IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

LITTLE ROCK FAMILY PLANNING SERVICES, *et al.*, Plaintiffs, v. LARRY JEGLEY, *et al.*, Defendants.	CIVIL ACTION Case No. 4:21-cv-00453-KGB

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION[1]

In clear violation of nearly half a century of unbroken Supreme Court precedent, Arkansas has enacted a near-total ban on abortion. The Ban[2] was passed and signed into law with full knowledge that it is unconstitutional under *Roe v. Wade* and its progeny, which unequivocally hold that a State may not ban abortion before the point of fetal viability. Such a direct attack on the right to abortion is outrageous and unlawful, but hardly surprising. The Ban is simply the latest and most blatant effort in Arkansas's long-running campaign to eliminate legal abortion in the state. It is an affront to the Constitution, and to the dignity and health of Arkansans, and that is why Plaintiffs move this Court for emergency relief.

[1] Unless otherwise indicated, all emphases are added and all internal citations and quotations omitted.

[2] A true and correct copy of the Ban is attached as Exhibit A to Plaintiffs' Verified Complaint for Declaratory & Injunctive Relief, ECF No. 1 ("Compl."). The Ban was enacted as Act 309 of the Regular Session, 2021, and is intended to be codified at ARK. CODE ANN. §§ 5-61-401–404.

The Supreme Court has long recognized and repeatedly affirmed that the right to abortion involves one of "the most intimate and personal choices a person may make in a lifetime" and is essential to a person's dignity, equality, and ability to shape a meaningful life—freedoms that lie at the core of the protections guaranteed by the Due Process Clause. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992). By depriving people seeking abortion in Arkansas of the most basic control over their bodies, their health, and their futures, the Ban forces them to accede to the State's unitary and unbending vision for their lives, as opposed to their own. Both the Supreme Court and the Eighth Circuit have held that the Due Process Clause prohibits such a result.

Moreover, the Ban is a particularly targeted attack on the equality, dignity, autonomy, and bodily integrity of Black Arkansans, rural Arkansans, and Arkansans with the fewest means. These communities already face serious inequities in access to medical care and higher risks of death from pregnancy-related causes. Rather than acting to remedy these inequalities, put an end to these preventable deaths, and respect Arkansans' reproductive-health-care decisions, the State seeks to strip Arkansans of the ability to protect their own health and well-being, "define their views of themselves and their places in society," and "participate equally in the economic and social life of the Nation." *Id.* at 856.

The Ban is currently scheduled to take effect on July 28, 2021. Absent an order from this Court, it will inflict on Plaintiffs' patients significant and irreparable harm for which there is no adequate remedy at law. Accordingly, Plaintiffs respectfully request that this Court enjoin Defendants, their officers, agents, servants, employees, attorneys, successors, and any persons in active concert or participation with them from enforcing the Ban.

STATEMENT OF FACTS[3]

Statutory Framework

The Ban makes it a crime for any person to "purposely perform or attempt to perform an abortion" at any point in pregnancy.[4] Act 309, p. 4, l. 26–28. Its sole exception permits an abortion "to save the life of a pregnant woman"[5] in a "medical emergency." *Id.* at p. 4, l. 18–22, 28. The Ban's extremely narrow definition of a "medical emergency" encompasses only "a condition in which an abortion is necessary to preserve the life of a pregnant woman whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself." *Id.* at p. 4, l. 18–22.

The Ban mandates the imposition of steep penalties for non-compliance. Providing or attempting to provide an abortion in violation of the Ban constitutes an unclassified felony, which is punishable by up to ten years in prison and/or a fine of up to $100,000. *See id.* at p. 4, l. 29–31. Moreover, any physician who provides or attempts to provide an abortion in violation of

[3] The factual allegations in Plaintiffs' Verified Complaint are supported by sworn declarations attached to the Complaint and by the literature citations contained therein.

[4] The Ban excludes from the definition of "abortion" the termination of a pregnancy where the purpose is to, *inter alia*, "remove a dead [embryo/fetus] caused by spontaneous abortion." Act 309, p. 4, l. 9–14. However, in some cases of "spontaneous abortion" (also called miscarriage) embryonic/fetal demise will not have occurred at the point the patient is actively miscarrying. While the standard of care in such cases is to offer the patient medical treatment to empty the uterus, the Ban would prohibit physicians from providing that care, thereby putting those patients at serious risk of suffering physical, mental, and emotional harm. *See* Compl. ¶¶ 51–53.

