No. 20220696-SC

IN THE
SUPREME COURT OF THE STATE OF UTAH

PLANNED PARENTHOOD ASSOCIATION OF UTAH,
on behalf of itself and its patients, physicians, and staff,
Appellee,
v.
STATE OF UTAH, et al.,
Appellants.

SUPPLEMENTAL BRIEF OF APPELLEE ADDRESSING APRIL 21, 2023, ORDER

On appeal from the Third Judicial District Court, Salt Lake County,
Honorable Andrew Stone, District Court No. 220903886

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On April 21, 2023, this Court directed the parties to submit supplemental briefing addressing whether the Utah Legislature's recent adoption of House Joint Resolution 2 ("H.J.R. 2") affects the continued propriety of this interlocutory appeal. The Court also asked whether, if it were to decide the appeal, "the district court is likely to be presented with either a new motion for a preliminary injunction or a request to reconsider the existing injunction under the revised Utah Rule of Civil Procedure 65A."

In the view of Appellee Planned Parenthood Association of Utah ("PPAU"), neither H.J.R. 2 nor other recent legislative developments warrant dismissal of the pending appeal. Indeed, given the advanced stage of the appeal, efficiency interests weigh in favor of this Court retaining jurisdiction.

Recent Developments Relevant to the Court's Order

This appeal involves review of a preliminary injunction blocking enforcement of Senate Bill 174 ("S.B. 174" or the "Trigger Ban"), a Utah law that bans abortion throughout pregnancy. The preliminary injunction was entered in July 2022 under Utah Rule of Civil Procedure 65A, which at that time permitted

entry of temporary injunctive relief where a court found that *either* "there is a substantial likelihood that the applicant will prevail on the merits of the underlying claim, or the case presents serious issues on the merits which should be the subject of further litigation." Utah R. Civ. P. 65A(e)(4) (pre-amendment version). The district court concluded that each of the six claims on which PPAU sought emergency injunctive relief against the Trigger Ban presented at least serious legal issues for further litigation. It therefore had no need to address whether PPAU was likely to prevail on the merits of any of its claims, although—as the district court recently stated—its estimation of PPAU's merits showing "went a little beyond just serious issues." Tr. of Second Prelim. Inj. Hr'g at 23:2–3, *PPAU v. State of Utah*, No. 220903886 (Utah 3d Jud. Dist. Ct. Apr. 28, 2023) ("Tr. of 2d PI Hr'g"), attached hereto as Addendum 1.

On October 3, 2022, this Court granted interlocutory review of the preliminary injunction order but declined to stay the injunction pending appeal. Party briefing is now complete, and 13 amici have filed briefs for this Court's consideration.

As discussed in further detail below, since this Court granted review, the Utah Legislature has adopted two laws with at least potential implications for PPAU's challenge to the Trigger Ban.

A. House Joint Resolution 2: The Rule 65A Amendment

In February 2023, the Utah Legislature adopted H.J.R. 2, attached hereto as Addendum 2. That resolution amended Rule 65A's preliminary-injunction standard to eliminate the "serious legal issues" prong and to require instead that a movant demonstrate "there is a substantial likelihood that [it] will prevail on the merits" of at least one of its claims. H.J.R. 2, § 1, adding Rule 65A(e)(4). H.J.R. 2 purports to provide a mechanism for certain parties subject to existing preliminary injunctions to move for reconsideration of those injunctions under the new Rule 65A standard. The resolution provides that the motion for reconsideration may "be filed at any time before the final determination of the case"; that upon a motion's filing, the court "must determine" whether the party that sought the preliminary injunction is likely to prevail; and that if the party is not likely to

prevail, the court "must terminate" the injunction. H.J.R. 2, § 1, adding Rule 65A(f)(4).

Although H.J.R. 2 does not expressly refer to this litigation, it was well understood at the time of adoption as a potential tool to eliminate the preliminary injunction against the Trigger Ban. For example, Rep. Brady Brammer, H.J.R. 2's sponsor, stated that the "[T]rigger [L]aw was also a trigger to this" Rule 65A amendment. *H.J.R. 2 Joint Resolution Amending Rules of Civil Procedure on Injunctions Before the H. Judiciary Comm.*, 2023 Gen. Session, 65th Legis., recording at 38:10–13 (Utah Jan. 18, 2023) (statement of Rep. Brammer), https://le.utah.gov/av/committeeArchive.jsp?timelineID=214847); *see also* Emily Anderson Stern, *Proposal That Could Restore Utah Abortion Ban Advances in Committee*, Salt Lake Trib. (Jan. 20, 2023), https://www.sltrib.com/news/politics/2023/01/19/proposal-that-could-restore-utah/ (quoting Rep. Brammer as stating that "the Dobbs decision issued by the U.S. Supreme Court in June—which left the right to make abortion policy up to the states, and triggered Utah's abortion ban—'brings [the issue] to a head'" in debate over the Rule 65A amendment).

Despite H.J.R. 2's adoption nearly three months ago, the State has not moved the district court for reconsideration of the preliminary injunction, which remains in effect, and the State has abided by the briefing schedule set by this Court to ensure its appeal is heard.

B. House Bill 467: The Clinic Ban

Less than a month after adopting H.J.R. 2, the Utah Legislature adopted H.B. 467, attached hereto as Addendum 3. That law was slated to take effect on May 3, 2023, but is now enjoined. *See* Mem. Decision Granting Prelim. Inj., *PPAU v. State of Utah*, No. 220903886 (Utah 3d Jud. Dist. Ct. May 2, 2023) ("2d PI. Mem."), attached hereto as an Addendum 4.

H.B. 467 (hereinafter, the "Clinic Ban") makes it illegal in Utah to provide an abortion anywhere other than a hospital, except in covered medical emergencies. *Id.* at 14. The new statute also eliminates the longstanding licensure category of abortion clinics, and it requires the Utah Department of Health and Human Services ("DHHS") to revoke the license of any facility other than a hospital that provides an abortion. *Id.* Because hospitals in Utah provide abortion

only in a narrow set of circumstances, licensed abortion clinics provide more than 95 percent of abortions in Utah. *Id.* at 6. And because hospitals have neither the incentive nor, in many cases, the practical or legal ability to expand abortion services if the Clinic Ban takes effect, the Clinic Ban functionally bans abortions just as the Trigger Ban does. *See id.* at 9 (crediting doctor's testimony that he is unaware of any Utah hospital with a detailed or coordinated plan to expand its capacity to provide abortions).

H.B. 467 also changes slightly the exceptions to the Trigger Ban. But those changes have no operative effect while the underlying Trigger Ban prohibition remains enjoined, and they do nothing to change the necessity of preliminary injunctive relief against the Trigger Ban, which, even as amended, criminalizes abortion in virtually all circumstances. *See In re. J.P.*, 648 P.2d 1364, 1370–71 (Utah 1982) (explaining that an amendment to a challenged statute moots an appeal only "when the amendment actually prevents the requested judicial relief from affecting the rights of the litigants" (citation omitted)); *see also Richards v. Cox*, 2019 UT 57, ¶ 2 n.4, 450 P.3d 1074.

In April 2023, PPAU moved to supplement its complaint in the instant case to add claims challenging the Clinic Ban, and it sought a preliminary injunction as to that ban as well. PPAU's Clinic Ban claims mirror those against the Trigger Ban in some, but not all, respects. Because the Clinic Ban functionally bans abortion in Utah, PPAU claims that it violates many of the same Utah constitutional protections that the Trigger Ban does. PPAU also challenges the Clinic Ban under the Uniform Operation of Laws ("UOL") clause, not just on behalf of patients, as it did with respect to the Trigger Ban, but also on its own behalf. In this respect, PPAU argues that the statute's classification between licensed abortion clinics and hospitals—which are similarly situated for purposes of providing abortion safely—is driven by animus and lacks any legitimate, much less compelling, purpose. 2d PI Mem. at 11–12.

On May 2, 2023, the district court issued a decision enjoining H.B. 467's enforcement. Based on PPAU's unrebutted evidence, the court found that PPAU "is likely to succeed in arguing that the Clinic Ban fails [to satisfy the UOL Clause] even under the rational basis test because the classifications established under the

Clinic Ban" between abortion providers and hospitals "are not reasonable and appear to directly and discriminatorily target" PPAU. *Id.* at 18; *see also id*. (further discussing the "substantial[]" likelihood of PPAU's success). The district court also concluded that PPAU met all other equitable factors identified in Rule 65A. *Id.*

Notably, the district court left open the question whether a more stringent level of scrutiny should apply to the UOL claim based on the Clinic Ban's impact on fundamental rights and its imposition of an "inherent disadvantage" on women as a class. *Id.* at 16. The court also did not consider PPAU's likelihood of prevailing on any of its other claims against the Clinic Ban because they mirrored those at issue in the Trigger Ban litigation. *Id.* at 11. In the district court's view, these other claims and the application of heightened scrutiny would involve arguments "inextricably bound up with the merits of the issues on appeal" from the Trigger Ban preliminary injunction. *Id.* at 12. Accordingly, the district court believed that it lacked jurisdiction to consider those arguments and claims even in the context of the wholly separate Clinic Ban. *Id.* at 12, 15.

At the time of filing, the district court had not yet issued a final, appealable order. *See id.* at 20 (directing PPAU to prepare a full order). Accordingly, it remains unclear whether the State will seek to appeal.

Argument

Although PPAU initially opposed interlocutory review of the Trigger Ban injunction, it does not believe that the recent developments discussed above now warrant dismissal of the appeal.

A. Given the substantial court and party resources already invested in the appeal, retaining jurisdiction at this time would best "serve the administration and interests of justice." Utah R. App. P. 5(g). PPAU has already briefed the appeal, arguing not only that it has presented serious legal issues warranting further litigation, but that it is likely to prevail on each of the six claims at issue—i.e., that PPAU is entitled to injunctive relief even under the standard now required by revised Rule 65A. *See* Br. of Resp't. Likewise, by arguing on appeal that PPAU's claims lack all merit, the State has necessarily taken the position that PPAU is not likely to prevail on those claims.

Moreover, at the recent preliminary-injunction hearing over the Clinic Ban, the district court remarked that its estimation of PPAU's merits showing as to the Trigger Ban "went a little beyond just serious issues," as reflected in the court's remarks at the July 2022 hearing. Tr. of 2d PI Hr'g at 23:2–3. Those statements suggest that reconsideration under H.J.R. 2's "likelihood of success" standard would not change the district court's conclusion that preliminary injunctive relief against the Trigger Ban remains warranted, even if the State belatedly moves for reconsideration. Under these circumstances, it would elevate form over substance to dismiss the pending appeal on the assumption that the State should first seek reconsideration of the preliminary injunction before asking this Court to review it.

Retaining jurisdiction over the Trigger Ban appeal is also likely to provide efficiencies at this point given the additional litigation necessitated by the Clinic Ban. Because some of PPAU's claims against the Clinic Ban overlap with claims involved in the Trigger Ban appeal, this Court's decision in the pending appeal could provide useful guidance to the parties and the district court with respect to the constitutionality of *both* statutes. The Court's guidance in this respect could

therefore streamline the litigation in ways not initially contemplated when this Court granted interlocutory review.

Finally, if this Court is concerned about opining on the merits of PPAU's constitutional claims given the amendment to Rule 65A, its discretionary power under Rule 5 "encompasses the authority to decide which questions presented in the interlocutory briefing may properly be resolved on the current record and which questions should be left for further development on remand." *W. Valley City v. Bret W. Rawson, P.C.*, 2021 UT 16, ¶ 32, 489 P.3d 191. At a minimum, the Court could retain jurisdiction to address the third-party standing question on which the State sought to appeal, since the answer to that question will serve as a "necessary foundation" for trial. *Houghton v. Dep't of Health*, 2008 UT 86, ¶ 14, 206 P.3d 287 (citation omitted). And it could defer a decision on whether to dismiss the appeal as to the merits-related questions until after argument. The Court might also identify any issues that it believes require further development on remand to resolve the merits, as it did, for example, in *Washington Townhomes, LLC v.*

Washington County Water Conservancy District, 2016 UT 43, ¶ 43, 388 P.3d 753 (refusing to exercise discretionary interlocutory review).

B. The Court also asked the parties whether, if it decides the appeal, PPAU is likely to seek a new preliminary injunction under Rule 65A, or the State is likely to seek reconsideration of the injunction at issue on appeal. PPAU responds as follows:

First, if the Court were to decide the pending appeal in PPAU's favor, it is possible that on remand the State would move for reconsideration of that injunction under the new Rule 65A standard. Given the district court's recent statements, *see supra* p.2, however, it appears unlikely that the new Rule 65A standard would change the district court's conclusion that PPAU is entitled to preliminary injunctive relief on its Trigger Ban claims. And PPAU may oppose that motion not only on the ground that PPAU *is* likely to prevail, but also, for example, on the ground that H.J.R. 2 is itself unlawful. Of course, if PPAU succeeds in opposing any future motion for reconsideration, the State may well seek to file yet another interlocutory appeal to this Court. But it is unclear whether any

subsequent reconsideration motion would actually change the key issues presented in the current appeal, and at least some of those issues—such as PPAU's standing—will remain live.

Second, if the Court were to retain jurisdiction and decide the pending appeal in the State's favor, PPAU reserves the right to seek a subsequent preliminary injunction against the Trigger Ban's enforcement. For example, if this Court were to rule against PPAU on standing grounds, PPAU might challenge the Trigger Ban on a new standing theory and/or address any evidentiary shortcomings identified in the Court's decision. Similarly, even if this Court found that PPAU had not identified serious legal issues on the merits of its claims supporting the existing injunction, PPAU might on remand seek a new preliminary injunction based on claims and facts raised in its April 3, 2023, supplemental complaint not at issue in the current appeal. At bottom, however, whether PPAU would seek another preliminary injunction against the enforcement of the Trigger Ban on remand would be very unlikely to hinge on H.J.R. 2's changes to the Rule 65A standard.

Conclusion

PPAU respectfully urges the Court to retain jurisdiction of the pending appeal, at least to resolve the third-party standing question presented by the State.

DATED this 8th day of May, 2023.

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Certificate of Compliance

I hereby certify that this brief complies with the court's April 21, 2023, order, because it contains 14 pages. It also complies with Utah R. App. P. 21(h) regarding public and non-public filings.

DATED this 8th day of May, 2023.

/s/ Troy L. Booher

Certificate of Service

This is to certify that on the 8th day of May, 2023, I caused the Brief of Appellee Addressing April 21, 2023, Order to be served via email on:

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Addendum 1

Tr. of Second Prelim. Inj. Hr'g,
PPAU v. State of Utah, No. 220903886
(Utah 3d Jud. Dist. Ct. Apr. 28, 2023)

THIRD DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

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PLANNED PARENTHOOD ASSOCIATION, et al.,	)	
Plaintiffs,	)	CASE NO. 220903886
vs.	)	APPELLATE NO. 20220696
	)	WITH KEYWORD INDEX
STATE OF UTAH, et al.,	)	
Defendants.	)	

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MOTION HEARING

APRIL 28, 2023

HONORABLE ANDREW H. STONE

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APPEARANCES:

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TROY BOOHER
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FOR THE DEFENDANTS: DAVID N. WOLF
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SALT LAKE CITY, UTAH; APRIL 28, 2023

HONORABLE ANDREW H. STONE

(Transcriber's note: Identification of speakers may not be accurate with audio recordings.)

(TIME 10:01:45 A.M.)

THE COURT: All right. Good morning, everyone.

For the record, it's April 28th, 2023. This is Case Number 220903886, Planned Parenthood Association and others versus State of Utah and others.

Counsel, could I have appearances, please?

MS. SWANSON: Good morning, Your Honor. My name is Hannah Swanson for the plaintiff Planned Parenthood Association of Utah. With me at counsel table is my colleague, Jennifer Sandman, from Planned Parenthood Federation of America, and Troy Booher from Zimmerman Booher. I'm also joined in the courtroom by Dick Baldwin of Zimmerman Booher and John Mejia of the ACLU of Utah.

MR. SORENSON: Good morning, Your Honor. My name's Lance Sorenson on behalf of the defendants, and with me here is David Wolf.

THE COURT: All right. We're here today on plaintiff's -- we'll call it second motion for preliminary injunction. Who's going to be presenting that for plaintiff?

MS. SWANSON: That will be me, Your Honor.

THE COURT: All right. Go ahead, please.

MS. SWANSON: Thank you.

Good morning, Your Honor.

THE COURT: Good morning.

MS. SWANSON: As an initial administrative matter, I'd like to note for the record that the parties have agreed to conduct this motion hearing on the briefs, declarations, exhibits, and argument and will not be introducing any live witnesses.

THE COURT: All right.

MS. SWANSON: In this motion, Planned Parenthood is asking for a second preliminary injunction against a second abortion ban. Abortion has been legal in Utah for the last 50 years. In that time, women have relied on abortion to provide for their families, protect their health, and determine for themselves the course of their lives. Last summer, this Court protected that 50-year status quo by entering emergency injunctive relief against Utah's trigger ban, which bans abortion in virtually all circumstances. In blocking the trigger ban, this Court recognized the widespread irreparable harm that a near total abortion ban would cause to Planned Parenthood, its staff, and the patients and their families that rely on Planned Parenthood for constitutionally protected care.

The Court also recognized that a near total abortion ban raised serious constitutional questions under multiple

rights protected by the Utah Constitution, including the right to privacy, the right to bodily integrity, the right to determine one's family composition, and the robust right to sex equality protected by the equal rights provision of the Utah Constitution.

The Court's injunction has allowed Planned Parenthood to continue providing abortion up to 18 weeks of pregnancy at its three licensed abortion clinics. Notably, the Utah Supreme Court declined to stay that injunction, even as it agreed to hear the State's appeal. That appeal is fully briefed, and was set for argument on May 10th, though last week the Court vacated the argument date and requested supplemental briefing from the parties on whether the State intends to seek reconsideration of the injunction under the modified Rule 65A standard.

In the meantime, the State has persevered in its efforts to eliminate abortion in Utah. In March, the governor signed House Bill 467 which bans abortion in virtually all circumstances by requiring that abortion be provided at hospitals. While the State now asserts in litigation that HB 467 was intended to improve patient safety, the bill sponsors were clear that their aim was not to improve the safety of abortion, but to shut down abortion clinics that provide what the State referred to as elective abortion. And even in litigation, the State has no response to Planned

Parenthood's extensive evidence that requiring abortion to be performed in hospitals does nothing to further patient safety.

As the legislators likely understood, while HB 467 will not improve patient safety, it will functionally ban abortion in the state. Today, over 95 percent of the abortions in Utah are provided at licensed abortion clinics like Planned Parenthood's. That's because hospitals in Utah provide abortion only in the narrowest of circumstances: when the patient's life is threatened or when there is a grave fetal anomaly, more rarely in cases of reported rape or incest. If those circumstances sound familiar, it's because they exactly match the exceptions to the trigger ban that this Court enjoined last summer.

THE COURT: Do clinics ever perform those abortions?

MS. SWANSON: Your Honor, the record does not reflect whether clinics perform abortions in those circumstances, but yes, Planned Parenthood does perform abortion in -- in those circumstances, on occasion.

And as the Court recognized last July, a law preventing people in Utah from accessing abortion in all but those narrow circumstances would have devastating consequences for women and families across the state. And it likely violates multiple provisions of the Utah Constitution. For the same reasons, a preliminary injunction against the clinic ban is warranted under Utah law.

One last point before I dive into some more specifics. HB 467 was designed to reinforce the trigger ban. Its sponsors described it as a cleanup bill for a Utah where abortion is broadly illegal, abortion clinics close their doors, and hospitals provide abortion in just a handful of circumstances permitted by the exceptions to the trigger ban.

Thanks to the Utah Constitution and this Court's injunction, that is not the Utah we live in today. The trigger ban is enjoined. Women in Utah can still rely on access to safe, legal abortion to do what is right for their bodies, their futures, and their families, as they've been doing for 50 years. It makes absolutely no sense for the clinic ban to upend that status quo while the trigger ban's legality is actively litigated in the courts.

Further, the State is wrong that this motion requires the Court to resolve difficult questions about the outer bounds of Utah's constitutional protections. Just like the trigger ban this Court already enjoined, the clinic ban strikes at the core of multiple constitutional protections by banning abortion in virtually all circumstances, and the Court need only perform a straightforward application of well-established uniform operation of the law's precedent to conclude that Planned Parenthood is substantially likely to prevail on that claim.

For all these reasons, Planned Parenthood

respectfully requests that the Court enter a second preliminary injunction against certain provisions of House Bill 467.

