

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

NICOLE BLACKMON, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	No. 23-1196-IV(I)
)	
STATE OF TENNESSEE, <i>et al.</i> ,)	Judge Donaghy
)	Chancellor Culbreath
Defendants.)	Chancellor Moskal

**MEMORANDUM AND ORDER ON PLAINTIFFS’
MOTION FOR TEMPORARY INJUNCTION**

This case came before the assigned three-judge panel on Plaintiffs’ *Motion for Temporary Injunction*.¹ Defendants filed a response in opposition, and Plaintiffs filed a reply. Participating in the hearing were Attorneys Linda Goldstein and Marc Hearn, representing Plaintiffs, and Assistant Solicitor General Whitney Hermandorfer, representing Defendants. Based on the motion, response, reply, declarations, exhibits, the amended complaint, and arguments of counsel, the Court respectfully grants, in part, Plaintiffs’ *Motion for Temporary Injunction* and denies, in part, the motion for the reasons discussed below.

I. BACKGROUND AND STATEMENT OF CASE

This case involves Plaintiffs’ constitutional challenges to the medical necessity exception to the criminal abortion statute passed by the Tennessee General Assembly, which was signed into law on April 28, 2023, and became effective immediately. 2023 Tenn. Pub. Acts ch. 313, §§ 1-3 (codified at Tenn. Code Ann. § 39-15-213(c)) (the “Medical Necessity Exception”). Tennessee’s criminal abortion statute had become effective during the prior year, on August 25, 2022, and made it a crime punishable as a Class C felony for any person to perform or attempt to perform an

¹ The Court also heard Defendants’ *Motion to Dismiss* on the same date and is entering a separate order on that motion granting the motion, in part, and denying it, in part.

abortion. Tenn. Code Ann. § 39-15-213(b). As originally enacted, the statute excluded from the definition of abortion the “removal of a dead fetus.” The 2023 amendment revised the definition of abortion to also exclude the termination of an “ectopic or molar pregnancy.” *Id.* § 39-15-213(a)(1). The 2023 amendment also created the Medical Necessity Exception, which provides, in pertinent part:

(c)(1) Notwithstanding subsection (b), a person who performs or attempts to perform an abortion does not commit the offense of criminal abortion if the abortion is performed or attempted by a licensed physician in a licensed hospital or ambulatory surgical treatment center and the following conditions are met:

(A) The physician determined, using reasonable medical judgment, based upon the facts known to the physician at the time, that the abortion was necessary to prevent the death of the pregnant woman or to prevent serious risk of substantial and irreversible impairment of a major bodily function of the pregnant woman; and

(B) The physician performs or attempts to perform the abortion in the manner which, using reasonable medical judgment, based upon the facts known to the physician at the time, provides the best opportunity for the unborn child to survive, unless using reasonable medical judgment, termination of the pregnancy in that manner would pose a greater risk of death to the pregnant woman or substantial and irreversible impairment of a major bodily function.

Id. § 39-15-213(c)(1).

Plaintiffs Nicole Blackmon, Allyson Phillips, Kaitlyn Dulong, K. Monica Kelly, Kathryn Archer, Rebecca Milner, and Rachel Fulton (the “Plaintiff Patients”) were pregnant and sought medical care in Tennessee for their pregnancies and related health conditions. Plaintiff Patients allege that each of them wanted to be pregnant, and none of them sought an elective abortion. However, each of them developed serious and potentially life-threatening medical conditions and/or fatal fetal diagnoses. Plaintiff Patients further allege they were denied or delayed in receiving medically necessary abortion care due to the confusion and uncertainty within the Tennessee medical community regarding the scope and application of the Medical Necessity

Exception. Each Plaintiff Patient suffered the tragic loss of her pregnancy, and several also suffered serious and life-threatening complications and injuries due to the delay in receiving or denial of medically necessary abortion care. Six of the seven Plaintiff Patients allege that they are again pregnant or want to become pregnant, but they fear they will not be able to obtain medically necessary abortion care in Tennessee if and when needed, placing their lives and health at risk.

Plaintiffs Heather Maune, M.D. and Laura Andreson, D.O. (the “Plaintiff Physicians”) are obstetricians/gynecologists who practice medicine in Nashville and Franklin, Tennessee, respectively. They treat pregnant patients with a wide variety of obstetrical and other health complications that develop during pregnancies, including life- or health-threatening medical conditions. Before the criminal abortion ban went into effect, they offered essential abortion care to their patients. Now, they allege they are limited in their ability to provide such care and can only offer information about out-of-state options due to the confusion and uncertainty within the Tennessee medical community as to the scope and application of the Medical Necessity Exception. Both Plaintiff Physicians sue on their own behalf and on behalf of their patients.

Defendants are the State of Tennessee, Tennessee Attorney General Jonathan Skrmetti, the Tennessee Board of Medical Examiners (“TBME”) and its officers and members, who are sued in their official capacity, and the Tennessee Board of Osteopathic Examiners (“TBOE”) and its officers and members, who are sued in their official capacity.

Plaintiff Patients challenge the constitutionality of the Medical Necessity Exception as violating their right to life and their right to equal protection under the Tennessee Constitution, Art. I, § 8 and Art. XI, § 8. Plaintiffs also further challenge the Medical Necessity Exception as unconstitutionally vague in violation of Plaintiff Physicians’ right to due process under Tennessee Constitution, Art. I, § 8. Plaintiffs request prospective declaratory and injunctive relief against the enforcement of the criminal abortion statute as applied to physicians treating pregnant patients

with “critical or emergent physical medical conditions” for whom medically necessary abortion care would prevent or alleviate a risk of death or serious risk to their health. Plaintiffs do not seek monetary damages for any of their injuries or losses.

Plaintiffs move for a temporary injunction under Tenn. R. Civ. P. 65.04, asking the Court to construe the Medical Necessity Exception in the manner they propose and enjoin the enforcement of the criminal abortion statute or any disciplinary proceedings under the criminal abortion statute as follows:

- (1) A declaration that the Medical Necessity Exception to Tennessee’s abortion ban permits physicians to provide a pregnant person with abortion care when the physician determines, in their best, good faith medical judgment and in consultation with the pregnant person, that the pregnant person has a critical or emergent physical medical condition, including a fetal diagnosis, that poses a risk of death or a risk to their health, including their fertility, without regard to when that risk may become manifest; and
- (2) An order prohibiting Defendants, as well as their agents, servants, employees, attorneys, any person in active concert or participation with Defendants, and successors in office, from enforcing the abortion ban or instituting disciplinary actions related to alleged violations of the abortion ban in a manner violating the above declaration; and
- (3) Further, Plaintiffs ask the Court to retain jurisdiction for the purposes of issuing further appropriate injunctive relief if the Court’s order is violated and to award such other and further relief as the Court deems just and proper.

In support of their motion, Plaintiffs submit the declarations of Plaintiff Patients and Plaintiff Physicians, attesting to the allegations of the First Amended Complaint. They also submit the expert declarations of Lisa C. Zuckerwise, M.D., Ali S. Raja, M.D., and Deva Sharma, M.D., and the declaration of Plaintiffs’ counsel, Linda Goldstein, with exhibits. Defendants oppose the requested relief and submit the expert declarations of Elena Krause, M.D., Ph.D., Stephen Hammond, M.D., FACOG, and Howard Curlin, M.D. In reply, Plaintiffs submit additional declarations of both Plaintiff Physicians, and declarations of Sarah Osmundson, M.D., Ali S. Raja, M.D., Lisa C. Zuckerwise, M.D., and Plaintiffs’ counsel Linda Goldstein.

