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

JUNE MEDICAL SERVICES LLC d/b/a HOPE MEDICAL GROUP FOR WOMEN, on behalf of its patients, physicians, and staff; BOSSIER CITY MEDICAL SUITE, on behalf of its patients, physicians, and staff; CHOICE, INC., OF TEXAS d/b/a CAUSEWAY MEDICAL CLINIC, on behalf of its patients, physicians, and staff, JOHN DOE 1, M.D., and JOHN DOE 2, M.D.,

Plaintiffs,

v.

JAMES DAVID CALDWELL, in his official capacity as Attorney General of Louisiana; JIMMY GUIDRY, in his official capacity as Louisiana State Health Officer & Medical Director of the Louisiana Department of Health and Hospitals; and MARK HENRY DAWSON, in his official capacity as President of the Louisiana State Board of Medical Examiners,

Defendants.

Case No. 3:14-cv-525

HEARING REQUESTED

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' APPLICATION FOR TEMPORARY RESTRAINING ORDER AND MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

The Constitution of the United States protects the fundamental right of every woman to choose to terminate a pregnancy. As the Fifth Circuit has recently stated, "for more than forty years, it has been settled constitutional law that the Fourteenth Amendment protects a woman's basic right to choose an abortion." *Jackson Women's Health Org. v. Currier*, No. 13-60599, 2014 WL 3730467, at *4 (5th Cir. July 29, 2014) (citing *Roe v. Wade*, 410 U.S. 113, 153 (1973)).

Louisiana House Bill 388 ("H.B. 388" or the "Act") requires that every doctor who provides abortions have active admitting privileges at a hospital not more than thirty miles from the location where the abortion is performed. The statute, which goes into effect on September 1, 2014, provides doctors a mere eighty-one days to comply, an impossible task in light of the fact that the hospitals within the area proscribed by the statute can take anywhere from 90 days to seven months to come to a decision on a doctor's admitting privileges application. Despite this and other obstacles created by the application process, each doctor who performs abortions at the Plaintiff clinics (except the one doctor who currently has such privileges) has submitted at least one application at a hospital within thirty miles of the clinic. No hospital has yet completed review of the doctors' applications. For this fact alone, this Court should enjoin the enforcement of the statute while the applications are pending.

The long, arduous, and subjective processes established by hospitals for doctors to obtain and retain admitting privileges, make H.B. 388 impossible to comply with as written. If the statute is enforced on its effective date of September 1, 2014, H.B. 388 will result in every doctor currently providing abortions at a clinic in Louisiana to stop providing those services, forcing clinics to cancel many appointments scheduled after September 1. The sole physician who

currently has admitting privileges will no longer provide abortions due to fears for his personal safety, but even if he were willing to do so, one doctor simply cannot meet the needs of all Louisiana seeking abortions.

The Fifth Circuit has recently granted the relief that Plaintiffs seek here – suspension of enforcement of the privileges requirement against physicians who have applications pending prior to the effective date of the law. Injunctive relief is also warranted here because, in addition to violating Plaintiffs' procedural due process rights, H.B. 388 creates an undue burden for women seeking abortions.

For the reasons discussed below, Plaintiffs seek a temporary restraining order to maintain the status quo until the merits of the accompanying motion for a preliminary injunction can be determined by this Court. The irreparable harm that will ensue if H.B. 388 takes effect on September 1 – the loss of access in Louisiana for many women to a woman's constitutionally protected right to choose to have an abortion – tips the balance in favor of granting temporary injunctive relief at this time.

STATEMENT OF FACTS

A. The Admitting Privileges Requirement

Louisiana House Bill 388, Regular Session (La. 2014), to be codified at La. Rev. Stat. § 40:1299.35.2, attached hereto as Exhibit 1, imposes a number of new statutory requirements on abortion clinics and providers. The portion of the Act challenged here requires that every doctor who provides abortions at a clinic must "have active admitting privileges at a hospital that is located not further than thirty miles from the location at which the abortion is performed or induced and that provides obstetrical or gynecological health care services ("admitting privileges

requirement").[1] Ex. 1 at § (A)(2)(a) (amending La. Rev. Stat. § 40:1299.35.2). "Active admitting privileges" means that "the physician is a member in good standing of the medical staff of a hospital that is currently licensed by the department, with the ability to admit a patient and to provide diagnostic and surgical services to such patient." *Id.* Any doctor who violates this provision is subject to a fine of not more than four thousand dollars. *Id.* at § (A)(2)(c). Furthermore, failure to comply with the admitting privileges requirement will subject a licensed abortion clinic to adverse licensure action, up to and including license revocation. *Id.* at § (A)(1). This provision is scheduled to take effect on September 1, 2014.

B. Plaintiffs

Plaintiffs June Medical Services LLC, which does business as Hope Medical Group for Women ("Hope"), Bossier City Medical Suite ("Bossier"), and Choice, Inc., of Texas, which does business as Causeway Medical Clinic ("Causeway") provide comprehensive, outpatient reproductive health care services, including abortion services, to thousands of women in Louisiana each year. Declaration of Kathaleen Pittman, Hope Clinic Administrator ¶¶ 1-6, attached hereto as Exhibit 2 ("Pittman Decl."); Declaration of Robert Gross, Administrator for Bossier and Causeway, ¶ 4, attached hereto as Exhibit 3 ("Gross Decl."). Together, the Hope, Bossier, and Causeway clinics are 3 of only 5 licensed abortion clinics in the state. Pittman Decl. ¶ 7; Gross Decl. ¶ 9. The doctors who perform abortions at Hope, Bossier, and Causeway are licensed Louisiana physicians. Pittman Decl. ¶ 5; Gross Decl. ¶ 5. Even before the events giving rise to this lawsuit, the Plaintiff clinics were subject to and in compliance with extensive

[1] H.B. 388 subjects Plaintiffs to additional regulations. In addition to the active admitting privileges requirement, Plaintiffs must comply with new regulations relating to reporting duties, licensing, and outpatient procedures. The provisions of H.B. 388 other than the admitting privileges requirement are not part of this litigation.

regulations, including but not limited to those relating to patient care, infection control, personnel, doctor qualifications, recordkeeping, and reporting obligations. Pittman Decl. ¶ 6; Gross Decl. ¶ 10.