With that, I'll start by summarizing the provisions of HB 467 that we are challenging in this motion before turning to the merits, irreparable harm, and the other Rule 65A factors. Utah has two separate abortion bans, the 18-week ban, which is currently the operative ban in Utah, and the trigger ban, which is enjoined by order of this Court. HB 467 amends the text of both bans by requiring that abortion be performed in hospitals only. Violating the hospital requirement is, therefore, a second-degree felony, just as it would be a felony to violate those other substantive abortion bans.

Additionally, HB 467 requires the Department of Health and Human Services to revoke the license of any facility other than a hospital that provides an abortion. So under HB 467, providing an abortion at an abortion clinic is both a crime and triggers mandatory facility license revocation. But even if abortion clinics stopped performing all abortions as of May 3rd, HB 467 will gradually eliminate the facility licenses, first, by preventing DHHS from issuing new facility licenses, starting on May 3rd; and, second, by providing that no abortion clinic may operate in the state once its existing facility license expires.

HB -- HB 467 also adds new professional licensing penalties for clinicians who provide an abortion in violation of either the 18-week ban or the trigger ban, including the hospital requirement that HB 467 adds to those bans. These penalties allow the Division of Professional Licensing to deny or revoke a professional license if it thinks the licensee has violated either of those criminal provisions, regardless of whether the licensee has been convicted of a crime. This goes beyond existing licensure penalties which apply only if the licensee is found guilty of violating a criminal law.

HB 467 also amends the scope of the exceptions to the trigger ban, but because the underlying trigger ban prohibition remains enjoined by this Court, changes to the trigger ban's exceptions have no operative effect. The upshot is that if HB 467 takes effect on May 3rd, it will prevent Planned Parenthood from providing abortion in three separate ways.

First, if Planned Parenthood provides an abortion at one of its licensed abortion clinics, it risks facing criminal prosecution for violating the hospital requirement that now appears in the 18-week ban. Second, DHHS will be required to revoke Planned Parenthood's facility licenses if it provides abortion at any of those three licensed abortion clinics. And third, the Division of Professional Licensing will have grounds to deny or revoke the professional license of the

Planned Parenthood physician who provides the abortion somewhere other than at a hospital. Together, if HB 467 takes effect, those criminal and licensing penalties will force Planned Parenthood to stop providing all abortions on May 3rd.

On the merits, by banning abortion at the licensed abortion clinics that provide over 95 percent of the abortions in the state, HB 467 is an abortion ban, and so it violates the Utah Constitution for many of the same reasons the trigger ban does. Specifically, the clinic ban and professional licensing penalties in HB 467 violate the right to bodily integrity, to privacy, to determine one's family composition, and the right to sex equality protected by the equal rights provision and the Uniform Operation of the Laws Clause.

But the Court doesn't even need to reach those substantive constitutional questions to find that Planned Parenthood is substantially likely to prevail on the merits, because Planned Parenthood is substantially likely to prevail on the merits of its claim that HB 467 violates the Uniform Operation of the Laws Clause by distinguishing between hospitals and licensed abortion clinics without a legitimate justification.

Because the Court is already quite familiar with our substantive constitutional claims, I plan to spend my time this morning on our uniform operations claim, but, of course, I'd be happy to answer questions about our substitutional --

THE COURT: Well --

MS. SWANSON: -- our substantive claims as well.

THE COURT: -- I appreciate that you're not addressing those because I don't think they're within my jurisdiction.

MS. SWANSON: Okay. Well, then, I will start with the Uniform Operation of the Laws Clause, which provides under Article 1, Section 2, "All laws of a general nature shall have uniform operation."

A law violates the uniform operations clause when it draws a classification between similarly situated entities without sufficient justification. The clinic ban distinguishes between similarly situated healthcare facilities, hospitals, and licensed abortion clinics without any legitimate justification for doing so.

Notably, the only government interest the State raises in support of the clinic ban is an interest in patient safety, despite that safety was not put forth as a justification during legislative debate. And as Dr. Turok explains in his second declaration, abortion is already one of the safest medical treatments available, and requiring it to be performed in a hospital does not make abortion safer. The State does not even attempt to rebut this extensive record evidence. The only other goal reasonably attributable to the legislature is to ban abortion by shutting down abortion

clinics, notwithstanding this Court's injunction against the trigger ban. That is not a legitimate purpose.

To explain why abortion clinics and hospitals are similarly situated for purposes of abortion safety, I'd like to start with some background about licensed abortion clinics in Utah. Utah law requires healthcare facilities that provide abortion to be licensed as abortion clinics. To maintain this licensure, clinics must comply with specific regulatory requirements and pass at least two annual inspections, at least one of which must be unannounced. Clinics must submit license renewal applications every year.

Three of Planned Parenthood's eight health centers are licensed as abortion clinics, and these health centers provide abortion up to 18 weeks of pregnancy. They do so using three methods of abortion: medication abortion, aspiration abortion, and abortion by dilation and evacuation, or D&E. All three of these methods are overwhelmingly safe, with major complications occurring in less than one-quarter of one percent of cases. None of these methods involves an incision or general anesthesia, and the two methods of procedural abortion generally take between five and 10 minutes to perform.

When an abortion complication does arise, it is almost always managed in the outpatient clinic where the abortion was initially provided. Published research that

Dr. Turok himself conducted in Utah examined the comparative safety of abortion provided at licensed abortion clinics like Planned Parenthoods, and at Utah hospitals. And that research concluded that abortion could be provided just as safely and at far lower cost at an outpatient abortion facility when provided by an experienced physician. And, of course, Planned Parenthood's physicians are extremely experienced. They are experts in their field, and they provide abortion not only at Planned Parenthood's licensed clinics, but also at Utah hospitals. Physicians from across the state refer complicated abortion cases to Planned Parenthood's physicians, and when they do, the physicians determine whether it is more appropriate to provide an abortion at a hospital or at one of Planned Parenthood's outpatient facilities, where the abortion is occasionally performed.

All around the country, these three methods of abortion are performed in outpatient health centers and physicians' offices, not hospitals. Major medical organizations, like the National Academies of Sciences, Engineering, and Medicine, and the American College of Obstetricians and Gynecologists agree that a hospital setting is not clinically necessary and only creates barriers to patients accessing that care.

Meanwhile, Utah hospitals provide abortion only for life or health, in cases of fetal anomaly, or in cases of

reported rape or incest. That's not just due to hospital preference. It's a function of Utah laws that restrict access to abortion. For example, Utah law prevents public money from being used to pay for abortion outside of those narrow circumstances. As a result of this, the University of Utah Hospital provided fewer than 30 abortions in the year 2020 out of the roughly 3,000 abortions that were provided in the state that year.

Utah law also permits both healthcare facilities and healthcare practitioners to refuse to provide an abortion. This means that a hospital could adopt a policy refusing to provide abortion, as some hospitals in Utah have, and also that any hospital member, regardless of whether their hospital employer permits abortion, could delay or interfere with abortion by declining to participate once the patient arrives for their appointment.

Utah law also prevents public and private insurance from paying for abortion outside of these narrow circumstances, which removes the financial incentive for Utah hospitals to provide abortion more broadly.

Aside from these legal constraints, there are numerous practical reasons why Utah hospitals do not provide abortion to the general public. For one thing, stigma and political pressure push hospitals away from providing abortion more broadly. And the features that distinguish hospital

facilities from licensed abortion clinics have no relationship to providing abortions safely. For example, providing abortion does not require an operating room, as it involves no incisions, and so all of the hospital regulations keyed to maintaining a sterile operating environment have no relationship to abortion safety.

Hospitals also have inpatient beds and are set up to provide general anesthesia. And, again, abortion does not require the administration of general anesthesia or any inpatient stay.

For all of these reasons, licensed abortion clinics and hospitals are similarly situated with regard to abortion safety. Indeed, HB 467 itself recognizes that outpatient clinics and hospitals are similarly situated for purposes of providing abortion safely because it defines hospital in a way that would allow some non-hospital facilities to continue to provide abortion. And HB 467 sponsors said that the clinic ban would allow some clinics to continue providing abortion, just not abortion clinics, by which they appear to have meant specifically Planned Parenthood.

For all these reasons, HB 467's classification between licensed abortion clinics and hospitals has no relationship to the only State interest the State has asserted in defense of that ban, patient safety. And because this classification implicates fundamental rights, heightened

scrutiny applies, and the clinic ban fails that review.

But even if rational basis is the standard, the Court must still ask whether the State's goals are legitimate, and whether there's a reasonable relationship between the classification drawn and the State's goals, looking at the legislative record and other record evidence to determine whether the facts supported the State's chosen means.

The statutes over- and under-inclusiveness matters in this inquiry because it sheds light on whether the State's asserted purpose is pretextual, and whether the State's real interest is invidiously discriminatory. That follows from the Uniform Operation of the Laws Clause's historical function of guarding against leg -- legislative classifications containing exceptions that privilege the politically connected and target the politically vulnerable.

Here, the State's real purpose, shutting down abortion clinics, is not a legitimate one. And the State has done nothing to meaningfully rebut or even dispute Planned Parenthood's showing that HB 467's classification between abortion clinics and hospitals does nothing to improve patient safety.

Notably, the State permits other medical procedures that are riskier than abortion, like vasectomy, tonsillectomy, and wisdom tooth removal to be provided in outpatient clinics. And Utah allows women to deliver babies in their homes,

despite that childbirth has a mortality rate over 12 times that of abortion. And even HB 467 would not restrict Planned Parenthood from treating patients' miscarriages using the same medications and procedures that they currently use for abortion.

For all those reasons, Planned Parenthood is substantially likely to prevail on the merits of its claim that HB 467's clinic ban and professional licensing penalties violate the Uniform Operation of the Laws Clause.

Planned Parenthood also satisfies the other Rule 65A factors. First, Planned Parenthood's evidence of the irreparable harm that will result, absent a preliminary injunction, is extensive, compelling, and entirely unrebutted. The loss of a constitutional right alone is sufficient to justify injunctive relief, but even aside from that, the vast majority of people in Utah will not be able to access abortion if HB 467 takes effect on May 3rd. Those people will be forced to remain pregnant, carry pregnancies to term, and give birth with all of the physical, economic, personal, and professional consequences that follow, in which the Court considered in detail in the first preliminary injunction motion against the trigger ban.

And even those people who are able to access abortion at hospitals will be forced to pay over 10 times as much for a procedure as they would at Planned Parenthood's clinics.

They'll be forced to spend hours more for their appointments, which means more time away from school, from work, or from their children, and it will compromise their confidentiality by requiring them to obtain abortion at a non-specialized facility. Others will be forced to travel out of state at great personal and professional cost, or to remain pregnant and undergo labor and delivery.

The impacts of this ban will fall disproportionately on the shoulders of Utahns of color, people who live in rural parts of the state, and people with low incomes. But even if the Court looks only at the harms to Planned Parenthood, as this Court found in entering the first preliminary injunction, Planned Parenthood and its staff would suffer reputational harm or the threat of criminal and licensing penalties if this law takes effect. Planned Parenthood staff, specifically, would face the threat of severe criminal and professional licensing penalties, which will force Planned Parenthood's physicians to deny patients care that they have trained for years to provide at an expert level, despite that they have the training to do so and the facilities available to do so safely.

The clinic ban and professional licensing penalties will also interfere with Planned Parenthood's ability to recruit and retain medical staff to provide other types of sexual and reproductive healthcare. We've seen this

consequence in Idaho where restrictive abortion bans have caused obstetricians and gynecologists to flee the state, leading one Idaho hospital to close its labor and delivery ward entirely.

The harm that Planned Parenthood, its patients, and its staff will suffer if the clinic ban takes effect vastly outweighs any possible harm the State could assert from an injunction. The State has no interest in enforcing an unconstitutional law, and the legislative history demonstrates that the clinic ban sponsors designed it to complement the trigger ban. The State has no interest in enforcing the clinic ban while the trigger ban remains enjoined.

Finally, the public interest weighs heavily in favor of preserving a 50-year status quo of safe, legal abortion in Utah.

In conclusion, House Bill 467 was passed to complement and facilitate the trigger ban by closing abortion clinics and requiring hospitals to provide the small handful of abortions still permitted under the exceptions to the trigger ban. But with the trigger ban enjoined and pending review by the Utah Supreme Court, HB 467 will accomplish the trigger ban's unfinished business by banning abortion in virtually all circumstances. HB 467, therefore, violates the Utah Constitution for many of the same reasons the trigger ban does, and it will inflict the same devastating irreparable

harm unless it is enjoined before it takes effect on May 3rd.

We, therefore, respectfully ask the Court to enter a second preliminary injunction against HB 467's clinic ban and professional licensing penalties, without bond. And I am happy to take the Court's questions.

THE COURT: Nope. Thank you.

Who will be arguing for the State?

MR. SORENSON: I will.

THE COURT: All right.

MR. SORENSON: Good morning, Your Honor. Again, Lance Sorenson for the State. Thank you for making some time for us this morning.

In order for the Court to resolve plaintiff's request to enjoin HB 467, it is imperative that the Court first answer one straightforward legal question, which is, does the Utah Constitution protect abortion as a fundamental right?

THE COURT: I'm going to stop you there. I'm a little concerned that the parties, both parties, have kind of glossed over the caselaw limiting my jurisdiction in the case of the pendency of an interlocutory appeal. I'm a little concerned about the State inviting me to tread on that jurisdiction. If you think that I can't do it without jurisdiction -- entering into that issue, I think the answer is, Judge, you don't have jurisdiction to decide the fundamental issue. Deny the injunction. But the State's

brief kind of goes farther and invites me to take up that issue. I know we're in a strange procedural zone up at the Supreme Court, and it may be that we will shortly be having that conversation here, but not today.

So I really think that I agree with Planned Parenthood in at least their -- the way they frame the issue and the way they've approached their analysis for the injunction, avoids treading on that area. And I respect that the State, in the same way, might say, well, you -- you've got to get into that area and -- but I think the answer is, therefore, you can't. And so you can't grant this. But I don't --

MR. SORENSON: Correct.

THE COURT: -- want to get into the issue of the likelihood of success on a theory that there's a fundamental right to abortion under the state constitution. I think we need to focus on the Uniform Operation of Law Clause at this point in the proceedings.

MR. SORENSON: Sure. I think plaintiff has raised both arguments.

THE COURT: They've alluded to the -- the second argument, and I --

MR. SORENSON: They've claimed the fundamental right, and they're asking the Court to make their review of the law under some kind of heightened scrutiny. And the Court --

THE COURT: I understand the effect of that, and if you say, to get the heightened scrutiny, you have to first examine this fundamental right, then I think the answer is I don't have jurisdiction to do the heightened scrutiny analysis. And I really am looking at this, and I'm open to --

MR. SORENSON: Yeah.

THE COURT: -- you know, if there are other theories for heightened scrutiny --

MR. SORENSON: Well --

THE COURT: -- but I'm really focused more on the Uniform Operations Law and the rational basis test.

MR. SORENSON: Okay. And I'm -- I will address those. But for the record, I -- as I read the cases on interlocutory appeals, the Court would be deprived of jurisdiction over the issue on appeal.

In the first injunction here, the Court did not go to whether there's a fundamental right or not. The Court said, oh, well, there's serious issues and that's how I'm making the decision on that first prong. That's what's gone up to the Supreme Court.

So the Court hasn't yet addressed the issue of whether there's a fundamental right to an abortion, or answered that question.

THE COURT: I think the record from that first argument will show that I went a little beyond that.

MR. SORENSON: That what?

THE COURT: I went a little beyond just serious issues.

MR. SORENSON: Okay.

THE COURT: So --

MR. SORENSON: So that being the case, though, I'm happy to discuss rational basis. But if the Court feels like it can't even make a determination of likelihood of success on the merits at all, then you're right. Deny the injunction, and let's wait for the Supreme Court to act, and then we'll have a better --

THE COURT: I appreciate that. I appreciate --

MR. SORENSON: -- understanding of where the Court should go.

THE COURT: -- (overtalking). What I don't want to do is tread on what the Supreme Court may have jurisdiction over. And I think they'll clear that up shortly, from what I can tell.

MR. SORENSON: Well, shortly is relative.

THE COURT: Well, in Supreme Court terms. Let's call it that.

MR. SORENSON: I think that the parties do have some disagreement on how to apply the Uniform Operation of Laws analysis. So let's go there. So under Uniform Operation of Laws analysis, there are three prongs. There must be a

classification created in the statute. The par -- similar parties are treated differently. That's the second prong. And then the third prong is, is there a justifiable basis for any dissimilar treatment?

And for reasons we set forth in our brief, we think that the claim here would fail the first two prongs, even. This piece of legislation does not create a classification; it gets rid of one. And so if we take plaintiff's argument to its logical conclusion, plaintiff is arguing that the constitution requires the State to create a license category for abortion clinics and maintain it forever -- forevermore, never -- never able to get rid of it. I don't see that in the constitution, in any part of the constitution, including Uniform Operation of Laws.

The second prong, are they similarly situated, hospitals are not similarly situated as abortion clinics. They operate under higher standards of care pursuant to the regulations. They have better emergency care, which is why plaintiff transfers cases to hospitals annually for emergency care.

But if you -- even if we get to the third prong, the question, I think, and where we have some disagreement, is how do you apply it. The most recent treatment, that I'm aware of, of how to apply the third prong of a Uniform Operation of Laws claim comes from the Supreme Court's

decision in Salt Lake City versus Inland Port. There, the Court said, "Our final inquiry in the uniform operation test is subject only to rational basis review, since the legislature's classification does not involve the suspect classification or implicate a fundamental right."

If I heard the Court correctly, we're not going to even get to whether there's a fundamental right today. We're just going to look at rational basis. And the State wins under rational basis. We don't have a fundamental right here.

The Supreme Court -- Utah Supreme Court has also said that Utah's application of a rational basis review under the Uniform Operation of Laws Clause, quote, "mirrors the federal standard in all relevant aspects." That's from the DirecTV case.

And here's why I think that's important, because we know under the federal standard of rational basis review in an equal protection case, virtually any abortion regulation is constitutional. Even up to a ban. Right? That's the Dobbs decision. And so a requirement that abortions be performed in hospitals would easily satisfy that test under the federal standard, and the Utah Supreme Court says the state standard mirrors that test in all relevant aspects. And so it stands to reason that the same abortion regulation that would satisfy the federal test of rational basis review satisfies the Utah standard.

In the case of the Adoption of J.S., the Court said, "Most classifications are presumptively permissible, and, thus, subject to rational basis review."

Kind of recircling back to my initial point, one of the reasons why it would be helpful to know if there's a fundamental right is because that alters the way the Court's going to look at this regulation. If we're going to go to rational basis, the Court has to apply the presumption of constitutionality. That's mandated by the Supreme Court. Rational basis review affords the legislature a wide degree of discretion. That's from the Chettero case. Same case says, "Rational basis scrutiny requires only that a classification bear some conceivable relation to a legitimate government purpose or goal."

So we don't need to get into whatever the actual legislative intent was of 75 members of the House and 29 members of the Senate. We look at the text of the statute, and we say, is there some conceivable relationship to a legitimate goal? A legitimate goal here would be health and safety. Is there a conceivable relationship?

Rational basis review does not mean we have to look for a perfect fit. Right? The legislature can draw lines where maybe plaintiff wouldn't or the Court wouldn't. The legislature gets wide discretion. So if we're going to bring up, why didn't the legislature do this with tonsillectomies or

live births, now we're getting into a heightened standard of review. But the Court's indicating we're not going there, right? We can only stay in rational basis review, which means the legislature has a lot of discretion in regulating abortion.

Plaintiffs here raise the same arguments that were raised in the Lees v. Oster case, which we cited in our brief. So in that case, you have a individual who wished to perform a particular procedure -- in that case, involving dental prosthetics -- arguing that -- same arguments. I could do it just as safely as a hospital. I can do it cheaper than a hospital, or in his case, a licensed dentist. He argued that that requirement that he operate under the supervision of someone else who was licensed was unconstitutional.

Here, plaintiff argues it can do cheap abortions, cheaper than hospitals, and, according to plaintiff, safe abortions, so it shouldn't have to operate under a hospital license. The Supreme Court rejected that argument in -- under Lees v. Oster; it should reject it also here.

Your Honor, with respect to public interest, the State has an interest in seeing its laws addressing health and safety take effect, and on a general level, the public has an interest in seeing its laws take effect, especially here where there's a presumption of constitutionality.

There is -- with respect to the balancing of the

harms and irreparable harm, plaintiff has repeatedly referred to this law as a ban, or a functional ban, but there is nothing in HB 467 that prevents a hospital from performing an abortion. Plaintiff has cited to other laws that might -- that prevent public funds -- or hospitals accepting public funds from performing the same abortions that plaintiff wishes to perform, but plaintiff hasn't sought to enjoin that law. Plaintiff sought to enjoin this law, which doesn't prevent hospitals from performing abortions.