II. FINDINGS OF FACT

The Court makes the following preliminary findings of fact for purposes of the pending motion for temporary injunction only, as required under Tenn. R. Civ. P. 65.04(6), based upon the Court's record at this stage of the proceedings.

Plaintiff Nicole Blackmon had serious, chronic health conditions that posed risks to her health during pregnancy in mid-July 2022, making her pregnancy high-risk. At 15 weeks, she received a fatal fetal diagnosis. She was unable to receive abortion care in Tennessee and had to continue her pregnancy, suffering related risks to her health. She went into premature labor at 31 weeks, was diagnosed with chorioamnionitis, an infection of the placenta and amniotic fluid, and gave birth to a stillborn baby after 32 hours of labor. She feared becoming pregnant again due to her serious health conditions and chose to undergo a tubal ligation.

Plaintiff Allyson Phillips became pregnant in the Fall of 2022. At 15 weeks, she was diagnosed as having no amniotic fluid and abnormal development of the fetus' kidneys, heart, and brain, making survival after birth highly unlikely. Phillips's continued pregnancy also posed serious risks to her health due to other medical conditions. She was unable to obtain an abortion in Tennessee and traveled to New York for abortion care. Her fetus died in utero prior to the abortion, placing Phillips at high risk of infection and blood clots. Phillips fears becoming pregnant again in Tennessee for lack of access to abortion care if needed.

Plaintiff Kaitlyn Dulong became pregnant in the Summer of 2022. In November 2022, she began experiencing complications and eventually was diagnosed with cervical insufficiency. She was denied emergency treatment because the fetus still had a heartbeat although the pregnancy was not viable. Her physician sought advice in order to provide her with medication for an induced abortion, causing a delay in receiving that medical care. Her fetus died, and she was diagnosed with acute chorioamnionitis, a severe inflammation of the placenta; and subchorionic hemorrhage,

bleeding between the uterine wall and chorioamniotic membranes. Subsequently, Dulong became pregnant again in 2023 and gave birth to her daughter in November 2023. She remains fearful of becoming pregnant in the future and being unable to obtain needed medical care in the event of a pregnancy complication.

Plaintiff Monica Kelly became pregnant in February 2023. In mid-March 2023, she learned that her fetus had several severe fetal anomalies, including severe swelling in the fetus' tissues and organs called hydrops fetalis. After further testing, the fetus was diagnosed with Trisomy 13, a genetic disorder that is a severe fetal condition that usually results in miscarriage. She was told by her health care providers that they could not offer abortion care but, if her pregnancy continued, she would be at risk for preeclampsia and infection. Kelly sought and obtained abortion care in Florida. Subsequently, she has become pregnant again but remains fearful of having to leave the state for necessary medical care.

Plaintiff Kathryn Archer became pregnant in 2022. At 20 weeks, she was told the fetus had several serious fetal anomalies and was unlikely to survive. The fetus had spina bifida, anomalies with brain development, and a stomach omphalocele, a defect in the abdominal wall where the stomach develops outside the abdomen. Archer was referred to a maternal fetal medicine specialist, who advised of additional anomalies and that the fetus would have brain damage, potential cardiac issues, and likely paralysis of her lower body and confirmed the fetus was unlikely to survive the pregnancy. After amniocentesis, the specialist diagnosed the fetus with Arnold-Chiara Type 2 malformation. Archer sought and obtained abortion care in Washington, D.C. At the time of filing the lawsuit, Archer was pregnant again and is apprehensive about getting care in Tennessee during her pregnancy if needed.

Plaintiff Rebecca Milner became pregnant in 2023. She began experiencing heavy bleeding at 16 weeks and was diagnosed with a large subchorionic hemorrhage, a form of internal

bleeding. In June 2023, she received a diagnosis of no amniotic fluid and preterm premature rupture of membranes (“PPROM”). She was told chances of the fetus’ viability were low, with nearly 100% mortality. Her physician said he previously would have advised an induction abortion but would not do so under the criminal abortion statute because it would place him in legal jeopardy. Milner was at significant risk of life- and health-threatening infection and hemorrhage if the pregnancy continued. Milner traveled out of state and obtained abortion care in Virginia. After returning to Tennessee, she was hospitalized for sepsis, a serious infection that began prior to receiving abortion care.

Plaintiff Rachel Fulton became pregnant in the summer of 2023. At 13 weeks, the fetus was diagnosed with cystic hygroma, a large fluid filled sac on the fetus’ back, and pleural effusion, fluid surrounding the fetus’ lungs. The fetus was later diagnosed with Trisomy 21, a genetic disorder. In November, Fulton was advised that due to fluid buildup in the fetus, consistent with a condition called fetal hydrops, her pregnancy would likely end in pregnancy loss, stillbirth, or death shortly after birth. She was also advised that she was at high risk for developing “mirror” syndrome, causing severe swelling in her lungs and limbs. As a result, Fulton sought abortion care out of state. She would like to become pregnant again but fears being pregnant in Tennessee for lack of access to abortion care.

Plaintiff Heather Maune, M.D. is a licensed obstetrician and gynecologist in private practice in Nashville, Tennessee. She has 13 years of experience and provides gynecological, obstetric, and prenatal care to her patients. Before Tennessee’s criminal abortion statute went into effect, she offered abortion care to patients who developed critical or emergent medical conditions during pregnancies. Each of the abortions she performed were for life- or health-preserving care. After the criminal abortion statute became effective, her ability to provide abortion care has been limited, and she has declined to provide or delayed providing medically necessary abortion care to

her patients. She fears prosecutors and politicians will target her for prosecution and revocation of her license to practice medicine under the criminal abortion ban statute with its vague language regarding the medical necessity exception, the failure to identify the timing of when abortion care can be performed, and the “reasonable medical judgment” standard of the exception not protecting her from prosecution even when she is acting in good faith.²

Plaintiff Laura Andreson, D.O. is a licensed obstetrician and gynecologist in private practice in Franklin, Tennessee. She has over 21 years of experience caring for pregnant women. Before Tennessee’s criminal abortion statute went into effect, she offered abortion care to patients who developed critical or emergent medical conditions during pregnancies. Each of the abortions she performed were for life- or health-preserving care. After the criminal abortion statute became effective, her ability to provide abortion care has been limited, and she has declined to provide or delayed providing medically necessary abortion care. She fears prosecutors and politicians will target her for prosecution and revocation of her license to practice medicine under the criminal abortion statute with its vague language regarding the medical necessity exception, the failure to identify when abortion care can be performed, and the “reasonable medical judgment” standard of the exception not protecting her from prosecution even when she is acting in good faith.

Plaintiffs’ Expert Lisa Zuckerwise, M.D. is a Tennessee-licensed and board-certified physician specializing in obstetrics and gynecology and maternal-fetal medicine with 11 years of experience. She opines that abortion care is part of the medical standard of care that should be offered to patients presenting medical conditions that: (i) pose a risk of infection, hemorrhage, or other health risk to the pregnant patient; (ii) can be exacerbated by pregnancy; and (iii) present a

² Plaintiff Physicians’ concern is that the Medical Necessity Exception removes criminal liability only in cases “using reasonable medical judgment, based upon the facts known to the physician at the time,” applying an objective standard under Tenn. Code Ann. § 39-15-213(c)(1). They contend that without a subjective “good faith” exception, the statute subjects physicians to prosecutors’ “second guessing,” after the fact, as to whether an abortion was performed based on reasonable medical judgment.

fetal condition making it unlikely that the fetus will survive. She further opines that Tennessee's Medical Necessity Exception to the criminal abortion statute is vague and confusing to medical professionals, and, as a result, Tennessee physicians are refusing or delaying abortion care. Finally, she opines that Tennessee physicians should be allowed to exercise their best, "good faith medical judgment" to determine when an abortion comes within the Medical Necessity Exception.

