the statute, a violation of any one of those laws or regulations provides grounds for the Department to revoke permanently the license of an outpatient abortion facility in Louisiana.

42. As amended, the statute also permits the Department to immediately suspend a facility's license if the Secretary "determines that the applicant is in violation of any provision of" the regulations governing outpatient abortion facilities or any other federal or state law or regulation if the Department, in the Secretary's discretion, also determines "that the violation or violations pose an imminent or immediate threat to the health, welfare or safety of a client or patient." La. Rev. Stat. Ann. § 40:2175.6[H]. While the Department has long had the authority to act to suspend a license where the Secretary found "that public health, safety, or welfare imperatively require[d] emergency action, and incorporate[d] a finding to that effect in its order," it could do so only if "prior to the institution of any agency proceedings" it provided "notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee is given an opportunity to show compliance with all lawful requirements for the retention of the license." La. Rev. Stat. Ann. § 49:961. Under the statute as amended and applied by the

Department as part of its Zero Tolerance Policy, an outpatient abortion facility could be shut down and kept shut down during the pendency of the appeal for any violation that the Secretary deems to pose an imminent or immediate threat even if the threat has been removed. By way of example, if an outpatient abortion facility installed a non-compliant boiler, it could be deprived of its license for months while the appeal process continued thereby forcing it into bankruptcy, even if the boiler were immediately removed to remedy any allegedly dangerous condition. *See* La. Rev. Stat. Ann. § 23:539[A] Installation of boilers (“No boiler shall be installed after six months from the date upon which the rules and regulations formulated by the assistant secretary governing new installations shall have become effective, unless the boiler conforms to such rules and regulations.”).

43. Furthermore, in the case of an immediate suspension, the statute, as amended, is designed to insulate the Department from review of its decision, and in practice as part of its Zero Tolerance Policy, the Department no longer permits outpatient abortion facilities “to show compliance with all lawful requirements for the retention of the license.” *See* La. Rev. Stat. § 49:961. First, the statute now provides that any administrative appeal of an immediate suspension decision gives the right solely to a devolutive appeal with the Secretary of the Department. Unlike a hospital and some other licensed medical facilities, an outpatient abortion facility no longer has the right to a suspensive appeal. Thus, if the outpatient abortion facility files an administrative appeal, it will still be deprived of its license, cannot operate, and cannot generate revenue to avoid bankruptcy during the pendency of the appeal. Second, the statute seeks to sharply limit the scope of any judicial review of such immediate suspension decisions. The outpatient abortion facility can file for injunctive relief from the immediate suspension with the district court for the parish of East Baton Rouge, but at least on its face, the statute provides

that injunctive relief can be granted only upon a showing by “clear and convincing evidence that the secretary’s decision to issue the immediate suspension of the license was arbitrary and capricious.” La. Rev. Stat. Ann. § 40:2175.6[H].

44. Finally, as amended, the statute provides that if a license is finally revoked or “renewal of a license is denied other than for cessation of business or non-operational status, or if the license is surrendered in lieu of an adverse action, any owner, officer, member, manager, director or administrator of the licensee may be prohibited from owning, managing, directing or operating another outpatient clinic in the state of Louisiana.” La. Rev. Stat. Ann. § 40:2175.6[I]. Thus, for a broad class of persons associated with an outpatient abortion facility, the revocation of a license could in the Secretary’s discretion result in a lifetime ban.

