**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF ALABAMA**
**NORTHERN DIVISION**

PLANNED PARENTHOOD SOUTHEAST, INC., on behalf of its patients, physicians, and staff; REPRODUCTIVE HEALTH SERVICES, on behalf of its patients, physicians, and staff; and JUNE AYERS, RN,

Plaintiffs,

v.

ROBERT BENTLEY, in his official capacity as Governor of the State of Alabama; LUTHER STRANGE, in his official capacity as Attorney General of the State of Alabama; ELLEN BROOKS, in her official capacity as District Attorney of Montgomery County, Alabama; BRANDON K. FALLS, in his official capacity as District Attorney of Jefferson County, Alabama; ASHLEY RICH, in her official capacity as District Attorney of Mobile County, Alabama; DONALD E. WILLIAMSON, MD, in his official capacity as State Health Officer of the State of Alabama; GEORGE C. SMITH, JR., MD, in his official capacity as Chairman of the Alabama Board of Medical Examiners; JAMES E. WEST, MD, in his official capacity as Chairman of the Medical Licensure Commission of Alabama; and MARTHA LAVENDER, DSN, RN, in her official capacity as President of the Alabama Board of Nursing,

Defendants.

CIVIL ACTION

Case No. _____

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

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Other Authorities**

**Regulations**



**Legislative Materials**

## INTRODUCTION

This is a constitutional challenge to Section 4(c) of Alabama House Bill 57, which, absent intervention from this Court, will take effect on July 1, 2013, and will require every physician who works at a licensed abortion clinic to obtain staff privileges at a local hospital. As the evidence in this case shows, this requirement is neither medically necessary nor justified. However, if allowed to take effect, the challenged staff privileges requirement would strip Plaintiffs—who operate the majority of the licensed abortion clinics in the State and are the only licensed providers in Birmingham, Montgomery, and Mobile—of their licenses and force them to cease providing abortion services, leaving just two licensed clinics remaining in the entire state. No court has ever upheld a law, such as this one, that grants unrestricted licensing authority over abortion clinics to private hospitals. Furthermore, no court has ever upheld a law, such as this one, that would outright eliminate the availability of abortion services throughout most of a state. Indeed, if enforced, the staff privileges requirement would not only violate Plaintiffs' due process rights, but it would also inflict significant and irreparable injury on the health, wellbeing, and constitutional rights of Plaintiffs' patients and women throughout Alabama. Accordingly, and for the reasons set forth below, this Court should grant Plaintiffs' request for injunctive relief.

## STATUTE

Alabama House Bill 57, Regular Session (2013) ("H.B. 57" or "Act"), which goes into effect on July 1, 2013, imposes a number of new statutory requirements on abortion clinics, including the requirement challenged here that every physician who provides abortions at a clinic "have staff privileges at an acute care hospital within the same standard metropolitan statistical area as the facility is located that permit him or her to perform dilation and curettage, laparotomy

procedures, hysterectomy, and any other procedures reasonably necessary to treat abortion-related complications." H.B. 57 § 4(c), attached hereto as Exhibit A ("staff privileges requirement").[1] Any clinic administrator who allows a physician without staff privileges to perform an abortion at his or her clinic will be guilty of a Class C Felony. *Id.* § 12(c). Furthermore, failure to comply with the staff privileges requirement will subject a clinic, as well as its licensed staff, to adverse licensure action, up to and including license revocation. *Id.* § 14.

## FACTS

### I. Plaintiffs and the Safety of Abortion

Plaintiffs Planned Parenthood Southeast, Inc. ("PPSE") and Reproductive Health Services ("RHS") provide comprehensive, outpatient reproductive health care services, including early abortion services, to thousands of women in Alabama each year. Decl. of Staci L. Fox ¶¶ 5-6, attached hereto as Exhibit B ("Fox Decl."); Decl. of June Ayers ¶ 4, attached hereto as Exhibit C ( "Ayers Decl.").[2] Planned Parenthood has been serving the women of Alabama and their families since 1930, and PPSE currently has health centers in Birmingham and Mobile. Fox Decl. ¶¶ 5-6. RHS has provided reproductive health services in Montgomery for the last thirty-five years. Ayers Decl. ¶ 1. Both are licensed as "abortion or reproductive health centers" by the Alabama Department of Public Health ("DPH"). Fox Decl. ¶ 9; Ayers Decl. ¶ 5. PPSE provides abortions to 14.6 weeks of pregnancy, as measured from the woman's last menstrual

[1] H.B. 57 subjects Plaintiffs to additional regulations. In addition to the staff privileges requirement, PPSE must comply with new regulations relating to staffing, policies, procedures, and emergency protocols, among other requirements, which go into effect on July 1, 2013. In addition, H.B. 57 will require some Plaintiffs to engage in expensive and medically unnecessary construction to continue to provide abortions as of July 1, 2014. With the exception of the staff privileges requirement, the other provisions of H.B. 57 are not part of this litigation.

[2] Plaintiffs PPSE and RHS sue on behalf of the clinics themselves, their staff, and their patients. The other Plaintiff in this case is June Ayers, owner and Administrator of RHS, who, as Administrator, is subject to civil and criminal penalties for violations of the staff privileges requirement. *See* H.B. 57 §§ 12(d), 13, 14.

period ("LMP"), while RHS provides abortions up to 14.0 weeks LMP. Fox Decl. ¶ 6; Ayers Decl. ¶ 4.

Together, PPSE and RHS comprise three-fifths of the licensed abortion clinics in the entire State. Fox Decl. ¶ 34; Ayers Decl. ¶ 25. The only other licensed abortion clinics in Alabama are located in Huntsville and Tuscaloosa. *See* DPH, Health Care Facilities Directory, available at http://adph.org/HEALTHCAREFACILITIES/Default.asp?id=5349. The Huntsville and Tuscaloosa facilities are not plaintiffs in this lawsuit. The physicians who perform abortions at PPSE and RHS are licensed Alabama physicians and are board-certified in either obstetrics and gynecology ("ob-gyn") or family medicine. Fox Decl. ¶ 7; Ayers Decl. ¶ 6. None of their physicians has admitting privileges at a hospital that is local to the clinic.

Even before the events giving rise to this lawsuit, Plaintiffs were subject to and in compliance with extensive regulations, including but not limited to those relating to patient care, infection control, personnel, physician qualifications, fire evacuation plans, emergency communications, recordkeeping, and physical plant requirements (such as minimum doorway sizes and room sizes, interior finishes and flooring material, and emergency exits). *See* Ala. Admin. Code r. 420-5-1-.01 *et seq*.; *see also* Fox Decl. ¶ 9; Ayers Decl. ¶ 5. The DPH conducts extensive annual surveys of Plaintiffs' health centers to ensure compliance with the regulations. *See generally* Ala. Admin. Code r. 420-5-1-.03; *see also* Fox Decl. ¶ 9; Ayers Decl. ¶ 5.

Legal abortion is one of the safest medical procedures performed in the United States. *See* Decl. of Dr. Paul Fine ¶ 5, attached hereto as Exhibit D ("Fine Decl."). Medication abortion, which Plaintiff PPSE offers up to 9 weeks LMP, involves the administration of medication(s) to induce an abortion. Fine Decl. ¶ 10; Fox Decl. ¶ 6.[3] Surgical abortion involves the use of

[3] This is a nonsurgical option that allows a woman to complete the abortion in the privacy of her own home. Fine Decl. ¶ 10.

instruments to evacuate the contents of the uterus. Fine Decl. ¶ 11. However, the term "surgical" is somewhat of a misnomer; surgical abortion involves no incision into the woman's skin or other bodily membrane, and is not what is typically thought of as surgery. *Id.*; *see also id.* ¶ 12. The procedure takes about five to eight minutes. *Id.* ¶ 11.