Plaintiffs' Expert Ali S. Raja, M.D. is a medical doctor licensed to practice medicine in Massachusetts and is board-certified in emergency medicine with 15 years of experience. She opines that: (i) Tennessee's Medical Necessity Exception to the criminal abortion ban statute creates uncertainty because it contains terms that do not have defined or universally understood medical meaning and carries harsh penalties; (ii) Tennessee's Medical Necessity Exception is unclear and not based on accepted medical terminology; (iii) Tennessee's Medical Necessity Exception is blocking the timely implementation of appropriate medical interventions; (iv) delaying timely abortion care is a deviation from the emergency medicine specialty and standard of care; (v) Massachusetts' medical necessity exception to its abortion statute provides guidance to physicians that is lacking under Tennessee law because Massachusetts' exception defers to the physician's best medical judgment necessary to preserve a patient's life or health; and (vi) Tennessee's Medical Necessity Exception is unworkable and dangerous in the emergency medical setting.

Plaintiffs' Expert Deva Sharma, M.D. is a board-certified, Tennessee-licensed physician in hematology-oncology and transfusion medicine at Vanderbilt University. She specializes in the treatment of rare red blood cell disorders and is an expert in women's reproductive health with sickle cell disease. She opines that: (i) sickle cell disease and other chronic blood disorders pose a high risk of fatal pregnancy complications; (ii) physicians cannot effectively prevent patient deaths or impairment of major bodily functions unless they are allowed to exercise their best

medical judgment, in consultation with their patients, regarding pregnancy terminations; and (iii) Tennessee's Medical Necessity Exception does not address the timing of when a physician may perform an abortion to preserve the life or health of a pregnant patient.

Defendants' Expert Elena Kraus, M.D. is a board-certified physician in obstetrics and gynecology and is currently licensed to practice as a maternal fetal medicine ("MFM") specialist in Nebraska. As a MFM specialist, she provides medical care for high-risk pregnancies, which include pre-existing maternal conditions, conditions that develop as a result of pregnancy, and fetal conditions that create an increased risk of morbidity and mortality in pregnancy, delivery, and post-delivery. She reviewed Tennessee's criminal abortion statute and Medical Necessity Exception, the amended complaint, and the declarations of Plaintiffs and Plaintiffs' experts. To summarize her opinions, she declares that: (i) Plaintiffs use the term "abortion" ambiguously, but Tennessee law has a defined meaning based on her interpretation of Tennessee's statute; (ii) "reasonable medical judgment" is a common, objective, and "evidence-based standard"; (iii) abortions are not without risk of harm to the pregnant patient; (iv) Tennessee's statute allows physicians the latitude to address rare cases of lethal fetal anomalies; and (v) the statutory terms "serious risk," "major bodily function," and "irreversible" have reasonably understood medical meaning and allow for "preemptive measures."

Defendants' Expert Stephen Hammond, M.D., FACOG is a Tennessee physician and is board-certified in obstetrics and gynecology. He has practiced medicine for 45 years. He has reviewed the amended complaint and declarations of Plaintiffs and their experts and offers the following opinions: (i) "abortion" has a defined meaning under Tennessee law that Plaintiffs ignore; (ii) Tennessee law has a clear application to "common medical scenarios" encountered in most OB-GYNs' practices; (iii) "reasonable medical judgment" is a common, objective, evidence-

based standard; and (iv) termination of any pregnancy poses a significant medical risk to the patient.

Defendants' Expert Howard Curlin, M.D. is a Tennessee licensed physician board-certified in obstetrics and gynecology. He has practiced in Tennessee at Vanderbilt University Medical Center since 2015, where he also serves as an Associate Professor of Obstetrics and Gynecology. From 2003 to 2015, he served as an active-duty physician in the United States Army practicing obstetrics and gynecology. He opines, based on his conversations with and observations of Tennessee physicians practicing obstetric care, that: (i) abortion implicates ethical considerations for both the pregnant woman and the unborn child; and (ii) Tennessee's abortion statute provides physicians a "clear, evidence-based standard."

Plaintiffs' Rebuttal Expert Sarah Osmundson, M.D. is the Vice Chair of Research at Vanderbilt University Medical Center and a practitioner in the Division of Maternal Fetal Medicine. She is also a member of the Family Planning Quality Pregnancy Committee, which must personally approve most medically induced abortions. Dr. Osmundson takes issue with Dr. Curlin's opinions and argues they do not represent the reality of how obstetricians in Tennessee are interacting with the Medical Necessity Exception. She states that, since the enactment of the criminal abortion statute, Vanderbilt University Medical Center denies abortion care in several scenarios where care is medically necessary. Dr. Osmundson also offers two more specific examples of women who were denied abortion care, including one woman who was at risk of losing her fertility.³ She opines that, based on her conversations with other physicians, the vast majority in Tennessee feel the criminal abortion statute "unfairly forces health care providers to balance appropriate medical care with the risk of criminal prosecution."

³ Neither Dr. Osmundson nor her patients are parties to this lawsuit.

For purposes of the temporary injunction only,⁴ and based on the parties' expert declarations, as acknowledged by counsel for the parties during the temporary injunction hearing, abortion care comes within the Medical Necessity Exception of Tennessee's abortion statute when the following medical conditions are presented:

- Previaible preterm premature rupture of membranes (PPROM);
- Inevitable abortion, defined as dilation of the cervix prior to viability of the pregnancy, either by preterm labor or cervical insufficiency;
- Fatal fetal diagnoses that lead to maternal health complications, such as severe preeclampsia or mirror syndrome associated with fetal hydrops; and
- Fatal fetal diagnoses that lead to maternal infection that will result in uterine rupture and the possible loss of a woman's fertility.

Plaintiffs submit they are not asking to expand the conditions for which medically necessary abortion care is permitted. Rather, they contend the deciding line of under what conditions and when such abortion care is permitted is simply unclear, and a declaratory judgment is needed to clarify both the scope and timing of permissible abortion care. Defendants respond that the statute as written is sufficiently clear to provide guidance to physicians, and the Court should not read in additional conditions where abortion care is allowed.

III. TEMPORARY INJUNCTION STANDARD

Rule 65.04 of the Tennessee Rules of Civil Procedure provides that “[a] temporary injunction may be granted during the pendency of an action if it is clearly shown by verified complaint, affidavit or other evidence that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss or damage pending

⁴ Defendants state that to the extent the parties agree that some conditions come within the Medical Necessity Exception, such agreement is limited for purposes of Plaintiffs' Motion for Temporary Injunction, and Defendants reserve the right to dispute these positions on the merits.

a final judgment in the action, or that the acts or omissions of the adverse party will tend to render such final judgment ineffectual.” Tenn. R. Civ. P. 65.04(2). The standard for determining whether injunctive relief is appropriate requires a court to consider the well-known four-factor test: “(1) the threat of irreparable harm to plaintiff if the injunction is not granted; (2) the balance between this harm to plaintiff and the injury that granting the injunction would inflict on the defendant; (3) the probability that plaintiff will succeed on the merits; and (4) the public interest.” *Fisher v. Hargett*, 604 S.W.3d 381, 394 (Tenn. 2020). All factors are to be considered, and no single factor is controlling. The grant or denial of a request for temporary injunction is discretionary with the trial court. *Id.* at 395.