[5] The statute refers to the "pregnant woman," but Plaintiffs recognize that people of other gender identities, including transgender men, gender non-binary individuals, and gender-diverse individuals, may also become pregnant and seek abortion services, and thus would also suffer irreparable harm under the Ban.

the Ban may also be subject to medical license revocation, suspension, probation, fines and/or other disciplinary action. *See* ARK. CODE ANN. §§ 17-95-409(a), 410(e)(3). Finally, an abortion clinic wherein an abortion is provided or attempted to be provided in violation of the Ban may also be subject to license denial, suspension or revocation, and/or financial penalties. *See* ARK. CODE ANN. §§ 20-9-302(b)(3)(A), 20-7-101(b)(1)(A).

The Ban is currently scheduled to take effect on July 28, 2021.[6] On that date, absent court-ordered relief, Plaintiffs will be forced to stop providing abortions or otherwise face severe criminal and other penalties.

Abortion in Arkansas

Plaintiffs Little Rock Family Planning Services ("LRFP") and Planned Parenthood of Arkansas & Eastern Oklahoma, d/b/a Planned Parenthood Great Plains ("PPAEO"), operate the only two outpatient clinics currently providing abortions in Arkansas. Compl. ¶ 27. Plaintiff Janet Cathey, M.D., provides abortion care in Arkansas. *Id.* ¶ 16.

Legal abortion is one of the safest medical procedures in the United States and is far safer than continuing a pregnancy through to childbirth. *Id.* ¶ 28. Abortion is also extremely common—approximately one in four women in this country will have an abortion by age forty-five. *Id.* ¶ 29.

The decision to terminate a pregnancy is motivated by a complex constellation of diverse,

[6] Under the Arkansas Constitution, Acts of the General Assembly without an emergency clause or specified effective date, like the Ban, become effective ninety days after adjournment of the legislative session at which they were enacted. However, the 93rd General Assembly did not adjourn the 2021 session; instead, the legislature took extended recess on April 28, 2021. Attorney General Rutledge has since opined that, provided the General Assembly recesses for longer than 90 days, all Acts passed before April 28, 2021 that do not contain an emergency clause or specified effective date shall become effective on July 28, 2021. *See* Ark. Att'y Gen. Op. No. 2021-029 (May 20, 2021).

interrelated, and deeply personal factors that are closely tied to each individual person's values, culture and religion, health and reproductive history, family situation and support system, educational or career goals, and resources and financial stability. *Id.* ¶¶ 30–35. Some people have abortions because they conclude that it is not the right time in their lives to have a child given their age, desire to pursue their education or career, or because they feel they lack the necessary financial resources or level of partner or familial support or stability. *Id.* ¶ 30. Some people seek abortions to preserve their life or health; some because they have become pregnant as a result of rape or incest; and others because they decide not to have children at all. *Id.* ¶ 32. Some people who have suffered trauma, such as sexual assault or domestic violence, may be concerned that pregnancy, childbirth, and/or an additional child may exacerbate already extremely difficult and dangerous situations for them and put them at risk of greater sexual or physical violence or worse. *Id.* ¶ 33. Still others may decide to have an abortion because of an indication or diagnosis of a fetal medical condition or anomaly; some families simply do not feel that they have financial, medical, educational, or emotional resources to care for a child with a disability or to do so alongside providing for the children they already have. *Id.* ¶ 34. Moreover, a majority of people having abortions in the United States—and 65% of women who obtained an abortion in Arkansas in 2019—have had at least one previous birth. *Id.* ¶ 31. These people may be struggling to provide adequately for existing children and may be concerned about their ability to make ends meet if they add another child to their family. *Id.*

If permitted to take effect, the Ban will make it impossible for almost all people to access legal abortion in Arkansas and thereby force Plaintiffs' patients to remain pregnant against their will. *Id.* ¶¶ 36, 46. This will have a devastating impact on those individuals' health, well-being, and lives, and will disproportionately harm Black Arkansans, rural Arkansans, and low-income

Arkansans, who have the least resources to navigate the harms imposed by the Ban and for whom forced pregnancy is particularly dangerous. *Id.* ¶¶ 47–64.