1. Hope

Hope has been serving the women of Louisiana and their families since 1980 and currently operates in Shreveport, Louisiana. Pittman Decl. ¶¶ 1, 4. Hope is licensed and inspected annually by the Louisiana Department of Health and Hospitals ("DHH"). Pittman Decl. ¶ 6; *About Hope Medical Group, available at* http://www.hopemedical.com/01_about.html. Plaintiff Dr. John Doe 1[2] performs 71% of the abortions at Hope, and Dr. Doe 3 performs the remaining 29%. Pittman Decl. ¶ 5; Declaration of John Doe 1, M.D. ¶ 2, attached hereto as Exhibit 4 ("Doe 1 Decl."); Declaration of John Doe 3, M.D. ¶ 3, attached hereto as Exhibit 5 ("Doe 3 Decl."). In the past 20 years at Hope, to the best knowledge of Hope's current staff, only four patients obtaining abortions experienced a complication that required hospitalization. Pittman Decl. ¶ 15; Doe 3 Decl. ¶ 5; Doe 1 Decl. ¶ 5.

2. Bossier

Bossier, located in Bossier City, Louisiana, provides both first and second trimester abortion services. Gross Decl. ¶¶ 1, 4. Plaintiff Dr. John Doe 2, the clinic's only doctor, has over 34 years of experience, and is assisted by trained staff, nurses, and a full time administrative director. Declaration of John Doe 2, M.D. ¶ 1, attached hereto as Exhibit 6 ("Doe 2 Decl."); Gross Decl. ¶ 5. Each year, Dr. Doe 2 performs approximately 750 abortions at Bossier. *See* Doe 2 Decl. ¶ 2. Dr. Doe 2 is also the only doctor in Louisiana who performs abortions past 16

[2] In order to protect the safety of the physicians, Plaintiffs have filed an accompanying motion to proceed using pseudonyms, and refer to the physicians herein as Drs. Doe 1 – 4. All physicians are referred to using male pronouns, without regard to their actual gender.

weeks' gestation and receives regular referrals from specialists to perform abortions on patients that are in the unfortunate circumstance of having to terminate a pregnancy based on severe genetic abnormalities. Doe 2 Decl. ¶ 4. Since 2009, to the best knowledge of the clinic staff, there have been only two patients at Bossier who experienced a complication that required hospitalization. Gross Decl. ¶ 9. In addition to abortion services, Bossier offers pregnancy tests, cancer screening, and contraception to patients. Gross Decl. ¶ 4.

3. Causeway

Causeway has been providing abortion and reproductive health services to its patients since 1999. Gross Decl. ¶ 1. Causeway is located in Metairie, Louisiana, and provides both first and second trimester abortion services. Gross Decl. ¶¶ 1, 4. The clinic's doctors are Dr. John Doe 2 (who has more than 34 years of experience in women's health) and Dr. John Doe 4, (who has more than 51 years of experience), and collectively perform approximately 2,100 abortions per year at Causeway. Doe 2 Decl. ¶ 1; Gross Decl. ¶ 9. Dr. Doe 4 performs approximately 75% of the abortions at Causeway. Gross Decl. ¶ 5. Dr. Doe 2 performs the other 25% of the abortions at Causeway. Doe 2 Decl. ¶ 3; Gross Decl. ¶ 5. Since 2009, to the best knowledge of the clinic staff, the clinic has had one patient, out of over 10,000, who experienced a complication that needed hospitalization. Gross Decl. ¶ 9. In addition to abortion services, Causeway offers pregnancy testing, cancer screening, and contraception to patients. Gross Decl. ¶ 4.

C. Admitting Privileges Applications

1. The Admitting Privileges Application Process

There is no uniform process for obtaining hospital admitting privileges. Rather, each individual hospital has a distinct, specialized application process. Hospitals generally have wide

discretion as to both the criteria considered and the decisions made in the application process. These processes may include several rounds of review and takes many months to complete. Based on information available to the Plaintiffs at this time, it appears that the hospitals within 30 miles of the Plaintiff clinics can take anywhere from 90 to 240 days or longer to complete the process. *See* Summary of Hospital Admitting Privilege Requirements, attached hereto as Exhibit 8.[3]

2. Doctors at the Plaintiff Clinics have Applications Pending at Area Hospitals

Each of Plaintiffs clinics' doctors who do not have privileges has at least one application pending at hospitals within 30 miles of their practice. Pittman Decl. ¶ 27; Gross Decl. ¶ 20. Nevertheless, because of the extended timeline of application decisions, it is impossible for Plaintiffs clinics' doctors to comply with the Act's requirements before its September 1 effective date. Indeed, some of the hospitals have not yet even provided the doctors with requested applications. *Id*.

Dr. Doe 2, who performs abortions at Bossier and Causeway clinics, submitted an application for admitting privileges at Willis-Knighton Hospital on May 12, 2014. Doe 2 Decl. ¶ 7. A staff member at Willis Knighton told Dr. Doe 2 that it would take at least four months for the board to reach a decision. *Id*. He currently has received no response from Tulane Hospital.

The other doctor, Dr. John Doe 4, who performs abortions at Causeway, submitted an application for admitting privileges at Ochsner Medical Center. The hospital has not yet

[3] For example, available information about the admitting privileges process at Minden Hospital suggests that an application for admitting privileges may take as long as 210 days—seven months—to resolve. Other Louisiana hospitals whose bylaws Plaintiffs have been able to obtain have similar, lengthy processes. *See* Summary of Hospital Admitting Privilege Requirements. (Oscher Kenner Medical Center process takes up to 240 days; East Jefferson Hospital process takes up to 120 days; Touro Infirmary process takes up to 180 days; University Health process takes up to 90 days; Christus Health – Shreveport process takes up to 180 days; Willis Knighton process takes up to 120 days).

responded to his application.