When “the temporary injunction is sought on the basis of an alleged constitutional violation, the third factor—likelihood of success on the merits—often is the determinative factor.” *Id.*, at 394. But even if “a court determines that a plaintiff is likely to succeed on the merits and there is a risk of irreparable harm, the court must carefully weigh the balance between that harm and the harm that granting the injunction will inflict on the defendant, as well as the public interest.” *See, e.g., Moore v. Lee*, 644 S.W.3d 59, 66-67 (Tenn. 2022) (vacating an injunction for failure to adequately consider the effect it would have on an upcoming election, finding the public interest weighed heavily against the injunction given the impact it would have on “election machinery already in gear”).

IV. ANALYSIS AND CONCLUSIONS OF LAW

Plaintiffs request the issuance of a temporary injunction (1) declaring and clarifying the standard under which the Medical Necessity Exception of the criminal abortion statute permits physicians to provide abortion care; (2) prohibiting Defendants from enforcing the criminal abortion ban; and (3) prohibiting the Board Defendants from instituting disciplinary actions related to violations of the abortion ban.

A. Chancery Court Jurisdiction to Enjoin a Criminal Statute

As a preliminary issue, Defendants question, and the Court considers, whether it can grant injunctive relief to enjoin the enforcement of the criminal abortion statute. Tennessee Code Annotated § 39-15-213 makes it a crime, punishable as a Class C felony,⁵ for any person to perform or attempt to perform an abortion in Tennessee. Generally, chancery courts lack the power to enjoin the enforcement of criminal statutes. *See Clinton Books, Inc. v. City of Memphis*, 197 S.W.3d 749, 752 (Tenn. 2006) (citing *Alexander v. Elkins*, 179 S.W. 310, 311 (Tenn. 1915); *J.W. Kelly & Co. v. Conner*, 123 S.W. 622, 637 (Tenn. 1909)). The Tennessee Supreme Court has explained:

Permitting a court of equity to interfere with the administration of this state's criminal laws, which the court is without jurisdiction to enforce, would cause confusion in the preservation of peace and order and the enforcement of the State's general police powers.

Id. (citing *J.W. Kelly & Co.*, 123 S.W. at 637). This rule, however, is not without exceptions. A court of equity may enjoin a criminal statute that the Tennessee Supreme Court has concluded is unconstitutional because “a person is not subject to criminal prosecution for acts committed in violation of th[at] statute.” *Id.* at 753. Second, a court of equity may enjoin criminal prosecution under an allegedly unconstitutional statute if that statute “injuriously affect[s] property rights [and an] injunction is necessary to protect the equity court's jurisdiction over the property.” *Id.* at 754 (citing *J.W. Kelly & Co.*, 123 S.W. at 630). The Tennessee Supreme Court has emphasized several requirements for the property rights exception: (1) jurisdiction over the property; (2) that is based in an acknowledged ground of equity jurisdiction; and (3) the sought “injunction must be merely incidental and ancillary to preserve the equity jurisdiction and make it effective.” *Id.* And while

⁵ A Class C felony under Tennessee law imposes a criminal penalty of imprisonment for three to fifteen years and a fine of up to \$10,000. *See* Tenn. Code Ann. § 40-35-111(b)(3).

some states appear to allow courts of equity to enjoin criminal laws “when the plaintiff contends that the statute at issue is void” or “when necessary to protect . . . fundamental constitutional rights,” *see, e.g., Ex Parte Marshall*, 323 So.3d 1188, 1196 (Ala. 2020); *Edmondson v. Pearce*, 91 P.3d 605, 614 (Okla. 2004), Tennessee has not allowed such relief.

The three-judge panel statute presents an additional issue to consider within this framework. While Tennessee’s common law limits the authority of courts of equity to enjoin criminal statutes, the three-judge panel statute expressly provides that a *civil* case brought against the state challenging the constitutionality of a state statute and including a claim for declaratory or injunctive relief “must be heard and determined by a three-judge panel.” Outside of the three-judge panel statute, a constitutional challenge to a criminal statute typically could only be brought in a circuit court that is able to exercise both equitable and criminal jurisdiction. *See* Tenn. Code Ann. §§ 16-10-102, -111. In Davidson County, however, circuit courts are designated separately from criminal courts, and circuit courts do not have criminal jurisdiction. *See State v. McFarland*, 638 S.W.2d 416, 416 (Tenn. Crim. App. 1982) (“By Chapter 52 of the Private Acts of 1842, the Criminal Court of Davidson County was established and given exclusive jurisdiction over crimes and criminal offenses theretofore exercised by the circuit court.”); *cf. Clinton Books*, 197 S.W.3d at 753 (“In Shelby County . . . the criminal courts are separate from the circuit courts, and the circuit courts do not hear criminal matters.”). Thus, it follows that in Davidson County a plaintiff cannot bring a *civil* action in *criminal* court with exclusive criminal jurisdiction to challenge the constitutionality and seek to enjoin enforcement of a criminal statute. Consequently, it is more difficult to square the three-judge panel statute’s “must hear and determine” directive in civil actions with the inability of Davidson County Chancery Court’s to enjoin the enforcement of an allegedly unconstitutional criminal statute.⁶

⁶ Plaintiff Physicians also argue in response to Defendants’ Motion to Dismiss that their property

The three-judge panel statute potentially displaces the *Clinton Books* common law rule in three-judge panel cases, at least in part. The Tennessee Supreme Court has held that “[w]hen there is a conflict between the common law and a statute, the provision of the statute must prevail.” *Ultsch v. HTI Memorial Hosp. Corp.*, 674 S.W.3d 851, 854 (Tenn. 2023) (quoting *Graves v. Ill. Cent. R.R. Co.*, 148 S.W. 239, 242 (Tenn. 1912)). Such abrogation should be found only when the legislature’s “intention to abrogate [is] clear.” *Id.* at 868 (citing *State v. Howard*, 504 S.W.3d 260, 270 (Tenn. 2016)). Therefore, “statutes in derogation of the common law are to be strictly construed and confined to their express terms.” *Id.* (quoting *Houghton v. Aramark Educ. Res., Inc.*, 90 S.W.3d 676, 679 (Tenn. 2002)). Courts “should presume that the legislature acted with the expectation that a common law principle applies except when a statute’s purpose to the contrary is evident.” *Id.* (citing *United States v. Texas*, 507 U.S. 529, 534 (1993)).