Most of the complications associated with abortion – such as bleeding and infection – are not only rare, but also minor and can be (and are) appropriately and safely managed at the clinic. *See* Fine Decl. ¶¶ 6, 14; Fox Decl. ¶ 13; *see also* Ayers Decl. ¶ 10. It is a very rare circumstance where an abortion patient experiences a complication that requires a visit to a local hospital emergency room ("E.R."), and an even rarer case where the patient needs to be admitted to the hospital for further treatment. *See* Fine Decl. ¶ 8; Fox Decl. ¶¶ 12, 14, 17; Ayers Decl. ¶¶ 10, 11, 13. Nationally, 2.5% of women obtaining first-trimester surgical abortions experience minor complications that can be handled at the health center. Less than 0.3% experience a complication that requires hospitalization. Fine Decl. ¶ 8.[4] Plaintiffs' complication rates are even lower. *See* Fox Decl. ¶ 12 (noting that PPSE's hospitalization rate of 0.045% is under the already quite low national statistic); Ayers Decl. ¶¶ 10-11, 13 (noting no hospitalizations in the past three years; no ambulance called to the clinic in over 20 years).

Notwithstanding that complications associated with abortion are extremely uncommon, Plaintiffs' clinics are well prepared to provide optimal care in the rare event they do occur. *See* Fox Decl. ¶¶ 15, 17, 21; Ayers Decl. ¶¶ 9-12, 14. Moreover, Alabama law already contains

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[4] By contrast, the risk of death associated with childbirth is approximately 14 times higher than that associated with abortion, and every pregnancy-related complication is more common among women having live births than among those having abortions. The risk of death related to abortion overall is less than 0.7 deaths per 100,000 procedures, which is roughly comparable to the risk of death following a miscarriage. By further contrast, the risk of death following the use of penicillin is 2.0 deaths per 100,000 uses. *See* Fine Decl. ¶¶ 5, 9.

detailed regulations concerning post-operative observation, monitoring, and follow-up care for abortion patients. Immediately following the abortion procedure, a patient must be "observed until a determination can be made whether any immediate post-operative complications are present." Ala. Admin. Code r. 420-5-1-.03(6)(a). Any patient who cannot be discharged within twelve hours of admission in an ambulatory condition must "be offered transportation to a local hospital for further treatment." *Id.*; *see also* Fox Decl. ¶¶ 13, 15; Ayers Decl. ¶¶ 10-11. A physician must sign all discharge orders and must remain on the premises until all patients are discharged. Ala. Admin. Code r. 420-5-1-.03(6)(a); *see also* Fox Decl. ¶ 13; Ayers Decl. ¶ 10. After hours, "[t]he facility must have a 24 hour answering service that immediately refers all calls related to post abortion problems to a qualified registered nurse, nurse practitioner, physician assistant, or physician." Ala. Admin. Code r. 420-5-1-.03(6)(d); *see also* Fox Decl. ¶ 16; Ayers Decl. ¶¶ 12-13. Furthermore, as is discussed below, per Alabama law, both PPSE and RHS have already ensured that "[a] physician with admitting privileges at a hospital within the same standard metropolitan statistical area as the clinic [or a qualified substitute] [is] available to provide care for complications arising from an abortion twenty-four hours a day, seven days a week." Ala. Admin. Code r. 420-5-1-.03(b);[5] *see also* Fox Decl. ¶ 8; Ayers Decl. ¶ 7. This is more than is required of any other outpatient facility in Alabama, including ambulatory surgical centers ("ASCs"), which perform more complicated surgeries than early abortion. Fine Decl. ¶ 30; *see also* Ayers Decl. ¶ 15.

## II. Management of Abortion Complications and Hospital Admitting Privileges

[5] Because the statutes and case law appear to use the terms "admitting privileges" and "staff privileges" interchangeably, Plaintiffs will do so, as well. However, in referring to the provision of H.B. 57 at issue in this case, Plaintiffs will solely use the term "staff privileges requirement."

As the record demonstrates, given the rarity of complications, the Plaintiffs' protocols, and the pre-existing requirement that abortion clinics have an agreement with a physician with admitting privileges, the staff privileges requirement is unnecessary to the provision of safe abortions. For instance, in the rare event that a complication does arise while the patient is at the clinic, that complication is nearly always resolved at the clinic. *See* Fine Decl. ¶¶ 6, 14; Fox Decl. ¶ 13; Ayers Decl. ¶ 10. Indeed, PPSE has transferred only two patients from their clinics to the hospital since 2006, Fox Decl. ¶ 14, and RHS has not transferred a patient to the hospital from the clinic in more than twenty years, Ayers Decl. ¶¶ 10-11. Furthermore, in the extremely rare circumstance where the clinic must transfer the patient to a hospital, the emergency medicine technicians responsible for transporting the patient determine where the patient should be taken—*not* Plaintiffs or their physicians—based on a host of different criteria. Fine Decl. ¶ 17; Fox Decl. ¶ 15.[6] Thus, even if all of Plaintiffs' physicians could get privileges at a local hospital, it is far from assured that a patient would actually be transferred to that hospital.

The staff privileges requirement is likewise irrelevant in the event that a patient experiences a complication outside the vicinity of the clinic. In the very small number of cases in which they do occur, complications – such as severe cramping – often arise after the patient has left the clinic and gone home. *See* Fine Decl. ¶ 20; Fox Decl. ¶ 16; Ayers Decl. ¶ 13. Between 45-60% of Plaintiffs' patients do not live near the clinics, Fox Decl. ¶ 18; Ayers Decl. ¶ 13, and nearly half of PPSE's patients choose medication abortion, which means, by definition, that a complication could only arise away from the clinic, Fox Decl. ¶ 16; *see also* Fine Decl. ¶ 21. Plaintiffs provide all their patients with an after-hours number to call in the event of

[6] In such a case, Plaintiffs' physicians would alert the E.R. and provide as much information as necessary to the on-call physician to ensure continuity of care. *See* Fox Decl. ¶¶ 15, 17; Ayers Decl. ¶ 14. This is consistent with general practice and the standard of care. *See* Fine Decl. ¶¶ 15, 23, 28-29; *see also* Fox Decl. ¶¶ 21-22.

complications or concerns. Fox Decl. ¶ 16; Ayers Decl. ¶¶ 12-13. Thus, in the rare case that any non-local patients require immediate additional treatment, Plaintiffs' staff instructs them, in accordance with the standard of care, to go to their local hospital emergency room. *See* Fox Decl. ¶ 17; Ayers Decl. ¶ 14; *see also* Fine ¶¶ 20-21, 29.