So, again, the Lees v. Oster case indicates that, yeah, if we increase the safety standards, it might cost more, because we're not going to do it on the cheap, but that's okay. The -- the legislature's allowed to make that determination.

THE COURT: Under -- if the law were to go forward, would clinics be permitted to perform the accepted abortions?

MR. SORENSON: Yeah. And the State interprets the definition of hospital to include licensed hospitals and clinics that are operating under a hospital license, so they're operating under those standards.

So when plaintiff says that this allows other clinics to do it but not an abortion clinic, it does if those clinics operate under a hospital license. And there's nothing in HB 467 that would prevent plaintiff from restructuring itself to comply with hospital requirements and obtaining a hospital

license.

THE COURT: Yeah. Thanks.

MR. SORENSON: Your Honor, I'd suggest that the only possible way an injunction could issue in this case is if the Court were to address the question, which the Court doesn't think it has jurisdiction to address, which is, there's a fundamental right to an abortion, and then it would have to lay out the test for how that test would apply to HB 467.

But under rational basis, under a long history of Utah caselaw, it's a deferential standard, and if there's a conceivable basis for the regulation, the regulation is upheld, and the injunction cannot issue here.

Do you have any questions for me, Your Honor?

THE COURT: No. Thank you.

MR. SORENSON: Thank you.

THE COURT: Ms. Swanson?

MS. SWANSON: Thank you, Your Honor.

Just a few points in rebuttal. First, on the Court's concern about whether it has jurisdiction to consider the substantive constitutional claims, we think the Court does have jurisdiction to consider whether the clinic ban violates those substantive constitutional protections. The appeal that the Utah Supreme Court is considering looks at whether the trigger ban violates those substantive constitutional rights, and in order to grant an injunction against the clinic ban,

the Court doesn't need to revisit that holding as to the trigger ban. And, of course, the -- the Court's determinations that a near total abortion ban likely do violate those provisions of the -- of the Utah Constitution is law of the case that this Court can rely on in -- in ruling on this motion for an injunction against the clinic ban.

I think also, though, if the Court is -- is concerned about addressing the question about right to abortion or whether substantive provisions of the Utah Constitution prevent the State from banning abortion, the Court doesn't need to answer that question in order to consider plaintiff's challenge to the clinic ban under the sex discrimination component of the Uniform Operation of the Laws Clause. And because the in -- the clinic ban disproportionately burdens women, heightened scrutiny applies, and under intermediate scrutiny, the clinic ban fails for all the reasons we've explained that it fails rational basis, it also fails intermediate scrutiny, which, under the Estate of Sheller case, does apply under the Utah Uniform Operation of the Laws Clause to statutes that burden women disproportionately to men.

Additionally, even if rational basis applies, the State is asking the Court to apply what is effectively the federal rational basis standard. It cites the Chettero case, which was looking to the federal standard rather than applying

the heightened standard under the Utah Uniform Operation of the Laws Clause, that the case Malan and, also, the Mountain Fuel Supply case make very clear that the Uniform Operation of the Laws Clause is written differently. The text is distinct from the federal equal protection clause, and -- and its review is more searching.

And so even under -- even under the -- the level of scrutiny that applies to economic regulations under the Uniform Operation of the Laws Clause, the Court does look at whether there is evidence in the record to support the classification that the State has drawn. I think the Sunday closing law cases are a really good illustration of this. They were cases drawing a classification between businesses providing one type of care and other businesses providing that same care.

The Court applied rational basis scrutiny under the Uniform Operation of the Laws Clause and determined that against the backdrop of all the other laws in effect and facts about the world, the classification that the State had drawn had such little relationship to its purported goals that that classification was discriminatory. It was invidiously discriminatory. So the over- and under-inclusiveness matters, and even under rational relationship review, this Court can strike down economic regulations that -- that have no rational relationship to the interests asserted by the State.

I think even in the Utah Inland Port Authority case that the State relies on -- and this was -- this was just last year that the Utah Supreme Court applied the Uniform Operation of the Laws Clause. In that case, the Court looked at -- at reports and record evidence and determined that, in light of that evidence that supported the State's classification, it was a reasonable line that the State had drawn. But it did have to look at the record to make that -- to make that conclusion.

I think because plaintiffs have put forward so much evidence in the record demonstrating that there is no relationship between the line that the State has drawn and its purported interest in patient safety, we have raised a presumption that this is unconstitutional, and the State now has a burden of rebutting that with some evidence that there is a rational relationship between the classification and its purported interest.

But I think a more -- a broader point is that this is -- this is not a case where the legislature has simply decided to apply new regulations to an existing abortion licensure category. Rather, it has a limited -- it has eliminated that licensure category entirely, not because of any demonstrated problem with how abortions are being provided in licensed abortion clinics, but because the State simply does not like licensed abortion clinics.

THE COURT: They make the point that in terms of the first prong, they haven't created a classification, they have eliminated a classification. What is your response to that?

MS. SWANSON: I think on the face of a statute, there are -- there's classifications drawn between licensed abortion clinics and hospitals. So, for example, HB 467 provides that no licensed abortion clinic may operate in this state after a certain date. At the same time, hospitals are permitted to continue providing abortion. And I think, based on -- based on how the statute treats those two categories, there is a classification drawn.

But I think even in the Dodge Town Inc. case, which is one of the Sunday closing law cases, that was a statute that applied specifically to one licensed category and required it to close. And there the Court concluded, first, yes, this is a classification. Two, it's a classification between similarly situated entities, in that case, automobile dealers and all other entities selling cars.

And then applying rational basis scrutiny under the Uniform Operation of the Laws Clause, the Court determined that, in light of all the evidence, the relationship between the classification and the State's purported goal was so attenuated, and the exceptions that were drawn made that cla -- made that classification even more attenuated, that there could be no purpose other than an invidiously

discriminatory one.

And I think that's on all fours with this case where -- where the State offers -- offered no reason during legislative debate to believe that requiring abortion to be provided in hospitals would do anything to make abortion safer. It said nothing about any problems of how abortion is currently provided in abortion clinics. And now, in litigation, the Court has -- I'm sorry. The State has offered no evidence to rebut plaintiff's robust showing, first, that abortion is already overwhelmingly safe; and, second, that requiring abortion to be provided in hospitals does nothing to improve patient safety.

So I think this Court can apply heightened scrutiny. I think it does have jurisdiction to consider the -- the clinic ban under those other substitutional -- substantive constitutional provisions. The Court does not need to reach the question whether there is a right to abortion protected by the Utah Constitution in order to apply intermediate scrutiny under our Uniform Operation of the Laws Clause claim.

But, finally, even if this Court confines its -- its consideration to our uniform operations claim with regards to the classification between licensed clinics and hospitals, this -- this classification fails the rational basis review that Utah courts apply in applying Utah's special Uniform Operation of the Laws Clause protections.

So for those reasons, we would ask the Court to enter a second preliminary injunction against the clinic ban. Thank you.

THE COURT: All right. Thank you, everybody. I -- I want to thank the parties for their work on their briefs and the arguments. You know, it's all been topnotch. And it would not be fair at this point to shoot from the hip. I'm -- I'm going to review the briefs again and -- in light of the arguments I've heard today, and reserve on the matter. I expect to get something out early next week.

So, thank you, everybody. We'll be in recess.

(Proceedings conclude at 10:43:46 A.M.)

CERTIFICATE

STATE OF UTAH)
) SS.
COUNTY OF WEBER)

I, Laurie Shingle, Certified Court Reporter in and for the State of Utah, do hereby certify:

That the preceding pages of transcript were transcribed by me and/or under my direction from an electronic recording.

That the proceedings transcribed are a full, true, and correct transcription of said proceedings, subject to the ability to hear and understand the recording.

Dated at Pleasant View, Utah, this the 30th day of April, 2023.

Laurie Shingle

Laurie Shingle, UT CCR, RPR, CMRS

Addendum 2

H.J.R. 2

Enrolled Copy **H.J.R. 2**

JOINT RESOLUTION AMENDING RULES OF CIVIL PROCEDURE ON INJUNCTIONS

2023 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Brady Brammer

Senate Sponsor: Daniel McCay

LONG TITLE

General Description:

This joint resolution amends the Utah Rules of Civil Procedure, Rule 65A, regarding injunctions.

Highlighted Provisions:

This resolution:

- amends the Utah Rules of Civil Procedure, Rule 65A, regarding injunctions.

Special Clauses:

This resolution provides a special effective date.

Utah Rules of Civil Procedure Affected:

AMENDS:

Rule 65A, Utah Rules of Civil Procedure

Be it resolved by the Legislature of the state of Utah, two-thirds of all members elected to each of the two houses voting in favor thereof:

As provided in Utah Constitution Article VIII, Section 4, the Legislature may amend rules of procedure and evidence adopted by the Utah Supreme Court upon a two-thirds vote of all members of both houses of the Legislature:

Section 1. **Rule 65A**, Utah Rules of Civil Procedure is amended to read:

Rule 65A. Injunctions.

(a) **Preliminary injunctions.**

(a) (1) **Notice.** No preliminary injunction shall be issued without notice to the adverse party.

(a) (2) **Consolidation of hearing.** Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible at the trial on the merits becomes part of the trial record and need not be repeated at the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(b) **Temporary restraining orders.**

(b) (1) **Notice.** No temporary restraining order shall be granted without notice to the adverse party or that party's attorney unless (A) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (B) the applicant or the applicant's attorney certifies to the court in writing as to the efforts, if any, that have been made to give notice and the reasons supporting the claim that notice should not be required.

(b) (2) **Form of order.** Every temporary restraining order shall be endorsed with the date and hour of issuance and shall be filed forthwith in the clerk's office and entered of record. The order shall define the injury and state why it is irreparable. The order shall expire by its terms within such time after entry, not to exceed 14 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record.

(b) (3) **Priority of hearing.** If a temporary restraining order is granted, the motion for a preliminary injunction shall be scheduled for hearing at the earliest possible time and takes precedence over all other civil matters except older matters of the same character. When the

motion comes on for hearing, the party who obtained the temporary restraining order shall have the burden to show entitlement to a preliminary injunction; if the party does not do so, the court shall dissolve the temporary restraining order.

(b) (4) **Dissolution or modification.** On 48 hours' notice to the party who obtained the temporary restraining order without notice, or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification. In that event the court shall proceed to hear and determine the motion as expeditiously as the ends of justice require.

(c) **Security.**

(c) (1) **Requirement.** The court shall condition issuance of the order or injunction on the giving of security by the applicant, in such sum and form as the court deems proper, unless it appears that none of the parties will incur or suffer costs, attorney fees or damage as the result of any wrongful order or injunction, or unless there exists some other substantial reason for dispensing with the requirement of security. No such security shall be required of the United States, the State of Utah, or of an officer, agency, or subdivision of either; nor shall it be required when it is prohibited by law.

(c) (2) **Amount not a limitation.** The amount of security shall not establish or limit the amount of costs, including reasonable attorney fees incurred in connection with the restraining order or preliminary injunction, or damages that may be awarded to a party who is found to have been wrongfully restrained or enjoined.

(c) (3) **Jurisdiction over surety.** A surety upon a bond or undertaking under this rule submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known.

(d) **Form and scope.** Every restraining order and order granting an injunction shall set forth the reasons for its issuance. It shall be specific in terms and shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained. It shall be binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive notice, in person or through counsel, or otherwise, of the order. If a restraining order is granted without notice to the party restrained, it shall state the reasons justifying the court's decision to proceed without notice.

(e) **Grounds.** A restraining order or preliminary injunction may issue only upon a showing by the applicant that:

(e) (1) there is a substantial likelihood that the applicant will prevail on the merits of the underlying claim;

(e) [~~(1) The~~] (2) the applicant will suffer irreparable harm unless the order or injunction issues;

(e) [~~(2) The~~] (3) the threatened injury to the applicant outweighs whatever damage the proposed order or injunction may cause the party restrained or enjoined; and

(e) [~~(3) The~~] (4) the order or injunction, if issued, would not be adverse to the public interest[~~; and~~].

[~~(e) (4) There is a substantial likelihood that the applicant will prevail on the merits of the underlying claim, or the case presents serious issues on the merits which should be the subject of further litigation.~~]

(f) Motion for reconsideration.

(f) (1) A party enjoined or restrained by a restraining order or a preliminary injunction on February 14, 2023, may move the court to reconsider whether the order or injunction should remain in effect if the order or injunction:

(A) is in writing;

(B) is restraining or enjoining the enforcement of a law; and

(C) explicitly states that the court granted the order or injunction on the ground that the case presented serious issues on the merits which should be the subject of further litigation.

(f) (2) A motion for reconsideration under this paragraph (f) may be filed at any time before the final determination of the case.

(f) (3) Upon a motion for reconsideration, the court must determine whether the issuance of the restraining order or preliminary injunction meets the requirements in paragraph (e) regardless of the requirements for the issuance of the order or injunction on the day on which the order or injunction was issued.

(f) (4) If the court determines that the issuance of the restraining order or preliminary injunction does not meet the requirements of paragraph (e), the court must terminate the order or injunction.

[~~(f)~~] **(g) Domestic relations cases.** Nothing in this rule shall be construed to limit the equitable powers of the courts in domestic relations cases.

Section 2. **Effective date.**

As provided in Utah Constitution Article VIII, Section 4, this resolution takes effect upon a two-thirds vote of all members elected to each house.

Addendum 3

H.B. 467

ABORTION CHANGES

2023 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Karianne Lisonbee

Senate Sponsor: Daniel McCay

Cosponsors:
Cheryl K. Acton
Carl R. Albrecht
Kera Birkeland
Brady Brammer
Walt Brooks
Jefferson S. Burton
Joseph Elison
Katy Hall
Jon Hawkins
Colin W. Jack
Dan N. Johnson
Trevor Lee
Steven J. Lund
A. Cory Maloy
Jefferson Moss
Susan Pulsipher
Mike Schultz
Mark A. Strong
Jordan D. Teuscher

LONG TITLE

General Description:

This bill modifies provisions related to abortion.

Highlighted Provisions:

This bill:

- modifies definitions;
- requires abortions to be performed in a hospital, with some exceptions;
- prohibits licensing of abortion clinics after May 2, 2023, but allows licensing of certain clinics for providing an abortion if the clinic meets certain standards;
- removes certain references to abortion clinics;
- provides that inducing or performing an abortion contrary to statutory requirements is unprofessional conduct for a physician, osteopathic physician, physician assistant, advanced practice registered nurse, certified nurse midwife, and direct-entry midwife;

- modifies provisions that govern what constitutes a medical emergency in relation to an abortion;
- modifies the conditions under which an abortion may be performed to protect the life or health of the mother;
- amends language related to medical defects of a fetus;
- repeals the statute that established a prohibition on abortions after 18 weeks and incorporates its contents into existing statute, replacing language that established now-superseded viability standards;
- standardizes language between various statutes that regulate abortion;
- requires a physician, in the case of a diagnosis of a lethal fetal anomaly, to give notice of the availability of perinatal hospice and perinatal palliative care services as an alternative to abortion;
- treats an individual who becomes pregnant at a certain age as having the same access to abortion services as rape or incest situations;
- prohibits the ability to receive an abortion due to rape or incest if the unborn child has reached 18 weeks gestational age;
- requires updates to abortion information modules to match current law;
- modifies state of mind standards for criminal acts;
- provides for severability;
- provides for regulation of drugs that are known to be used in relation to an abortion;
- creates a criminal offense for prescribing a drug for the purpose of causing an abortion, unless the prescriber is licensed as a physician under the laws of this state; and
- makes technical changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

26-21-2, as last amended by Laws of Utah 2022, Chapter 255

26-21-6.5, as last amended by Laws of Utah 2018, Chapter 282

26-21-7, as last amended by Laws of Utah 2019, Chapter 349

26-21-8, as last amended by Laws of Utah 2016, Chapter 74

26-21-11, as last amended by Laws of Utah 1997, Chapter 209

26-21-25, as last amended by Laws of Utah 2010, Chapter 218

58-31b-502, as last amended by Laws of Utah 2022, Chapter 290

58-44a-502, as last amended by Laws of Utah 2020, Chapter 25

58-67-304, as last amended by Laws of Utah 2020, Chapters 12, 339

58-67-502, as last amended by Laws of Utah 2021, Chapter 337

58-68-304, as last amended by Laws of Utah 2020, Chapters 12, 339

58-68-502, as last amended by Laws of Utah 2021, Chapter 337

58-70a-501, as last amended by Laws of Utah 2021, Chapter 312

58-77-603, as enacted by Laws of Utah 2005, Chapter 299

63I-2-276, as last amended by Laws of Utah 2022, Chapter 117

76-7-301, as last amended by Laws of Utah 2021, Chapter 262

76-7-302, as last amended by Laws of Utah 2022, Chapter 335

76-7-302.4, as enacted by Laws of Utah 2019, Chapter 124

76-7-304, as last amended by Laws of Utah 2018, Chapter 282

76-7-304.5, as last amended by Laws of Utah 2022, Chapter 287

76-7-305, as last amended by Laws of Utah 2022, Chapter 181

76-7-305.5, as last amended by Laws of Utah 2020, Chapter 251

76-7-313, as last amended by Laws of Utah 2019, Chapters 124, 208

76-7-314, as last amended by Laws of Utah 2019, Chapter 208

76-7-314.5, as last amended by Laws of Utah 2010, Chapter 13

76-7-317, as enacted by Laws of Utah 1974, Chapter 33

76-7a-101, as last amended by Laws of Utah 2021, Chapter 262

76-7a-201, as enacted by Laws of Utah 2020, Chapter 279

ENACTS:

76-7-332, Utah Code Annotated 1953

REPEALS:

76-7-302.5, as enacted by Laws of Utah 2019, Chapter 208

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **26-21-2** is amended to read:

26-21-2. Definitions.

As used in this chapter:

(1) (a) "Abortion clinic" means a type I abortion clinic or a type II abortion clinic.

(b) "Abortion clinic" does not mean a clinic that meets the definition of hospital under Section 76-7-301 or Section 76-7a-101.

(2) "Activities of daily living" means essential activities including:

(a) dressing;

(b) eating;

(c) grooming;

(d) bathing;

(e) toileting;

(f) ambulation;

(g) transferring; and

(h) self-administration of medication.

(3) "Ambulatory surgical facility" means a freestanding facility, which provides surgical services to patients not requiring hospitalization.

(4) "Assistance with activities of daily living" means providing of or arranging for the provision of assistance with activities of daily living.

(5) (a) "Assisted living facility" means:

(i) a type I assisted living facility, which is a residential facility that provides assistance with activities of daily living and social care to two or more residents who:

(A) require protected living arrangements; and

(B) are capable of achieving mobility sufficient to exit the facility without the assistance of another person; and

(ii) a type II assisted living facility, which is a residential facility with a home-like setting that provides an array of coordinated supportive personal and health care services available 24 hours per day to residents who have been assessed under department rule to need any of these services.

(b) Each resident in a type I or type II assisted living facility shall have a service plan based on the assessment, which may include:

(i) specified services of intermittent nursing care;

(ii) administration of medication; and

(iii) support services promoting residents' independence and self sufficiency.

(6) "Birthing center" means a facility that:

(a) receives maternal clients and provides care during pregnancy, delivery, and immediately after delivery; and

(b) (i) is freestanding; or

(ii) is not freestanding, but meets the requirements for an alongside midwifery unit described in Subsection 26-21-29(7).

(7) "Committee" means the Health Facility Committee created in Section 26B-1-204.

(8) "Consumer" means any person not primarily engaged in the provision of health care to individuals or in the administration of facilities or institutions in which such care is provided and who does not hold a fiduciary position, or have a fiduciary interest in any entity involved in the provision of health care, and does not receive, either directly or through his spouse, more than 1/10 of his gross income from any entity or activity relating to health care.

(9) "End stage renal disease facility" means a facility which furnishes staff-assisted kidney dialysis services, self-dialysis services, or home-dialysis services on an outpatient basis.

(10) "Freestanding" means existing independently or physically separated from another health care facility by fire walls and doors and administrated by separate staff with separate records.

(11) "General acute hospital" means a facility which provides diagnostic, therapeutic, and rehabilitative services to both inpatients and outpatients by or under the supervision of physicians.

(12) "Governmental unit" means the state, or any county, municipality, or other political subdivision or any department, division, board, or agency of the state, a county, municipality, or other political subdivision.

(13) (a) "Health care facility" means general acute hospitals, specialty hospitals, home health agencies, hospices, nursing care facilities, residential-assisted living facilities, birthing centers, ambulatory surgical facilities, small health care facilities, abortion clinics, a clinic that meets the definition of hospital under Section 76-7-301 or 76-7a-201, facilities owned or operated by health maintenance organizations, end stage renal disease facilities, and any other health care facility which the committee designates by rule.