Dr. John Doe 1, who performs abortions at Hope Clinic, has submitted applications for admitting privileges at three hospitals: Willis Knighton Hospital on June 17, Minden Medical Center on July 25, and Christus Health System on August 15.[4] Doe 1 Decl. ¶ 6. Dr. Doe 1 has also attempted to seek admitting privileges at University Health, but has been told that the department of family medicine is not willing to extend admitting privileges to him. Doe 1 Decl. ¶ 7.

Decisions on the applications are within the discretion of the hospitals, and Plaintiffs cannot force the hospitals to act within the time frame established by the Act. As of today, Plaintiffs have no indication that they will receive privileges from any hospital by September 1. Pittman Decl. ¶¶ 27-28; Gross Decl. ¶ 21; Summary of Hospital Admitting Privilege Requirements.

3. Hospitals have Broad Discretion Regarding the Admissions Process

Hospitals have broad discretion to approve or deny admitting privileges applications. For example, at the Minden Medical Center, the applicant will not be entitled to a hearing if the application is denied "[o]n the basis of inconsistency with the hospital's current service plan, including . . . the mix of patient care services to be provided." Ex. 2, Attach. 4, Medical Staff Bylaws, Rules and Regulations of Minden Medical Center, at 36. Other area hospitals have similar requirements.[5] Hospitals may also restrict admitting privileges to physicians who serve

[4] Christus Health System is a Catholic hospital, which is unlikely to grant admitting privileges to a doctor who performs abortions. Christus Health Shreveport-Bossier Medical Staff Bylaws Art. 2.2(b)(6), see Ex. 2, Attach. 2.

[5] *See* Summary of Hospital Admitting Privilege Requirements at 1, 4 (*e.g.*, Oschner Medical Center may deny privileges based on "a lack of need or resources"; University Health may deny privileges if the hospital does not need or have the ability to accommodate the doctors' specialty.).

on their faculty.

Hospitals also may decide to limit admitting privileges to doctors who will admit a minimum number of patients a year. Pittman Decl. ¶ 25; Declaration of Dr. Christopher M. Estes ¶ 49, attached hereto as Exhibit 7 ("Estes Decl.").[6] During the application and interview process, hospitals may ask the applicant to estimate how many patients they expect to admit. Pittman Decl. ¶ 25. Furthermore, the Joint Commission, an organization that accredits and certifies hospitals, has advised at least some, if not all, of the hospitals in Louisiana that they should not renew admitting privileges for doctors who have not admitted patients recently. Doe 3 Decl. ¶ 8.

To the extent the local hospitals will impose minimum admission requirements, Plaintiffs clinics' doctors who specialize in providing abortions, will never meet this minimum requirement, because they rarely admit clinic patients to the hospital. Pittman Decl. ¶¶ 15, 25. Although complications from abortion are not common, those that do occur can, except in rare instances, be handled in an outpatient setting without the need for hospitalization. Estes Decl. ¶ 48. In the past 20 years, only four patients at Hope have had complications requiring hospitalization as a result of abortion care. Pittman Decl. ¶ 15. Similarly, in recent years, two Bossier patients and one Causeway patient have required hospitalization following an abortion Gross Decl. ¶ 9. Thus, historically, doctors at these clinics admit almost no patients to area hospitals.

Dr. Doe 3 is the only physician known to Plaintiffs who currently has admitting privileges that comply with the Act. Doe 3 Decl. ¶ 6. He was able to obtain and keep these

[6] *See, e.g.*, Summary of Hospital Admitting Privilege Requirements at 5 (Willis Knighton requires applicants to agree to "use the Hospital sufficiently to allow continuing assessment of current competence.").

privileges because of his busy OB-GYN private practice, not as a result of his work performing abortions at Hope. *Id*. Dr. Doe 3 would not be able to maintain admitting privileges without the patient admissions generated by his private OB-GYN practice because complications requiring hospitalization are so rare in abortion procedures that he would not admit a sufficient number of patients per year solely as a result of his work at Hope. Doe 3 Decl. ¶¶ 5, 7. Thus, to the extent local hospitals will require a minimum number of admissions per year to grant admitting privileges, the Plaintiff clinics' doctors will be unable to obtain privileges.

D. Lack of Medical Need for Admitting Privileges for Safe Abortion Care

The admitting privileges requirement is also medically unnecessary and unjustified. An abortion is a safe medical procedure that rarely results in complications requiring hospitalization and is effectively and safely performed in an outpatient setting. A recent large study found that the prevalence of any complication of first-trimester surgical abortion – including minor complications – is 1.3%. Estes Decl. ¶ 24. Most of these complications are not only rare, but can be appropriately and safely managed at the clinic. Estes Decl. ¶ 27. Less than 0.3% of women experience a complication that requires hospitalization.[7] Estes Decl. ¶ 25.

The safety record of Plaintiffs clinics' doctors is consistent with the national average, with very few patients requiring hospitalization as a result of complications from abortions performed at the clinics. Pittman Decl. ¶ 15; Gross Decl. ¶ 9.

Plaintiff clinics have established safety procedures to provide optimal care in the rare event that a complication does occur, and indeed, almost all complications are resolved at the

[7] By contrast, the risk of death associated with childbirth is approximately 14 times higher than that associated with abortion, and every pregnancy-related complication is more common among women having live births than among those having abortions. Raymond EG & Grimes DA, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, Obstet. & Gynecol. 2012; 119: 215-19.

clinic. If transfer is required, the Plaintiff clinics follow established protocols governing transfer of patients needing emergency care. Pittman Decl. ¶ 16; Gross Decl. ¶ 10. The Plaintiff clinics' doctors alert the nearest emergency room and provide the necessary information, including a copy of the patient's medical record, to the hospital to ensure continuity of care. *Id*.