C. The Statutory and Regulatory Licensing Provisions Governing Other Medical Facilities

45. In addition to outpatient abortion facilities, the Department regulates a wide variety of medical facilities through statutory and regulatory provisions, including but not limited to:

- (1) Abuse/Addiction Treatment Facilities, La. Admin. Code §§ 48:I.7401 through 48:I.7455;
- (2) Adult Brain Injury Facilities, La. Rev. Stat. Ann. §§ 40:2120.31 through 40:2120.40;
- (3) Adult Day Health Care Providers, La. Rev. Stat. Ann. §§ 40:2120.41 through 40:2120.47; La. Admin. Code §§ 48:I.4201 through 48:I.4295;
- (4) Adult Residential Care Homes and Providers, La. Rev. Stat. Ann. §§ 40:2151 through 40:2166.8; La. Admin. Code §§ 48:I.6801 through 48:I.6893 and 48:I.8801 through 48:I.8835;
- (5) Ambulatory Surgical Centers, La. Rev. Stat. Ann. §§ 40:2131 through 40:2145; La. Admin. Code §§ 48:I.4501 through 48:I.4571;
- (6) Children’s Respite Care Centers, La. Rev. Stat. Ann. §§ 40:2175.11 through 40:2175.15; La. Admin. Code §§ 48:I.8001 through 48:I.8095;

- (7) Crisis Receiving Centers, La. Rev. Stat. Ann. §§ 40:2180.11 through 40:2180.16; La. Admin. Code §§ 48:I.9601 through 48:I.9637;
- (8) End Stage Renal Disease Facilities, La. Rev. Stat. Ann. §§ 40:2117.1 through 40:2118; La. Admin. Code §§ 48:I.8401 through 48:I.8461;
- (9) Home and Community-Based Service Providers, La. Rev. Stat. Ann. §§ 40:2120.1 through 40:2120.8;
- (10) Home Health Agencies, La. Rev. Stat. Ann. §§ 40:2116.31 through 40:2116.40; La. Admin. Code §§ 48:I.9101 through 48:I.9131;
- (11) Hospices, La. Rev. Stat. Ann. §§ 40:2181 through 40:2191; La. Admin. Code §§ 48:I.8201 through 48:I.8257;
- (12) Hospitals, La. Rev. Stat. Ann. §§ 40:2101 through 40:2115; La. Admin. Code §§ 48:I.6701 through 48:I.6755;
- (13) Intermediate Care Facilities for Persons with Developmental Disabilities, La. Rev. Stat. Ann. §§ 40:2180 through 40:2180.5;
- (14) Nursing Homes; La. Rev. Stat. Ann. §§ 40:2009.1 through 40:2009.19; La. Admin. Code §§ 48:I.9701 through 48:I.9749;
- (15) Pain Management Clinics, La. Rev. Stat. Ann. §§ 40:2198.11 through 40:2198.13; La. Admin. Code §§ 48:I.7801 through 48:I.7861;
- (16) Pediatric Day Health Care Facilities, La. Rev. Stat. Ann. §§ 40:2193 through 40:2193.4; La. Admin. Code §§ 48:I.5201 through 48:I.5285;
- (17) Psychiatric Residential Treatment Facilities, La. Admin. Code §§ 48:I.9001 through 48:I.9085;
- (18) Respite Care Service Providers, La. Admin. Code §§ 48:I.8101 through 48:I.8167.
- (19) Rural Health Clinics, La. Rev. Stat. Ann. §§ 40:2195 through 40:2197; La. Admin. Code §§ 48:I.7501 through 48:I.7535; and
- (20) Trauma Centers, La. Rev. Stat. Ann. §§ 40:2171 through 40:2173.

46. Among all of the types of medical facilities regulated by the Department, the State of Louisiana has singled out outpatient abortion facilities for treatment that no other similarly situated regulated medical facility receives.

47. Under the applicable statutes and regulations, none of these other types of medical facilities can lawfully have their license revoked or immediately suspended by the Department for a violation of any “federal or state law or regulation,” without some required showing of a substantial failure to comply, and upon information and belief, without some opportunity in practice to bring themselves into compliance.

48. Under the applicable statutes and regulations, none of these medical facilities are required to prove by “clear and convincing evidence that the secretary’s decision to issue the immediate suspension of the license was arbitrary and capricious” to obtain injunctive relief from an immediate suspension order. The standard is designed to preclude meaningful judicial review that would otherwise be available to all other licensed medical facilities.