Plaintiffs last year collectively referred 1-3 patients to the emergency room. *See* Fox Decl. ¶ 17; Ayers Decl. ¶ 12. In most of these cases, the patients are treated by the E.R. physician as outpatients and released. *See* Fine Decl. ¶ 22; Fox Decl. ¶ 19; *see also* Ayers Decl. ¶ 12. Indeed, in many instances, the patient goes to the E.R. because her symptoms – such as bleeding or cramping – are unsettling to her, but they do not, in fact, require medical treatment. Fine Decl. ¶ 22; Fox Decl. ¶ 19. In any event, when they do require medical attention, the majority of complications from the abortions Plaintiffs perform are similar to those encountered by women experiencing miscarriage, which emergency room physicians can, and routinely do, handle. Fine Decl. ¶ 22. Where additional care is necessary, the emergency room can, and would, involve the on-call ob-gyn. Fine Decl. ¶¶ 16, 18-19; Fox Decl. ¶ 20. This is fully consistent with the standard of care. *See* Fine Decl. ¶¶ 16, 23, 29; Fox Decl. ¶ 21. Thus, for these patients as well, a requirement that the abortion provider have staff privileges at a hospital near the clinic has no value.

Finally, the staff privileges requirement is irrelevant to the optimal provision of care to Plaintiffs' patients because, in the exceedingly rare event that hospitalization is required, the physician who provided the abortion may not be the appropriate physician to manage the patient's care in the hospital. For example, if the patient has suffered a vascular or bowel injury, it is critical that she be treated by the appropriate subspecialist; similarly, a woman with a

cardiac- or lung-related complication should be seen by a cardiologist or pulmonologist. *See generally* Fine Decl. ¶¶ 18-19.

Indeed, as the expert declaration of Dr. Paul Fine—a practicing ob-gyn who has been on the faculty of Baylor College of Medicine in Houston, Texas, for 34 years and is the Medical Director of Planned Parenthood Gulf Coast and the Medical Director of Emergency Medical Services for three Texas cities—makes clear, the model of the community physician who provides all of his or her patients' care (whether inpatient or outpatient) is simply outdated, and is no longer the standard of care. *Id.* at ¶ 25; *see also id.* at ¶ 31. Hospitals are increasingly hiring their own dedicated staff physicians (meaning physicians who solely work at the hospital, not physicians who have privileges to work at the hospital), and limiting the ability to provide inpatient care to these "hospitalists." *See id.* at ¶ 26. Even where hospitals continue to rely on physicians with privileges, rather than hospitalists, they still grant privileges only to those physicians who admit a significant enough number of patients and perform a significant number of hospital-based procedures each year. *See id.* at ¶¶ 31-32. Thus, in more and more cases, only those physicians who have truly hospital-based as well as outpatient practices—not, e.g., abortion providers whose patients rarely, if ever, need hospital-based care—are even permitted to have privileges. *See id.*

## III. Plaintiffs' Inability to Meet the New Staff Privileges Requirement

Not only is the staff privileges requirement medically unnecessary, it also makes it impossible for Plaintiffs to continue to provide abortions within the State. As is demonstrated below, for reasons totally unrelated to the provision of safe and high quality abortion services, Plaintiffs' physicians will be unable obtain staff privileges at any of the hospitals near the clinics.

Thus, if the staff privileges requirement is allowed to be enforced, Plaintiffs will be forced to stop offering abortions altogether, leaving only two licensed clinics in the state.

The record shows that to obtain privileges at any of the hospitals near the clinics, a physician must admit anywhere from 12 to 48 patients to the hospital for inpatient treatment each year and/or must live and practice close enough to the hospital to provide continuous coverage for his or her patients (and sometimes for other physicians' patients, as well). *See* Fox Decl. ¶ 27; Ayers Decl. ¶¶ 17, 22-23; *see generally* Fine Decl. ¶¶ 31-32. These criteria render Plaintiffs' physicians ineligible for staff privileges at any of those hospitals.[7] As explained above, abortion (when performed safely and competently, as Plaintiffs' physicians do) will never generate even close to the minimum number of annual admissions required to obtain privileges. *See* pp. 4-5, *supra*. Clearly, Plaintiffs' physicians' inability to meet this requirement has nothing to do with their ability to provide high quality medical care. If anything, the opposite is true: Because abortion is so safe, Plaintiffs' physicians will never send enough patients to the hospital to warrant the hospital granting them privileges. *See generally* Fine Decl. ¶¶ 31-32. Moreover, none of Plaintiffs' physicians reside in Birmingham, Mobile, or Montgomery and therefore could not meet a hospital's residency requirement, or the obligation to take on additional patients at that hospital.[8] *See* Fox Decl. ¶¶ 7, 27; Ayers Decl. ¶¶ 6, 8, 17, 22.

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[7] Moreover, many of the hospitals also require an applicant for privileges to provide reference letters from other local physicians who already have privileges at that hospital, or to identify another local physician with privileges at that hospital who is willing to serve as a back-up, if necessary. *See* Fox Decl. ¶ 28. These requirements would also prove extremely difficult, if not impossible, to meet. Just as it is extremely difficult to find local physicians willing to provide abortions in Alabama, *see infra* n.8, it is unlikely that Plaintiffs' physicians will be able find anyone willing to be publicly identified with their application. *See id*. ¶ 29; *see also* Ayers Decl. ¶ 8 (describing difficulty finding local physicians due to threats and harassment directed towards abortion providers, or any physician even affiliated with the clinic).

[8] It is extremely difficult to find local physicians willing to provide abortions in Alabama. *See* Ayers Decl. ¶ 8. As Plaintiff Ayers explains, physicians that work at and for the clinics are subject to ongoing, sometimes daily, harassment. *Id.* Some of this harassment is very severe: For example, just last year, an

In addition to these categorical disqualifications, some hospitals will not grant Plaintiffs' physicians staff privileges because the hospitals have religious objections to abortion. Fox Decl. ¶ 24. Similarly, Plaintiffs' physicians are barred from obtaining privileges at certain university hospitals because they all require a faculty appointment (which Plaintiffs' physicians do not have). *Id.* at ¶ 25. Widespread opposition to abortion can also result in political pressure on hospitals to deny privileges.[9] Here too, these criteria are clearly unrelated to the provision of safe outpatient abortion services.

If Plaintiffs' providers applied for privileges—despite the fact that they cannot satisfy the requirements outlined above—and were denied, it could result in serious adverse consequences for their future career and practice. *See id.* at ¶ 30. Hospitals that deny privileges are required by federal law to report the denial of privileges to the National Practitioner Database ("NPD"), which tracks information about physicians and their qualifications. Hospitals and other medical employers check the NPD before making any hiring decisions, and they also specifically ask whether applicants have ever been denied hospital privileges. *Id.*

Notably, the State has imposed the staff privileges requirement on abortion clinics and abortion clinics alone. *See generally* Ayers Decl. ¶ 15; *see also* Ala. Admin. Code r. 420-5-2-.01

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Alabama-based physician who had worked for RHS for ten years resigned out of fear for her safety and that of her family when a host of personal and identifying information (such has home addresses and phone numbers) were posted on a website designed to encourage harassment of abortion providers. *Id.*

[9] *See Pro-Choice Miss. v. Thompson*, No. 3:96-596 (S.D. Miss. Sept. 28, 1996), at 21, attached hereto as Exhibit E (striking written transfer agreement requirement, recognizing "as a practical matter, local pressure can and will be brought upon hospitals to deny these written transfer agreement to abortion providers . . . [T]he hospitals then would have third-party vetoes over whether the abortion providers can obtain a license from the State of Mississippi"). *See also* n.12 *infra*, discussing successful efforts by anti-abortion activists and politicians in Ohio to pressure the University of Toledo to terminate written transfer agreements with two clinics.