Here, the Court finds that it can give effect to the language of the three-judge panel statute without abrogating or displacing the common law rule in *Clinton Books*. In this case, Plaintiffs seek both declaratory and injunctive relief. Therefore, even if Davidson County chancery court lacks jurisdiction to enjoin the enforcement of the criminal abortion statute, it maintains the ability to enter declaratory relief on the merits of plaintiffs’ request for declaratory judgment based on their claim that the criminal abortion statute is unconstitutional. *See* Tenn. Code Ann. § 29-14-103 (providing that any person “whose rights, status, or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute”); *see also Erwin Billiard Parlor v. Buckner*, 300 S.W. 565, 566 (Tenn. 1927); *Tennesseans*

rights in their medical licenses are sufficiently jeopardized to come within the exception outlined in *Clinton Books* because a conviction under the criminal abortion statute would require the Board Defendants to investigate and potentially revoke Plaintiff Physicians’ licenses. However, the criminal abortion statute itself does not lead to a loss of licensure—the statutes governing the Board Defendants do. And as discussed below, since those statutes are not criminal, this Court has the authority to enjoin enforcement of the licensure statutes, if warranted.

for Sensible Election L. v. Tenn. Bureau of Ethics & Campaign Fin., No. M2018-01967-COA-R3-CV, 2019 WL 6770481, at *26 (Tenn. Ct. App. Dec. 12, 2019). Because relief remains available to Plaintiffs under the Declaratory Judgment Act in this case, the Court can “hear and determine” the case under the three-judge panel statute without abrogating *Clinton Books*’ common law principle that the chancery courts lack jurisdiction to enjoin the enforcement of criminal statutes.

The Court concludes that it can adjudicate, on the merits, the declaratory judgment claim for prospective relief regarding the constitutionality of the Medical Necessity exception to the criminal abortion statute, but it lacks jurisdiction to temporarily enjoin the enforcement of the criminal abortion statute.⁷ Plaintiffs “are the masters of their complaint.” *Binns v. Trader Joe’s E., Inc.*, 690 S.W.3d 241, 255 (Tenn. 2024). As a result, they subject themselves to the powers and the limitations of the court where they choose to file. *See, e.g., Mullins v. State*, 294 S.W.3d 529, 540 (Tenn. 2009). Because courts of equity in Tennessee lack the power to enjoin the enforcement of criminal statutes, that portion of the Plaintiffs’ motion seeking to enjoin the enforcement of the criminal abortion statute against Plaintiff Physicians with respect to their claim that the Medical Necessity Exception is unconstitutionally vague must be denied.

B. Plaintiffs’ Application for Temporary Injunction

Having concluded that the Court cannot enjoin the enforcement of the criminal abortion statute against Plaintiff Physicians, the Court turns to the other relief requested—to construe or clarify the Medical Necessity Exception and to enjoin the Board Defendants, the Attorney General, and the Board Members from enforcing the physician disciplinary statutes for alleged violations

⁷ Plaintiff Physicians may, of course, challenge the constitutionality of the Medical Necessity Exception to the criminal abortion statute as a defense to any criminal prosecution that may be brought against them under that statute.

of the criminal abortion statute. *See* Tenn. Code Ann. §§ 63-6-214(b), 63-9-111(b). The Court applies the four factors for injunctive relief to Plaintiffs’ request.

1. Likelihood of Success on the Merits⁸

Plaintiffs have the burden of showing a likelihood of success on the merits on each of their constitutional claims for declaratory relief. *See Fisher*, 604 S.W.3d at 394.

Right to Life. Plaintiff Patients assert that the Medical Necessity Exception, as applied, violates their right to life under Article I, section 8 of the Tennessee Constitution. The right to life provision states that no one shall be “deprived of his life, liberty, or property, but by the judgment of his peers or the law of the land.” The Tennessee Supreme Court holds this constitutional provision protects against “deprivations of fundamental rights like the right to marry, have children, make child rearing decisions, determine child custody, and maintain bodily integrity.” *Lynch v. City of Jellico*, 205 S.W.3d 384, 391-92 (Tenn. 2006). Laws that interfere with fundamental rights are subject to strict scrutiny and must be “narrowly tailored to serve a compelling state interest.” *Estate. of Alley v. State*, 648 S.W.3d 201, 225 (Tenn. Crim. App. 2021). Otherwise, the statute in question must “bear[] ‘a reasonable relation to a proper legislative purpose.’” *Mansell v. Bridgestone Firestone N. Am. Tire, LLC*, 417 S.W.3d 393, 409 (Tenn. 2013) (quoting *Gallaher v. Elam*, 104 S.W.3d 455, 463 (Tenn. 2003)).

As a threshold matter, the Court finds Plaintiff Patients assert a claim of deprivation of their fundamental constitutional right to life, requiring strict scrutiny review. Their declarations are replete with examples of abortion care being denied in health- and life-threatening situations despite Defendants conceding that the Medical Necessity Exception would have applied in some

⁸ In addition to the arguments on the merits raised by Defendants, they assert Plaintiffs cannot demonstrate a likelihood of success on the merits because their claims are barred by the doctrines of sovereign immunity and lack of standing. These arguments are addressed in the Court’s separate *Memorandum and Order on Defendants’ Motion to Dismiss* rejecting those arguments with one exception, and the Court does not repeat its analysis of those issues and conclusions here.

of those situations. Because Plaintiff Patients were denied necessary abortion care, they suffered severe risks to their life and health, including death, infection, severe bleeding, and potential loss of fertility.

Plaintiff Patients' right to life is a fundamental right. *See Bush v. State*, 428 S.W.3d 1, 18 (Tenn. 1997) (noting fundamental rights protected by the Due Process Clause are those which are “‘deeply rooted in this Nation’s history and tradition’ in the sense that they involve ‘the basic values that underlie our society.’”) (quoting *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 503 (1977)); *Estate. of Alley*, 648 S.W.3d at 225 (“In order to qualify for such protection, the individual’s fundamental rights and liberties must be . . . ‘implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.’”) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

Plaintiffs must show a likelihood of success on the merits that the Medical Necessity Exception is not narrowly tailored to serve a compelling state interest. The parties’ overarching dispute concerns the construction to be given the Medical Necessity Exception, as to its scope and the timing for providing medically necessary abortion care. Legal challenges to statutes similar to Tennessee’s are presently being pursued in other jurisdictions. For example, Plaintiffs cite to a recent ruling by the Oklahoma Supreme Court holding that Oklahoma’s medical necessity exception was unconstitutional because it prevented abortions up until such time as the mother’s life was “in actual and present danger.” *Oklahoma Call for Reprod. Just. v. Drummond*, 526 P.3d 1123, 1131 (Okla. 2023); *accord Wrigley v. Romanick*, 988 N.W.2d 231, 243 (N.D. 2023) (abortion statute not narrowly tailored when it did not permit treatment in situations “‘necessary to prevent severe, life altering damage’”). *But cf. Members of Med. Licensing Bd. of Indiana v. Planned Parenthood Great Nw., Hawai’i, Alaska, Indiana, Kentucky, Inc.*, 211 N.E.3d 957, 975 (Ind. 2023) (holding an abortion statute did not violate plaintiffs’ right to life because “while

[Article I,] Section 1 [of the Indiana Constitution] precludes the General Assembly from prohibiting an abortion that is necessary to protect a woman’s life or to protect her from a serious health risk, Section 1’s protection of ‘liberty’ generally permits the General Assembly to prohibit abortions that do not fall within one of those categories”).

Defendants dispute that Tennessee’s criminal abortion statute is as narrow and strict as Plaintiffs claim—indeed, as noted above, Defendants concede there are several medical conditions that, at least for purposes of this temporary injunction, come within the Medical Necessity Exception. Defendants instead argue that Plaintiffs seek protection from criminal liability for providing abortion care in a much broader range of conditions than that which is constitutionally required.