(b) "Health care facility" does not include the offices of private physicians or dentists, whether for individual or group practice, except that it does include an abortion clinic.

(14) "Health maintenance organization" means an organization, organized under the laws of any state which:

(a) is a qualified health maintenance organization under 42 U.S.C. Sec. 300e-9; or

(b) (i) provides or otherwise makes available to enrolled participants at least the following basic health care services: usual physician services, hospitalization, laboratory, x-ray, emergency, and preventive services and out-of-area coverage;

(ii) is compensated, except for copayments, for the provision of the basic health services listed in Subsection (14)(b)(i) to enrolled participants by a payment which is paid on a periodic basis without regard to the date the health services are provided and which is fixed without regard to the frequency, extent, or kind of health services actually provided; and

(iii) provides physicians' services primarily directly through physicians who are either

employees or partners of such organizations, or through arrangements with individual physicians or one or more groups of physicians organized on a group practice or individual practice basis.

(15) (a) "Home health agency" means an agency, organization, or facility or a subdivision of an agency, organization, or facility which employs two or more direct care staff persons who provide licensed nursing services, therapeutic services of physical therapy, speech therapy, occupational therapy, medical social services, or home health aide services on a visiting basis.

(b) "Home health agency" does not mean an individual who provides services under the authority of a private license.

(16) "Hospice" means a program of care for the terminally ill and their families which occurs in a home or in a health care facility and which provides medical, palliative, psychological, spiritual, and supportive care and treatment.

(17) "Nursing care facility" means a health care facility, other than a general acute or specialty hospital, constructed, licensed, and operated to provide patient living accommodations, 24-hour staff availability, and at least two of the following patient services:

(a) a selection of patient care services, under the direction and supervision of a registered nurse, ranging from continuous medical, skilled nursing, psychological, or other professional therapies to intermittent health-related or paraprofessional personal care services;

(b) a structured, supportive social living environment based on a professionally designed and supervised treatment plan, oriented to the individual's habilitation or rehabilitation needs; or

(c) a supervised living environment that provides support, training, or assistance with individual activities of daily living.

(18) "Person" means any individual, firm, partnership, corporation, company, association, or joint stock association, and the legal successor thereof.

(19) "Resident" means a person 21 years old or older who:

(a) as a result of physical or mental limitations or age requires or requests services

provided in an assisted living facility; and

(b) does not require intensive medical or nursing services as provided in a hospital or nursing care facility.

(20) "Small health care facility" means a four to 16 bed facility that provides licensed health care programs and services to residents.

(21) "Specialty hospital" means a facility which provides specialized diagnostic, therapeutic, or rehabilitative services in the recognized specialty or specialties for which the hospital is licensed.

(22) "Substantial compliance" means in a department survey of a licensee, the department determines there is an absence of deficiencies which would harm the physical health, mental health, safety, or welfare of patients or residents of a licensee.

(23) "Type I abortion clinic" means a facility, including a physician's office, but not including a general acute or specialty hospital, that:

(a) performs abortions, as defined in Section 76-7-301, during the first trimester of pregnancy; and

(b) does not perform abortions, as defined in Section 76-7-301, after the first trimester of pregnancy.

(24) "Type II abortion clinic" means a facility, including a physician's office, but not including a general acute or specialty hospital, that:

(a) performs abortions, as defined in Section 76-7-301, after the first trimester of pregnancy; or

(b) performs abortions, as defined in Section 76-7-301, during the first trimester of pregnancy and after the first trimester of pregnancy.

Section 2. Section **26-21-6.5** is amended to read:

26-21-6.5. Licensing of an abortion clinic -- Rulemaking authority -- Fee -- Licensing of a clinic meeting the definition of hospital.

(1) (a) No abortion clinic may operate in the state on or after January 1, 2024, or the last valid date of an abortion clinic license issued under the requirements of this section,

whichever date is later.

(b) Notwithstanding Subsection (1)(a), a licensed abortion clinic may not perform an abortion in violation of any provision of state law.

(2) The state may not issue a license for an abortion clinic after May 2, 2023.

(3) For any license for an abortion clinic that is issued under this section:

(a) A type I abortion clinic may not operate in the state without a license issued by the department to operate a type I abortion clinic.

[~~(2)~~] (b) A type II abortion clinic may not operate in the state without a license issued by the department to operate a type II abortion clinic.

[~~(3)~~] (c) The department shall make rules establishing minimum health, safety, sanitary, and recordkeeping requirements for:

[~~(a)~~] (i) a type I abortion clinic; and

[~~(b)~~] (ii) a type II abortion clinic.

[~~(4)~~] (d) To receive and maintain a license described in this section, an abortion clinic shall:

[~~(a)~~] (i) apply for a license on a form prescribed by the department;

[~~(b)~~] (ii) satisfy and maintain the minimum health, safety, sanitary, and recordkeeping requirements established under Subsection [~~(3)~~] (3)(c) that relate to the type of abortion clinic licensed;

[~~(c)~~] (iii) comply with the recordkeeping and reporting requirements of Section 76-7-313;

[~~(d)~~] (iv) comply with the requirements of Title 76, Chapter 7, Part 3, Abortion, and Title 76, Chapter 7a, Abortion Prohibition;

[~~(e)~~] (v) pay the annual licensing fee; and

[~~(f)~~] (vi) cooperate with inspections conducted by the department.

[~~(5)~~] (e) The department shall, at least twice per year, inspect each abortion clinic in the state to ensure that the abortion clinic is complying with all statutory and licensing requirements relating to the abortion clinic. At least one of the inspections shall be made

without providing notice to the abortion clinic.

[~~(6)~~] (f) The department shall charge an annual license fee, set by the department in accordance with the procedures described in Section 63J-1-504, to an abortion clinic in an amount that will pay for the cost of the licensing requirements described in this section and the cost of inspecting abortion clinics.

[~~(7)~~] (g) The department shall deposit the licensing fees described in this section in the General Fund as a dedicated credit to be used solely to pay for the cost of the licensing requirements described in this section and the cost of inspecting abortion clinics.

(4) (a) Notwithstanding any other provision of this section, the department may license a clinic that meets the definition of hospital under Section 76-7-301 or Section 76-7a-101.

(b) A clinic described in Subsection (4)(a) is not defined as an abortion clinic.

Section 3. Section **26-21-7** is amended to read:

26-21-7. Exempt facilities.

This chapter does not apply to:

(1) a dispensary or first aid facility maintained by any commercial or industrial plant, educational institution, or convent;

(2) a health care facility owned or operated by an agency of the United States;

(3) the office of a physician, physician assistant, or dentist whether it is an individual or group practice[~~, except that it does apply to an abortion clinic~~];

(4) a health care facility established or operated by any recognized church or denomination for the practice of religious tenets administered by mental or spiritual means without the use of drugs, whether gratuitously or for compensation, if it complies with statutes and rules on environmental protection and life safety;

(5) any health care facility owned or operated by the Department of Corrections, created in Section 64-13-2; and

(6) a residential facility providing 24-hour care:

(a) that does not employ direct care staff;

(b) in which the residents of the facility contract with a licensed hospice agency to

receive end-of-life medical care; and

(c) that meets other requirements for an exemption as designated by administrative rule.

Section 4. Section **26-21-8** is amended to read:

26-21-8. License required -- Not assignable or transferable -- Posting -- Expiration and renewal -- Time for compliance by operating facilities.

(1) (a) A person or governmental unit acting severally or jointly with any other person or governmental unit, may not establish, conduct, or maintain a health care facility in this state without receiving a license from the department as provided by this chapter and the rules adopted pursuant to this chapter.

(b) This Subsection (1) does not apply to facilities that are exempt under Section 26-21-7.

(2) A license issued under this chapter is not assignable or transferable.

(3) The current license shall at all times be posted in each health care facility in a place readily visible and accessible to the public.

(4) (a) The department may issue a license for a period of time [~~not to exceed 12 months from the date of issuance for an abortion clinic and~~] not to exceed 24 months from the date of issuance for [~~other~~] health care facilities that meet the provisions of this chapter and department rules adopted pursuant to this chapter.

(b) Each license expires at midnight on the day designated on the license as the expiration date, unless previously revoked by the department.

(c) The license shall be renewed upon completion of the application requirements, unless the department finds the health care facility has not complied with the provisions of this chapter or the rules adopted pursuant to this chapter.

(5) A license may be issued under this section only for the operation of a specific facility at a specific site by a specific person.

(6) Any health care facility in operation at the time of adoption of any applicable rules as provided under this chapter shall be given a reasonable time for compliance as determined

by the committee.

Section 5. Section **26-21-11** is amended to read:

26-21-11. Violations -- Denial or revocation of license -- Restricting or prohibiting new admissions -- Monitor.

(1) If the department finds a violation of this chapter or any rules adopted pursuant to this chapter the department may take one or more of the following actions:

[~~(1)~~] (a) serve a written statement of violation requiring corrective action, which shall include time frames for correction of all violations;

[~~(2)~~] (b) subject to Subsection (2), deny or revoke a license if it finds:

[~~(a)~~] (i) there has been a failure to comply with the rules established pursuant to this chapter;

[~~(b)~~] (ii) evidence of aiding, abetting, or permitting the commission of any illegal act; or

[~~(c)~~] (iii) conduct adverse to the public health, morals, welfare, and safety of the people of the state;

[~~(3)~~] (c) restrict or prohibit new admissions to a health care facility or revoke the license of a health care facility for:

[~~(a)~~] (i) violation of any rule adopted under this chapter; or

[~~(b)~~] (ii) permitting, aiding, or abetting the commission of any illegal act in the health care facility;

[~~(4)~~] (d) place a department representative as a monitor in the facility until corrective action is completed;

[~~(5)~~] (e) assess to the facility the cost incurred by the department in placing a monitor;

[~~(6)~~] (f) assess an administrative penalty as allowed by Subsection 26-23-6(1)(a); or

[~~(7)~~] (g) issue a cease and desist order to the facility.

(2) If the department finds that an abortion has been performed in violation of Section 76-7-314 or 76-7a-201, the department shall deny or revoke the license.

Section 6. Section **26-21-25** is amended to read:

26-21-25. Patient identity protection.

(1) As used in this section:

(a) "EMTALA" means the federal Emergency Medical Treatment and Active Labor Act.

(b) "Health professional office" means:

(i) a physician's office; or

(ii) a dental office.

(c) "Medical facility" means:

(i) a general acute hospital;

(ii) a specialty hospital;

(iii) a home health agency;

(iv) a hospice;

(v) a nursing care facility;

(vi) a residential-assisted living facility;

(vii) a birthing center;

(viii) an ambulatory surgical facility;

(ix) a small health care facility;

(x) an abortion clinic;

(xi) a clinic that meets the definition of hospital under Section 76-7-301 or Section 76-7a-101;

[~~(xi)~~] (xii) a facility owned or operated by a health maintenance organization;

[~~(xii)~~] (xiii) an end stage renal disease facility;

[~~(xiii)~~] (xiv) a health care clinic; or

[~~(xiv)~~] (xv) any other health care facility that the committee designates by rule.

(2) (a) In order to discourage identity theft and health insurance fraud, and to reduce the risk of medical errors caused by incorrect medical records, a medical facility or a health professional office shall request identification from an individual prior to providing in-patient or out-patient services to the individual.

(b) If the individual who will receive services from the medical facility or a health professional office lacks the legal capacity to consent to treatment, the medical facility or a health professional office shall request identification:

(i) for the individual who lacks the legal capacity to consent to treatment; and

(ii) from the individual who consents to treatment on behalf of the individual described in Subsection (2)(b)(i).

(3) A medical facility or a health professional office:

(a) that is subject to EMTALA:

(i) may not refuse services to an individual on the basis that the individual did not provide identification when requested; and

(ii) shall post notice in its emergency department that informs a patient of the patient's right to treatment for an emergency medical condition under EMTALA;

(b) may not be penalized for failing to ask for identification;

(c) is not subject to a private right of action for failing to ask for identification; and

(d) may document or confirm patient identity by:

(i) photograph;

(ii) fingerprinting;

(iii) palm scan; or

(iv) other reasonable means.

(4) The identification described in this section:

(a) is intended to be used for medical records purposes only; and

(b) shall be kept in accordance with the requirements of the Health Insurance Portability and Accountability Act of 1996.

Section 7. Section **58-31b-502** is amended to read:

58-31b-502. Unprofessional conduct.

(1) "Unprofessional conduct" includes:

(a) failure to safeguard a patient's right to privacy as to the patient's person, condition, diagnosis, personal effects, or any other matter about which the licensee is privileged to know

because of the licensee's or person with a certification's position or practice as a nurse or practice as a medication aide certified;

(b) failure to provide nursing service or service as a medication aide certified in a manner that demonstrates respect for the patient's human dignity and unique personal character and needs without regard to the patient's race, religion, ethnic background, socioeconomic status, age, sex, or the nature of the patient's health problem;

(c) engaging in sexual relations with a patient during any:

(i) period when a generally recognized professional relationship exists between the person licensed or certified under this chapter and the patient; or

(ii) extended period when a patient has reasonable cause to believe a professional relationship exists between the person licensed or certified under the provisions of this chapter and the patient;

(d) (i) as a result of any circumstance under Subsection (1)(c), exploiting or using information about a patient or exploiting the licensee's or the person with a certification's professional relationship between the licensee or holder of a certification under this chapter and the patient; or

(ii) exploiting the patient by use of the licensee's or person with a certification's knowledge of the patient obtained while acting as a nurse or a medication aide certified;

(e) unlawfully obtaining, possessing, or using any prescription drug or illicit drug;

(f) unauthorized taking or personal use of nursing supplies from an employer;

(g) unauthorized taking or personal use of a patient's personal property;

(h) unlawful or inappropriate delegation of nursing care;

(i) failure to exercise appropriate supervision of persons providing patient care services under supervision of the licensed nurse;

(j) employing or aiding and abetting the employment of an unqualified or unlicensed person to practice as a nurse;

(k) failure to file or record any medical report as required by law, impeding or obstructing the filing or recording of such a report, or inducing another to fail to file or record

such a report;

(l) breach of a statutory, common law, regulatory, or ethical requirement of confidentiality with respect to a person who is a patient, unless ordered by a court;

(m) failure to pay a penalty imposed by the division;

(n) prescribing a Schedule II controlled substance without complying with the requirements in Section 58-31b-803, if applicable;

(o) violating Section 58-31b-801;

(p) violating the dispensing requirements of Section 58-17b-309 or Chapter 17b, Part 8, Dispensing Medical Practitioner and Dispensing Medical Practitioner Clinic Pharmacy, if applicable;

(q) performing or inducing an abortion in violation of the requirements of Section 76-7-302 or Section 76-7a-201, regardless of whether the person licensed or certified under the provisions of this chapter is found guilty of a crime in connection with the violation;

[~~(q)~~] (r) falsely making an entry in, or altering, a medical record with the intent to conceal:

(i) a wrongful or negligent act or omission of an individual licensed under this chapter or an individual under the direction or control of an individual licensed under this chapter; or

(ii) conduct described in Subsections (1)(a) through (o) or Subsection 58-1-501(1); or

[~~(r)~~] (s) violating the requirements of Title 26, Chapter 61a, Utah Medical Cannabis Act.

(2) "Unprofessional conduct" does not include, in accordance with Title 26, Chapter 61a, Utah Medical Cannabis Act, when registered as a qualified medical provider, or acting as a limited medical provider, as those terms are defined in Section 26-61a-102, recommending the use of medical cannabis.

(3) Notwithstanding Subsection (2), the division, in consultation with the board and in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, shall define unprofessional conduct for an advanced practice registered nurse described in Subsection (2).

Section 8. Section **58-44a-502** is amended to read:

58-44a-502. Unprofessional conduct.

"Unprofessional conduct" includes:

(1) disregard for a patient's dignity or right to privacy as to the patient's person, condition, possessions, or medical record;

(2) engaging in an act, practice, or omission which when considered with the duties and responsibilities of a certified nurse midwife does or could jeopardize the health, safety, or welfare of a patient or the public;

(3) failure to confine one's practice as a certified nurse midwife to those acts or practices permitted by law;

(4) failure to file or record any medical report as required by law, impeding or obstructing the filing or recording of such a report, or inducing another to fail to file or record such a report;

(5) breach of a statutory, common law, regulatory, or ethical requirement of confidentiality with respect to a person who is a patient, unless ordered by the court;

(6) failure to pay a penalty imposed by the division;

(7) prescribing a schedule II-III controlled substance without a consulting physician;

(8) performing or inducing an abortion in violation of the requirements of Section 76-7-302 or Section 76-7a-201, regardless of whether the individual licensed under this chapter is found guilty of a crime in connection with the violation;

[~~(8)~~] (9) (a) failure to have and maintain a safe mechanism for obtaining medical consultation, collaboration, and referral with a consulting physician, including failure to identify one or more consulting physicians in the written documents required by Subsection 58-44a-102(9)(b)(iii); or

(b) representing that the certified nurse midwife is in compliance with Subsection [~~(8)(a)~~] (9)(a) when the certified nurse midwife is not in compliance with Subsection [~~(8)(a)~~] (9)(a); or

[~~(9)~~] (10) falsely making an entry in, or altering, a medical record with the intent to conceal:

(a) a wrongful or negligent act or omission of an individual licensed under this chapter or an individual under the direction or control of an individual licensed under this chapter; or

(b) conduct described in Subsections (1) through [~~(8)~~] (9) or Subsection 58-1-501(1).

Section 9. Section **58-67-304** is amended to read:

58-67-304. License renewal requirements.

(1) As a condition precedent for license renewal, each licensee shall, during each two-year licensure cycle or other cycle defined by division rule:

(a) complete qualified continuing professional education requirements in accordance with the number of hours and standards defined by division rule made in collaboration with the board;

(b) appoint a contact person for access to medical records and an alternate contact person for access to medical records in accordance with Subsection 58-67-302(1)(i);

(c) if the licensee practices medicine in a location with no other persons licensed under this chapter, provide some method of notice to the licensee's patients of the identity and location of the contact person and alternate contact person for the licensee; and

(d) if the licensee is an associate physician licensed under Section 58-67-302.8, successfully complete the educational methods and programs described in Subsection 58-67-807(4).

(2) If a renewal period is extended or shortened under Section 58-67-303, the continuing education hours required for license renewal under this section are increased or decreased proportionally.

(3) (a) An application to renew a license under this chapter shall:

[~~(a)~~] (i) require a physician to answer the following question: "Do you perform elective abortions in Utah in a location other than a hospital?"; and

[~~(b)~~] (ii) immediately following the question, contain the following statement: "For purposes of the immediately preceding question, elective abortion means an abortion other than one of the following: removal of a dead fetus, removal of an ectopic pregnancy, an abortion that is necessary to avert the death of a woman, an abortion that is necessary to avert a serious

physical risk of substantial [~~and irreversible~~] impairment of a major bodily function of a woman, an abortion of a fetus that has a defect that is uniformly diagnosable and uniformly lethal, or an abortion where the woman is pregnant as a result of rape or incest."

(b) The statement in Subsection (3)(a)(ii) shall be modified, if necessary, to ensure compliance with the definitions and requirements of Title 76, Chapter 7, Part 3, Abortion, and Title 76, Chapter 7a, Abortion Prohibition.

(4) In order to assist the Department of Health and Human Services in fulfilling [~~its~~] the department's responsibilities relating to the licensing of [~~an abortion clinic~~] a health care facility and the enforcement of Title 76, Chapter 7, Part 3, Abortion, and Title 76, Chapter 7a, Abortion Prohibition, if a physician responds positively to the question described in Subsection [~~(3)(a),~~] (3)(a)(i) the division shall, within 30 days after the day on which [~~it~~] the division renews the physician's license under this chapter, inform the Department of Health and Human Services in writing:

(a) of the name and business address of the physician; and

(b) that the physician responded positively to the question described in Subsection [~~(3)(a)~~] (3)(a)(i).

(5) The division shall accept and apply toward the hour requirement in Subsection (1)(a) any continuing education that a physician completes in accordance with Sections 26-61a-106 and 26-61a-403.

Section 10. Section **58-67-502** is amended to read:

58-67-502. Unprofessional conduct.