*et seq*.[10] Yet physicians frequently perform surgeries that are far more complicated and riskier than abortion in ASCs. Fine Decl. ¶ 30. In the field of gynecology, this can include laparoscopy, laparoscopic hysterectomy, and vaginal hysterectomy. These procedures also generally involve general anesthesia—which Plaintiffs do not use—which requires the patient to be paralyzed and intubated. *Id.* The use of general anesthesia in and of itself is riskier than the abortions provided by Plaintiffs. *Id.* Physicians are even permitted to use general anesthesia in their offices without any admitting privileges requirement. *See* Ala. Admin. Code r. 540-X-10-.01 *et seq.* Nonetheless, these types of procedures/anesthesia are routinely performed in outpatient settings and, if complications arise, these complications can be and are safely and appropriately treated at a nearby E.R. without need for the physician performing the outpatient procedure to have admitting privileges. *Id.* at ¶ 29.

The legislature was well aware it would be impossible for Plaintiffs to comply with the new law. *See* Ayers Decl. ¶ 18. The Act itself was the centerpiece of the Alabama House Republican Caucus's 2013 "We Dare Defend Our Right To Life" campaign and was championed by anti-abortion politicians as a means to limit abortion access in the state of Alabama. *See* *We Dare Defend Our Rights*, Ala. House Republicans, http:// alhousegop.com/wedaredefend/; *see also, e.g.*, Video recording: Remarks from Sen. Mac McCutcheon (Jan. 21, 2013), *available at* http://www.youtube.com/watch?v=PdJleB3OdxQ (explaining H.B. 57 will "shut down these clinics we have all over this state"); *see also* Video recording: Remarks from Gov. Bentley (Mar. 6, 2013), *available at* http://www.youtube.com/watch?v=z4dp4d_0xvs ("We need to always remember that it is our duty to protect those innocent lives that are not being protected right now

[10] *See also* Associated Press, *Abortion Bill Passes House*, DecaturDaily.com, Feb. 20, 2013, http://www.decaturdaily.com/stories/Abortion-bill-passes-House,113776 (explanation by legislative sponsor of staff privileges requirement that it would not apply to any other outpatient surgical procedure).

. . . We need to remember that we're dealing with human life and this is what God expects us to do. . . . [H.B. 57] has now passed the House. Let's now continue to support it in the Senate. Let's get it out of the Senate Health Committee, let the Senators vote on that bill, and then send it to me so I can sign it."). And Americans United for Life ("AUL"), which identified Alabama as one of its target states for 2013, has long advocated use of admitting privileges laws as part of an incremental strategy to eliminate access to abortion.[11]

Moreover, the staff privileges requirement contained in the Act is similar to one that was enacted in Mississippi last year, and one that was recently passed in North Dakota—both with the express knowledge and intent that it would likely close the last remaining clinics in those states. *See e.g.*, Miss. H.B. 1390, Regular Session (2012); N.D. S.B. 2305, 63rd Legis. Assemb. (2013); *see also* Erik Eckholm, *North Dakota's Sole Abortion Clinic Sues to Block New Law*, N.Y. Times, May 15, 2013, *available at* http://www.nytimes.com/2013/05/16/us/north-dakotas-sole-abortion-clinic-sues-to-block-new-law.html; Joe Sutton and Tom Watkins, *Mississippi legislature tightens restrictions on abortion providers*, CNN Politics, Apr. 4, 2012, http://www.cnn.com/2012/04/04/politics/mississippi-abortion.[12] In fact, writing about the Mississippi admitting privileges law, AUL has stated,

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[11] *See e.g.*, *Abortion*, AUL, http://www.aul.org/issue/abortion/ ("We provide state lawmakers, state attorneys general, public policy groups, lobbyists, the media, and others . . . with proven legal strategies and tools that will, step-by-step and state-by-state, lead to a more pro-life America and help set the stage of the state-by-state battle that will follow *Roe*'s ultimate reversal"); *AUL Releases Strategy Initiatives for 2013 State Legislative Sessions*, AUL, Feb. 7, 2013, *available at* http://www.aul.org/2013/02/aul-releases-strategy-initiatives-for-2013-state-legislative-sessions/ (noting that AUL is actively working in Alabama state legislature).

[12] Similarly, in Ohio anti-abortion groups have used an existing written transfer agreement law (a law requiring clinics to have a written agreement with a local hospital that the hospital will accept patient transfers, even though, by law, any hospital is bound to accept such a transfer) to try to shut down clinics throughout that state. For example, Ohio Right to Life ("ORTL"), along with state legislators, exerted pressure on the University of Toledo to cancel its written transfer agreements with two Toledo-based clinics, putting those clinics' continued existence in jeopardy. *See University of Toledo Terminates*

> Mississippi provides an excellent example of the cumulative effectiveness of the step-by-step enactment of protective laws such as informed consent, parental involvement, clinic regulations, and others—an "accumulated victories" strategy—to combat the evil of abortion. . . . As a result, . . . six out of seven abortion clinics have closed—leaving only one embattled abortion clinic in the entire state. However, Mississippi's 2012 enactment of a requirement that all abortion providers have admitting privileges at a local hospital . . . has placed that remaining clinic in imminent jeopardy.

*See* AUL, Defending Life 2013, *available at* http://www.aul.org/2013/02/the-defending-life-report/.[13]

## IV. Irreparable Injury to Plaintiffs and their Patients

Because it will be impossible for Plaintiffs to comply with the staff privileges requirement, absent an injunction from this Court, Plaintiffs will be forced to cease providing abortion services as of July 1, 2013, with resulting irreparable injury to Plaintiffs. *See* Fox Decl. ¶¶ 4, 31; Ayers Decl. ¶¶ 3, 25. This will leave only two licensed abortion clinics in the entire state, one in Huntsville and the other in Tuscaloosa. As such, the staff privileges requirement will have a devastating impact on Plaintiffs' patients and their families.

One-third of women will have an abortion in their lifetime; the majority of these women are already mothers, and of those that are not, 66% intend to have children in the future. Fine Decl. ¶ 33. Some women have abortions to preserve their life or their health; some because they have become pregnant as a result of rape; and others because they choose not to have biological children. Family considerations, i.e., whether a woman and her partner are ready and able to start a family, and/or whether they have the capacity and resources to care for another child (and

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*Contract with Abortion Clinic*, ORTL, Apr. 4, 2013, *available at* http://www.ohiolife.org/press-releases/2013/4/4/university-of-toledo-terminates-contract-with-abortion-clini.html.

[13] The Mississippi law has since been preliminarily enjoined by a federal court on the basis of the plaintiffs' claims, *inter alia*, that the effect of the law is to impose an undue burden a woman's constitutional right to abortion, *see Jackson Women's Health Org. v. Currier*, No. 3:12-436, 2013 WL 1624365 (S.D. Miss. April 15, 2013), while the North Dakota law was very recently challenged on similar grounds, *see* TJ Jurke, *Group Files Lawsuit Over N.D. Abortion Law*, Forum News Service, May 15, 2013, *available at* http://www.wdaz.com/event/article/id/17889/.

still care for existing children), are nearly always factors in a woman's abortion decision. *Id.* For each of these women, access to safe, legal abortion is critical for their own wellbeing and for the wellbeing of their families as a whole. *See* Fine Decl. ¶¶ 34-36.