The Court finds that both sides have presented evidence in support of their respective positions regarding the Medical Necessity Exception. Plaintiff Patients offer their declarations recounting tragic personal experiences of being denied medically necessary emergency abortion care despite suffering certain medical conditions that Defendants concede come within the Medical Necessity Exception. Plaintiff Physicians offer their declarations as to how the criminal abortion statute and the uncertainty within the Tennessee medical community surrounding its application impact their medical judgment and the availability of necessary maternal health care options they provide. Plaintiffs also offer declarations of their expert witnesses who detail a number of complex, nuanced, and often rapidly progressing medical conditions that the Medical Necessity Exception to the criminal abortion statute does not address. For example, as Dr. Zuckerwise opines, there are many health conditions where “it is not possible to know how and when the condition will worsen such that a threshold of no return for morbidity or mortality is crossed.” The differences in medical opinions and reasonable medical judgment among medical professionals, about whether a situation presents a sufficiently “serious risk” to come within the Medical

Necessity Exception plainly evidences that delay or denial of medically necessary abortion care substantiates Plaintiffs' claims. At the same time, Defendants offer their own expert witnesses who opine that the lack of a clear definition about what constitutes a medical necessity affords physicians adequate leeway in deciding what constitutes a "serious risk" and necessary intervention in appropriate cases, and the lack of a hard and fast rule "allows for interpretation and medical judgment of a licensed physician based on their knowledge, training, and the facts known to them at the time." Plaintiffs, on the other hand, do not appear to be asking for a bright line test, as their experts also opine that creating "a finite list of conditions" that are covered by the Medical Necessity Exception would be "dangerous."

The parties agree, at least for purposes of temporary injunctive relief, that abortion care is health care that is medically necessary in certain circumstances that should come within the Medical Necessity Exception without subjecting physicians to criminal prosecution in those situations. The question remains, however, whether the Medical Necessity Exception, as currently written, serves a compelling state interest and is narrowly tailored to achieve that goal. Given the range of interpretations proffered through the expert declarations submitted by both Plaintiffs and Defendants, the Court finds that the issue of which conditions, and the timing of when they present and escalate to life-threatening conditions, constitute medical emergencies within the Medical Necessity Exception is demonstrably unclear, notwithstanding the "reasonable medical judgment" of the physician standard set forth in the Exception. This lack of clarity is evidenced by the confusion and lack of consensus within the Tennessee medical community on the circumstances requiring necessary health- and life-saving abortion care. The evidence presented underscores how serious, difficult, and complex these issues are and raises significant questions as to whether the Medical Necessity Exception is sufficiently narrow to serve a compelling state interest.

The Court concludes Plaintiff Patients have made the required showing of a likelihood of success on the merits of their constitutional right to life challenge to the Medical Necessity Exception, at least to the extent of the maternal medical conditions the parties agree should come within the Medical Necessity Exception for purpose of temporary injunctive relief. This factor weighs in favor of granting injunctive relief. *Cf. Six Clinics Holding Corp., II v. Cafcomp Sys., Inc.*, 119 F.3d 393, 402 (6th Cir. 1997) (finding a likelihood of success on the merits where “the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation”).

Equal Protection. Plaintiff Patients also allege that the criminal abortion statute violates their equal protection rights. Article XI, section 8 of the Tennessee Constitution “require[s] that persons who are similarly situated be treated alike.” *Christ Church Pentecostal v. Tenn. State Bd. of Equalization*, 428 S.W.3d 800, 822 (Tenn. Ct. App. 2013). In making this determination, Tennessee courts “utilize[] three standards of scrutiny, depending upon the right asserted.” *State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994) (quoting *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 153 (Tenn. 1993)). The parties agree in this case that the Court should apply a rational basis standard of review. Under this standard, the Tennessee Supreme Court has “observed that state legislatures have the initial discretion to determine what is ‘different’ and what is ‘the same’ and that they are given considerable latitude in making those determinations.” *Gallaher*, 104 S.W.3d at 461. Thus, the bar for establishing a rational basis for the challenged statute is low; a court’s review of the legislature’s choice is limited to whether “the challenged classifications have a reasonable relationship to a legitimate state interest.” *Id.*; *see also Fisher*, 604 S.W.3d at 399 (holding that under rational basis review, a statute is constitutional if “any reasonably conceivable state of facts could provide a rational basis for its application”).

Plaintiff Patients, as pregnant women, claim they are similarly situated to non-pregnant women who seek and are in need of emergency medical care. Yet because of the criminal abortion statute, pregnant women are treated differently than non-pregnant women because their access to emergency medical care is restricted. Defendants argue in response that Plaintiffs are not “similarly situated to non-pregnant persons seeking other medical treatments,” obviating the need for any equal protection analysis. The Court addresses this issue in its separate Memorandum and Order on Defendants’ *Motion to Dismiss*. The Court adopts but does not repeat its analysis and conclusion here. The Court finds Plaintiff Patients have shown they are “similarly situated” to non-pregnant women for purposes of their equal protection challenge.

In addition, Plaintiff Patients must show a likelihood of success on the merits that the challenged classification for purposes of the Medical Necessity Exception, creating unequal access to emergency medical care, is not reasonably related to a legitimate state interest. Defendants contend under a rational basis standard of review that the State has a reasonable and legitimate state interest in protecting the life of the unborn and the integrity of the medical profession, both of which the United States Supreme Court has held are legitimate state interests. *See Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 301 (2022); *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007); *Glucksberg*, 521 U.S. at 731. Plaintiffs respond that such state interest is not rational and must yield to the life and health of pregnant women who are “experiencing critical or emergent physical medical conditions where enforcement of the abortion ban is unlikely to result in a live birth or a sustained life.”

Under a rational basis review, the Court finds that Plaintiffs have made the requisite showing of likelihood of success on the merits of Plaintiff Patients’ equal protection challenge with respect to the limited maternal medical conditions on which the parties agree come within the Medical Necessity Exception for purposes of the temporary injunction.

Vagueness Challenge. Finally, Plaintiff Physicians challenge the Medical Necessity Exception on the grounds that it is unconstitutionally vague in violation of their due process rights. A statute is void for vagueness when “its prohibitions are not clearly defined.” *State v. Crank*, 468 S.W.3d 15, 22 (Tenn. 2015) (quoting *State v. Pickett*, 211 S.W.3d 696, 704 (Tenn. 2007)). “The primary purpose of the vagueness doctrine is to ensure that our statutes provide fair warning as to the nature of forbidden conduct so that individuals are not ‘held criminally responsible for conduct which [they] could not reasonably understand to be proscribed.’” *Nunn v. Tenn. Dep’t of Corr.*, 547 S.W.3d 163, 195 (Tenn. Ct. App. 2017) (alteration in original) (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954)). Courts look at “the plain meaning of the statutory terms, the legislative history, and prior judicial interpretations of the statutory language” to determine “whether [the] statute’s prohibitions are not clearly defined and are susceptible to different interpretations as to what conduct is actually proscribed.” *Id.* (alteration in original); *see also State v. Lyons*, 802 S.W.2d 590, 591 (Tenn. 1990) (“A statute may be held vague on its face if it provides no legally fixed standards and leaves to the personal predilections of an officer, prosecutor, judge or jury the determination of the illegality of conduct.”); *cf. Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490, 502 (6th Cir. 2012) (“The right at issue is the right of physicians to have notice of what behavior is criminal before they can be prosecuted. Because this is a legal question, the relevant inquiry is whether a reasonable physician would know that certain acts when performing an abortion are criminal or not.”).