(1) "Unprofessional conduct" includes, in addition to the definition in Section 58-1-501:

(a) using or employing the services of any individual to assist a licensee in any manner not in accordance with the generally recognized practices, standards, or ethics of the profession, state law, or division rule;

(b) making a material misrepresentation regarding the qualifications for licensure under Section 58-67-302.7 or Section 58-67-302.8;

(c) violating the dispensing requirements of Chapter 17b, Part 8, Dispensing Medical Practitioner and Dispensing Medical Practitioner Clinic Pharmacy, if applicable;

(d) violating the requirements of Title 26, Chapter 61a, Utah Medical Cannabis Act; [~~or~~]

(e) performing or inducing an abortion in violation of the requirements of Section 76-7-302 or Section 76-7a-201, regardless of whether the individual licensed under this chapter is found guilty of a crime in connection with the violation; or

[~~(e)~~] (f) falsely making an entry in, or altering, a medical record with the intent to conceal:

(i) a wrongful or negligent act or omission of an individual licensed under this chapter or an individual under the direction or control of an individual licensed under this chapter; or

(ii) conduct described in Subsections (1)(a) through [~~(d)~~] (e) or Subsection 58-1-501(1).

(2) "Unprofessional conduct" does not include:

(a) in compliance with Section 58-85-103:

(i) obtaining an investigational drug or investigational device;

(ii) administering the investigational drug to an eligible patient; or

(iii) treating an eligible patient with the investigational drug or investigational device; or

(b) in accordance with Title 26, Chapter 61a, Utah Medical Cannabis Act:

(i) when registered as a qualified medical provider or acting as a limited medical provider, as those terms are defined in Section 26-61a-102, recommending the use of medical cannabis;

(ii) when registered as a pharmacy medical provider, as that term is defined in Section 26-61a-102, providing pharmacy medical provider services in a medical cannabis pharmacy; or

(iii) when registered as a state central patient portal medical provider, as that term is defined in Section 26-61a-102, providing state central patient portal medical provider services.

(3) Notwithstanding Subsection (2)(b), the division, in consultation with the board and

in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, shall define unprofessional conduct for a physician described in Subsection (2)(b).

Section 11. Section **58-68-304** is amended to read:

58-68-304. License renewal requirements.

(1) As a condition precedent for license renewal, each licensee shall, during each two-year licensure cycle or other cycle defined by division rule:

(a) complete qualified continuing professional education requirements in accordance with the number of hours and standards defined by division rule in collaboration with the board;

(b) appoint a contact person for access to medical records and an alternate contact person for access to medical records in accordance with Subsection 58-68-302(1)(i);

(c) if the licensee practices osteopathic medicine in a location with no other persons licensed under this chapter, provide some method of notice to the licensee's patients of the identity and location of the contact person and alternate contact person for access to medical records for the licensee in accordance with Subsection 58-68-302(1)(j); and

(d) if the licensee is an associate physician licensed under Section 58-68-302.5, successfully complete the educational methods and programs described in Subsection 58-68-807(4).

(2) If a renewal period is extended or shortened under Section 58-68-303, the continuing education hours required for license renewal under this section are increased or decreased proportionally.

(3) (a) An application to renew a license under this chapter shall:

[~~(a)~~] (i) require a physician to answer the following question: "Do you perform elective abortions in Utah in a location other than a hospital?"; and

[~~(b)~~] (ii) immediately following the question, contain the following statement: "For purposes of the immediately preceding question, elective abortion means an abortion other than one of the following: removal of a dead fetus, removal of an ectopic pregnancy, an abortion that is necessary to avert the death of a woman, an abortion that is necessary to avert a serious

physical risk of substantial [~~and irreversible~~] impairment of a major bodily function of a woman, an abortion of a fetus that has a defect that is uniformly diagnosable and uniformly lethal, or an abortion where the woman is pregnant as a result of rape or incest."

(b) The statement in Subsection (3)(a)(ii) shall be modified, if necessary, to ensure compliance with the definitions and requirements of Title 76, Chapter 7, Part 3, Abortion, and Title 76, Chapter 7a, Abortion Prohibition.

(4) In order to assist the Department of Health and Human Services in fulfilling [~~its~~] the department's responsibilities relating to the licensing of [~~an abortion clinic~~] a health care facility and the enforcement of Title 76, Chapter 7, Part 3, Abortion, and Title 76, Chapter 7a, Abortion Prohibition, if a physician responds positively to the question described in Subsection [~~(3)(a)~~] (3)(a)(i), the division shall, within 30 days after the day on which it renews the physician's license under this chapter, inform the Department of Health and Human Services in writing:

(a) of the name and business address of the physician; and

(b) that the physician responded positively to the question described in Subsection [~~(3)(a)~~] (3)(a)(i).

(5) The division shall accept and apply toward the hour requirement in Subsection (1)(a) any continuing education that a physician completes in accordance with Sections 26-61a-106 and 26-61a-403.

Section 12. Section **58-68-502** is amended to read:

58-68-502. Unprofessional conduct.

(1) "Unprofessional conduct" includes, in addition to the definition in Section 58-1-501:

(a) using or employing the services of any individual to assist a licensee in any manner not in accordance with the generally recognized practices, standards, or ethics of the profession, state law, or division rule;

(b) violating the dispensing requirements of Chapter 17b, Part 8, Dispensing Medical Practitioner and Dispensing Medical Practitioner Clinic Pharmacy, if applicable;

(c) making a material misrepresentation regarding the qualifications for licensure under Section 58-68-302.5;

(d) violating the requirements of Title 26, Chapter 61a, Utah Medical Cannabis Act; [~~or~~]

(e) performing or inducing an abortion in violation of the requirements of Section 76-7-302 or Section 76-7a-201, regardless of whether the individual licensed under this chapter is found guilty of a crime in connection with the violation; or

[~~(e)~~] (f) falsely making an entry in, or altering, a medical record with the intent to conceal:

(i) a wrongful or negligent act or omission of an individual licensed under this chapter or an individual under the direction or control of an individual licensed under this chapter; or

(ii) conduct described in Subsections (1)(a) through [~~(d)~~] (e) or Subsection 58-1-501(1).

(2) "Unprofessional conduct" does not include:

(a) in compliance with Section 58-85-103:

(i) obtaining an investigational drug or investigational device;

(ii) administering the investigational drug to an eligible patient; or

(iii) treating an eligible patient with the investigational drug or investigational device; or

(b) in accordance with Title 26, Chapter 61a, Utah Medical Cannabis Act:

(i) when registered as a qualified medical provider or acting as a limited medical provider, as those terms are defined in Section 26-61a-102, recommending the use of medical cannabis;

(ii) when registered as a pharmacy medical provider, as that term is defined in Section 26-61a-102, providing pharmacy medical provider services in a medical cannabis pharmacy; or

(iii) when registered as a state central patient portal medical provider, as that term is defined in Section 26-61a-102, providing state central patient portal medical provider services.

(3) Notwithstanding Subsection (2)(b), the division, in consultation with the board and

in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, shall define unprofessional conduct for a physician described in Subsection (2)(b).

Section 13. Section **58-70a-501** is amended to read:

58-70a-501. Scope of practice.

(1) A physician assistant may provide any medical services that are not specifically prohibited under this chapter or rules adopted under this chapter, and that are within the physician assistant's skills and scope of competence.

(2) A physician assistant shall consult, collaborate with, and refer to appropriate members of the health care team:

(a) as indicated by the patient's condition;

(b) based on the physician assistant's education, experience, and competencies;

(c) the applicable standard of care; and

(d) if applicable, in accordance with the requirements described in Section 58-70a-307.

(3) Subject to Section 58-70a-307, the degree of collaboration under Subsection (2):

(a) shall be determined at the physician assistant's practice, including decisions made by the physician assistant's:

(i) employer;

(ii) group;

(iii) hospital service; or

(iv) health care facility credentialing and privileging system; and

(b) may also be determined by a managed care organization with whom the physician assistant is a network provider.

(4) A physician assistant may only provide healthcare services:

(a) for which the physician assistant has been trained and credentialed, privileged, or authorized to perform; and

(b) that are within the physician assistant's practice specialty.

(5) A physician assistant may authenticate through a signature, certification, stamp, verification, affidavit, or endorsement any document that may be authenticated by a physician

and that is within the physician assistant's scope of practice.

(6) A physician assistant is responsible for the care that the physician assistant provides.

(7) (a) As used in this Subsection (7):

(i) "ALS/ACLS certification" means a certification:

(A) in advanced life support by the American Red Cross;

(B) in advanced cardiac life support by the American Heart Association; or

(C) that is equivalent to a certification described in Subsection (7)(a)(i)(A) or (B).

(ii) "Minimal sedation anxiolysis" means creating a drug induced state:

(A) during which a patient responds normally to verbal commands;

(B) which may impair cognitive function and physical coordination; and

(C) which does not affect airway, reflexes, or ventilatory and cardiovascular function.

(b) Except as provided in Subsections (c) through (e), a physician assistant may not administer general anesthetics.

(c) A physician assistant may perform minimal sedation anxiolysis if the procedure is within the physician assistant's scope of practice.

(d) A physician assistant may perform rapid sequence induction for intubation of a patient if:

(i) the procedure is within the physician assistant's scope of practice;

(ii) the physician assistant holds a valid ALS/ACLS certification and is credentialed and privileged at the hospital where the procedure is performed; and

(iii) (A) a qualified physician is not available and able to perform the procedure; or

(B) the procedure is performed by the physician assistant under supervision of or delegation by a physician.

(e) Subsection (7)(b) does not apply to anesthetics administered by a physician assistant:

(i) in an intensive care unit of a hospital;

(ii) for the purpose of enabling a patient to tolerate ventilator support or intubation; and

(iii) under supervision of or delegation by a physician whose usual scope of practice includes the procedure.

(8) (a) A physician assistant may prescribe or administer an appropriate controlled substance that is within the physician assistant's scope of practice if the physician assistant holds a Utah controlled substance license and a DEA registration.

(b) A physician assistant may prescribe, order, administer, and procure a drug or medical device that is within the physician assistant's scope of practice.

(c) A physician assistant may dispense a drug if dispensing the drug:

(i) is permitted under Title 58, Chapter 17b, Pharmacy Practice Act; and

(ii) is within the physician assistant's scope of practice.

(9) A physician assistant may not perform or induce an abortion in violation of the requirements of Section 76-7-302 or Section 76-7a-201, regardless of whether the physician assistant is found guilty of a crime in connection with the violation.

[~~(9)~~] (10) A physician assistant practicing independently may only perform or provide a health care service that:

(a) is appropriate to perform or provide outside of a health care facility; and

(b) the physician assistant has been trained and credentialed or authorized to provide or perform independently without physician supervision.

[~~(10)~~] (11) A physician assistant, while practicing as a physician assistant:

(a) shall wear an identification badge showing the physician assistant's license classification as a physician assistant;

(b) shall identify themselves to a patient as a physician assistant; and

(c) may not identify themselves to any person in connection with activities allowed under this chapter other than as a physician assistant or PA.

Section 14. Section **58-77-603** is amended to read:

58-77-603. Prohibited practices.

A direct-entry midwife may not:

(1) administer a prescription drug to a client in a manner that violates this chapter;

(2) effect any type of surgical delivery except for the cutting of an emergency episiotomy;

(3) administer any type of epidural, spinal, or caudal anesthetic, or any type of narcotic analgesia;

(4) use forceps or a vacuum extractor;

(5) manually remove the placenta, except in an emergency that presents an immediate threat to the life of the client; or

(6) [~~induce abortion~~] perform or induce an abortion in violation of the requirements of Section 76-7-302 or Section 76-7a-201, regardless of whether the direct-entry midwife is found guilty of a crime in connection with the violation.

Section 15. Section **63I-2-276** is amended to read:

63I-2-276. Repeal dates: Title 76.

(1) Subsection 76-5-102.7(2)(b), regarding assault or threat of violence against an owner, employee, or contractor of a health facility, is repealed January 1, 2027.

[~~(2) If Section 76-7-302.4 is not in effect before January 1, 2029, Section 76-7-302.4 is repealed January 1, 2029.~~]

[~~(3)~~] (2) Section 76-7-305.7 is repealed January 1, 2023.

Section 16. Section **76-7-301** is amended to read:

76-7-301. Definitions.

As used in this part:

(1) (a) "Abortion" means[~~:~~] the act, by a physician, of using an instrument, or prescribing a drug, with the intent to cause the death of an unborn child of a woman known to be pregnant, except as permitted under this part.

[~~(i) the intentional termination or attempted termination of human pregnancy after implantation of a fertilized ovum through a medical procedure carried out by a physician or through a substance used under the direction of a physician;~~]

[~~(ii) the intentional killing or attempted killing of a live unborn child through a medical procedure carried out by a physician or through a substance used under the direction of a~~

~~physician; or~~]

[~~(iii) the intentional causing or attempted causing of a miscarriage through a medical procedure carried out by a physician or through a substance used under the direction of a physician.~~]

(b) "Abortion" does not include:

(i) removal of a dead unborn child;

(ii) removal of an ectopic pregnancy; or

(iii) the killing or attempted killing of an unborn child without the consent of the pregnant woman, unless:

(A) the killing or attempted killing is done through a medical procedure carried out by a physician or through a substance used under the direction of a physician; and

(B) the physician is unable to obtain the consent due to a medical emergency.

[~~(2) "Abortion clinic" means the same as that term is defined in Section 26-21-2.~~]

[~~(3)~~] (2) "Abuse" means the same as that term is defined in Section 80-1-102.

[~~(4)~~] (3) "Department" means the Department of Health and Human Services.

[~~(5)~~] (4) "Down syndrome" means a genetic condition associated with an extra chromosome 21, in whole or in part, or an effective trisomy for chromosome 21.

[~~(6)~~] (5) "Gestational age" means the age of an unborn child as calculated from the first day of the last menstrual period of the pregnant woman.

[~~(7)~~] (6) "Hospital" means:

(a) a general hospital licensed by the department according to Title 26, Chapter 21, Health Care Facility Licensing and Inspection Act; and

(b) a clinic or other medical facility [~~to the extent that such clinic or other medical facility is certified by the department as providing equipment and personnel sufficient in quantity and quality to provide the same degree of safety to the pregnant woman and the unborn child as would be provided for the particular medical procedures undertaken by a general hospital licensed by the department~~] that meets the following criteria:

(i) a clinician who performs procedures at the clinic is required to be credentialed to

perform the same procedures at a general hospital licensed by the department; and

(ii) any procedures performed at the clinic are done with the same level of safety for the pregnant woman and unborn child as would be available in a general hospital licensed by the department.

[~~(8)~~] (7) "Information module" means the pregnancy termination information module prepared by the department.

[~~(9)~~] (8) "Medical emergency" means [~~that condition which, on the basis of the physician's good faith clinical judgment, so threatens the life of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death, or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function~~] a life threatening physical condition aggravated by, caused by, or arising from a pregnancy that places the pregnant woman at risk of death, or poses a serious risk of substantial impairment of a major bodily function, unless the abortion is performed or induced.

[~~(10)~~] (9) "Minor" means an individual who is:

(a) under 18 years old;

(b) unmarried; and

(c) not emancipated.

[~~(11)~~] (10) (a) "Partial birth abortion" means an abortion in which the person performing the abortion:

(i) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and

(ii) performs the overt act, other than completion of delivery, that kills the partially living fetus.

(b) "Partial birth abortion" does not include the dilation and evacuation procedure involving dismemberment prior to removal, the suction curettage procedure, or the suction

aspiration procedure for abortion.

(11) "Perinatal hospice" means comprehensive support to the mother and her family from the time of the diagnosis of a lethal fetal anomaly, through the time of the child's birth, and through the postpartum period, that:

(a) focuses on alleviating fear and ensuring that the woman and her family experience the life and death of a child in a comfortable and supportive environment; and

(b) may include counseling or medical care by:

(i) maternal-fetal medical specialists;

(ii) obstetricians;

(iii) neonatologists;

(iv) anesthesia specialists;

(v) psychiatrists, psychologists, or other mental health providers;

(vi) clergy;

(vii) social workers; or

(viii) specialty nurses.

(12) "Physician" means:

(a) a medical doctor licensed to practice medicine and surgery under Title 58, Chapter 67, Utah Medical Practice Act;

(b) an osteopathic physician licensed to practice osteopathic medicine under Title 58, Chapter 68, Utah Osteopathic Medical Practice Act; or

(c) a physician employed by the federal government who has qualifications similar to [~~a person~~] an individual described in Subsection (12)(a) or (b).

(13) (a) "Severe brain abnormality" means a malformation or defect that causes an individual to live in a mentally vegetative state.

(b) "Severe brain abnormality" does not include:

(i) Down syndrome;

(ii) spina bifida;

(iii) cerebral palsy; or

(iv) any other malformation, defect, or condition that does not cause an individual to live in a mentally vegetative state.

Section 17. Section **76-7-302** is amended to read:

76-7-302. Circumstances under which abortion authorized.

[~~(1) As used in this section, "viable" means that the unborn child has reached a stage of fetal development when the unborn child is potentially able to live outside the womb, as determined by the attending physician to a reasonable degree of medical certainty.~~]

[~~(2)~~] (1) An abortion may be performed in this state only by a physician.

[~~(3)~~] (2) An abortion may be performed in this state only under the following circumstances:

(a) the unborn child [~~is not viable, or~~] has not reached 18 weeks gestational age;

(b) the unborn child [~~is viable, if:~~] has reached 18 weeks gestational age, and:

(i) the abortion is necessary to avert:

(A) the death of the woman on whom the abortion is performed; or

(B) a serious physical risk of substantial [~~and irreversible~~] impairment of a major bodily function of the woman on whom the abortion is performed; or

(ii) subject to Subsection (4), two physicians who practice maternal fetal medicine concur, in writing, in the patient's medical record that the fetus[~~:~~] has a fetal abnormality that in the physicians' reasonable medical judgment is incompatible with life; or

[~~(A) has a defect that is uniformly diagnosable and uniformly lethal; or~~]

[~~(B) has a severe brain abnormality that is uniformly diagnosable; or~~]

[~~(iii) (A)~~]

(c) the unborn child has not reached 18 weeks gestational age and:

(i) (A) the woman is pregnant as a result of:

(I) rape, as described in Section 76-5-402;

(II) rape of a child, as described in Section 76-5-402.1; or

(III) incest, as described in Subsection 76-5-406(2)(j) or Section 76-7-102; [~~and~~] or

(B) the pregnant child is under the age of 14; and

[~~(B)~~] (ii) before the abortion is performed, the physician who performs the abortion:

[~~(I)~~] (A) for an abortion authorized under Subsection (2)(c)(i)(A), verifies that the incident described in Subsection [~~(3)(b)(iii)(A)~~] (2)(c)(i)(A) has been reported to law enforcement; and

[~~(II)~~] (B) if applicable, complies with the requirements of Section 80-2-602.

[~~(4)~~] (3) An abortion may be performed only in [~~an abortion clinic or~~] a hospital, unless it is necessary to perform the abortion in another location due to a medical emergency.

(4) If the unborn child has been diagnosed with a fetal abnormality that is incompatible with life, at the time of the diagnosis, the physician shall inform the woman, both verbally and in writing, that perinatal hospice and perinatal palliative care services are available and are an alternative to abortion.

Section 18. Section **76-7-302.4** is amended to read:

76-7-302.4. Abortion restriction of an unborn child with Down syndrome.

Notwithstanding any other provision of this part, an abortion may not be performed if the pregnant mother's sole reason for the abortion is that the unborn child has or may have Down syndrome, unless the abortion is permissible for a reason described in [~~Subsection 76-7-302(3)(b)~~] Section 76-7-302.

Section 19. Section **76-7-304** is amended to read:

76-7-304. Considerations by physician -- Notice to a parent or guardian -- Exceptions.

(1) To enable the physician to exercise the physician's best medical judgment, the physician shall consider all factors relevant to the well-being of a pregnant woman upon whom an abortion is to be performed, including:

(a) her physical, emotional, and psychological health and safety;

(b) her age; and

(c) her familial situation.

(2) Subject to Subsection (3), at least 24 hours before a physician performs an abortion on a minor, the physician shall notify a parent or guardian of the minor that the minor intends

to have an abortion.

(3) A physician is not required to comply with Subsection (2) if:

(a) subject to Subsection (4)(a):

(i) a medical condition exists that, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant minor as to necessitate the abortion of her pregnancy to avert:

(A) the minor's death; or

(B) a serious physical risk of substantial [~~and irreversible~~] impairment of a major bodily function of the minor; and

(ii) there is not sufficient time to give the notice required under Subsection (2) before it is necessary to terminate the minor's pregnancy in order to avert the minor's death or impairment described in Subsection (3)(a)(i);

(b) subject to Subsection (4)(b):

(i) the physician complies with Subsection (5); and

(ii) (A) the minor is pregnant as a result of incest to which the parent or guardian was a party; or

(B) the parent or guardian has abused the minor; or

(c) subject to Subsection (4)(b), the parent or guardian has not assumed responsibility for the minor's care and upbringing.

(4) (a) If, for the reason described in Subsection (3)(a), a physician does not give the 24-hour notice described in Subsection (2), the physician shall give the required notice as early as possible before the abortion, unless it is necessary to perform the abortion immediately in order to avert the minor's death or impairment described in Subsection (3)(a)(i).