Arkansas's Harassing and Unsuccessful Attempts to Eliminate Abortion

Arkansas's enactment of the Ban marks the zenith of its decade-long campaign to eliminate legal abortion in the state. In addition to enacting numerous laws aimed at obstructing access to and further stigmatizing abortion,[7] Arkansas has directly flouted Supreme Court precedent on multiple occasions by attempting to ban abortion outright. *See* Compl. ¶¶ 38–41.

For example, in 2013, the legislature attempted to ban abortion starting at twelve weeks of pregnancy, as measured by the first day of a patient's last menstrual period ("LMP"). *See* ARK. CODE ANN. § 20-16-1304. That ban was found unconstitutional. *Edwards v. Beck*, 8 F. Supp. 3d 1091, 1097, 1101 (E.D. Ark. 2014), *aff'd*, 786 F.3d 1113 (8th Cir. 2015).

Then, in 2017, Arkansas banned the safest and most common method of second-trimester abortion, and the only second-trimester method available in the outpatient setting. ARK. CODE ANN. §§ 20-16-1801–1807. Once again, the law was enjoined as unconstitutional. *Hopkins v. Jegley*, No. 4:17-CV-00404-KGB, 2021 WL 41927, at *70–71 (E.D. Ark. Jan. 5, 2021), *appeal*

[7] *See, e.g.*, ARK. CODE ANN. § 20-16-1703 (extending mandatory waiting period between doctor providing state-mandated information to patient seeking abortion and provision of abortion from forty-eight to seventy-two hours and maintaining existing requirement that patient receive the information in-person, necessitating two trips to the clinic); *id.* § 23-79-156 (banning health-insurance policies offered in the state health-insurance exchange from including coverage for abortion, with limited exceptions); *id.* § 20-16-606 (prohibiting qualified physicians from providing abortion care unless they are board-certified or -eligible in obstetrics and gynecology); *id.* §§ 20-17-801, 802 (imposing burdensome and confusing requirements regarding the disposal of fetal tissue that require patients' partners or other family members be notified of their abortion). Moreover, the Ban challenged here is one of the twenty abortion restrictions that the Arkansas legislature passed in *this session alone*, tying Louisiana's 1978 record for most restrictions passed in a single year. *See* Elizabeth Nash & Lauren Cross, *2021 Is on Track to Become the Most Devastating Antiabortion State Legislative Session in Decades*, GUTTMACHER INSTITUTE, (Apr. 30, 2021), https://www.guttmacher.org/article/2021/04/2021-track-become-most-devastating-antiabortion-state-legislative-session-decades.

filed, No. 21-1068 (8th Cir. Jan. 11, 2021).

In 2019, Arkansas enacted *two laws* attempting to ban abortion prior to viability: a ban on abortion starting at eighteen weeks LMP and another ban based on a person's reason for seeking care. *See* ARK. CODE ANN. § 20-16-2004; *id.* § 20-16-2103. This Court's preliminary injunction barring enforcement of both bans was affirmed by the Eighth Circuit earlier this year. *See Little Rock Fam. Plan. Servs. v. Rutledge*, 397 F. Supp. 3d 1213 (E.D. Ark. 2019) (granting preliminary injunction), *aff'd in relevant part*, 984 F.3d 682 (8th Cir. 2021).

The Ban is Arkansas's latest and most direct effort to deny Arkansans their fundamental right to terminate a pregnancy before viability and to pursue their own values, beliefs, visions, and opportunities for their futures, to the detriment of their health and well-being. Compl. ¶ 43.

ARGUMENT

Plaintiffs seek a temporary restraining order and/or preliminary injunction to prevent the Ban from inflicting constitutional, medical, emotional, psychological, and other irreparable harms on their patients. In a motion for emergency relief, the district court considers the (1) probability that the movant will succeed on the merits; (2) threat of irreparable harm; (3) balance of equities; and (4) public interest. *See Grasso Enters., L.L.C. v. Express Scripts, Inc.*, 809 F.3d 1033, 1036 n.2 (8th Cir. 2016) (citing *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc)). In the Eighth Circuit, the same standards apply to requests for temporary restraining orders and preliminary injunctions. *See S.B. McLaughlin & Co. v. Tudor Oaks Condo. Project*, 877 F.2d 707, 708 (8th Cir. 1989).