49. In fact, at a hearing before the Louisiana House Health & Welfare Committee, which was held on April 29, 2010, to discuss Act 490, Steve Rousseau, Department Executive Counsel, conceded that no other statute or regulation under Louisiana law requires a showing by clear and convincing evidence that an agency acted in an arbitrary and capricious manner to obtain injunctive relief from a court.

50. Upon information and belief, despite numerous violations—even deaths—at other licensed medical facilities, the only instance in which the Department has ever acted on an immediate basis to suspend the license of a medical facility occurred recently with respect to an outpatient abortion facility, namely Hope Medical, on September 3, 2010. Also upon information and belief, although the Department has revoked the licenses of medical facilities other than outpatient abortion facilities, these revocations came only after deaths at these facilities or repeated and egregious violations that went uncorrected after notice from the Department.

51. Finally, under the statutes and regulations applicable to other medical facilities, the Department does not have the authority to indefinitely prohibit owners, officers, members, managers, directors or administrators of the facility from owning, managing, directing or operating another facility in the State of Louisiana should that facility's license be revoked.

52. In enacting Act 490, the State of Louisiana did not identify any aspect of the procedures performed at outpatient abortion facilities that distinguishes them from those procedures performed at the numerous other medical facilities regulated by the Department, which would therefore make it appropriate for outpatient abortion facilities to receive the uniquely burdensome legislative treatment set forth in Act 490. In fact, the procedures commonly performed at outpatient abortion facilities are on the low end of the scale of complexity, risk, and invasiveness when compared to the range of procedures regularly performed at many of the other medical facilities in the State of Louisiana.

D. Licensed Outpatient Abortion Facilities in Louisiana

53. Upon information and belief, there are a total of seven licensed outpatient abortion facilities in Louisiana. Bossier City Medical, Causeway Medical, Delta Clinic, Midtown Medical, and Women's Health Care Center (collectively, the "Abortion Facility Plaintiffs") comprise five of those. The other two are currently subject to license revocation proceedings initiated by the Department.

54. Upon information and belief, Gentilly Medical Clinic for Women ("Gentilly Medical"), which is not a party to this action, is currently involved in an administrative appeal of a revocation of its license by the Department. Hope Medical, which is likewise not a party to this action, is currently appealing the Department's immediate suspension of its license before the District Court of East Baton Rouge. *See Hope Medical Group for Women v. Keck*, No.

594653 (La. 19th Judicial Dist. Sept. 14, 2010) (granting temporary restraining order to permit Hope Medical to continue operations).

55. Bossier City Medical has been providing abortion services for over 30 years. It has been licensed by the Department continuously since 2004.

56. Causeway Medical has been providing abortion services for over 10 years. It has been licensed by the Department continuously since 2004.

57. Delta Clinic has been providing abortion services for over 30 years. It has been licensed by the Department continuously since 2004.

58. Midtown Medical has been providing abortion services for over 7 years. It has been licensed by the Department continuously since 2004.

59. Women's Health Care Center began providing abortion services in or about 1996. Following Hurricane Katrina, the clinic was closed for repairs from August 2005 to December 2008. It has been licensed by the Department continuously since 2004, but its license was inactive during the period when the clinic was closed.

60. Of the seven licensed outpatient abortion facilities in the State of Louisiana, four are in or around the Greater New Orleans Metropolitan Area – Plaintiff Causeway Medical (Metairie), Plaintiff Women's Health Care Center (New Orleans), Plaintiff Midtown Medical (New Orleans), and Non-Party Gentilly Medical (New Orleans) – one is in the Baton Rouge Metropolitan Area – Plaintiff Delta Clinic (Baton Rouge) – and two are in the Shreveport-Bossier City Metropolitan Area – Plaintiff Bossier City Medical (Bossier City) and Non-Party Hope Medical (Shreveport).

61. These seven facilities are currently the only outpatient abortion facilities serving the 4,492,076 residents of the State of Louisiana, estimated as of July 1, 2009, by the United States Census Bureau.