Furthermore, in the extremely rare circumstance where the clinic must transfer the patient to a hospital, the emergency medicine technicians responsible for transporting the patient follow the standard of care protocol which dictates that a patient is taken to the nearest hospital that is accepting patients. Estes Decl. ¶ 40. Thus, the clinic doctor may not dictate where to admit the patient and cannot require that the patient be transferred to a specific hospital where the doctor can exercise his admitting privileges.

Nor is it always medically appropriate for a patient to receive emergency care at a hospital near the clinic where they received the abortion. More than 30% of the patients who obtain abortions at Hope, and many of the patients who obtain abortions at the Bossier and Causeway clinics, come from outside Louisiana, and many in-state patients have traveled over 30 miles to reach the clinic. Pittman Decl. ¶¶ 9-10; Gross Decl. ¶ 7. Any complication that occurs after a patient who lives outside of the clinic area has gone home will occur when the patient is no longer in range of the hospitals near the clinic. If those complications require emergent hospital treatment, it would be most medically appropriate for a patient to go to the hospital nearest her, not a hospital near the clinic, even if that is where the clinic doctor has admitting privileges.

In the event that a patient does require post-procedure care at a hospital, patients typically are treated by the emergency room doctors on an outpatient basis and released. Estes Decl. ¶ 48. To the extent any complications arise, the majority are similar to those encountered by women

experiencing miscarriage, which emergency room doctors can, and routinely do, handle. Estes Decl. ¶¶ 39, 47-48. Where additional care is necessary, the emergency room doctor can, and would, involve a specialist. Estes Decl. ¶¶ 39, 47-48. This is fully consistent with the standard of care. Estes Decl. ¶¶ 39, 47-48. Thus, even for patients who experience serious complications, a requirement that the abortion provider have admitting privileges at a hospital near the clinic provides no additional safety benefit.

Moreover, the trend in medicine today is toward specialization of doctors who practice in outpatient settings and doctors who practice in hospitals. Estes Decl. ¶ 32. Most hospitals have their own dedicated staff doctors, and these "hospitalists" focus on providing hospital-based care, while other doctors specialize in outpatient care. Estes Decl. ¶ 32. It is the standard of care for physicians who practice in an outpatient setting to rely on other doctors to provide any care their patients may need in a hospital setting. Notably, Louisiana has imposed the admitting privileges requirement only on doctors providing abortions There are many other procedures performed in outpatient settings that have similar or higher complication rates than abortion, including other gynecologic procedures and non-gynecologic procedures such as colonoscopies, Estes Decl. ¶¶ 18-20, and yet Louisiana law does not require that doctors performing these other procedures in an outpatient setting have local hospital admitting privileges. *See, e.g.,* La. Admin. Code 48:I.4535(e)(1) (requiring ambulatory surgical centers "to secure a written transfer agreement with at least one hospital in the community" and that "each member of the medical staff of the center shall also be a member in good standing of the medical staff of at least one hospital in the community").

E. Irreparable Injury to Plaintiffs and their Patients

Because it will be impossible for all but one of the clinics' doctors to comply with the

Act, absent an injunction from this Court, the Plaintiff clinics' doctors will be forced to cease providing abortion services, with resulting irreparable injury to their patients' health and well-being. Pittman Decl. ¶ 30; Gross Decl. ¶ 22. Unless enjoined, the Act will make it impossible for Bossier and Causeway to provide abortions because no doctor at those clinics will have admitting privileges by September 1. Further, the one doctor at Hope who currently has admitting privileges, Dr. Doe 3, will cease providing abortion services if no other doctor in the state is able to provide abortions. Doe 3 Decl. ¶¶ 9, 12-13.

As Dr. Doe 3 explains in his Declaration, he is justifiably concerned that, if he becomes the only doctor in Louisiana able to legally perform abortions, anti-choice groups will drastically escalate their threats to his safety and his career. Dr. Doe 3 has received numerous physical and verbal threats to his life and reputation because of his work performing abortions. Threatening flyers have been handed out in his neighborhood and near his offices, encouraging others to harass him and his family. He has been sufficiently scared for his own safety and the safety of his family that he reported these events to both the police and the FBI. Doe 3 Decl. ¶¶ 10-11.

Dr. Doe 3's fears – and the fears of all doctors who perform abortions in Louisiana – are grounded in the reality of a long history of violence directed towards abortion providers in the United States. All three Plaintiff clinics are subject to regular protests, and Hope has been attacked twice in the last 20 years, including one arson attempt in which a Molotov cocktail was thrown at the facility. Pittman Decl. ¶ 8; Gross Decl. ¶ 6. This history, combined with the current threats against Dr. Doe 3, create an intolerable risk which will force Dr. Doe 3 to retire from Hope, and thus, force the closure of the Clinic. Doe 3 Decl. ¶¶ 10-12; Pittman Decl. ¶¶ 19, 30.

Even if the Court were to assume that Dr. Doe 3 were to continue providing abortion

services after the Act takes effect on September 1, enforcement of the Act would irreparably injure the women of Louisiana. To the best of Plaintiffs' knowledge, no other doctor in Louisiana would be able to provide abortion services as of September 1; any scheduled appointments with any other doctors would be cancelled. Doe 3 Decl. ¶ 9; Gross Decl. ¶ 22; Pittman Decl. ¶ 30. Dr. Doe 3, who only practices part-time at Hope, could not provide abortion care to every woman in Louisiana who needs this medical service. Doe 3 Decl. ¶ 13. Additionally, Dr. Doe 3 does not provide abortion services past sixteen weeks of pregnancy and, absent relief from this Court, women will lose the ability to obtain an abortion in Louisiana after 16 weeks of pregnancy, including all patients having to terminate a pregnancy based on severe genetic abnormalities or severe threats to their health. Doe 2 Decl. ¶ 4. Thus, if the Act takes effect on September 1, 2014, the Plaintiff clinics' patients will experience significant delays and burdens in obtaining abortion care, if they are able to obtain such care at all. Doe 3 Decl. ¶ 13; Doe 2 Decl. ¶ 9.