Plaintiffs have presented significant evidence on this issue through the declarations of Plaintiff Physicians who have practiced medicine, firsthand, under the Medical Necessity Exception. Dr. Maune’s declaration attests that multiple doctors have ceased providing necessary abortion care because they are not sure whether a given situation will subject them to criminal prosecution. Plaintiff Dulong (who Defendants concede should have received abortion care)

declares that she did not receive care until her obstetrician “spent two hours on the phone calling various legal and ethics personnel” seeking guidance about providing the immediate abortion care she needed. Plaintiffs’ expert witnesses also offer examples of how the Medical Necessity Exception continues to create uncertainty and confuse Tennessee medical professionals, resulting in the denial of or delay in receiving necessary abortion care. Dr. Zuckerwise’s reply and Dr. Osmundson’s rebuttal declarations, for example, detail instances of Vanderbilt University Medical Center’s Family Planning Quality Pregnancy Committee routinely discussing whether to provide abortion care and declining to do so because it is unclear whether they would be protected from prosecution.

In contrast, Defendants offer no *fact* witness declarations. They instead provide opinion declarations from experts who practice outside of Tennessee or do not provide medically necessary abortion care in Tennessee.⁹

The Court recognizes that “[s]tatutes that are ‘applicable in a wide variety of situations, must necessarily use words of general meaning, because greater precision is both impractical and difficult,’ and this does not render the statute unconstitutionally vague.” *Nunn*, 547 S.W.3d at 199-200 (quoting *Lyons*, 802 S.W.2d at 592). However, the supporting evidence Defendants offer are declarations from experts giving their opinions on how to interpret the Medical Necessity Exception, while acknowledging that the existing Medical Necessity Exception language will cause physicians to offer differing courses of treatment. Plaintiffs have offered firsthand examples of how the Medical Necessity Exception is impacting emergency and medically necessary abortion

⁹ One of Defendants’ experts, Dr. Curlin, practices at Vanderbilt University Medical Center. However, Dr. Osmundson states in her declaration that Dr. Curlin is a member of the Minimally Invasive Gynecologic Surgery Division and has “never been involved in the decision-making process to permit or deny an abortion at [Vanderbilt].” Dr. Osmundson correctly notes that Dr. Curlin treats ectopic and molar pregnancies, but those conditions are excluded from the statutory definition of abortion. See Tenn. Code Ann. § 39-15-213(a)(1).

care in Tennessee *in practice*. The Court finds this Plaintiff Physicians have shown a likelihood of success on the merits of their vagueness claim.

2. Immediate and Irreparable Harm

Plaintiffs must show immediate and irreparable harm in support of their request for injunctive relief. Tenn. R. Civ. P. 65.04(2). “In order to justify equitable relief on grounds that irreparable harm will result unless relief is granted, the injury must be real, practically unavoidable, and certain.” *Steppach v. Thomas*, 346 S.W.3d 488, 501 (citing *State ex rel. Agee v. Chapman*, 922 S.W.2d 516, 519 (Tenn. Ct. App. 1995)). Plaintiffs clearly have shown a risk of irreparable harm. “When constitutional rights are threatened or impaired, irreparable injury is presumed.” *Fisher*, 604 S.W.3d at 415 (Lee, J., concurring in part and dissenting in part) (quoting *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012)); accord *Elrod v. Burns*, 427 U.S. 347, 373 (1976). As noted previously, Plaintiffs have made the requisite showing of likelihood of success on the merits of their constitutional claims for the purpose of a temporary injunction based on the serious health- and life-threatening conditions previously suffered and may be suffered pending a final judgment in this case and in light of the presumption of irreparable constitutional harm. Plaintiff Patients’ claim that they fear not being able to obtain necessary emergency abortion care in Tennessee in the future, and Plaintiff Physicians’ assertions, on behalf of themselves and their existing patients who are pregnant and facing serious pregnancy-related complications, evidence irreparable and immediate harm.

Defendants respond that because five of the seven Plaintiff Patients are not currently pregnant, and the declarations offered by Plaintiffs Kelly and Archer do not indicate any issues with their pregnancies that would require emergency abortion care, Plaintiffs have not shown the requisite immediate harm. Defendants also assert that the length of time between the alleged

injuries to Plaintiffs and the filing of this lawsuit—approximately seventeen months, plus another four months to file a temporary injunction motion—belies any assertion of an “immediate” harm.¹⁰

Plaintiffs assert that they have suffered irreparable constitutional harm in the past and the harm is immediate because they, along with women across the State, will “continue” to suffer violation of their constitutional rights. Plaintiffs rely on the declarations of both Plaintiff Physicians describing circumstances where they have denied necessary abortion care to patients whom they would have cared for absent the criminal abortion statute, and the nature and immediacy of rapidly developing emergency pregnancy complications

The Court concludes that the factor of immediate and irreparable harm, pending a final judgment on the merits, weighs in favor of Plaintiffs. The claims alleged by Plaintiff Patients are the violations of their constitutional rights, and the harm asserted is the ongoing violations of those rights. The fact that some Plaintiff Patients are not currently experiencing a pregnancy-related emergency medical condition does not diminish the irreparability of the constitutional harm or the impact of the Medical Necessity Exception on their constitutional rights to seek access to and obtain medically necessary abortion care, when needed on an emergency basis, to protect their life and prevent substantial and irreversible impairment of major bodily functions. Such medical emergencies often are rapidly progressing conditions that would preclude Plaintiffs’ ability to file a lawsuit and seek immediate judicial relief. Plaintiff Physicians, Drs. Maune and Andreson, have attested to circumstances involving serious medical conditions faced by their current pregnant patients that present the potential of serious immediate harm, where Plaintiff Physicians previously would have prescribed emergency abortion care but are constrained from doing so under the

¹⁰ Plaintiffs argue that Defendants are seeking to invoke the doctrine of laches, and that Defendants cannot rely on this ground because there has been no “unreasonable delay that prejudices the party seeking to employ” the doctrine. *Dennis Joslin Co., LLC v. Johnson*, 138 S.W.3d 197, 200 (Tenn. Ct. App. 2003). The Court does not read the Defendants’ argument as raising laches, but as instead pointing out that the delay in filing cuts against the argument that Plaintiffs will suffer “immediate and irreparable injury” under the temporary injunction standard.

Medical Necessity Exception given the documented uncertainty within the medical community as to the standards justifying abortion care and faced with the possibility of criminal prosecution and loss of their medical license if their medical judgment is second-guessed. Finally, Dr. Zuckerwise has attested that it is not possible to know how and when maternal medical conditions will worsen for morbidity and mortality. The Court finds the factor of immediate and irreparable harm weighs in favor of granting temporary injunctive relief.

In the context of the physician disciplinary statutes, however, which are the only statutes the Court can enjoin for purposes of temporary injunctive relief, the immediacy of harm is one step removed. In order to be disciplined by the Board Defendants, Plaintiff Physicians would first need to perform abortion care that allegedly violated the criminal abortion statute and a complaint filed. The Board Defendants would then need to investigate the complaint and determine whether formal disciplinary action should be pursued. *See* Tenn. Code Ann. § 63-6-101(c); Tenn. Comp. R. & Regs. 0880-02-.11(4) (TBME); *see also* Tenn. Code Ann. § 63-9-111(b); Tenn. Comp. R. & Regs. 1050-02-.09(4) (TBOE).