E. Changes in the Department's Practices Following the Enactment of Act 490

62. Prior to the recent passage of Act 490, the Department's practices with respect to inspecting outpatient abortion facilities were as follows:

- a. The Department conducted unannounced inspections of outpatient abortion facilities on a periodic basis.
- b. If, during an inspection, an inspector discovered a practice, procedure, or condition that the inspector believed to violate a provision of law, the inspector would give the facility verbal notice of that finding at the end of the inspection.
- c. In addition, following such an inspection, the Department would give the facility written notice of the finding via a written Statement of Deficiencies.
- d. The Statement of Deficiencies sent to an outpatient abortion facility would be accompanied by a letter giving the facility an opportunity to submit a Plan of Correction within a designated period of time (usually about ten days).
- e. If a facility submitted an unacceptable Plan of Correction, the Department would send the Plan of Correction back to the facility with a letter explaining the inadequacies in the plan.
- f. The facility would then be given a brief, additional period of time in which to submit a revised Plan of Correction.
- g. If an outpatient abortion facility submitted an acceptable Plan of Correction to the Department within the designated time frame, the Department would take no further action against the facility's license on the basis of the cited deficiencies.

- h. If, during an inspection, an inspector discovered a practice, procedure, or condition that the inspector believed to both violate a provision of law and create an immediate threat of harm to patients, the inspector would give the facility a Notification of Determination of Immediate Jeopardy (“IJ”).
- i. When the Department gave a facility an IJ, the facility was instructed to begin taking corrective action immediately and to submit a Plan of Correction while the inspector was still at the facility.
- j. Following such an inspection, the Department would give the facility written notice of the deficiencies found, including those underlying the IJ, via a Statement of Deficiencies.
- k. Such a Statement of Deficiencies would be accompanied by a letter giving the facility time to submit a Plan of Correction, and if an acceptable Plan of Correction was submitted to the Department within the designated time frame, the Department would take no action to revoke or suspend the facility’s license on the basis of the cited deficiencies.

63. Following the passage of Act 490, the Department conducted an inspection of an outpatient abortion facility, namely Hope Medical, which reflected the following departmental practices:

- a. During the inspection, the inspector discovered practices, procedures, or conditions that the inspector alleged both to violate provisions of law and to create an immediate threat of harm to patients, and the inspector gave the facility an IJ.

- b. Although the facility immediately submitted a Plan of Correction upon receipt of the IJ, and immediately changed its practices in accordance with the Plan of Correction, and although the Plan of Correction was accepted by the Department, the facility was neither sent a Statement of Deficiencies after the inspection nor given an Opportunity to submit any further Plan of Correction.
- c. Instead, approximately three weeks after the inspection, the Department issued an immediate suspension of the facility's license and initiated proceedings to permanently revoke the facility's license. Both the suspension and revocation notices expressly stated that the Department would not consider any corrective actions taken by the abortion facility during or after the date of the inspection.
- d. At the same time, the Secretary issued a press release announcing the Department's actions against the facility and explaining that the Department was acting pursuant to its new powers under Act 490.

64. Based on the Department's recent actions, Plaintiffs reasonably believe that the Department has adopted a new practice since passage of Act 490 with respect to inspecting outpatient abortion facilities. Pursuant to its new Zero Tolerance Policy, the Department no longer provides abortion facilities notice of alleged deficiencies and an opportunity to correct them before taking action to suspend or revoke a facility license.

65. Each of the Abortion Facility Plaintiffs reasonably fears that when the Department next inspects it, the Department will initiate action to suspend or revoke its license without first giving it an opportunity to respond to or correct any alleged deficiencies.

F. Impact of the Department's Enforcement Practices Following Enactment of Act 490

66. When the Department inspects outpatient abortion facilities, it issues deficiencies not only for violations of the applicable licensing statutes and outpatient abortion facility regulations, but also for failing to have policies and procedures that ensure compliance with wholly separate statutes (such as provisions of the Louisiana Children's Code) and alleged standards of care.