Plaintiffs readily satisfy the four-factor inquiry. The Ban expressly prohibits abortions at all pre-viable points in pregnancy. For nearly five decades, the Supreme Court has repeatedly and unequivocally held that under the Due Process Clause of the Fourteenth Amendment, a State

may not ban abortion at any point before viability. *See, e.g.*, *Roe*, 410 U.S. at 153–54, 164–65; *Casey*, 505 U.S. at 879; *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016); *June Med. Servs. L. L. C. v. Russo*, 140 S. Ct. 2103, 2135 (2020) (Roberts, J., concurring). The Eighth Circuit has repeatedly echoed these binding authorities in invalidating state bans on abortion. *See Reprod. Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Parson*, No. 19-2882, 2021 WL 2345256, at *3 (8th Cir. June 9, 2021) (invalidating Missouri's ban on abortion starting at eight weeks (or later), and ban on abortion based on patient's reason); *Little Rock Fam. Plan. Servs. v. Rutledge*, 984 F.3d 682, 687 (8th Cir. 2021) (invalidating Arkansas's eighteen-week ban and ban on abortion based on patient's reason), *petition for cert. filed*, No. 20-1434 (U.S. Apr. 13, 2021); *Edwards v. Beck*, 786 F.3d 1113, 1117 (8th Cir. 2015) (invalidating Arkansas's twelve-week ban); *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 772 (8th Cir. 2015) (invalidating North Dakota's six-week ban).

Indeed, just six months ago, in reliance on *Roe* and its progeny, the Eighth Circuit affirmed this Court's preliminary injunction against two Arkansas laws that banned abortion prior to viability. *Little Rock Fam. Plan. Servs.*, 984 F.3d at 687–90. In so doing, the Eighth Circuit made clear that the Supreme Court's "pre-viability rule is categorical," and that it is "well established in this Circuit" that "[b]efore viability, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy." *Id.* at 687. And just last week, the Eighth Circuit again reiterated that "[b]ans on pre-viability abortions are categorically unconstitutional" in affirming a preliminary injunction blocking two Missouri bans—one ban on abortion starting as early as eight weeks, and another ban on abortion based on a patient's reason. *Reprod. Health Servs. of Planned Parenthood of St. Louis Region, Inc.*, 2021 WL 2345256, at *3–6.

Because the Ban clearly and directly contravenes this binding precedent, Plaintiffs are likely to succeed on the merits. In addition, enforcement of the Ban will inflict severe and irreparable harm on Plaintiffs' patients' constitutional rights, as well as their health, safety, and well-being; the balance of hardships weighs decisively in Plaintiffs' favor; and the public interest would be served by blocking the enforcement of this unconstitutional and harmful statute. This Court should, therefore, grant Plaintiffs' request for a temporary restraining order and/or preliminary injunctive relief.

I. PLAINTIFFS HAVE DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR SUBSTANTIVE DUE PROCESS CLAIM.

Plaintiffs are likely to succeed on the merits of their claim that the Ban violates their patients' Fourteenth Amendment rights. Governor Hutchinson has already conceded that the Ban is blatantly unconstitutional under clear and binding Supreme Court precedent. *See* Compl. ¶ 7. Nearly half a century ago, in *Roe v. Wade*, 410 U.S. at 166, the Supreme Court struck down as unconstitutional a state criminal abortion statute prohibiting all abortions except those provided to save the life of the pregnant woman. Specifically, the Court held that (1) the Due Process Clause protects the right to choose abortion, *id.* at 153–54, and, (2) before viability, the State has no interest sufficient to justify an abortion ban, *id.* at 163–65. Rather, the State may "proscribe" abortion only after viability—and even then, the State cannot ban abortions necessary to preserve a patient's life or health. *Id.* at 163–64.

Since then—including as recently as last year, in *June Medical Services*—the Supreme Court has repeatedly affirmed that a "woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce." *Casey*, 505 U.S. at 871; *Whole Woman's Health*, 136 S. Ct. at 2300; *June Med. Servs.*, 140 S. Ct. at 2135 (Roberts, J., concurring) (*Casey* reaffirmed "the most central

principle of *Roe v. Wade*," "a woman's right to terminate her pregnancy before viability."); *id.* at 2120 (plurality op.). The law is clear: a ban on abortion at *any* point before viability is *per se* unconstitutional, no matter what interests the State claims in support of the ban. In other words, "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion. . . . Regardless of whether exceptions are made for particular circumstances, a State may not prohibit *any* woman from making the ultimate decision to terminate her pregnancy before viability." *Casey*, 505 U.S. at 846, 879.