Finally, Shreveport is in the northwest corner of Louisiana, hundreds of miles from the population centers near Louisiana's coast. A woman in New Orleans, for example, would have to travel more than 340 miles to reach Hope, where Dr. Doe 3 practices.[8] Given that women must make two trips to an abortion clinic under Louisiana law – an initial visit for counseling and then a second visit for the abortion, at least 24 hours later – the burdens are even more significant. Pittman Decl. ¶ 13; Gross Decl. ¶ 8. These burdens impose particularly significant obstacles for low-income women, such as many of the Plaintiff clinics' patients, who will have difficulty arranging for additional child care, time off from work, and money for gas, if they even

[8] The driving distance from Shreveport to New Orleans is approximately 343 miles. *See* *http://www.travelmath.com/drive-distance/from/Shreveport,+LA/to/New+Orleans,+LA*.

own a car.[9] With these severe obstacles to accessing care, many women will not be able to access safe and legal abortion in Louisiana at all, and some will carry to term regardless of the impact on their lives and health. Estes Decl. ¶ 52. Other women may be forced to take desperate measures, such as attempting to self-abort or seeking care from unlicensed and unsafe providers, thus further placing their health at risk. Estes Decl. ¶ 53.

Accordingly, there is no question that enforcement of the admitting privileges requirement will cause severe and irreparable harm to the Plaintiff clinics and the patients they serve.

ARGUMENT

A. Standard of Review

Plaintiffs are entitled to a temporary restraining order and preliminary injunction. The standards for issuance of a temporary restraining order or a preliminary injunction are the same. The moving party must show (1) a substantial likelihood of success on the merits; (2) a substantial threat that failure to grant the injunction will result in irreparable injury to the moving party; (3) the threatened injury outweighs any damages the injunction may cause defendant; and (4) the injunction will not disserve the public interest. *Hoover v. Morales*, 164 F.3d 221, 224 (5th Cir. 1998); *Opulent Life Church v. City of Holly Springs, Miss*., 697 F.3d 279, 288 (5th Cir. 2012); *Productos Carnic S.A. v. Central American Beef and Seafood Trading Co*., 621 F.2d 683, 685 (5th Cir. 1980).

[9] According to information provided by patients at Hope, 70-90% live below the federal poverty line. Pittman Decl. ¶ 14. Likewise, a significant percentage of the patients at Bossier and Causeway live at or below the federal poverty line. Doe 2 Decl. ¶ 3.

B. Plaintiffs Have Demonstrated a Substantial Likelihood of Success on the Merits on Their Claim That the Act Violates Plaintiffs' Procedural Due Process Rights

The Act's admitting privileges requirement violates Plaintiffs' rights to procedural due process because it fails to give them sufficient time to comply. The requirement takes effect just 81 days after the Act's passage, but Louisiana law gives hospitals wide latitude in determining when to decide on a doctor's application for admitting privileges, and, in this case, the hospitals within 30 miles of the Plaintiff clinics have procedures allowing the hospitals as long as seven months, if not longer, even without delays, to decide on a doctor's application. *See* La. Rev. Stat. § 40:2114(C) (requiring that doctors meet the "reasonable criteria for membership" of a hospital) and 40:2114(E) (which requires that hospitals "establish rules, regulations, and procedures" for admitting privileges but remaining silent on when the hospital must decide on a pending application); *and see* Summary of Hospital Admitting Privilege Requirements[10]. Regardless of its other constitutional flaws, the admitting privileges requirement should be preliminarily enjoined until doctors are given sufficient time to comply.

This Circuit has held that an admitting privileges requirement may not be enforced without sufficient time to allow doctors to comply. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 600 (5th Cir. 2014). In *Abbott*, the Fifth Circuit held that the Texas admitting privileges requirement could not be enforced against abortion providers who applied for admitting privileges within the grace period provided by the statute but were awaiting a response from a hospital. The Court of Appeals found that it was "unreasonable to expect that all abortion providers will be able to comply with the admitting-

[10] See *supra* note 3, describing time associated with application process for each hospital for which Plaintiffs have been able to obtain bylaws.

privileges provision within [the grace period provided by the statute] where receiving a response from a hospital processing an application for admitting privileges can take [longer than the statutory grace period.]" *Abbott*, 748 F.3d at 600 ("it would be absurd to enforce [the statute] against physicians who *timely* applied for admitting privileges but have not heard back from the hospital").[11]

Here, the Plaintiff clinics' doctors simply do not have enough time to comply with the law. Not only can it take weeks to file an application—identifying appropriate hospitals, obtaining applications, and gathering supporting documents—but, once an application is filed, the hospital can take as many as 710 days to respond, and perhaps longer if the hospital chooses to defer its decision. *See* Summary of Hospital Admitting Privilege Requirements. The hospitals within 30 miles of the Plaintiff clinics each require that doctors meet a series of procedural hurdles before obtaining privileges. *See* Summary of Hospital Admitting Privilege Requirements. The Plaintiff clinics' doctors have not received, and do not expect to receive, notification as to whether those applications will be granted prior to September 1, 2014. Pittman Decl. ¶¶ 27-28; Gross Decl. ¶¶ 20-21.