67. When the Department cites an outpatient abortion facility for a deficiency, it often does so on the basis of conduct, policies, or practices that have been in place at that facility for years, and that have been subject to prior Department inspections without eliciting any comment from the Department.

68. In citing outpatient abortion facilities for deficiencies, the Department often applies statutes and regulations in inconsistent ways.

69. Because the Department issues deficiencies based on requirements not set forth in the applicable licensing statutes and outpatient abortion facility regulations, and because the Department applies statutes and regulations inconsistently, the Abortion Facility Plaintiffs frequently lack notice that conduct alleged by the Department to constitute a deficiency violates their conditions of licensure.

70. The Department's practice of citing of deficiencies based on requirements not set forth in the applicable licensing statutes and outpatient abortion facility regulations, and the Department's inconsistent application of statutes and regulations, subject the Abortion Facility Plaintiffs to arbitrary enforcement.

71. The harms imposed on Plaintiffs by the foregoing lack of notice and arbitrary enforcement are greatly increased by Act 490 and the Zero Tolerance Policy because alleged

deficiencies at the Abortion Facility Plaintiffs' facilities no longer simply necessitate a change in practices or procedures and a Plan of Correction; they now expose the Abortion Facility Plaintiffs to the possibility of immediate suspension and/or or permanent revocation of their licenses without any opportunity to correct the alleged deficiency.

72. Enforcement of Act 490 and the Zero Tolerance Policy makes it likely that the Department will suspend or revoke many or all of the Abortion Facility Plaintiffs' licenses in the foreseeable future.

73. The purpose of Act 490 and the Zero Tolerance Policy is to close down outpatient abortion facilities regardless of whether those facilities are operating safely.

74. The suspension and/or revocation of some or all of the Abortion Facility Plaintiffs' licenses would significantly impede the ability of Dr. Doe's patients to obtain professional abortion services.

**FIRST CLAIM FOR RELIEF
(Vagueness)**

75. The allegations of paragraphs 1 through 74 are incorporated as though fully set forth herein.

76. Act 490 is unconstitutional under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution because it fails to give the Abortion Facility Plaintiffs fair notice of the conditions of licensure for outpatient abortion facilities and encourages arbitrary and discriminatory enforcement.

77. The Zero Tolerance Policy practiced by the Department is unconstitutional under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution because it fails to give the Abortion Facility Plaintiffs fair notice of the conditions of licensure for outpatient abortion facilities and encourages arbitrary and discriminatory enforcement.

**SECOND CLAIM FOR RELIEF
(Equal Protection)**

78. The allegations of paragraphs 1 through 74 are incorporated as though fully set forth herein.

79. Act 490 violates the rights of the Abortion Facility Plaintiffs under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution by treating outpatient abortion facilities differently than all other medical facilities regulated by the Department without any basis for the differential treatment other than animus toward abortion providers.

**THIRD CLAIM FOR RELIEF
(Substantive Due Process—Irrational Government Action)**

80. The allegations of paragraphs 1 through 74 are incorporated as though fully set forth herein.

81. Act 490 violates the rights of the Abortion Facility Plaintiffs to substantive due process under the Fourteenth Amendment to the U.S. Constitution because it deprives them of liberty and property interests in an arbitrary, unreasonable, and capricious manner, and invests an impermissible degree of subjective discretion in the Secretary by authorizing the Secretary to suspend or revoke an outpatient abortion facility's license based on any violation of any federal or state law or regulation, authorizing the Secretary to ban an individual for life from owning, managing, directing, or operating an outpatient abortion facility, and sharply curtailing the scope of judicial review of the Secretary's actions.

82. The Zero Tolerance Policy violates the right of the Abortion Facility Plaintiffs to substantive due process under the Fourteenth Amendment to the U.S. Constitution because it deprives them of liberty and property interests in an arbitrary, unreasonable and capricious manner.