Eliminating all of the licensed abortion facilities in Birmingham, Montgomery, and Mobile, and leaving only two in the entire state, will make it increasingly difficult, and for some women impossible, to access safe, legal abortion care. As the expert testimony in this case confirms, increasing the distance women must travel to get to a licensed abortion clinic imposes a substantial burden on abortion access, and for some women, longer travel distances pose insurmountable obstacles. *See* Decl. of Dr. Stanley Henshaw ¶¶ 3-9, attached hereto as Exhibit F ( "Henshaw Decl."). If Plaintiffs are forced to stop providing abortion services, the severe reduction in access will impose added burdens in terms of increased costs and transportation—as many as 200-400 additional miles (round trip) for some women, *id.* at ¶¶ 11-13, and given that most Alabama women make two trips to an abortion clinic – an initial visit for counseling and then a second visit for the abortion, at least 24 hours later – the burdens are even more significant, Fox Decl. ¶ 33; Ayers Decl. ¶ 25. The evidence further shows that such travel burdens impose particularly significant obstacles for low-income women, Henshaw Decl. ¶ 14, such as the majority of Plaintiffs' patients, who will have difficulty arranging for additional child care, time off from work, and scraping together money for gas, if they even own a car, Fox Decl. ¶¶ 32, 36; Ayers Decl. ¶ 26. The significant travel burdens created by eliminating the majority of abortion providers in the state will prevent some women from obtaining abortions, forcing them to carry pregnancies to term against their will, regardless of the impact on their lives and their health. *See* Henshaw Decl. ¶¶ 9-10, 15; Fox Decl. ¶¶ 34-37; Ayers Decl. ¶ 25; Fine Decl. ¶¶ 34, 36. For others, inability to access the two remaining clinics located in Tuscaloosa and

Huntsville will lead them to take desperate measures, such as attempting to self-abort or seeking care from unsafe providers, thus further putting their health at risk. *See* Fox Decl. ¶ 36; Ayers Decl. ¶¶ 26-27; Fine Decl. ¶ 35.

Accordingly, there is no question that enforcement of the staff privileges requirement will cause severe and irreparable harm to Plaintiffs and their patients.

**ARGUMENT**

The staff privileges requirement fails under more than a century of the Supreme Court's due process holdings, and more than four decades of Supreme Court decisions upholding and affirming a woman's constitutional right to choose abortion. The requirement is unconstitutional in at least three respects: First, it delegates standardless and unreviewable licensing authority to private parties in violation of the due process clause (nondelegation doctrine) by making a clinic's license contingent on its physicians' ability to obtain staff privileges at a hospital. Second, it violates women's fundamental right to privacy by saddling abortion—a constitutionally protected medical procedure—with an onerous, unnecessary, and unjustified regulation. Third, it violates women's fundamental right to privacy by eliminating the availability of abortion in most of the State, which will impose a substantial obstacle in the path of a woman seeking an abortion.

Plaintiffs are entitled to a temporary restraining order or preliminary injunction because: (1) there is a substantial likelihood of success on the merits of their claims; (2) enforcement of the staff privileges requirement would result in irreparable injury; (3) the threatened injury to Plaintiffs and their patients outweighs whatever injury the proposed injunction may cause Defendants; and (4) issuance of the injunction is in the public interest. *See McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998); *see also Ingram v. Ault,* 50 F.3d 898, 900

(11th Cir. 1995) (same standard applies to requests for preliminary injunction and temporary restraining orders).

## I. PLAINTIFFS HAVE DEMONSTRATED A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CLAIM THAT THE STAFF PRIVILEGES REQUIREMENT VIOLATES THE NONDELEGATION DOCTRINE.

By making clinic licenses contingent on the ability of Plaintiffs' physicians to obtain staff privileges at local hospitals, Defendants have essentially granted the hospitals total veto power over who may obtain a license to provide abortions within the State. In so doing, the State has delegated standardless and entirely unreviewable discretion to the hospitals to determine whether the clinics can continue to operate. As an unbroken line of precedent stretching back more than a century makes clear, such delegation of standardless and complete discretion that allows private parties to act upon potentially arbitrary criteria violates the due process clause. Plaintiffs are thus extremely likely to succeed on the merits of their claim that the staff privileges requirement violates the nondelegation doctrine.

There is no disputing that Plaintiffs have a constitutionally protected property interest in their licenses. *See, e.g.*, *Bell v. Burson*, 402 U.S. 535, 539 (1971) (holding that license holders have constitutionally protected due process interests in their licenses); *Foxy Lady, Inc. v. City of Atlanta, Ga.*, 347 F.3d 1232, 1236 (11th Cir. 2003) (recognizing due process protections apply to license revocation) (citing *Burson*, 402 U.S. at 539); *Wells Fargo Armored Serv. Corp. v. Ga. Pub. Serv. Comm'n,* 547 F.2d 938, 941 (5th Cir. 1977) (same).

In order to protect this interest:

> The due process clause imposes three essential requirements on occupational licensing schemes: specificity, rationality, and fairness. Specificity focuses on the standards and guidelines that a licensing board uses in granting, denying, suspending, renewing, or revoking a license and demands that they be intelligible. Rationality requires that the standards

> bear a reasonable relation to effective practice of the regulated occupation. Fairness concerns the makeup of the licensing board, the procedures it follows, and the necessity and timing of judicial review.

*See* Commentary, Ala. Stat. § 41-22-19 (Westlaw 2013) (internal citations omitted).

The nondelegation doctrine prohibits the State from evading these due process protections by delegating its licensing authority to a private, non-state actor. *See e.g.*, *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (holding Due Process clause prohibits standardless delegation of legislative authority to private individuals); *Wash. ex. rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928) (same); *Eubank v. City of Richmond*, 226 U.S. 137 (1912) (same); *see also Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 555 (9th Cir. 2004) ("When a State delegates its licensing authority to a third party, the delegated authority must satisfy the requirements of due process."); *cf. Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (overturning city ordinances vesting San Francisco Board of Supervisors with unlimited and unreviewable authority to license laundries within city limits).

Pursuant to this longstanding doctrine, the delegation of licensing authority to a private party is constitutional *only* if the state has imposed constitutionally adequate standards or criteria to guide the private party's discretion and/or the state still retains some final decision-making authority over the licensing decision. Here, the State has done neither. Indeed, not only has the state failed to provide any standards to govern whether staff privileges should be granted, but it has also empowered the hospitals with the final authority to deny the Plaintiffs' licenses. As the Supreme Court and lower federal courts have made abundantly clear, such a scheme violates Due Process. *See e.g.*, *Eubank*, 226 U.S. at 143-44 (striking ordinance that required city to establish property lines upon the request of two-thirds of adjacent property owners because it "confer[red] the power on some property holders to virtually control and dispose of the property

rights of others, [and] create[d] no standard by which the power thus given is to be exercised; . . . the property holders who . . . establish the line may do so solely for their own interest and even capriciously"); *Roberge*, 278 U.S. 121-22 (striking ordinance requiring consent from private property owners before building a "home for the aged poor" because "[t]here is no provision for review under the ordinance; their failure to give consent is final. They are . . . free to withhold consent for selfish reasons or arbitrarily" and thus "the delegation of power . . . is repugnant to the due process clause of the Fourteenth Amendment"); *see also Carter Coal*, 298 U.S. at 311 (holding arbitrary delegation to the private industry to "regulate the affairs of an unwilling minority" was "legislative delegation in its most obnoxious form" and therefore unconstitutional).