Absent an injunction, the Plaintiff clinics' doctors will be forced either to stop practicing

[11] Plaintiffs meet standard for assessing procedural due process claims: whether the plaintiff (1) has "identif[ied] a protected life, liberty, or property interest," and (2) is deprived of that interest without due process of law, and are substantially likely to succeed on their due process claim. *Phillips v. Vandygriff*, 711 F.2d 1217, 1221-22 (5th Cir. 1983) The Supreme Court has repeatedly recognized that "the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts" of the Due Process Clause. *Greene v. McElroy*, 360 U.S. 474, 492 (1959); *see also Phillips*, 711 F.2d at 1222 ("[A] person has a liberty interest in pursuing an occupation."). Furthermore, "any law that requires you to do something by a certain date must give you adequate time to do it; otherwise, the law would be irrational and arbitrary for compliance with it would be impossible." *Campbell v. Bennett*, 212 F. Supp. 2d 1339, 1343 (M.D. Ala. 2002); *see also Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.").

or face heavy monetary penalties and disciplinary action from the Louisiana State Board of Medical Examiners. Courts have not hesitated to find a due process violation under these circumstances. *Abbott*, 748 F.3d at 600 (holding as a matter of law that an admitting privileges requirement in Texas could not be enforced against abortion providers who applied for admitting privileges within the 100-day grace period allowed under the statute, but were awaiting a response from a hospital); *see also Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 611-13 (6th Cir. 2006) (immediate shut-down of abortion provider violated procedural due process); *Hodes & Nauser, MD's, PA v. Moser*, No. 11-2365-CM, slip. op. at 40:16-19 (D. Kan. Jul. 1, 2011) (temporarily enjoining abortion facility requirements where plaintiffs not given enough time to comply); *see also Jackson Women's Health Org. v. Currier*, 940 F. Supp. 2d 416, 424 (S.D. Miss. 2013) (initially granting partial preliminary injunction of Mississippi admitting privileges law while physicians' privileges applications were still pending).

Plaintiffs thus seek the Court's immediate enjoinment of the Act to, at the very minimum, allow the Plaintiff clinics' doctors to continue practicing until they receive notification from hospitals regarding their applications for admitting privileges.

C. Plaintiffs Have Demonstrated a Substantial Likelihood of Success on the Merits of their Claim that the Act Violates Their Patients' Fourteenth Amendment Rights

i. States May Not Enact Laws That Create an Undue Burden on a Woman's Right to Obtain an Abortion

Because the admitting privileges requirement is medically unwarranted and unnecessary, and will either drastically reduce or completely eliminate the availability of legal abortion in the state, Plaintiffs are likely to succeed on the merits of their claim that the requirement violates a woman's constitutional right to an abortion.

The Constitution protects the fundamental right to personal privacy, including a woman's right to choose to terminate her pregnancy. "[F]or more than forty years, it has been settled

constitutional law that the Fourteenth Amendment protects a woman's basic right to choose an abortion." *Currier*, 2014 WL 3730467, at *4 (citing *Roe v. Wade*, 410 U.S. 113, 153 (1973)). Laws that impose an "undue burden" on the exercise of this right are unconstitutional. *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 895 (1992). A law imposes an undue burden "'if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'" *Gonzales v. Carhart*, 550 U.S. 124, 156 (2007) (quoting *Casey*, 505 U.S. at 878).A law with the "effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" is not "a permissible means of serving . . . legitimate ends." *Casey*, 505 U.S. at 877; *see also Currier*, 2014 WL 3730467, at *4.

The Fifth Circuit has made clear that measures effectively forcing all, or a substantial portion, of a state's abortion providers to close create an extreme obstacle, and are likely to constitute an unconstitutional undue burden. *Okpalobi v. Foster*, 190 F.3d 337, 357 (5th Cir. 1999) ("A measure that has the effect of forcing all or a substantial portion of a state's abortion providers to stop offering such procedures creates a substantial obstacle to a woman's right to have a pre-viability abortion, thus constituting an undue burden under *Casey*."); *see also Currier*, 2014 WL 3730467, at *9 (holding that law requiring admitting privileges imposed an unconstitutional undue burden where it caused the state's only abortion provider to close).

The admitting privileges requirement being challenged here is similar to laws that have been passed in Mississippi, North Dakota, Alabama, Texas, and Wisconsin – each with the express knowledge and intent that it would close most or all of the remaining clinics in those states.[12] The Mississippi, Wisconsin and Alabama laws have since been preliminarily or

[12] *See e.g.*, Miss. H.B. 1390, Regular Session (2012); N.D. S.B. 230, 63rd Legis. Assemb. (2013); Ala. H.B. 57, Regular Session (2013); *see also* Erik Eckhold, *North Dakota's Sole Abortion Clinic Sues to Block New Law*, N.Y. Times, May 15, 2013, *available at*

(Footnote continues on next page.)

permanently enjoined by federal courts. *Currier*, 2014 WL 3730467, at *17; *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, 738 F.3d 786, 799 (7th Cir. 2013); *Planned Parenthood Southeast, Inc. v. Strange*, No. 2:13cv-0405-MHT, 2014 WL 3809403, at *48 (M.D. Ala. Aug. 4, 2014).

Moreover, the admitting privileges requirement for doctors providing abortions is neither medically necessary nor justified, and is opposed by leading medical associations including the American Medical Association (AMA) and the American Congress of Obstetricians and Gynecologists (ACOG).[13] The Act was championed by out-of-state anti-choice groups, and has been identified by Louisiana state officials as a direct means to limit abortion access. *See* Video Recording: Governor Jindal Press Conference on 2014 Pro-Life Legislation (March 7, 2014), *available at* https://www.youtube.com/watch?v=7q7yL4V_DDk&feature=youtu.be (stating, at a press conference announcing H.B. 388 and another anti-choice bill: "We've been named the top pro-life state in America for the last three years . . .and we do it through making it tough to get an abortion in Louisiana . . . until [Roe is overturned] we want to make it as difficult as possible for the people doing that.").

(Footnote continued from previous page.)

http://www.nytimes.com/2013/05/16/us/north-dakotas-sole-abortion-clinic-sues-to-block-new-law.html; Joe Sutton and Tom Watkins, *Mississippi legislature tightens restrictions on abortion providers*, CNN Politics, Apr. 4, 2012, *available at* http://www.cnn.com/2012/04/04/politics/mississippi-abortion; *We Dare Defend Our Rights*, Ala. House Republicans, http://alhousegop.com/wedaredefend.