(b) If, for a reason described in Subsection (3)(b) or (c), a parent or guardian of a minor is not notified that the minor intends to have an abortion, the physician shall notify another parent or guardian of the minor, if the minor has another parent or guardian that is not exempt from notification under Subsection (3)(b) or (c).

(5) If, for a reason described in Subsection (3)(b)(ii)(A) or (B), a physician does not

notify a parent or guardian of a minor that the minor intends to have an abortion, the physician shall report the incest or abuse to the Division of Child and Family Services within the Department of Health and Human Services.

Section 20. Section **76-7-304.5** is amended to read:

76-7-304.5. Consent required for abortions performed on minors -- Division of Child and Family Services as guardian of a minor -- Hearing to allow a minor to self-consent -- Appeals.

(1) In addition to the other requirements of this part, a physician may not perform an abortion on a minor unless:

(a) the physician obtains the informed written consent of a parent or guardian of the minor, in accordance with Sections 76-7-305 and 76-7-305.5;

(b) the minor is granted the right, by court order under Subsection (4)(b), to consent to the abortion without obtaining consent from a parent or guardian; or

(c) (i) a medical condition exists that, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant minor as to necessitate the abortion of her pregnancy to avert:

(A) the minor's death; or

(B) a [~~serious risk of substantial and irreversible impairment of a major bodily function of the minor~~] risk described in Subsection 76-7-302(2)(b)(i)(B); and

(ii) there is not sufficient time to obtain the consent in the manner chosen by the minor under Subsection (2) before it is necessary to terminate the minor's pregnancy in order to avert the minor's death or impairment described in Subsection (1)(c)(i).

(2) (a) A minor who wants to have an abortion may choose:

(i) to seek consent from the minor's parent or guardian as described in Subsection (1); or

(ii) to seek a court order as described in Subsection (1).

(b) Neither Subsection (1) nor this Subsection (2) require the minor to seek or obtain consent from the minor's parent or guardian if the circumstances described in Subsection

76-7-304(3)(b)(ii) exist.

(3) If a minor does not obtain the consent of the minor's parent or guardian, the minor may file a petition with the juvenile court to obtain a court order as described in Subsection (1).

(4) (a) The juvenile court shall close the hearing on a petition described in Subsection (3) to the public.

(b) After considering the evidence presented at the hearing, the court shall order that the minor may obtain an abortion without the consent of a parent or guardian of the minor if the court finds by a preponderance of the evidence that:

(i) the minor:

(A) has given her informed consent to the abortion; and

(B) is mature and capable of giving informed consent to the abortion; or

(ii) an abortion would be in the minor's best interest.

(5) The Judicial Council shall make rules that:

(a) provide for the administration of the proceedings described in this section;

(b) provide for the appeal of a court's decision under this section;

(c) ensure the confidentiality of the proceedings described in this section and the records related to the proceedings; and

(d) establish procedures to expedite the hearing and appeal proceedings described in this section.

Section 21. Section **76-7-305** is amended to read:

76-7-305. Informed consent requirements for abortion -- 72-hour wait mandatory -- Exceptions.

(1) A person may not perform an abortion, unless, before performing the abortion, the physician who will perform the abortion obtains from the woman on whom the abortion is to be performed a voluntary and informed written consent that is consistent with:

(a) Section 8.08 of the American Medical Association's Code of Medical Ethics, Current Opinions; and

(b) the provisions of this section.

(2) Except as provided in Subsection (8), consent to an abortion is voluntary and informed only if, at least 72 hours before the abortion:

(a) a staff member of [~~an abortion clinic or~~] a hospital, physician, registered nurse, nurse practitioner, advanced practice registered nurse, certified nurse midwife, genetic counselor, or physician's assistant presents the information module to the pregnant woman;

(b) the pregnant woman views the entire information module and presents evidence to the individual described in Subsection (2)(a) that the pregnant woman viewed the entire information module;

(c) after receiving the evidence described in Subsection (2)(b), the individual described in Subsection (2)(a):

(i) documents that the pregnant woman viewed the entire information module;

(ii) gives the pregnant woman, upon her request, a copy of the documentation described in Subsection (2)(c)(i); and

(iii) provides a copy of the statement described in Subsection (2)(c)(i) to the physician who is to perform the abortion, upon request of that physician or the pregnant woman;

(d) after the pregnant woman views the entire information module, the physician who is to perform the abortion, the referring physician, a physician, a registered nurse, nurse practitioner, advanced practice registered nurse, certified nurse midwife, genetic counselor, or physician's assistant, in a face-to-face consultation in any location in the state, orally informs the woman of:

(i) the nature of the proposed abortion procedure;

(ii) specifically how the procedure described in Subsection (2)(d)(i) will affect the fetus;

(iii) the risks and alternatives to the abortion procedure or treatment;

(iv) the options and consequences of aborting a medication-induced abortion, if the proposed abortion procedure is a medication-induced abortion;

(v) the probable gestational age and a description of the development of the unborn child at the time the abortion would be performed;

(vi) the medical risks associated with carrying her child to term;

(vii) the right to view an ultrasound of the unborn child, at no expense to the pregnant woman, upon her request; and

(viii) when the result of a prenatal screening or diagnostic test indicates that the unborn child has or may have Down syndrome, the [~~Department of Health website containing~~] department's website, which contains the information described in Section 26-10-14, including the information on the informational support sheet; and

(e) after the pregnant woman views the entire information module, a staff member of the [~~abortion clinic or~~] hospital provides to the pregnant woman:

(i) on a document that the pregnant woman may take home:

(A) the address for the department's website described in Section 76-7-305.5; and

(B) a statement that the woman may request, from a staff member of the [~~abortion clinic or~~] hospital where the woman viewed the information module, a printed copy of the material on the department's website;

(ii) a printed copy of the material on the department's website described in Section 76-7-305.5, if requested by the pregnant woman; and

(iii) a copy of the form described in Subsection 26-21-33(3)(a)(i) regarding the disposition of the aborted fetus.

(3) Before performing an abortion, the physician who is to perform the abortion shall:

(a) in a face-to-face consultation, provide the information described in Subsection (2)(d), unless the attending physician or referring physician is the individual who provided the information required under Subsection (2)(d); and

(b) (i) obtain from the pregnant woman a written certification that the information required to be provided under Subsection (2) and this Subsection (3) was provided in accordance with the requirements of Subsection (2) and this Subsection (3);

(ii) obtain a copy of the statement described in Subsection (2)(c)(i); and

(iii) ensure that:

(A) the woman has received the information described in Subsections 26-21-33(3) and

(4); and

(B) if the woman has a preference for the disposition of the aborted fetus, the woman has informed the health care facility of the woman's decision regarding the disposition of the aborted fetus.

(4) When a [~~serious~~] medical emergency compels the performance of an abortion, the physician shall inform the woman prior to the abortion, if possible, of the medical indications supporting the physician's judgment that an abortion is necessary.

(5) If an ultrasound is performed on a woman before an abortion is performed, the individual who performs the ultrasound, or another qualified individual, shall:

(a) inform the woman that the ultrasound images will be simultaneously displayed in a manner to permit her to:

(i) view the images, if she chooses to view the images; or

(ii) not view the images, if she chooses not to view the images;

(b) simultaneously display the ultrasound images in order to permit the woman to:

(i) view the images, if she chooses to view the images; or

(ii) not view the images, if she chooses not to view the images;

(c) inform the woman that, if she desires, the person performing the ultrasound, or another qualified person shall provide a detailed description of the ultrasound images, including:

(i) the dimensions of the unborn child;

(ii) the presence of cardiac activity in the unborn child, if present and viewable; and

(iii) the presence of external body parts or internal organs, if present and viewable; and

(d) provide the detailed description described in Subsection (5)(c), if the woman requests it.

(6) The information described in Subsections (2), (3), and (5) is not required to be provided to a pregnant woman under this section if the abortion is performed for a reason described in:

(a) Subsection [~~76-7-302(3)(b)(i)~~] 76-7-302(2)(b)(i), if the treating physician and one

other physician concur, in writing, that the abortion is necessary to avert:

(i) the death of the woman on whom the abortion is performed; or

(ii) a [~~serious risk of substantial and irreversible impairment of a major bodily function of the woman on whom the abortion is performed~~] risk described in Subsection 76-7-302(2)(b)(i)(B); or

(b) Subsection [~~76-7-302(3)(b)(ii)~~] 76-7-302(2)(b)(ii).

(7) In addition to the criminal penalties described in this part, a physician who violates the provisions of this section:

(a) is guilty of unprofessional conduct as defined in Section 58-67-102 or 58-68-102; and

(b) shall be subject to:

(i) suspension or revocation of the physician's license for the practice of medicine and surgery in accordance with Section 58-67-401 or 58-68-401; and

(ii) administrative penalties in accordance with Section 58-67-402 or 58-68-402.

(8) A physician is not guilty of violating this section for failure to furnish any of the information described in Subsection (2) or (3), or for failing to comply with Subsection (5), if:

(a) the physician can demonstrate by a preponderance of the evidence that the physician reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the pregnant woman;

(b) in the physician's professional judgment, the abortion was necessary to avert:

(i) the death of the woman on whom the abortion is performed; or

(ii) a [~~serious risk of substantial and irreversible impairment of a major bodily function of the woman on whom the abortion is performed~~] risk described in Subsection 76-7-302(2)(b)(i)(B);

(c) the pregnancy was the result of rape or rape of a child, as described in Sections 76-5-402 and 76-5-402.1;

(d) the pregnancy was the result of incest, as defined in Subsection 76-5-406(2)(j) and Section 76-7-102; or

(e) at the time of the abortion, the pregnant [~~woman~~] child was 14 years old or younger.

(9) A physician who complies with the provisions of this section and Section 76-7-304.5 may not be held civilly liable to the physician's patient for failure to obtain informed consent under Section 78B-3-406.

(10) (a) The department shall provide an ultrasound, in accordance with the provisions of Subsection (5)(b), at no expense to the pregnant woman.

(b) A local health department shall refer a pregnant woman who requests an ultrasound described in Subsection (10)(a) to the department.

(11) A physician is not guilty of violating this section if:

(a) the information described in Subsection (2) is provided less than 72 hours before the physician performs the abortion; and

(b) in the physician's professional judgment, the abortion was necessary in a case where:

(i) a ruptured membrane, documented by the attending or referring physician, will cause a serious infection; or

(ii) a serious infection, documented by the attending or referring physician, will cause a ruptured membrane.

Section 22. Section **76-7-305.5** is amended to read:

76-7-305.5. Requirements for information module and website.

(1) In order to ensure that a woman's consent to an abortion is truly an informed consent, the department shall, in accordance with the requirements of this section, develop an information module and maintain a public website.

(2) The information module and public website described in Subsection (1) shall:

(a) be scientifically accurate, comprehensible, and presented in a truthful, nonmisleading manner;

(b) present adoption as a preferred and positive choice and alternative to abortion;

(c) be produced in a manner that conveys the state's preference for childbirth over

abortion;

(d) state that the state prefers childbirth over abortion;

(e) state that it is unlawful for any person to coerce a woman to undergo an abortion;

(f) state that any physician who performs an abortion without obtaining the woman's informed consent or without providing her a private medical consultation in accordance with the requirements of this section, may be liable to her for damages in a civil action at law;

(g) provide a geographically indexed list of resources and public and private services available to assist, financially or otherwise, a pregnant woman during pregnancy, at childbirth, and while the child is dependent, including:

(i) medical assistance benefits for prenatal care, childbirth, and neonatal care;

(ii) services and supports available under Section 35A-3-308;

(iii) other financial aid that may be available during an adoption;

(iv) services available from public adoption agencies, private adoption agencies, and private attorneys whose practice includes adoption; and

(v) the names, addresses, and telephone numbers of each person listed under this Subsection (2)(g);

(h) describe the adoption-related expenses that may be paid under Section 76-7-203;

(i) describe the persons who may pay the adoption related expenses described in Subsection (2)(h);

(j) except as provided in Subsection (4), describe the legal responsibility of the father of a child to assist in child support, even if the father has agreed to pay for an abortion;

(k) except as provided in Subsection (4), describe the services available through the Office of Recovery Services, within the Department of Human Services, to establish and collect the support described in Subsection (2)(j);

(l) state that private adoption is legal;

(m) describe and depict, with pictures or video segments, the probable anatomical and physiological characteristics of an unborn child at two-week gestational increments from fertilization to full term, including:

(i) brain and heart function;

(ii) the presence and development of external members and internal organs; and

(iii) the dimensions of the fetus;

(n) show an ultrasound of the heartbeat of an unborn child at:

(i) four weeks from conception;

(ii) six to eight weeks from conception; and

(iii) each month after 10 weeks gestational age, up to 14 weeks gestational age;

(o) describe abortion procedures used in current medical practice at the various stages of growth of the unborn child, including:

(i) the medical risks associated with each procedure;

(ii) the risk related to subsequent childbearing that are associated with each procedure; and

(iii) the consequences of each procedure to the unborn child at various stages of fetal development;

(p) describe the possible detrimental psychological effects of abortion;

(q) describe the medical risks associated with carrying a child to term;

(r) include relevant information on the possibility of an unborn child's survival at the two-week gestational increments described in Subsection (2)(m);

(s) except as provided in Subsection (5), include:

(i) information regarding substantial medical evidence from studies concluding that an unborn child who is at least 20 weeks gestational age may be capable of experiencing pain during an abortion procedure; and

(ii) the measures that will be taken in accordance with Section 76-7-308.5;

(t) explain the options and consequences of aborting a medication-induced abortion;

(u) include the following statement regarding a medication-induced abortion, "Research indicates that mifepristone alone is not always effective in ending a pregnancy. You may still have a viable pregnancy after taking mifepristone. If you have taken mifepristone but have not yet taken the second drug and have questions regarding the health of your fetus or are

questioning your decision to terminate your pregnancy, you should consult a physician immediately.";

(v) inform a pregnant woman that she has the right to view an ultrasound of the unborn child, at no expense to her, upon her request;

(w) inform a pregnant woman that she has the right to:

(i) determine the final disposition of the remains of the aborted fetus;

(ii) unless the woman waives this right in writing, wait up to 72 hours after the abortion procedure is performed to make a determination regarding the disposition of the aborted fetus before the health care facility may dispose of the fetal remains;

(iii) receive information about options for disposition of the aborted fetus, including the method of disposition that is usual and customary for a health care facility; and

(iv) for a medication-induced abortion, return the aborted fetus to the health care facility for disposition; and

(x) provide a digital copy of the form described in Subsection 26-21-33(3)(a)(i); and

(y) be in a typeface large enough to be clearly legible.

(3) The information module and website described in Subsection (1) may include a toll-free 24-hour telephone number that may be called in order to obtain, orally, a list and description of services, agencies, and adoption attorneys in the locality of the caller.

(4) The department may develop a version of the information module and website that omits the information in Subsections (2)(j) and (k) for a viewer who is pregnant as the result of rape.

(5) The department may develop a version of the information module and website that omits the information described in Subsection (2)(s) for a viewer who will have an abortion performed:

(a) on an unborn child who is less than 20 weeks gestational age at the time of the abortion; or

(b) on an unborn child who is at least 20 weeks gestational age at the time of the abortion, if:

(i) the abortion is being performed for a reason described in Subsection [~~76-7-302(3)(b)(i)~~] 76-7-302(2)(b)(i) or (ii); and

(ii) due to a serious medical emergency, time does not permit compliance with the requirement to provide the information described in Subsection (2)(s).

(6) The department and each local health department shall make the information module and the website described in Subsection (1) available at no cost to any person.

(7) The department shall make the website described in Subsection (1) available for viewing on the department's website by clicking on a conspicuous link on the home page of the website.

(8) The department shall ensure that the information module is:

(a) available to be viewed at all facilities where an abortion may be performed;

(b) interactive for the individual viewing the module, including the provision of opportunities to answer questions and manually engage with the module before the module transitions from one substantive section to the next;

(c) produced in English and may include subtitles in Spanish or another language; and

(d) capable of being viewed on a tablet or other portable device.

(9) After the department releases the initial version of the information module, for the use described in Section 76-7-305, the department shall:

(a) update the information module, as required by law; and

(b) present an updated version of the information module to the Health and Human Services Interim Committee for the committee's review and recommendation before releasing the updated version for the use described in Section 76-7-305.

Section 23. Section **76-7-313** is amended to read:

76-7-313. Department's enforcement responsibility -- Physician's report to department.

(1) In order for the department to maintain necessary statistical information and ensure enforcement of the provisions of this part:

(a) any physician performing an abortion must obtain and record in writing:

(i) the age, marital status, and county of residence of the woman on whom the abortion was performed;

(ii) the number of previous abortions performed on the woman described in Subsection (1)(a)(i);

(iii) the hospital or other facility where the abortion was performed;

(iv) the weight in grams of the unborn child aborted, if it is possible to ascertain;

(v) the pathological description of the unborn child;

(vi) the given gestational age of the unborn child;

(vii) the date the abortion was performed;

(viii) the measurements of the unborn child, if possible to ascertain; and

(ix) the medical procedure used to abort the unborn child; and

(b) the department shall make rules in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act.

(2) Each physician who performs an abortion shall provide the following to the department within 30 days after the day on which the abortion is performed:

(a) the information described in Subsection (1);

(b) a copy of the pathologist's report described in Section 76-7-309;

(c) an affidavit:

(i) indicating whether the required consent was obtained pursuant to Sections 76-7-305 and 76-7-305.5;

(ii) described in Subsection (3), if applicable; and

(iii) indicating whether at the time the physician performed the abortion, the physician had any knowledge that the pregnant woman sought the abortion solely because the unborn child had or may have had Down syndrome; and

(d) a certificate indicating:

[~~(i) whether the unborn child was or was not viable, as defined in Subsection 76-7-302(1), at the time of the abortion;~~]

[~~(ii)~~] (i) whether the unborn child was older or younger than 18 weeks gestational age

at the time of the abortion; and

[~~(iii)~~] (ii) [~~if the unborn child was viable, as defined in Subsection 76-7-302(1), or older than 18 weeks gestational age at the time of the abortion,~~] the reason for the abortion.

(3) If the information module or the address to the website is not provided to a pregnant woman, the physician who performs the abortion on the woman shall, within 10 days after the day on which the abortion is performed, provide to the department an affidavit that:

(a) specifies the information that was not provided to the woman; and

(b) states the reason that the information was not provided to the woman.

(4) All information supplied to the department shall be confidential and privileged pursuant to Title 26, Chapter 25, Confidential Information Release.

(5) The department shall pursue all administrative and legal remedies when the department determines that a physician or a facility has not complied with the provisions of this part.

Section 24. Section **76-7-314** is amended to read:

76-7-314. Violations of abortion laws -- Classifications.

(1) [~~A willful~~] An intentional violation of Section 76-7-307, 76-7-308, 76-7-310, 76-7-310.5, 76-7-311, or 76-7-312 is a felony of the third degree.

(2) A violation of Section 76-7-326 is a felony of the third degree.

(3) A violation of Section [~~76-7-302.5 or~~] 76-7-314.5 is a felony of the second degree.

(4) A violation of any other provision of this part, including Subsections 76-7-305(2)(a) through (c), and (e), is a class A misdemeanor.

(5) The [~~Department of Health~~] department shall report a physician's violation of any provision of this part to the Physicians Licensing Board, described in Section 58-67-201.

(6) Any person with knowledge of a physician's violation of any provision of this part may report the violation to the Physicians Licensing Board, described in Section 58-67-201.

(7) In addition to the penalties described in this section, the department may take any action described in Section 26-21-11 against [~~an abortion clinic~~] a health care facility if a violation of this chapter occurs at the [~~abortion clinic~~] health care facility.

Section 25. Section **76-7-314.5** is amended to read:

76-7-314.5. Killing an unborn child.

(1) A person is guilty of killing an unborn child if the person intentionally causes the death of an unborn child by performing an abortion of the unborn child in violation of the provisions of Subsection [~~76-7-302(3)~~] 76-7-302(2).

(2) A woman is not criminally liable for:

(a) seeking to obtain, or obtaining, an abortion that is permitted by this part; or

(b) a physician's failure to comply with Subsection [~~76-7-302(3)(b)(ii)~~] 76-7-302(2)(b)(ii) or Section 76-7-305.

Section 26. Section **76-7-317** is amended to read:

76-7-317. Severability clause.