Applying this precedent, federal courts have not hesitated to strike down laws that, like the staff privileges requirement, use admitting privileges or similar measures to delegate standardless, arbitrary, and unreviewable licensing authority over abortion clinics to private hospitals. For example, in *Birth Control Ctrs., Inc. v. Reizen*, 508 F. Supp. 1366, 1374 (E.D. Mich. 1981), *aff'd other grounds*, 743 F.2d 352 (6th Cir. 1984), a federal district court in Michigan held that a law that required abortion clinics to secure either a written transfer agreement or a written agreement with a physician who has staff privileges at a local hospital to admit and attend to any patient with an emergency "violate[d] due process concepts because [it] delegate[d] a licensing function to private entities without standards to guide their discretion." As the court explained,

> The defect lies in the delegation of unguided power to a private entity, whose self-interest could color its decision to assist licensure of a competitor. Similar delegations of licensing functions have met with judicial disapproval . . . The power to prohibit licensure may not constitutionally be placed in the hands of hospitals. Such an impermissible delegation without standards or safeguards to protect

> against unfairness, arbitrariness or favoritism is void for lack of due process.

*Reizen*, 508 F. Supp. at 1375 (internal citations omitted).

Similarly, in *Hallmark Clinic v. North Carolina Dep't of Human Resources*, 380 F. Supp. 1153 (E.D. N.C. 1974), the court held unconstitutional a law requiring abortion clinics either to have a written transfer agreement with local hospitals or to ensure that all its physicians have full admitting privileges at a local hospital. Because "the state ha[d] placed no limits on the hospital's decision to grant or withhold a transfer agreement, or even to ignore a request for one," the court held the state had given "hospitals the arbitrary power to veto the performance of abortions for any reason or no reason at all." *Id*. at 1158. Similarly, the court recognized that "[s]taff privileges, like transfer agreements, depend on the whim or good will of a hospital . . . and the Department has not undertaken to superimpose its own criteria or even guidelines to control admission to staff privileges." *Id.* at 1159. As the court concluded,

> the state cannot confer upon a private institution the exercise of arbitrary and capricious power. If the state is determined to utilize hospitals as a control factor for the protection of patients in freestanding abortion clinics then it must establish and enforce standards for admission to hospital staff privileges. To do otherwise is government by caprice and cannot withstand fourteenth amendment challenges.

*Id.*; *cf. Women's Med. Ctr. of Nw. Houston v. Bell*, 248 F.3d 411, 422 (5th Cir. 2001) ("Especially in the context of abortion, a constitutionally protected right that has been a traditional target of hostility, standardless laws and regulations such as these open the door to potentially arbitrary and discriminatory enforcement.").

Because it delegates to private hospitals precisely the same standardless and unreviewable discretion to deprive Plaintiffs of their licenses that has consistently been rejected

by federal courts, the staff privileges requirement at issue in this case necessarily violates the nondelegation doctrine. Indeed, the requirement is flawed in multiple respects.

Alabama law imposes few—if any—standards on hospitals with respect to the staff privileges process. However, "[i]f the state is determined to utilize hospitals as a control factor for the protection of patients in freestanding abortion clinics then it must establish and enforce standards for admission to hospital staff privileges." *Hallmark Clinic*, 380 F. Supp. at 1159. [14] Alabama law only requires that hospitals adopt bylaws that "[i]nclude criteria for determining the privileges to be granted to individual practitioners and a procedure for applying the criteria to individuals requesting privileges." Ala. Admin. Code r. 420-5-7-.09(4)(f). In other words, the only standard imposed by the State is that the hospitals themselves adopt some unspecified criteria and procedure. The State otherwise fails to "superimpose its own criteria or even guidelines to control admission to staff privileges."[15] *Hallmark Clinic*, 380 F. Supp. at 1159; *see also id.* ("Although the law imposes some restrictions on decisions to deny or revoke staff privileges, the limitations are mostly procedural. Selection of standards is generally left to the hospital . . . The resulting potential for arbitrariness is the same."); *Reizen,* 508 F. Supp. at 1374 (holding admitting privileges requirement "violate[d] due process concepts because [it] delegate[d] a licensing function to private entities without standards to guide their discretion"); *Carter Coal*, 298 U.S. 238. As decades of precedent make clear, the Due Process Clause prohibits the State from delegating such standardless discretion to private parties.

[14] Although Alabama may have no independent reason or obligation to impose its own guidelines and criteria on the admitting privileges process in and of itself, a very different obligation applies when it is the State that effectively adopts the hospital admitting privileges process as part of its *own* requirements for maintaining an abortion facility license.

[15] The only limit the state has placed on hospitals' discretion is that they cannot "depend[] *solely* upon certification, fellowship, or membership in a specialty body or society" when granting privileges. Ala. Admin. Code r. 420-5-7-.04(2)(f) (emphasis added).

However, the delegation here is not only impermissible on its face because it gives private parties the *opportunity* to impose arbitrary and irrational standards to deny clinics the ability to operate; it is impermissible because, here, the delegation *actually operates*[16] to deny Plaintiffs licenses based on a number of requirements that are unrelated to the provision of safe, outpatient abortions—and upon which the State itself could not constitutionally rely. *See Schware v. Board of Bar Examiners,* 353 U.S. 232, 239 (1957) (holding that state can require high standards of qualification before granting a license, but those qualifications must have a rational connection to the license sought); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002) (striking down requirement that caskets be sold only by licensed funeral directors because licensing requirement had no rational relationship to state's proffered interests); *Cornwell v. Hamilton,* 80 F. Supp. 2d 1101 (S.D. Cal. 1999) (holding unconstitutional requirement that African hair braider take state mandated cosmetology course and pass licensing exam because it bore no substantial relationship to state's objectives); Commentary, Ala Code § 42-22-19 (Westlaw 2013) ("The due process clause imposes three essential requirements on occupational licensing schemes: specificity, rationality, and fairness. . . . Rationality requires that the standards bear a reasonable relation to effective practice of the regulated occupation.") (internal citations and quotations omitted).

For example, as the accompanying declarations make clear, most, if not all, of the relevant Alabama hospitals grant staff privileges only to physicians who admit a minimum

[16] This case is thus unlike *Greenville Women's Clinic v. Comm'r, South Carolina Dep't of Health & Envtl. Control*, 317 F.3d 357, 362-63 (4th Cir. 2002), where the Fourth Circuit rejected a nondelegation claim because the plaintiffs in that case had *already* obtained the necessary licenses and made the necessary arrangements and thus "the possibility that the requirements will amount to a third party veto [was] so remote that, on a facial challenge, [the court could] not conclude that the statute denies the abortion clinics due process."

number of patients per year.[17] *See* p. 14, *supra*. This means that the practical effect of the staff privileges requirement is that only those physicians who maintain a high-risk practice where somewhere between twelve and forty-eight of their patients will need to be hospitalized each year can provide abortions. Put another way, the staff privileges requirement prevents Plaintiffs from maintaining a license to provide abortion services because few, if any, of their patients will require hospitalization—abortion practice is *too safe* to satisfy hospitals' admissions quota.[18] This is precisely the sort of arbitrary result the nondelegation doctrine is meant to guard against: Since it would certainly be arbitrary and capricious if the State were to deny a clinic a license solely because its physicians do not send a minimum number of patients to the hospital each year, it is equally impermissible for the state to delegate such an irrational power to a private entity. *See Tucson Woman's Clinic*, 379 F.3d at 556 (explaining that the nondelegation doctrine prohibits the State from delegating to a third party the power to prohibit abortion providers from performing abortions based upon reasons that would be illegitimate for the state itself to act on);

[17] Whether such criteria are legitimate standards for a hospital to apply in deciding whether to grant a physician admitting privileges is irrelevant to the resolution of this case. Because the State has made the hospital's decision to deny admitting privileges an absolute bar to a clinic obtaining a license, the only relevant question for the due process analysis is whether the criteria employed by the hospital—including, *e.g.*, the admissions quota—have a rational relationship to the clinic's ability to provide safe abortion care. As demonstrated above, the answer to that question is a resounding no.