[13] *See* Brief of *Amici Curiae* American College of Obstetricians and Gynecologists and the American Medical Association in Support of Plaintiffs-Appellees and in Support of Affirmance, *Planned Parenthood v. Abbott*, No. 13-51008 (5th Cir. Dec. 19, 2013) *available at* http://www.acog.org/~/media/News%20Releases/20131220Release.pdf; Statement on State Legislation Requiring Hospital Admitting Privileges for Physicians Providing Abortion Statistics, *available at* http://www.acog.org/About_ACOG/News_Room/News_Releases/2013/Hospital_Admitting_Privileges_for_Physicians_Providing_Abortion_Services (April 25, 2013).

ii. The Admitting Privileges Requirement Creates an Undue Burden on Women Seeking Abortions Because It Will Force the Closure of Every Clinic in Louisiana

A law that forces every abortion provider in the state to stop offering abortions is likely unconstitutional. *Currier*, 2014 WL 3730467, at *9 (enjoining admitting privileges requirement because plaintiff "has demonstrated a substantial likelihood of proving that H.B. 1390—effectively closing the one abortion clinic in the state—has the effect of placing a substantial obstacle in the path of a woman seeking an abortion in Mississippi, and is therefore unconstitutional as applied to the plaintiffs in this case.").

H.B. 388 is likely to force all of the Louisiana's already small number of abortion providers to stop serving their communities as of September 1. Drs. Doe 1, Doe 4, and Doe 2 each have applied for admitting privileges at local hospitals; these applications have been either flatly refused or have no reasonable expectation of being granted by the time H.B. 388 takes effect. Doe 1 Decl. ¶¶ 6-7; Doe 2 Decl. ¶¶ 7-8; Pittman Decl. ¶¶ 27-28; Gross Decl. ¶¶ 20-21. It is not at all clear that either of the other two clinics currently providing abortions in Louisiana could continue to do so as of September 1.

There is only one doctor who currently has admitting privileges and would legally be able to perform abortions on or after September 1: Dr. Doe 3. Dr. Doe 3 fears, however, that if he is the only doctor who can legally perform abortions, he will become the sole focus of every anti-choice group in the state, including those willing to engage in threatening and intimidating tactics. Thus, due to legitimate threats to his personal safety and his continued medical practice, Dr. Doe 3 will not perform any abortions if H.B. 388 is enforced. Doe 3 Decl. ¶¶ 9-13. This is a direct result of H.B. 388; but for this Act, Dr. Doe 3 would not face the increased threat of being the sole provider of abortions in the state and the accompanying increased threat.

In *Abbott*, the Fifth Circuit concluded that, in a facial challenge, no undue burden existed

when the evidence demonstrated that "[a]ll of the major Texas cities, including Austin, Corpus Christi, Dallas, El Paso, Houston, and San Antonio, continue to have multiple clinics where many physicians will have or obtain hospital admitting privileges," and would be able to continue providing abortion services even if the admitting privileges law in that state took effect. 748 F.3d at 598. The facts here, however, are different; the majority, if not all, of the clinics in Louisiana will not be able to provide abortion services on September 1 without injunctive relief, and the two largest cities – New Orleans and Louisiana – will no longer have a clinic providing abortions.

As a result, because H.B. 388 will effectively eliminate all access to legal abortion in Louisiana,[14] it creates a substantial obstacle to a woman's right to have a pre-viability abortion, and constitutes an impermissible undue burden under *Casey*.[15]

iii. The Admitting Privileges Requirement Would Create an Undue Burden on Women Seeking Abortions in Louisiana Even if Dr. Doe 3 Continued to Practice

Even if the Court assumes that Dr. Doe 3 would continue providing limited abortion services at Hope, which he will not (Doe 3 Decl. ¶¶ 9, 12-13), H.B. 388 would still be unconstitutional. "A measure that has the effect of forcing all **or a substantial portion** of a state's abortion providers to stop offering such procedures creates a substantial obstacle to a woman's right to have a pre-viability abortion, thus constituting an undue burden under *Casey*." *Okpalobi*, 190 F.3d at 357 (emphasis added); *accord Currier*, 2014 WL 3730467, at *17 (law imposed an unconstitutional undue burden where it caused the state's only abortion provider to close); *Tucson Woman's Clinic v. Eden* 379 F.3d 531, 542 (9th Cir. 2004) (fact-finder could

[14] *See supra*, note 3.

[15] *See Currier*, 2014 WL 3730467, at *4.

conclude that regulation "limiting the supply of abortion providers" in the state "imposes a substantial obstacle"); *Planned Parenthood Se. v. Bentley*, 951 F. Supp. 2d 1280, 1286 (M.D. Ala. 2013) (enjoining admitting privileges requirement that may have closed clinics because women would have had to travel great distances to the few remaining clinics, and "for a significant number of women, this distance would be no mere encumbrance, but an insurmountable barrier to obtaining an abortion."); *Planned Parenthood of the Heartland v. Heineman*, 724 F. Supp. 2d 1025, 1044-46 (D. Neb. 2010) (measure that would deter most providers from performing abortions imposes a substantial obstacle on access to abortion care); *Planned Parenthood of Kan. v. Drummond*, No. 07-4164-CV, 2007 WL 2811407, at *7-8, *10 (W.D. Mo. Sept. 24, 2007) (finding likelihood of success where, *inter alia*, law could have the effect of "shutting down Missouri's only abortion facilities located outside the St. Louis area").