If any one or more provision, section, subsection, sentence, clause, phrase, or word of this part or the application thereof to any person or circumstance is found to be unconstitutional, the same is hereby declared to be severable and the balance of this part shall remain effective notwithstanding such unconstitutionality. The legislature hereby declares that it would have passed this part, and each provision, section, subsection, sentence, clause, phrase, or word thereof, irrespective of the fact that any one or more provision, section, subsection, sentence, clause, phrase, or word be declared unconstitutional. This section applies to any provision, section, subsection, sentence, clause, phrase, or word of this part, regardless of the time of enactment, amendment, or repeal.

Section 27. Section **76-7-332** is enacted to read:

76-7-332. Drugs known to be used for abortion -- Prescriber limitation -- Criminal penalties -- Pharmacy presumption for other use.

(1) As used in the section, "abortion-related drug" means a drug or medication that is known to be used for the purpose of performing an abortion, and includes:

(a) methotrexate, or methotrexate with misoprostol;

(b) mifepristone, also known as mifeprex;

(c) misoprostol, also known as cytotec; and

(d) RU-486.

(2) An individual may not prescribe an abortion-related drug for the purpose of causing an abortion, unless the individual is licensed as a physician in this state under:

(a) Title 58, Chapter 67, Utah Medical Practice Act; or

(b) Title 58, Chapter 68, Utah Osteopathic Medical Practice Act.

(3) A violation of Subsection (2) is a class B misdemeanor.

(4) (a) Any prescription or medical order for a drug that is known to possibly cause an abortion shall be presumed by a pharmacy to be for an indication other than for the termination of a pregnancy.

(b) A pharmacy dispensing a prescription or medical order for a drug that is known to possibly cause an abortion shall not be required to verify whether the prescription or medical order violates any provision of this chapter.

Section 28. Section **76-7a-101** is amended to read:

76-7a-101. Definitions.

As used in this chapter:

(1) (a) "Abortion" means[~~:~~] the act, by a physician, of using an instrument, or prescribing a drug, with the intent to cause the death of an unborn child of a woman known to be pregnant, except as permitted under this chapter.

[~~(i) the intentional termination or attempted termination of human pregnancy after implantation of a fertilized ovum through a medical procedure carried out by a physician or through a substance used under the direction of a physician;~~]

[~~(ii) the intentional killing or attempted killing of a live unborn child through a medical procedure carried out by a physician or through a substance used under the direction of a physician; or~~]

[~~(iii) the intentional causing or attempted causing of a miscarriage through a medical procedure carried out by a physician or through a substance used under the direction of a physician.~~]

(b) "Abortion" does not include:

(i) removal of a dead unborn child;

(ii) removal of an ectopic pregnancy; or

(iii) the killing or attempted killing of an unborn child without the consent of the pregnant woman, unless:

(A) the killing or attempted killing is done through a medical procedure carried out by a physician or through a substance used under the direction of a physician; and

(B) the physician is unable to obtain the consent due to a medical emergency.

[~~(2) "Abortion clinic" means a type I abortion clinic licensed by the state or a type II abortion clinic licensed by the state.~~]

[~~(3)~~] (2) "Department" means the Department of Health and Human Services.

[~~(4)~~] (3) "Down syndrome" means a genetic condition associated with an extra chromosome 21, in whole or in part, or an effective trisomy for chromosome 21.

[~~(5)~~] (4) "Hospital" means:

(a) a general hospital licensed by the department; [~~or~~] and

(b) a clinic or other medical facility [~~to the extent the clinic or other medical facility is certified by the department as providing equipment and personnel sufficient in quantity and quality to provide the same degree of safety to a pregnant woman and an unborn child as would be provided for the particular medical procedure undertaken by a general hospital licensed by the department.~~] that meets the following criteria:

(i) a clinician who performs procedures at the clinic is required to be credentialed to perform the same procedures at a general hospital licensed by the department; and

(ii) any procedures performed at the clinic are done with the same level of safety for the pregnant woman and unborn child as would be available in a general hospital licensed by the department.

[~~(6) "Incest" means the same as that term is defined in Section 80-1-102.~~]

[~~(7)~~] (5) "Medical emergency" means a [~~condition which, on the basis of the physician's good faith clinical judgment, so threatens the life of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death, or for which a delay~~

~~will create serious risk of substantial and irreversible impairment of major bodily function~~] life threatening physical condition aggravated by, caused by, or arising from a pregnancy that places the pregnant woman at risk of death, or poses a serious risk of substantial impairment of a major bodily function, unless the abortion is performed or induced.

(6) "Perinatal hospice" means comprehensive support to the mother and her family from the time of the diagnosis of a lethal fetal anomaly, through the time of the child's birth, and through the postpartum period, that:

(a) focuses on alleviating fear and ensuring that the woman and her family experience the life and death of a child in a comfortable and supportive environment; and

(b) may include counseling or medical care by:

(i) maternal-fetal medical specialists;

(ii) obstetricians;

(iii) neonatologists;

(iv) anesthesia specialists;

(v) psychiatrists, psychologists, or other mental health providers;

(vi) clergy;

(vii) social workers; or

(viii) specialty nurses.

[~~(8)~~] (7) "Physician" means:

(a) a medical doctor licensed to practice medicine and surgery in the state;

(b) an osteopathic physician licensed to practice osteopathic medicine in the state; or

(c) a physician employed by the federal government who has qualifications similar to an individual described in Subsection [~~(8)(a) or (b)~~] (7)(a) or (b).

[~~(9) "Rape" means the same as that term is defined in Title 76, Utah Criminal Code.~~]

[~~(10)~~] (8) (a) "Severe brain abnormality" means a malformation or defect that causes an individual to live in a mentally vegetative state.

(b) "Severe brain abnormality" does not include:

(i) Down syndrome;

(ii) spina bifida;

(iii) cerebral palsy; or

(iv) any other malformation, defect, or condition that does not cause an individual to live in a mentally vegetative state.

Section 29. Section **76-7a-201** is amended to read:

76-7a-201. Abortion prohibition -- Exceptions -- Penalties.

(1) An abortion may be performed in this state only under the following circumstances:

(a) the abortion is necessary to avert:

(i) the death of the woman on whom the abortion is performed; or

(ii) a serious physical risk of substantial [~~and irreversible~~] impairment of a major bodily function of the woman on whom the abortion is performed;

(b) subject to Subsection (3), two physicians who practice maternal fetal medicine concur, in writing, in the patient's medical record that the fetus[~~:~~] has a fetal abnormality that in the physicians' reasonable medical judgment is incompatible with life; or

[~~(i) has a defect that is uniformly diagnosable and uniformly lethal; or~~]

[~~(ii) has a severe brain abnormality that is uniformly diagnosable; or~~]

(c) [~~(i)~~] the unborn child has not reached 18 weeks gestational age and:

(i) (A) the woman is pregnant as a result of:

[~~(A)~~] (I) rape, as described in Section 76-5-402;

[~~(B)~~] (II) rape of a child, as described in Section 76-5-402.1; or

[~~(C)~~] (III) incest[~~; and~~], as described in Subsection 76-5-406(2)(j) or Section 76-7-102; or

(B) the pregnant child is under the age of 14; and

(ii) before the abortion is performed, the physician who performs the abortion:

(A) for an abortion authorized under Subsection (1)(c)(i)(A), verifies that the incident described in Subsection [~~(1)(c)(i)~~] (1)(c)(i)(A) has been reported to law enforcement; and

(B) if applicable, complies with requirements related to reporting suspicions of or known child abuse.

(2) An abortion may be performed only:

(a) by a physician; and

(b) in [~~an abortion clinic or~~] a hospital, unless it is necessary to perform the abortion in another location due to a medical emergency.

(3) If the unborn child has been diagnosed with a fetal abnormality that is incompatible with life, at the time of the diagnosis, the physician shall inform the woman, both verbally and in writing, that perinatal hospice services and perinatal palliative care are available and are an alternative to abortion.

[~~(3)~~] (4) A person who performs an abortion in violation of this section is guilty of a second degree felony.

[~~(4)~~] (5) In addition to the penalty described in Subsection [~~(3)~~] (4), the department may take appropriate corrective action against [~~an abortion clinic~~] a health care facility, including revoking the [~~abortion clinic's~~] health care facility's license, if a violation of this chapter occurs at the [~~abortion clinic~~] health care facility.

[~~(5)~~] (6) The department shall report a physician's violation of any provision of this section to the state entity that regulates the licensing of a physician.

Section 30. **Repealer.**

This bill repeals:

Section **76-7-302.5, Circumstances under which abortion prohibited.**

Addendum 4

Mem. Decision Granting Prelim. Inj.,
PPAU v. State of Utah, No. 220903886
(Utah 3d Jud. Dist. Ct. May 2, 2023)

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH	
PLANNED PARENTHOOD ASSOCIATION OF UTAH, on behalf of itself and its patients, physicians, and staff, **Plaintiff,** **vs.** **STATE OF UTAH, *et al.*,** **Defendants.**	**MEMORANDUM DECISION** **CASE NO. 220903886** **Judge Andrew H. Stone**

This matter came before the Court for hearing on April 28, 2023, in connection with the plaintiff's Second Motion for a Preliminary Injunction ("Second Motion"). At the conclusion of the hearing, the Court took the matter under advisement. After further considering the parties' written submissions, the relevant legal authorities, and counsel's oral argument the Court rules as follows.

PROCEDURAL BACKGROUND

On July 19, 2022, this Court entered an Order Granting Plaintiff's Motion for a Preliminary Injunction. The Order pertained to Senate Bill 174, 2020 Leg., Gen. Sess. (Utah 2020) (codified at Utah Code Ann. tit. 76, ch. 7A), referred to as the "Trigger Ban".

The defendants (collectively referred to as the "State") filed a Petition for Permission to Appeal an Interlocutory Order. On October 3, 2022, the Utah Supreme Court granted the Petition and the appeal is currently pending. Case No. 20220696-SC. The appeal presents issues of

standing and whether the plaintiff "failed to show a substantial likelihood of success or serious issue on their claims that the Utah Constitution impliedly protects a right to abortion." (Petition at p. 5).

The State moved to stay this Court's Order granting the plaintiff's preliminary injunction pending appeal. The Utah Supreme Court denied that motion. Under the injunction, the plaintiff "has continued to provide abortions up to 18 weeks of pregnancy, which is the legal limit pursuant to a separate provision of Utah law not challenged in this litigation." (Second Motion at p. 4).

On April 3, 2023, the plaintiff filed an Expedited Motion for Leave to File First Supplemental Complaint. On that same date, the plaintiff filed the currently pending Second Motion.

In its Motion for Leave, the plaintiff indicates that the Utah Legislature had enacted in March of 2023, House Bill 467, 2023 Leg., Gen. Sess. (Utah 2023) ("HB 467"). The plaintiff asserts that HB 467, which it refers to as the "Clinic Ban," requires all abortions to be performed in a hospital and criminalizes abortions performed in licensed abortion clinics. (Second Motion at p. 1).

The plaintiff sought leave to file a supplemental or amended complaint to address HB 467's amendments. The State filed a Response to the plaintiff's Motion which did not oppose the proposed amendment, but which noted the following:

> The interlocutory appeal divests this Court of jurisdiction over the issues on appeal. See In re Discipline of Pendleton, 2000 UT 77, ¶¶ 36-37, 11 P.3d 284 ("The [district court] case, except for the hearing on the appeal from the interlocutory order, is to proceed in the lower court . . .") (internal citation omitted). The State does not interpret the new claims of Plaintiff's proposed Supplemental Complaint as interfering with the issues on appeal but, to the extent they do, this Court lacks jurisdiction to take action upon the Motion until after the Supreme Court issues its decision in Case No. 20220696-SC.

(Response at p. 2). On April 17, 2023, the Court entered an Order Granting Plaintiff's Expedited Motion for Leave to File First Supplemental Complaint. The Court now addresses the Second Motion.

COURT'S JURISDICTION DURING PENDENCY OF INTERLOCUTORY APPEAL

While the State touches on the Court's jurisdiction in its Response, neither side has elaborated on this fundamental issue. Thus, the Court addresses the extent to which it retains jurisdiction to consider the issues presented in the Second Motion, following the State's interlocutory appeal.

In the Pendleton case, which is referenced in the State's Response to the plaintiff's Motion for Leave, the OPC commenced a disciplinary proceeding against Pendleton following criminal charges being filed against him. Pendleton, 11 P.3d at 287. Pendleton filed an interlocutory appeal of the trial court's interim suspension order. Id. at 288. Pendleton argued to the trial court that it lacked jurisdiction over his case during the pendency of his appeal. Id. at 289. As a corollary, he argued that he had no duty to respond to the OPC's discovery requests, served during this time. Id. The trial court denied Pendleton's motion for a protective order seeking relief from the OPC's requested discovery, but did not address jurisdiction. Id.

On appeal, in considering the denial of Pendleton's motion, the Utah Supreme Court addressed Pendleton's jurisdictional issues. The court noted as follows:

> Moreover, it is generally recognized that the granting of an interlocutory appeal does not normally divest the district court of jurisdiction over the underlying matter. See 16 Charles A. Wright et al., Federal Practice and Procedure: Jurisdiction 2d § 3921.2, at 53–64 (1996); see also, e.g., Ex Parte Nat'l Enameling & Stamping Co., 201 U.S. 156, 162, 26 S.Ct. 404, 50 L.Ed. 707 (1906) ("It was not intended that the cause as a whole should be transferred to the appellate court prior to the final decree. The case, except for the hearing on the appeal from the interlocutory order, is to proceed in the lower court as though no such appeal had been taken, unless otherwise specially ordered."); Equal Employment Opportunity Comm'n v. Norris, Nos. 99–5068, 99–5089, 216 F.3d 1087, 2000 U.S.App. LEXIS 14680, at *3–*4 (10th Cir. June 27, 2000). When the scope of the interlocutory appeal is not

> affected by litigation of the underlying action, the interest in expediting litigation requires that the district court proceed with the action. See 16 Wright, supra, at 54, 56.

Id. at 293-294.

The court ruled that "the pending proceeding to determine whether permanent disciplinary sanctions should be imposed against Pendleton was in no way dependent upon our disposition of Pendleton's interlocutory appeal. Thus, even though the disciplinary court failed to address this issue, the disciplinary court retained jurisdiction over the ongoing disciplinary proceeding, and the OPC was entitled to proceed with discovery." Id. at 294.

The case of Saunders v. Sharp, 818 P.2d 574, 577-578 (Utah App. 1991), while not an interlocutory appeal case, is also instructive. In that case, during the pendency of an appeal from the trial court's judgment, the trial judge entered post-judgment orders. Those, then, became the subject of a second appeal. One aspect of the appeal was the award of post-judgment attorney fees, which the appellant claimed went beyond the district court's jurisdiction:

> Initially, White Pine argues the district court had no jurisdiction to award additional attorney fees. White Pine relies on the principle that "the trial court is divested of jurisdiction over a case while it is under advisement on appeal." See White v. State, 795 P.2d 648, 650 (Utah 1990).
>
> Generally, when a party files a timely notice of appeal, the court that issued the judgment loses jurisdiction over the matters on appeal. As with many general rules, however, there are exceptions. Courts have concluded that even where a trial court is otherwise divested of jurisdiction due to an appeal, the trial court retains the power to act on collateral matters. The Utah Supreme Court implicitly recognized this exception in White, indicating that to prevent unnecessary delay, "where any action by the trial court is not likely to modify a party's rights with respect to the issues raised on appeal," the trial court could act. 795 P.2d at 650. Most appellate courts that have addressed the propriety of a post-judgment motion for attorney fees have concluded that the issue of attorney fees involved a collateral matter, and thus the matter was appropriately considered by the trial court after an appeal was filed.

Id.

Under these cases, this Court retains limited jurisdiction over matters that are independent of, collateral or supplemental to, the issues presented in the State's interlocutory appeal. As the Court analyzes the arguments presented in the briefing, it will indicate whether the issues involved are collateral to or inextricably bound up with the merits of the issues on appeal, thus determining the scope of this Court's jurisdiction.

FACTUAL BACKGROUND

The plaintiff has proffered evidence in the form of Declarations submitted by the following individuals: (1) David Turok, M.D., the plaintiff's Director of Surgical Services; (2) Annabel Sheinberg, the plaintiff's Vice President of External Affairs and (3) Colleen M. Heflin, a Professor of Public Administration and International Affairs at the Maxwell School of Citizenship and Public Affairs at Syracuse University.

Dr. Turok has submitted dual Declarations, both of which were considered by the Court. The Court will refer to Dr. Turok's first Declaration, submitted in support of the plaintiff's Motion for TRO, as "First Turok Decl." His second Declaration, submitted in support of the Second Motion, will be referred to as "Second Turok Decl."

Further, the Court again considered the Brief of Amici Curiae ("Brief") filed by the American College of Obstetricians and Gynecologists, the American Medical Association, and the Society for Maternal-Fetal Medicine. This Brief was filed in connection with the plaintiff's first Motion for Preliminary Injunction. The "[a]mici curiae are leading medical societies representing physicians, nurses, and other clinicians who serve patients in Utah and nationwide, and whose policies represent the education, training, and experience of the vast majority of clinicians in this country." (Brief at p. 2). The Brief discusses a number of medical articles and other authoritative medical literature which are pertinent to the Clinic Ban.

The State has not proffered any evidence to rebut the substance of the plaintiff's evidence, relying primarily on conclusory allegations and the legal argument that the Utah Constitution does not establish a right to abortion.

The unrebutted evidence presented by the plaintiff is summarized as follows[1]:

1. Through its physicians licensed to practice in Utah, the plaintiff provides abortion at three health centers. Second Turok Decl. ¶ 14. The plaintiff is one of only two outpatient abortion providers in Utah. *Id.* ¶ 63.
2. Each of the plaintiff's three health centers is licensed as an "abortion clinic" under Utah law. Second Turok Decl. ¶ 14. Decl. of Annabel Sheinberg in Supp. of Pl.'s Second Mot. for Prelim. Inj. ("Sheinberg Decl.") ¶ 4.
3. The plaintiff and one other abortion clinic currently provide more than 95 percent of Utah abortions. Second Turok Decl. ¶7
4. The plaintiff is currently providing abortions up to 18 weeks from the first day of the patient's last menstrual period confirmed by ultrasound and as permitted by Utah's 18-Week Ban. Second Turok Decl. ¶15
5. Abortions at the plaintiff's clinics are performed by board-certified physicians licensed to practice in Utah. Second Turok Decl. ¶16
6. The various methods of abortion provided by the plaintiff are simple, straightforward medical treatments that typically take no more than 10 minutes, have an extremely low complication rate, are almost always provided in outpatient, office-based settings, and,

[1] Quotations and citations omitted.

unlike some other office-based procedures such as vasectomies, involve no incisions. Second Turok Decl. ¶18.

7. Abortion is one of the safest procedures in contemporary medical practice and is safely and routinely provided in outpatient settings in countries around the world. Second Turok Decl. ¶32.

8. Major complications, defined as those requiring hospital admission, surgery, or blood transfusion, occur in just 0.23 percent of abortions performed in outpatient, office-based settings. Second Turok Decl. ¶34.

9. Abortion compares favorably, with a markedly lower complication rate, to other procedures routinely performed in outpatient, office-based settings, including vasectomies. Second Turok Decl. ¶35.

10. There is no medical reason to require abortion to take place in hospitals and not abortion clinics. In Utah, as is done throughout the country, legal abortions are safely and routinely performed in doctors' offices and outpatient health center settings. Second Turok Decl. ¶41

11. No scientific evidence indicates abortions performed in a hospital are safer than those performed in an appropriate outpatient, office-based setting. To the contrary, as is true for nearly every medical procedure, fewer complications are seen in settings that perform higher volumes of the same procedure, making abortion clinics like the plaintiff's safer than hospitals for most abortion patients. Second Turok Decl. ¶43.

12. Published research supports the conclusion that abortion is safest when performed by clinicians who have lots of experience providing abortions. Second Turok Decl. ¶44.

13. The plaintiff's physicians have low abortion complication rates and superb safety records. Second Turok Decl. ¶48.

14. National medical experts such as the National Academies of Sciences, Engineering, and Medicine, the American College of Obstetricians and Gynecologists, and the American Public Health Association reject the notion that abortions should be performed in hospitals. Id.

15. Abortion is rarely performed in hospital settings. Both the University of Utah Hospital and Intermountain Healthcare, Utah's largest hospital system, only provide abortion as a result of maternal medical conditions, grave or lethal fetal anomalies, or rape or incest, and follow internal rules against providing abortion in all other circumstances. Induction abortion, the method of abortion most appropriately performed in a hospital setting, is only performed at the University of Utah Hospital once every few weeks. Second Turok Decl. ¶49.

16. In Utah, procedures with risks similar to the risks associated with abortion— including endometrial biopsy, colposcopy, hysteroscopy (scoping of the cervix and uterus), Loop Electrosurgical Excision Procedure ("LEEP") (removing pre-cancerous cells from the cervix), and dilation and curettage for miscarriage management, which, from a clinical perspective, is the same procedure as aspiration abortion—are routinely performed in outpatient clinics and physicians' offices rather than in hospitals. Second Turok Decl. ¶54.