Given this well-established rule, attempts to ban abortion prior to viability have been uniformly rejected by courts across the country, including the Eighth Circuit. *See supra* p. 8; *see also Jackson Women's Health Org. v. Dobbs*, 951 F.3d 246, 248 (5th Cir. 2020) (six-week ban); *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 274, 277 (5th Cir. 2019) (fifteen-week ban), *cert. granted*, No. 19-1392, 2021 WL 1951792 (U.S. May 17, 2021); *Isaacson v. Horne*, 716 F.3d 1213, 1217, 1231 (9th Cir. 2013) (twenty-week ban); *Jane L. v. Bangerter*, 102 F.3d 1112, 1117–18 (10th Cir. 1996) (twenty-two-week ban); *Sojourner T. v. Edwards*, 974 F.2d 27, 29, 31 (5th Cir. 1992) (ban on all abortions); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1368–69, 1371–72 (9th Cir. 1992) (ban on all abortions); *Planned Parenthood S. Atl. v. Wilson*, No. CV 3:21-00508-MGL, 2021 WL 1060123, at *5 (D.S.C. Mar. 19, 2021) (six-week ban), *appeal filed*, No. 21-1369 (4th Cir. Apr. 5, 2021); *Memphis Ctr. for Reprod. Health v. Slatery*, No. 3:20-CV-00501, 2020 WL 4274198, at *2 (M.D. Tenn. July 24, 2020) (six-week ban), *appeal filed*, No. 20-5969 (6th Cir. Aug. 24, 2020); *SisterSong Women of Color Reprod. Justice Collective v. Kemp*, 472 F. Supp. 3d 1297, 1312 (N.D. Ga. 2020) (six-week ban), *appeal filed*, No. 20-13024 (11th Cir. Aug. 11, 2020); *Robinson v. Marshall*, 415 F. Supp. 3d 1053, 1059 (M.D. Ala. 2019) (ban on all abortions); *Preterm-Cleveland v. Yost*, 394 F.

Supp. 3d 796, 804 (S.D. Ohio 2019) (six-week ban); *Bryant v. Woodall*, 363 F. Supp. 3d 611, 630–32 (M.D.N.C. 2019) (twenty-week ban), *appeal pending on other grounds*, No. 19-1685 (4th Cir. June 26, 2019); *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, No. 3:19-CV-178-DJH, 2019 WL 1233575, at *2 (W.D. Ky. Mar. 15, 2019) (six-week ban).

Under this binding precedent, the Ban is unquestionably unconstitutional on its face, irrespective of any interest the State may assert to support it. *See Casey*, 505 U.S. at 846; *Roe*, 410 U.S. at 163–65. Indeed, "unless and until the Supreme Court dictates otherwise," lower courts "must apply" the categorical pre-viability rule. *Little Rock Fam. Plan. Servs.*, 984 F.3d at 693 (Shepherd, J., concurring); *see also MKB Mgmt. Corp.*, 795 F.3d at 771–72 (rejecting argument that "the Supreme Court has called into question the continuing validity of its abortion jurisprudence" and holding that all federal courts "are bound by those decisions"). Accordingly, Plaintiffs have demonstrated they will succeed on the merits of their substantive due process claim.

II. PLAINTIFFS' PATIENTS WILL SUFFER IRREPARABLE HARM IF THE BAN TAKES EFFECT.

Plaintiffs have likewise clearly demonstrated that the Ban would inflict serious and irreparable harm on their patients. To begin, the Ban violates Plaintiffs' patients' constitutional rights, and it is well-settled that "the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Little Rock Fam. Plan. Servs.*, 397 F. Supp. 3d at 1321 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *Planned Parenthood of Minn., Inc. v. Citizens for Cmty. Action*, 558 F.2d 861, 867 (8th Cir. 1977) ("Planned Parenthood's showing that the ordinance interfered with the exercise of its constitutional rights and the rights of its patients supports a finding of irreparable injury."); *see also Reprod. Health Servs. of Planned Parenthood*

of St. Louis Region, Inc., 2021 WL 2345256, at *5 ("[F]or purposes of the irreparable-harm inquiry, the prohibition of even a single pre-viability abortion would suffice.").

The Ban would also impose irreparable physical, emotional, and psychological harms on Plaintiffs' patients by forcing them to remain pregnant against their will. Compl. ¶¶ 47–50. As the Supreme Court held in *Roe*:

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.