While the threat of license revocation or other discipline sufficiently establishes the irreparability of the harm suffered by Plaintiff Physicians, it may not be sufficiently immediate to support the “extraordinary remedy” of granting a preliminary injunction. *Moore*, 644 S.W.3d at 67; *see also Johnson v. Robertson*, No. 3:23-CV-01379, 2024 WL 2750942, at *8 (M.D. Tenn. May 29, 2024) (“Although Plaintiff states in his affidavit that [he has suffered past harm], Plaintiff has offered nothing other than his own speculation to support his assertion that a similar result would follow absent the preliminary injunction he seeks.”). Combined with the length of time required to pursue disciplinary action under the TBME and TBOE disciplinary statutes, Plaintiff Physicians’ arguments do not support a finding of immediate harm.

3. *Balance of Harms*

The Court next considers the balance of the harms to Plaintiffs and Defendants if the Court were to grant or deny the temporary injunction. The Indiana Supreme Court recently noted that “[a]bortion is an intractable issue because it brings two irreconcilable interests into conflict: a woman’s interest in ending a pregnancy and the State’s interest in protecting the life that abortion would end.” *Planned Parenthood Great Nw.*, 211 N.E.3d at 961. Plaintiffs contend that women are being denied or delayed in receiving medically necessary and life-saving abortion care in Tennessee every day. A denial of their request for injunctive relief will continue to perpetuate serious and irreparable harm and potential patient death. They further contend there is far less harm to the State when a potentially unconstitutional statute is enjoined. Defendants counter that the State has a compelling interest in safeguarding and protecting the life of unborn fetuses and the harm in allowing more permissive abortion care is too great.

The parties’ arguments on the balance of harms factor are based on their different interpretations of the Medical Necessity Exception to the criminal abortion statute. A merits interpretation of the Medical Necessity Exception is not before the Court on Plaintiffs’ motion for temporary injunction. Instead, the Court is to weigh the balance of the harm to Defendants if the injunctive relief is granted against the relative harm imposed to Plaintiffs if the injunctive relief is not granted. The Court finds that both parties have presented evidence that, if their interpretation of the criminal abortion statute is correct, the balance of harms weighs in their favor. As a result, the Court finds that the balance of harm does not favor either party. The Court further finds, however, that to the extent the parties agree for purposes of the temporary injunction that the limited medical conditions come within the Medical Necessity Exception, this factor weighs in favor of granting temporary injunctive relief to address those four emergency medical conditions.

4. Public Interest

Finally, the Court considers the public interest. Plaintiffs argue that the protection of their constitutional rights and certainty in the application of criminal statutes are both fundamental to a functioning society. *See also Fisher*, 604 S.W.3d at 407 (Lee, J., concurring in part and dissenting in part) (“[I]ssues of the public interest and harm to the respective parties largely depend on the constitutionality of the [state action].” (quoting *Daunt v. Benson*, 956 F.3d 396, 406 (6th Cir. 2020))); *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217, 22 (6th Cir. 2016) (holding that protection of constitutional rights “is always in the public interest”). Defendants argue that it is in the public interest to enforce constitutional laws and to effectuate the State’s compelling interest in protecting fetal life. *See also Thompson v. DeWine*, 976 F.3d 610, 619 (6th Cir. 2020) (“It’s in the public interest that we give effect to the will of the people by enforcing the laws they and their representatives enact.”). The parties present competing arguments in support of their respective positions, and the Court finds that this factor does not weigh in favor of either party. The Court further finds, however, that to the extent the parties agree for purposes of the temporary injunction that the limited medical conditions identified above come within the Medical Necessity Exception, the public interest weighs in favor of granting injunctive relief to address those four emergency medical conditions.

IV. CONCLUSION

The Court has carefully and thoroughly reviewed all of the evidence and arguments submitted in support of and opposition to Plaintiffs’ motion for temporary injunction. As a preliminary matter, this Court concludes that it is without jurisdiction to enjoin the enforcement of the criminal abortion statute, Tenn. Code Ann. § 39-15-213(b). *See Clinton Books*, 197 S.W.3d at 752. Accordingly, the request to enjoin the enforcement of the criminal abortion statute against the Plaintiff Physicians must be denied for lack of jurisdiction.

On the issue of the construction to be given to the Medical Necessity Exception, the Court concludes that Plaintiffs have clearly shown a likelihood of success on the merits that their constitutional rights are being or will be violated. Plaintiff Patients have also shown they will suffer immediate and irreparable harm pending a final judgment in this case, while Plaintiff Physicians have shown their potential harm through disciplinary proceedings is irreparable, but not immediate. The balance of harms to the parties and the public interest factors weigh strongly as to both parties, but without favoring either party. Based on the foregoing factors, coupled with the parties' agreement for purposes of the temporary injunction that specific pregnancy-related emergency medical conditions discussed above come within the Medical Necessity Exception, the Court concludes temporary injunctive relief should be granted to address those conditions, but denied as to all other relief requested.

It is, accordingly, ORDERED that Plaintiffs' *Motion for Temporary Injunction* is hereby GRANTED, in part, and DENIED in part.

It is further ORDERED that Plaintiffs' request to enjoin the enforcement of the criminal abortion statute is hereby DENIED based on this Court's lack of jurisdiction.

It is further ORDERED that Plaintiffs' requests for a mandatory injunction as to the construction of the Medical Necessity Exception and to enjoin Defendants from instituting disciplinary actions against Plaintiff Physicians are hereby GRANTED, in part, as follows:

A. The following pregnancy-related conditions are declared to be serious medical emergencies that come within the Medical Necessity Exception of the criminal abortion statute that are "necessary to prevent the death of a pregnant woman or to prevent serious risk of substantial and irreversible impairment of a major bodily function of the pregnant woman":

- (i) Previale perterm premature rupture of membranes ("PPROM");
- (ii) Inevitable abortion, defined as dilation of the cervix prior to viability of the pregnancy, either by preterm labor or cervical insufficiency;

- (iii) Fatal fetal diagnoses that lead to maternal health conditions, such as severe preeclampsia and mirror syndrome associated with fetal hydrops; and
- (iv) Fatal fetal diagnoses leading to an infection that will result in uterine rupture or potential loss of fertility.

B. The Board Defendants, the Attorney General, and the Board Members, and their respective officers, agents, and attorneys, are hereby ENJOINED from instituting disciplinary proceedings against Plaintiff Physicians for providing abortion care for the pregnancy-related medical conditions listed above which the parties agree for purposes of this temporary injunction are serious medical emergencies that come within the Medical Necessity Exception to the criminal abortion statute, Tenn. Code Ann. § 39-15-213(c).

It is further ORDERED that Plaintiffs' *Motion for Temporary Injunction* is hereby DENIED as to all other requests for injunctive relief.

It is further ORDERED that Plaintiffs shall post a \$1,000 injunction bond, as required under Rule 65.05.

It is further ORDERED that this temporary injunction shall remain in effect during the pendency of this action until modified or dissolved by the Court on motion of any party or until the entry of an order following a final hearing on the merits.

All other issues are reserved.

s/ Patricia Head Moskal
CHANCELLOR PATRICIA HEAD MOSKAL,
Chief Judge

s/ Sandra Donaghy
JUDGE SANDRA DONAGHY

s/ Kasey A. Culbreath
CHANCELLOR KASEY CULBREATH

ISSUED this the _____ day of _____, 2024, at _____ .m.

MARIA M. SALAS, Clerk and Master

By: _____
Deputy Clerk and Master