17. Procedures with higher complication rates than abortion are routinely, and without controversy, performed in outpatient, office-based settings throughout Utah. These include colonoscopies, wisdom teeth extractions, tonsillectomies, and vasectomies. Second Turok Decl. ¶55.

18. Even in the rare event that an abortion complication arises during the procedure, it can nearly always be safely and appropriately managed in an outpatient office setting. For example, most cases of hemorrhage (the technical term for bleeding) are managed in the

clinical setting with uterotonic medications, like misoprostol, that cause uterine contractions and reduce bleeding and with uterine massage. Second Turok Decl. ¶57.

19. Most cases of cervical laceration are managed in the clinic setting either with Monsel's Solution or suture. Cases of incomplete abortion are generally managed through repeat aspiration or medication. In the exceedingly rare event that a higher level of care is needed to manage complications, patients are safely stabilized and transferred to a hospital, sometimes even more quickly than they would be transferred between departments within the same hospital system. Second Turok Decl. ¶¶57–9.

20. Dr. Turok is not aware of any detailed or coordinated plan by a Utah hospital to expand its capacity to provide abortions to more patients in the event HB 467 takes effect. Second Turok Decl. ¶67.

21. In practice, the Clinic Ban will drive most people seeking abortion out of state or force them to remain pregnant and ultimately give birth against their will. Patients unable to immediately receive abortion care at a Utah hospital as a result of hospital policies and capacity will be forced to delay receiving abortion care in Utah while they wait for an appointment at a Utah hospital (if they found a hospital willing to provide their procedure) or, more likely, travel out of state to obtain an abortion elsewhere. In either scenario, the abortion will almost certainly be performed later in pregnancy than if the patient had access to care at the plaintiff's clinics. Second Turok Decl. ¶72.

22. HB 467 only permits facilities licensed as "hospitals," not abortion clinics, to perform abortions as of May 3, 2023. Under HB 467's expanded definition of "hospital," PPAU's licensed abortion clinics should qualify as "hospitals" and therefore should be able to continue performing abortions. But DHHS has adopted an interpretation of HB 467 that

prevents the plaintiff from qualifying as a "hospital" notwithstanding the language of HB 467. Sheinberg Decl. ¶7.

23. Because HB 467's expanded definition of "hospital" appears to apply to plaintiff's licensed abortion clinics, on March 20, 2023, Ms. Sheinberg met with the director of the DHHS Division of Licensing and Background Checks and asked what the plaintiff's licensed abortion clinics would need to do to be designated as "hospitals" under HB 467, such that they could remain licensed and continue providing abortion after May 2, 2023, despite HB 467. Sheinberg Decl. ¶15.
24. At that meeting, the DHHS licensing division director informed Ms. Sheinberg that only licensed general hospitals and satellite facilities operating under a general hospital's license would be eligible for HB 467's expanded "hospital" definition. Sheinberg Decl. ¶16.
25. The next day, by email, Ms. Sheinberg asked the DHHS licensing division director to confirm this understanding. She responded on March 27, 2023, confirming that the plaintiff's health centers would either have to be licensed as general hospitals or have to operate as satellite facilities under a general hospital license in order to continue providing abortion after May 2, 2023. Sheinberg Decl. ¶17.

LEGAL ANALYSIS

The plaintiff "urges the Court to enter a preliminary injunction against the Clinic Ban before its May 3, 2023, effective date, to preserve the status quo currently maintained by the preliminary injunction against the Trigger Ban while it addresses the significant constitutional violations concurrently inflicted by the two laws." (Second Motion at p. 2). In addressing the

interplay between the Trigger Ban and the Clinic Ban, the plaintiff frames the scope of its Second Motion as follows:

> But because amendments to the Trigger Ban have no operative effect while the underlying Trigger Ban prohibition remains enjoined by this Court, this motion seeks preliminary injunctive relief against the Clinic Ban only to the extent that it requires abortions before 18 weeks LMP to be performed in a "hospital" as defined by HB 467; prohibits licensed "abortion clinics" from providing abortions before 18 weeks LMP; and eliminates "abortion clinics" as a facility licensure category.

(Second Motion at p. 2).

Under Rule 65A(e) of the Utah Rules of Civil Procedure, as amended and effective February 14, 2023, a preliminary injunction may issue only upon a showing by the applicant that:

> (1) there is a substantial likelihood that the applicant will prevail on the merits of the underlying claim;
>
> (2) the applicant will suffer irreparable harm unless the order or injunction issues;
>
> (3) the threatened injury to the applicant outweighs whatever damage the proposed order or injunction may cause the party restrained or enjoined; and
>
> (4) the order or injunction, if issued, would not be adverse to the public interest.

Utah R. Civ. P. 65A(e).

The Court begins its analysis with the "substantial likelihood" of prevailing factor. The plaintiff argues that it is substantially likely to prevail on the merits of its claims that the Clinic Ban violates the Utah Constitution. The plaintiff breaks out its arguments as follows: First, the plaintiff argues that the Clinic Ban violates the Utah Constitution's Uniform Operation of the Laws Clause ("UOL Clause"). Next, echoing the arguments raised in its initial Motion for a Preliminary Injunction, the plaintiff argues that the Clinic Ban functionally eliminates access to abortion in violation of the Utah Constitution. Incorporating by reference the briefing and evidence submitted in support of this initial Motion pertaining to the Trigger Ban, the plaintiff argues that the Clinic

Ban similarly violates constitutional rights such as the right to determine one's own family composition, a right to equal protection and the right to bodily integrity. (Second Motion at p. 20).

Before commencing its substantive analysis, the Court must first address the jurisdictional implications of the plaintiff's second argument. Specifically, this argument is inextricably bound up with the merits of the issues on appeal and is beyond the scope of this Court's jurisdiction. So too is the State's argument in Opposition that the Court must assess, as a threshold legal matter, whether the Utah Constitution establishes a right to an abortion. Where the State's Petition for interlocutory appeal specifically challenges the granting of the preliminary injunction of the Trigger Ban by arguing that plaintiff cannot establish an implied state constitutional right to abortion, this "threshold" question posed in the State's Opposition clearly interferes with the issues on appeal and thus, the Court is divested of jurisdiction to consider it.

In contrast, the plaintiff's argument that the Clinic Ban creates a classification between two types of health care facilities, in violation of the UOL Clause, presents a new issue which is collateral to and separate from the issues on appeal. However, as will be discussed below, the level of scrutiny to be applied to the Clinic Ban under the UOL Clause also has jurisdictional implications.

With these jurisdictional parameters in mind, the Court addresses whether the plaintiff is substantially likely to prevail on the merits of its claim that the Clinic Ban violates the UOL Clause. The UOL Clause provides: "All laws of a general nature shall have a uniform operation." Utah Const. art. I, § 24. "The modern formulation of uniform operation is different [from historical understanding]. It treats the requirement of uniform operation as a state-law counterpart to the federal Equal Protection Clause." State v. Canton, 2013 UT 44, ¶ 35, 308 P.3d 517. Further, in Merrill v. Utah Labor Comm'n, 2009 UT 26, ¶ 7, 223 P.3d 1089, the Utah Supreme Court observed:

> The uniform operation of laws provision and the Equal Protection clause address similar concerns in determining the constitutionality of a statute. Both have as their basic concept the settled concern of the law that the legislature be restrained from the fundamentally unfair practice of creating classifications that result in different treatment being given [to] persons who are, in fact, similarly situated. The two provisions are substantially parallel. Accordingly, because our review [of] legislative classifications under article I, section 24 [of the Utah Constitution] ... is at least as exacting and, in some circumstances, more rigorous than the standard applied under the [Fourteenth Amendment of the] federal constitution, we evaluate the constitutionality of the statute under Utah law.

Id. (alterations in original) (internal quotation marks omitted).

"Our cases have established a three-step framework for assessing whether a legislative classification runs afoul of the modern formulation of uniform operation. We ask '(1) whether the statute creates any classifications; (2) whether the classifications impose any disparate treatment on persons similarly situated; and (3) if there is disparate treatment, whether the legislature had any reasonable objective that warrants the disparity.'" Taylorsville City v. Mitchell, 466 P.3d 148, 155 (Utah 2020) (citing Count My Vote, Inc. v. Cox, 2019 UT 60, ¶ 29, 452 P.3d 1109 (citation omitted)). The "last. step incorporates varying standards of scrutiny" under which "most classifications are presumptively permissible, and thus subject only to rational basis review." Id. (citing Canton, 2013 UT at ¶ 36) (citation and internal quotation marks omitted). "Heightened scrutiny applies only if a classification implicates a fundamental right or draws a distinction based on a 'suspect class' such as race or gender. Otherwise, the standard is rational basis—a low bar requiring only a 'reasonable objective' for any disparate treatment." Id. (citations omitted).

Under this three-step framework, the Court finds that the plaintiff is likely to succeed in arguing that the Clinic Ban creates classifications between licensed abortion clinics and hospitals which impose disparate treatment of health care facilities without any reasonable objective.

First, the plaintiff has persuasively argued that the Clinic Ban creates a classification between hospitals and abortion clinics with respect to where an abortion may be performed. As the Second Motion points out:

> Under the Clinic Ban, '[a]n abortion may be performed only in a hospital, unless it is necessary to perform the abortion in another location due to a medical emergency.' HB 467 §17 (amending Utah Code Ann. § 76-7-302(3)). Meanwhile, 'a licensed abortion clinic may not perform an abortion in violation of any provision of state law,' including this hospital requirement. Id. §2 (amending Utah Code Ann. § 26-21-6.5(1)(b)). The Clinic Ban requires DHHS to revoke the license of any health care facility other than a hospital that provides an abortion. Id. § 5 (amending Utah Code Ann. § 26-21-11(2)).

(Second Motion at pp. 14-15). The Court finds that the plaintiff is likely to succeed on the merits of its argument that the new statutory scheme, where one class of regulated abortion providers is required to close while another class of providers is allowed to operate, constitutes a "straightforward classification triggering scrutiny under the UOL Clause." (Reply at pp. 6-7).

The Court is not persuaded by the State's argument that the statute eliminates a classification of separate clinics rather than creating one. The Court looks at the effect of the new statute at the time of its enactment, rather than ignoring the status quo ante. The new statute recognizes the different classifications of providers, and then treats the classes differently. If the statute seeks to eliminate one kind of provider, that is also a classification and the extreme in disparate treatment, as discussed below.

Next, the plaintiff is likely to succeed on its argument that the classification between licensed abortion clinics and "hospitals" constitutes disparate treatment of health care facilities that are similarly situated for purposes of abortion safety. (Second Motion at p. 15). Indeed, the Clinic Ban's expanded definition of "hospital" to include certain outpatient clinics constitutes an implicit recognition that these health care facilities are indeed similarly situated, but licensed abortion clinics are singled out and treated differently. Sheinberg Decl. ¶¶15-17. Yet, as the

plaintiff observes, the factual record confirms that the "plaintiff provides abortion via physicians who are credentialed to provide those same methods of abortion at a hospital, and . . . those methods of abortion are as safe at an outpatient clinic like [the plaintiff's] licensed abortion clinics as they would be if provided at a hospital." (Second Motion at p. 16).

The State argues that abortion clinics and "hospitals," even under the expanded definition, are not similarly situated because they are subject to differing standards of care and provide differing levels of care. (Opp. at p. 58). But merely reciting the differing licensure requirements for hospitals and clinics does not explain how those differences affect the provision of abortion services in the first 18 weeks. Based on plaintiff's unrebutted evidence, in terms of the treatment provided in performing abortion as a routine and common medical procedure and considering patient health and safety, these health care facilities provide comparable care and can be considered similarly situated. Second Turok Decl. ¶¶32-33.

Finally, the Court turns to the third step of the uniform operation analysis. In this regard, there is an issue as to the level of review which the Legislature's classification is subject to. Given the jurisdictional limitations discussed above, the Court cannot reach the inquiry of whether the classification implicates a fundamental right which would require a heightened scrutiny analysis.

During oral argument, counsel for the plaintiff suggested that while being mindful of jurisdictional limitations, the Court could still apply an intermediate level of scrutiny. Counsel cited Est. of Scheller v. Pessetto, 783 P.2d 70, 76–77 (Utah Ct. App. 1989), in support of this proposition. In Scheller, the court indicated that "[s]tatutory schemes which are gender-based are examined on an intermediate level under the fourteenth amendment. Gender-based classifications must serve important governmental objectives and must be substantially related to achieving those

objectives in order to withstand judicial scrutiny under the equal protection clause." Id. at 72 (citations omitted).

In its Second Motion, the plaintiff argues "[t]he analysis first asks whether a law results in either disparate treatment or disparate impact on women as compared to men, or whether it disproportionately impairs women's ability to fully enjoy their privileges and civil, political, and religious rights." (Second Motion at p. 25). The factual record supports that the Clinic Ban poses an inherent disadvantage to women by severely restricting their accessibility to abortion care as compared to men, who can obtain vasectomies, for instance, a procedure with higher complication rates than abortion which, as Dr. Turok attests, are performed in outpatient, office-based settings throughout Utah. Second Turok Decl. ¶35.

While this is a persuasive argument, the Court is primarily focused on the classification and disparate treatment of health care facilities that are similarly situated under the UOL Clause. The Second Motion does not offer a fully developed argument that the Clinic Ban involves suspect or gender-based classification under the Equal Protection Clause. For that reason, the Court will not reach the merits of this issue at this juncture, but will instead apply a "rational basis" review for the uniform operation test. Salt Lake City Corp. v. Utah Inland Port Auth., 2022 UT 27, 524 P.3d 573, 578. And in this case and on the present record, that review is enough to likely invalidate the law under the UOL Clause.

Under the rational basis standard, a "classification is reasonably related to its legitimate objectives" if "the classification is reasonable," "the objectives of the legislative action are legitimate," and "there is a reasonable relationship between the classification and the legislative purpose." State v. Outzen, 2017 UT 30, ¶ 20, 408 P.3d 334 (citations omitted). "The first step in the test is to determine if the classification made in the statute is reasonable. In deciding if a

classification is reasonable, we have considered: (1) if there is a greater burden on one class as opposed to another without a reason; (2) if the statute results in unfair discrimination; (3) if the statute creates a classification that is arbitrary or unreasonable; or (4) if the statute singles out similarly situated people or groups without justification." Merrill, 2009 UT at ¶10 (citation omitted).

The Court finds that the plaintiff has made a strong showing of its likelihood to succeed on its argument that the Legislature was not reasonable in imposing different burdens on licensed abortion clinics then hospitals because this classification singles out the plaintiff and other licensed abortion clinics without a rational basis. The Clinic Ban places a greater burden on licensed abortion clinics by criminalizing abortions performed in such clinics despite the unrebutted evidence that abortions performed in an outpatient clinic are equally as safe as those performed in a hospital. The plaintiff has advanced a factual record supporting the conclusion that the Legislature's classification is unreasonable and appears to single out abortion clinics without any justification.

Indeed, the Legislature's objective in enacting the Clinic Ban is nebulous. In its Opposition, the State asserts that the Legislature's "reasonable objective" was "improving the safety for both mother and unborn child in the provision of abortion, especially in the realm of surgical services and emergency care." (Opp. at p. 52). Yet, the plaintiff explains that "HB 467's sponsors did not claim that the Clinic Ban was intended to promote a government interest in patient safety and did not identify any evidence that abortions provided in general hospitals are safer than the same method of abortion provided in an outpatient clinic." (Second Motion at p. 17). The plaintiff points to the legislative debate where HB 467's House sponsor indicated that the Clinic Ban would

still allow some clinics to continue providing abortion— just not the plaintiff's licensed abortion clinics:

> I actually don't think that that is what this bill does . . . the language about hospitals is the existing language. There is a deletion of Planned Parenthood—or I'm sorry, of abortion clinics. . . . This [bill] doesn't preclude an individual to visit their doctor in a clinic environment and receive a prescription . . . . We are certainly not pigeonholing patients into one type of service.

(Second Motion at p. 18) (citation omitted).

Ultimately, the plaintiff is likely to succeed in arguing that the Clinic Ban fails even under the rational basis test because the classifications established under the Clinic Ban are not reasonable and appear to directly and discriminatorily target the plaintiff. "The Clinic Ban's distinction between licensed abortion clinics and hospitals fails to promote patient safety, and indeed lacks a rational relationship to any government interest other than preventing abortion clinics from providing abortion—and that interest is not a legitimate one." (Second Motion at p. 19).

Based on the foregoing, the Court finds that the plaintiff is substantially likely to prevail on the merits of its claim that the Clinic Ban violates the Uniform Operation of Laws Clause. The Court further finds that the plaintiff has advanced sufficient evidence to also satisfy the remaining three preliminary injunction requirements.

On the irreparable harm prong of Rule 65A, Dr. Turok's dual Declarations along with Ms. Heflin's Declaration and the Brief all speak to and provide proof of the irreparable harm that Utahns seeking an abortion will suffer if the Clinic Ban goes into effect. The plaintiff has articulated the reasons for and the likelihood of the injury to its patients if they are unable to access time-sensitive abortion care:

> In short, the Clinic Ban will force many Utahns seeking an abortion to carry pregnancies to term against their will, with all of the physical, emotional, and financial costs that entails.

> First Turok Decl. ¶ 5; see also id. ¶¶ 21–43; see also Heflin Decl. ¶¶ 41–42. Some Utahns will inevitably turn to self-managed abortion by buying pills or other items online and outside the U.S. healthcare system, which may in some cases be unsafe, ineffective, and/or subject the person to criminal investigation or prosecution. First Turok Decl. ¶ 22. And even Utahns who are ultimately able to obtain an abortion—either because they have been able to scrape together the resources to travel out of state or because they are able to obtain an abortion at a Utah hospital—will suffer irreparable harm. Id. ¶¶ 44–54; see also Heflin Decl. ¶¶ 34–40. Specifically, patients who obtain abortions in Utah hospitals will be forced to bear dramatically increased costs, loss of confidentiality, greater medical risk, scheduling delays and the associated increases in cost and medical risk, and a much greater investment of total appointment time compared to the status quo. Second Turok Decl. ¶ 69.

(Second Motion at p. 33).

Presently, abortions are rarely performed in hospital settings and Dr. Turok is not aware of any detailed or coordinated plan by a Utah hospital to expand its capacity to provide abortions to more patients in the event HB 467 takes effect. Second Turok Decl. ¶¶49, 67. There is an absence of evidence from the State to counter Dr. Turok's statement that "the Clinic Ban will drive most people seeking abortion out of state or force them to remain pregnant and ultimately give birth against their will. Patients unable to immediately receive abortion care at a Utah hospital as a result of hospital policies and capacity will be forced to delay receiving abortion care in Utah while they wait for an appointment at a Utah hospital (if they found a hospital willing to provide their procedure) or, more likely, travel out of state to obtain an abortion elsewhere. In either scenario, the abortion will almost certainly be performed later in pregnancy than if the patient had access to care at the plaintiff's clinics." Second Turok Decl. ¶72.

Next, the evidence clearly indicates that the threatened injury to the plaintiff and its patients outweighs whatever damage the State would suffer if the Clinic Ban is allowed to go into effect, rather than preserving the status quo. The plaintiff has persuasively argued that "[t]he balance of equities and public interest thus weigh decisively in [the plaintiff's] favor." (Second Motion at p. 35). Further, given the absence of evidence from the State, there is nothing before the Court to

indicate that an injunction would be adverse to the public interest. In terms of the State's and the public's interest, the plaintiff correctly observes that "Utah already bans nearly all abortions after 18 weeks of pregnancy, including in cases of rape or incest. See Utah Code Ann. § 76-7-302(2) (as amended by HB 467). An injunction against the Clinic Ban would not prevent Utah from enforcing this ban on abortions after 18 weeks' gestation." Id.

Accordingly, the Court grants the plaintiff's Second Motion and enters a preliminary injunction that enjoins and restrains the State from administering and enforcing HB 467 in so far as it requires abortions before 18 weeks LMP to be performed in a "hospital" as defined by HB 467; prohibits licensed "abortion clinics" from providing abortions before 18 weeks LMP; and eliminates "abortion clinics" as a facility licensure category or imposes penalties with respect to any such abortion provided during the pendency of this injunction. The injunction is issued without the posting of security.

Plaintiff to submit a comprehensive Order.

Dated this 2nd day of May, 2023.

ANDREW H. STONE
DISTRICT COURT JUDGE

STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE CITY

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 220903886 by the method and on the date specified.

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Date: 05/02/2023

/s/ ALEXANDRA HANSON

Signature