410 U.S. at 153. Because a pregnant person "who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear . . . [h]er suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role." *Casey*, 505 U.S. at 852. Such "harms to women who are unable to obtain abortion care" as a result of pre-viability abortion bans have been found to be "irreparable." *See Little Rock Fam. Plan. Servs.*, 397 F. Supp. 3d at 1322 (citing *Roe*, 410 U.S. at 153 as "describing '[s]pecific and direct harm' from forced childbirth").

All of these harms would most substantially impact Black Arkansans, rural Arkansans, and pregnant people with the fewest means—communities that already face a higher risk of death from pregnancy and multiple barriers to equitable access to medical care and financial resources. *See* Compl. ¶¶ 54–64. Black Arkansans in particular will be at risk of suffering severe harm because they access abortion care at a higher rate than white Arkansans, and also suffer some of the gravest consequences from forced pregnancy: in a state with one of the

nation's highest maternal mortality rates,[8] Black Arkansans are two-to-three times more likely to die of pregnancy-related causes than their white counterparts. *Id.* ¶ 55. People seeking abortion in Arkansas are also disproportionately poor, *id.* ¶¶ 57–58, and would therefore suffer to a greater extent from a lack of resources to attempt to travel out-of-state to obtain care. Denying people the ability to terminate a pregnancy in the face of these disparities would only increase preventable deaths and inflict physical, emotional, and financial injuries upon Plaintiffs' patients. A temporary restraining order and/or preliminary injunction against the Ban is warranted to avoid these imminent, grave, and irreparable harms.

III. THE BALANCE OF EQUITIES TIPS DECIDEDLY IN PLAINTIFFS' FAVOR.

A request for preliminary relief also involves an inquiry into "whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined." *Dataphase Sys., Inc.*, 640 F.2d at 113. While Plaintiffs' patients will unquestionably suffer numerous irreparable harms if the Ban takes effect, Defendants will suffer no injury whatsoever. Plaintiffs' requested relief will simply preserve the status quo that has been in place for nearly five decades. *See Ferry-Morse Seed Co. v. Food Corn, Inc.*, 729 F.2d 589, 593 (8th Cir. 1984) ("The primary function of preliminary injunction is to preserve the status quo[.]"); *see also Little Rock Fam. Plan. Servs.*, 398 F. Supp. 3d at 424 (holding balance of equities favors preliminary injunctive relief in challenge to two abortion bans); *MKB Mgmt. Corp. v. Burdick*, 954 F. Supp. 2d 900, 913 (D.N.D. 2013) (holding balance of equities favors preliminary injunctive relief in challenge to six-week abortion ban). Further,

[8] *See* Compl. ¶ 50, n.11, Ark. Dep't of Health, *Arkansas Maternal Mortality Review Committee Legislative Report*, at 7 (Dec. 2020), https://www.healthy.arkansas.gov/images/uploads/pdf/FINAL_MMRC_Legislative_Report_12.09.20_PDF.pdf ("America's Health Rankings' 2019 *Health of Women and Children Report* ranked Arkansas 46th out of 50 states (with 50 being the worst) in maternal mortality.").

the State of Arkansas cannot seriously claim to be harmed by an injunction prohibiting enforcement of a law that state officials have already conceded is unconstitutional. *See* Compl. ¶ 7; *Jackson Women's Health Org. v. Dobbs*, 379 F. Supp. 3d 549, 552–53 (S.D. Miss. 2019) (granting preliminary injunction against six-week abortion ban where defendants conceded that no fetus is viable at six weeks and that "[the court] must follow Supreme Court precedent"), *aff'd*, 951 F.3d 246 (5th Cir. 2020); *Little Rock Fam. Plan. Servs.*, 397 F. Supp. 3d at 1322 (enjoining abortion bans and restrictions would not irreparably harm the State because "the State has no interest in enforcing laws that are unconstitutional").

IV. INJUNCTIVE RELIEF SERVES THE PUBLIC INTEREST.

Enjoining the Ban and allowing Plaintiffs' patients to continue exercising their constitutional right to terminate their pregnancies would serve the public interest. As the Eighth Circuit has made clear, "the protection of constitutional rights is always in the public interest." *Planned Parenthood Minn., N. Dakota, S. Dakota v. Rounds*, 530 F.3d 724, 752 (8th Cir. 2008). That is because it is axiomatic that the public interest is served by upholding the Constitution and preventing the enforcement of unconstitutional laws. *See, e.g.*, *Planned Parenthood of Minn.*, 799 F. Supp. 2d at 1077 (finding public interest furthered by protecting constitutional right to abortion); *Little Rock Fam. Plan. Servs.*, 397 F. Supp. 3d at 1323 (same). Because the Ban is clearly unconstitutional (*see supra* Part I), injunctive relief preventing its enforcement would serve the public interest.