[18] In addition, as the declarations make clear, some of the relevant hospitals refuse to grant privileges to physicians who are not university professors, Fox Decl. ¶ 25, or to doctors who do not live or maintain a practice near enough to the hospital to provide ongoing coverage for their patients and their colleagues' patients, *id*. ¶ 27; Ayers Decl. ¶¶ 22-23. Still others will not provide the necessary privileges to Plaintiffs' physicians because of the hospitals' religious opposition to abortion, or their inability to obtain references or backup physicians. Fox Decl. ¶¶ 24, 28. Here too, just as it would be unconstitutional and irrational for a state to deny Plaintiffs a license based on these factors, it is arbitrary and unconstitutional for the State to permit private entities to effectively veto the licenses based on these criteria. *Cf. Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 281 (1985) (overturning under privileges and immunities clause state statute limiting bar admission to state residents because "[o]ut-of-state lawyers may-and often do-represent persons who raise unpopular federal claims. In some cases, representation by nonresident counsel may be the only means available for the vindication of federal rights."); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (overturning under establishment clause state statute vesting churches with power to veto applications for liquor licenses within a 500 hundred foot radius of the church).

*Hallmark Clinic*, 380 F. Supp. at 1158-59 ("The state cannot grant hospitals power it does not have itself.").[19]

Likewise, the due process violation is particularly egregious here because the power the State has delegated to these private entities is complete. There is no opportunity for judicial review. Nor has the State even retained for itself the power to waive the staff privileges requirement in appropriate cases. Ala. Admin. Code r. 420-5-1-.01(6)(a) (prohibiting the State Board of Health from waiving any statutorily mandated element of the licensing process). Thus, the staff privileges requirement vests the hospitals with complete and unreviewable veto power over the licensing process. This is the *sine qua non* of an unconstitutional delegation and is sufficient in and of itself to render the staff privileges requirement unconstitutional. *See e.g.*, *Roberge*, 278 U.S. at 121-22 (finding violation of due process where "[t]here is no provision for review under the ordinance; [the private property owners'] failure to give consent is final."); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940) (upholding under nondelegation doctrine statute allowing a private group of coal producers to propose minimum coal prices to a government commission, which could then approve, disapprove, or modify the proposal, because entity still functioned subordinately to government body); *Women's Med. Prof. Corp. v. Baird*, 438 F.3d 595, 610 (6th Cir. 2006) (holding nondelegation doctrine inapplicable where state had ability to waive hospital transfer agreement requirement thus

[19] Compounding these problems, Alabama law does not impose any rules on hospitals with respect to the admitting privileges *process*. There is no provision for notice or hearing; it does not appear that a hospital is required to explain and/or justify the reasons for any denial, or provide an opportunity for appeal; and there does not appear to be any limit on how long a hospital can take to decide whether to grant privileges—presumably, an application could be pending indefinitely. Once again, just as it would be unconstitutional for a state licensing authority to operate without basic due process protections, it is unconstitutional for Defendants to delegate such unrestricted power to private entities. *See generally Burson*, 402 U.S. at 539 (state may not revoke license without procedural due process); *see also Tucson Woman's Clinic*, 379 F.3d at 555 (upholding admitting privileges requirement where Arizona law required hospitals give applicants notice and opportunity for a hearing, and provided for judicial review).

"prevent[ing] the hospitals from having an unconstitutional third-party veto over [abortion clinic's] license"). Indeed, the lack of any supervisory or waiver power over the process distinguishes this staff privileges requirement from other such requirements that have been upheld by the federal courts. *See Baird*, 438 F.3d at 610; *Greenville Women's Clinic v. Comm'r*, 317 F.3d at 362-363.[20]

Finally, the staff privileges requirement is constitutionally flawed because it is "legislative delegation in its most obnoxious form[] for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business." *Carter Coal*, 298 U.S. at 311; *see also Reizen*, 508 F. Supp. at 1375 ("The defect lies in the delegation of unguided power to a private entity, whose self-interest could color its decision to assist licensure of a competitor.") While an Alabama hospital likely does not view an abortion clinic as competition, *per se*, it may well have interests adverse to those of the clinics—i.e., an institutional objection to abortion or simply an interest in *not* being associated with an abortion clinic. *See e.g.*, *Jackson Women's Health*, 2013 WL 1624365, at *4 ("The record does, however, demonstrate that elective abortions are anathema to the policies of the hospitals in the Jackson metropolitan area, which prompted them to reject the doctor's applications out of hand."); *Pro-Choice Miss. v. Thompson*, No. 3:96-596 (S.D. Miss. Sept. 28, 1996), at 21 (striking written transfer agreement requirement, recognizing "as a practical matter, local pressure can and will be brought upon hospitals to deny these written transfer agreement to abortion providers. . . . [T]he hospitals then would have third-party vetoes over whether the abortion providers can obtain a license from the State of Mississippi"). *See also* n.12, *supra*.

[20] To Plaintiffs' knowledge, the only other such requirement upheld by a federal court, *Tucson Woman's Clinic*, 379 F.3d at 555, is distinguishable because Arizona already imposed extensive due process standards on the hospitals. As already discussed herein, there are no such requirements in Alabama.

For all these reasons, Plaintiffs are extremely likely to succeed on the merits of their claim that the staff privileges requirement violates the nondelegation doctrine, and the requirement should thus be enjoined by this Court.

## II. PLAINTIFFS HAVE DEMONSTRATED A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CLAIM THAT THE STAFF PRIVILEGES REQUIREMENT VIOLATES THE FOURTEENTH AMENDMENT RIGHT TO PRIVACY

In order for a purported health regulation of abortion to withstand constitutional scrutiny, the State must demonstrate that the regulation is necessary to advance maternal health. *See, e.g.*, *Doe v. Bolton*, 410 U.S. 179, 195 (1973) (striking requirement that all abortions be performed in hospitals because "[t]he State . . . has not presented persuasive data to show that only hospitals meet its acknowledged interest in insuring the quality of the operation and the full protection of the patient."); *see also Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 900-01 (1992) (recognizing recordkeeping and reporting requirements as "a vital element of medical research" that were actually "directed to the preservation of maternal health") (internal citation omitted). If the State can meet its burden of proof in showing that a health regulation is necessary to advance maternal health, a regulation of abortion still can only be upheld if the *effect* of the regulation does not impose an undue burden on a woman's right to abortion. *See, e.g.*, *id.* at 878 (holding state may only regulate pre-viability abortion on the basis of maternal health if those regulations do not "have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion"). Here, because the staff privileges requirement is medically unwarranted and unnecessary and will make abortion unavailable throughout much of the state, Plaintiffs are also likely to succeed on the merits of their claim that the requirement violates a woman's constitutional right to decide to have an abortion.