In *Abbott*, the Court relied heavily on the fact that the law would not pose an undue burden to most women seeking abortions. 748 F.3d at 597-600 ("The evidence presented to the district court demonstrates that if the admitting-privileges regulation burdens abortion access by diminishing the number of doctors who will perform abortions and requiring women to travel farther, the burden does not fall on the vast majority of Texas women seeking abortions.") The Fifth Circuit in *Abbott* noted that "[a]ll of the major Texas cities, including Austin, Corpus Christi, Dallas, El Paso, Houston, and San Antonio, continue to have multiple clinics where many physicians will have or obtain hospital admitting privileges." 748 F.3d at 598. The *Abbott* court also found that an increase of travel of "less than 150 miles" was acceptable. *Id.*

The record in this case demonstrates that, even if Dr. Doe 3 continued to provide abortions in Shreveport, he is hundreds of miles from many parts of the state, especially the population centers along Louisiana's coast. Pittman Decl. ¶ 9. A woman in New Orleans, for

example, would have to travel more than 340 miles to reach Shreveport.[16] The immediate and practical effect of H.B. 388 is that women in Louisiana's two largest cities—New Orleans and Baton Rouge—will have no access to an abortion provider within 200 miles. Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2012, *available at* http://louisiana.gov/Explore/Demographics_and_Geography/PlaceEstimates.php; Pittman Decl. ¶ 9. Louisiana women from the most populous part of the state would be subject to a greater time burden, up to five hours of travel to reach Shreveport from New Orleans,[17] which could increase the health risks as a pregnancy advances. Finally, because Dr. Doe 3 does not provide abortions after 16 weeks of gestation, those services would not be available in the entire state even if Dr. Doe 3 continued to practice. Doe 2 Decl. ¶ 4.

Moreover, a single doctor could not possibly meet the State's demand for abortion services. Dr. Doe 3 operates a busy independent OB-GYN practice and only performs 29 percent of all abortion procedures at the Hope clinic. Doe 3 Decl. ¶¶ 3, 7; Pittman Decl. ¶ 5. In 2011, the most recent year for which statistics are available, 12,210 women obtained abortions in Louisiana. Guttmacher Institute, *State Facts About Abortion: Louisiana*, *available at* http://www.guttmacher.org/pubs/sfaa/louisiana.html. Even if Dr. Doe 3 were willing to risk his own livelihood and personal safety to continue performing abortions, which he is not, he would not be able to serve the overwhelming majority of women seeking that procedure. Accordingly, a large number of women would effectively be prevented from obtaining abortions by H.B. 388.

[16] *See supra*, note 8.

[17] The *Abbott* court noted that, "on Texas highways," women would have to travel "less than three hours." 748 F.3d. at 597.

D. Plaintiffs, And Their Patients, Will Suffer Irreparable Harm Unless the Court Enjoins the Act

As discussed above, Plaintiffs have demonstrated the harms they and their patients will suffer if the state of Louisiana enforces the Act on September 1. It will be impossible for all but one of the clinics' doctors to comply with the Act without an injunction from this Court, and the Plaintiff clinics' doctors therefore will be forced to cease providing abortion services, with resulting irreparable injury to Plaintiffs and their patients.

It is well established that, in cases involving challenges to laws based on a deprivation of constitutional rights, once a constitutional violation is demonstrated, no further showing of irreparable injury is necessary. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (loss of constitutional "freedoms . . . unquestionably constitutes irreparable injury"); *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981) ("That the injury resulting from defendants' actions is minimized by the presence of other abortion facilities does not eliminate or render harmless the potential continuing constitutional violation of a fundamental right."); *S. Cent. Bell Tel. Co. v. La. Pub. Serv. Comm'n*, 555 So. 2d 1370, 1373 (La. 1990) ("A showing of irreparable injury, however, is not necessary when the deprivation of a constitutional right is involved.") (citing C. Wright & A. Miller, *Federal Practice and Procedure* § 2948 at 440 (1973).

The elimination of abortion will cause irreparable harm to the Plaintiff clinics' patients' health and well-being by causing undue delay and, for some, forcing them to continue their pregnancies to term—regardless of risk. *See* Estes Decl. ¶¶ 51-52; *see also Deerfield Med. Ctr.*, 661 F.2d at 338 (an infringement on a woman's constitutional right to have an abortion "mandates" a finding of irreparable injury because "once an infringement has occurred it cannot

be undone by monetary relief"); *and see Strange*, 2014 WL 3809403, at *24 (admitting privileges requirement held unconstitutional where it would eliminate abortion clinics in three of Alabama's five largest cities, and the significant harms to patients included time, financial cost, and invasion of privacy, as well as the significant risk that women who are unable to procure abortions would turn to unsupervised and unsafe use of abortion-inducing medications).

Injunctive relief is therefore necessary to protect Plaintiffs and their patients from experiencing irreparable injury.

E. The Equities Tip Sharply In Favor of Granting a Preliminary Injunction, Which Is In the Public Interest

Neither the Defendants nor the public interest will be harmed by the issuance of an injunction that merely preserves the *status quo*, in which the Plaintiff clinics safely provide care to their patients, while questions about the law's constitutionality are adjudicated. This is precisely the purpose of temporary and preliminary injunctive relief. Given that abortion is a safe procedure with very few complications, and given Plaintiff clinics' safety record, no patient's safety would be compromised, and there can be no injury to Defendants.

Moreover, the public interest will be served, rather than harmed, by injunctive relief. The public interest is not served by allowing an unconstitutional law to take effect. *Currier*, 940 F. Supp. 2d at 424 ("[T]he grant of an injunction will not disserve the public interest, an element that is generally met when an injunction is designed to avoid constitutional deprivations."). And, without an injunction, Plaintiffs' patients will suffer significantly reduced access to constitutionally protected abortion services. Thus, ensuring continued access to constitutionally protected health care services is serves the public interest.

F. A Bond Is Not Necessary In This Case

Finally, the Court should waive the bond requirement of Rule 65(c) of the Federal Rules

of Civil Procedure. The Fifth Circuit has held that the bond requirement can be waived if the opposing party will not incur any damages from the injunction, particularly in public interest litigation. *City of Atlanta v. Metro. Atlanta Rapid Transit Auth.*, 636 F.2d 1084, 1094 (5th Cir. 1981) (waiving bond requirement where plaintiffs engaged in public-interest litigation, "an area in which the courts have recognized an exception to the Rule 65 security requirement"). Because Defendants will be unharmed by relief that merely maintains the status quo and permits Plaintiffs to continue to provide safe abortion care to their patients, the Court should waive the bond requirement.

HEARING REQUESTED

Plaintiffs respectfully request a hearing on this motion.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant their Motion for Preliminary Injunction.

Dated: August 22, 2014

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