V. A BOND IS NOT NECESSARY IN THIS CASE.

This Court should waive the Federal Rule of Civil Procedure 65(c) security requirement. It is well established that whether to require a bond rests in the discretion of the trial court, and circumstances like this one support a finding that no bond is necessary. Where "plaintiffs are

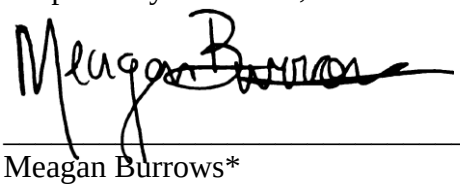
serving a public interest" in acting to protect constitutional rights related to abortion, and the governmental defendants "will not be harmed by the order" to preserve the status quo, it is "customary" to not require security. *Comprehensive Health of Planned Parenthood Great Plains v. Williams*, 263 F. Supp. 3d 729, 739 (W.D. Mo. 2017), *vacated on other grounds sub nom. Comprehensive Health of Planned Parenthood Great Plains v. Hawley*, 903 F.3d 750 (8th Cir. 2018). Plaintiffs are dedicated to serving their patients, including many poor and low-income patients, and are seeking to vindicate and protect their constitutional rights. A bond would impose unnecessary hardship, particularly where the State faces no prospect of monetary damages in this case. *See Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'rs*, 826 F.3d 1030, 1043 (8th Cir. 2016) (affirming district court's waiver of bond requirement "based on its evaluation of public interest"); *Hopkins*, 2021 WL 41927, at *124 (waiving bond requirement where abortion provider plaintiffs were acting in public interest to protect constitutional rights and defendants would not be harmed by preserving the status quo). Because Defendants would not be harmed by relief that merely maintains the status quo so that Plaintiffs can continue to provide safe and compassionate abortion care to their patients, the Court should waive the bond requirement.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' Motion for a Temporary Restraining Order and/or Preliminary Injunction, and enjoin Defendants, their officers, agents, servants, employees, attorneys, successors, and any persons in active concert or participation with them from enforcing the Ban during the pendency of this litigation.

Dated: June 14, 2021

Respectfully submitted,



O'MELVENY & MYERS LLP

Leah Godesky*
1999 Avenue of the Stars
Los Angeles, California 90067
lgodesky@omm.com
Tel: (301) 246-8501
Fax: (212) 326-2061

Kendall Turner*
1625 Eye St. NW
Washington, DC 20006
kendallturner@omm.com
Tel: (202) 383-5300

Attorneys for Plaintiffs LRFP, PPAEO & Janet Cathey, M.D.

Maithreyi Ratakonda*
Susan Lambiase*
Planned Parenthood Federation of America
123 William St., 9th Fl.
New York, NY 10038
mai.ratakonda@ppfa.org
susan.lambiase@ppfa.org
Tel: (212) 261-4405

Attorneys for Plaintiffs PPAEO and Janet Cathey, M.D.

** Motion for admission pro hac vice granted*

Meagan Burrows*
Rebecca Chan*
Brigitte Amiri*
American Civil Liberties Union Foundation
125 Broad St, 18th Floor
New York, NY 10004
mburrows@aclu.org
rebeccac@aclu.org
bamiri@aclu.org
Tel: (212) 549-2633

Attorneys for Plaintiff LRFP
Brooke-Augusta Ware (AR Bar No. 2004091)
Mann & Kemp PLLC
221 West 2nd Street, Suite 408
Little Rock, AR 72201
brooke@mannkemp.com
Tel: (501) 222-7378

Breean Walas (AR Bar No. 2006077)
Walas Law Firm, PLLC
P.O. Box 4591
Bozeman, MT 59772
breean@walaslawfirm.com
Tel: (501) 246-1067

On Behalf of the Arkansas Civil Liberties Union Foundation, Inc.

Attorneys for Plaintiffs LRFP, PPAEO & Janet Cathey, M.D.