FOURTH CLAIM FOR RELIEF
(Substantive Due Process—Right to Terminate a Pregnancy)

83. The allegations of paragraphs 1 through 74 are incorporated as though fully set forth herein.

84. Act 490 has both the purpose and the effect of imposing a substantial obstacle in the path of Dr. Doe's patients who are seeking to obtain pre-viability abortions. Therefore, Act 490 violates the fundamental right to terminate a pregnancy guaranteed by the Fourteenth Amendment to the U.S. Constitution.

85. The Zero Tolerance Policy has both the purpose and the effect of imposing a substantial obstacle in the path of Dr. Doe's patients who are seeking to obtain pre-viability abortions. Therefore, the Zero Tolerance Policy violates the fundamental right to terminate a pregnancy guaranteed by the Fourteenth Amendment to the U.S. Constitution.

ATTORNEY'S FEES

86. Plaintiffs are entitled to an award of reasonable attorney's fees and expenses pursuant to 42 U.S.C. § 1988.

REQUEST FOR RELIEF

Plaintiffs respectfully request that this Court:

1. Issue a declaratory judgment that:
 - a. Act 490 is unconstitutional and unenforceable as a whole; and/or
 - b. Section G of Act 490 (codified at La. Rev. Stat. Ann. § 40:2175.6[G]), which authorizes the Secretary to deny, refuse to renew, or revoke the license of an outpatient abortion facility based on any violation of the regulations governing outpatient abortion facilities or any violation of any other federal or state law or regulation, is unconstitutional and unenforceable; and/or

- c. Section H of Act 490 (codified at La. Rev. Stat. Ann. § 40:2175.6[H]), which authorizes the Secretary to immediately suspend the license of an outpatient abortion facility without complying with the requirements of La. Rev. Stat. § 49:961 and sharply limits judicial review of the Secretary's actions, is unconstitutional and unenforceable; and/or
 - d. Section I of Act 490 (codified at La. Rev. Stat. Ann. § 40:2175.6[I]), which authorizes the Secretary to permanently bar an individual from owning, managing, directing, or operating an outpatient abortion facility in Louisiana, is unconstitutional and unenforceable; and/or
 - e. the Zero Tolerance Policy, pursuant to which the Department denies a licensed outpatient abortion facility notice of an alleged violation and an opportunity to correct it before taking action to suspend or revoke its license, is unconstitutional and unenforceable; and/or
2. Issue permanent injunctive relief, without bond, restraining Defendant, his employees, agents, and successors in office from:
- a. enforcing Act 490 as a whole; and/or
 - b. enforcing Section G of Act 490 (codified at La. Rev. Stat. Ann. § 40:2175.6[G]), which authorizes the Secretary to deny, refuse to renew, or revoke the license of an outpatient abortion facility based on any violation of the regulations governing outpatient abortion facilities or any violation of any other federal or state law or regulation; and/or
 - c. enforcing Section H of Act 490 (codified at La. Rev. Stat. Ann. § 40:2175.6[H]), which authorizes the Secretary to immediately suspend the license of an

outpatient abortion facility without complying with the requirements of La. Rev. Stat. § 49:961 and sharply limits judicial review of the Secretary's actions; and/or

- d. enforcing Section I of Act 490 (codified at La. Rev. Stat. Ann. § 40:2175.6[I]), which authorizes the Secretary to permanently bar an individual from owning, managing, directing, or operating an outpatient abortion facility in Louisiana; and/or
 - e. enforcing the Zero Tolerance Policy, pursuant to which the Department denies a licensed outpatient abortion facility notice of an alleged violation and an opportunity to correct it before taking action to suspend or revoke its license; and/or
3. Grant Plaintiffs attorney's fees, costs and expenses pursuant to 42 U.S.C. § 1988; and/or
 4. Grant such other and further relief as the Court may deem just, proper, and equitable.

Dated: November 17, 2010

Respectfully submitted,

/S/ William E. Rittenberg

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*Motion for Admission *Pro Hac Vice* to be filed.

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