### A. The Staff Privileges Requirement Cannot Withstand Constitutional Scrutiny Because it Is Medically Unnecessary.

The right to abortion has "real and substantial protection as an exercise of [a woman's] liberty under the Due Process Clause." *Lawrence v. Texas*, 539 U.S. 558, 565 (2003). Thus, when the State purports to regulate abortion in the interest of maternal health, it is the State's burden to prove that such regulations actually advance that interest.[21] *See e.g.*, *Bolton*, 410 U.S. at 195; *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 431 (1983) ("If a State requires licensing or undertakes to regulate the performance of abortions . . . the health standards adopted must be legitimately related to the objective the State seeks to accomplish.") (citation and quotation omitted), *rev'd on other grounds*, *Casey*, 505 U.S. 833; *Akron*, 462 U.S. at 430 (noting that "the decisive factor" in upholding recordkeeping and informed consent regulations in *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976) was that "the State met its burden of demonstrating that these regulations furthered important health-related State concerns"); *see also Casey*, 505 U.S. at 900-01 (recognizing recordkeeping and reporting requirements as "a vital element of medical research" that were "directed to the preservation of maternal health") (internal citation omitted); *Pro-Choice Miss. v. Thompson*, No. 3:96-596 (S.D. Miss. Sept. 28, 1996), at 18 (striking ob-gyn residency requirement for abortion providers because the "state cannot meet its burden . . . [of] showing there is a reasonable medical

[21] By contrast, "[s]ubstantive due process challenges that do not implicate fundamental rights are reviewed under the highly deferential 'rational basis' standard." *Schwarz v. Kogan*, 132 F.3d 1387, 1390 (11th Cir. 1998). However, there can be no valid argument that such a low burden of proof applies when considering state regulation of a fundamental right, such as abortion, which is plainly subject to heightened constitutional protection beyond that provided by rational basis review. *See, e.g., Casey*, 505 U.S. at 851 ("Our cases recognize the right . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.") (internal citations and quotations omitted). If this protection means anything, it means that a regulation that the State claims advances women's health must actually do so, and the staff privileges requirement does not.

necessity directed to preserve the woman's health"). Holding the State to its burden of proof is particularly important where, as here, the regulation would reduce abortion services in Alabama by three-fifths, leaving only two licensed abortion clinics throughout the entire state. Because Defendants will not be able to prove that requiring every physician who provides abortions in an outpatient clinic to obtain staff privileges at a nearby hospital—and making clinic licensure entirely contingent on obtaining such privileges—is medically necessary or justified, the staff privileges requirement is unconstitutional and must be enjoined by this Court. *See, e.g.*, *Akron*, 462 U.S. at 435-37 (striking down hospitalization requirement that prevented outpatient clinics from performing second-trimester abortions because experience, the medical literature, and professional standards of prominent medical organizations demonstrated that early second-trimester abortions may be performed as safely in outpatient clinics as in hospitals); *Danforth*, 428 U.S. at 77-78 (invalidating ban on saline abortions because, *inter alia*, testimony demonstrated that saline was the most commonly used method of post-first trimester abortion nationally).[22]

First of all, the staff privileges requirement is medically unnecessary. It is extremely unlikely that an abortion patient will ever need hospital-based care—less than 0.3% of abortions result in hospitalization. Moreover, existing law already requires Plaintiffs to contract with "[a] physician with admitting privileges at a hospital within the same standard metropolitan statistical area as the clinic [who is] available to provide care for complications arising from an abortion twenty-four hours a day, seven days a week." Ala. Admin. Code r. 420-5-1-.03(6)(b); *see also* Fox Decl. ¶ 8; Ayers Decl. ¶ 7. If no physician that meets the above qualifications is available to

[22] Although *Casey* overruled "those parts of *Danforth* and *Akron* which . . . are inconsistent with *Roe*'s statement that the State has a legitimate interest in promoting the life or the potential life of the unborn," 505 U.S. at 870, *Casey* did not overrule the *Danforth* or *Akron* decisions with respect to provisions that were enacted to further women's health.

provide patient care in the event of an emergency, the clinic must stop performing abortions no later than 72 hours before the physician's unavailability. Ala. Admin. Code r. 420-5-1-.03(6)(b)(5). The DPH inspects Plaintiffs annually to ensure compliance with these requirements, and Plaintiffs are in full compliance with them.

But even if this were not already the law, there is *no* evidence to suggest that a patient cannot or would not be appropriately treated by a trained E.R. physician and/or other specialists on the hospital's own staff. To the contrary, the expert testimony of Dr. Fine shows that referring a patient to a hospital emergency room is consistent with the standard of care, in the exceedingly rare case of a complication requiring it. Fine Decl. ¶¶ 15, 20-22, 29. The majority of complications from the abortions Plaintiffs perform are similar to those encountered by women experiencing miscarriage, which emergency room physicians can, and routinely do, handle. *Id.* at ¶ 22. However, where additional care is necessary, the emergency room can, and would, involve the on-call ob-gyn or other physicians, as necessary. *Id.* ¶¶ 16, 22.

Moreover, as Dr. Fine's testimony also shows, there is a complete disconnect between the staff privileges requirement and the reality of abortion practice. First, the requirement rests upon the false premise that an ambulance would necessarily transfer a patient to the hospital where the physician has privileges, but this is far from the case given that the EMTs generally choose where to transfer a patient based on their own protocols and the patient's condition. *Id.* at ¶ 17. Similarly, the requirement presumes that a patient will necessarily be in the vicinity of the hospital where her physician has admitting privileges when she experiences a complication. However, between 45-60% of Plaintiffs' patients do not live near the clinics, Fox Decl. ¶ 18; Ayers Decl. ¶ 13, and nearly half of PPSE's patients choose medication abortion, which means, by definition, that a complication could only arise away from the clinic, Fox Decl. ¶ 16; *see also*

Fine Decl. ¶ 21. For these patients, the standard of care dictates that, in the exceedingly rare case of a complication requiring a hospital visit, the physician refer them to their nearest emergency room. *See* Fox Decl. ¶ 17; Ayers Decl. ¶ 14; *see also* Fine Decl. ¶¶ 20-21, 29. And, even if the abortion provider had privileges at the hospital where a patient was receiving treatment for a complication, that provider might not be the appropriate physician to provide that treatment. Fine Decl. ¶¶ 18-19. As such, the staff privileges requirement essentially serves no purpose at all other than to eliminate access to abortion.

Indeed, as noted above, the State does not impose a similar staff privileges requirement on any other kind of outpatient facility in Alabama. *See* p. 10, *supra*. Alabama physicians are permitted to perform surgery in their offices – even using general anesthesia, which Plaintiffs do not use – without any requirement that any of those physicians have staff or admitting privileges at a local hospital. *See, e.g.*, Ala. Admin. Code § 540-X-10-.01(2)(f) ("Planning should include, but not be limited to, emergency medicines, emergency equipment, and transfer protocols."). Even ambulatory surgical centers ("ASCs"), which provide procedures generally more complicated and riskier than abortion, can be licensed without obtaining staff or admitting privileges for their surgeons. *See e.g.*, Fine Decl. ¶ 30; Ala. Admin. Code r. 420-5-2-.01 *et seq*. As Dr. Fine's testimony demonstrates, referring a patient to an emergency room to handle complications, where the outpatient provider lacks staff privileges, is common throughout outpatient medicine. Fine Decl. ¶¶ 25, 27-29, 32.

Second, and perhaps more importantly, "[t]he State's discretion to regulate [on the basis of maternal health] does not . . . permit it to adopt abortion regulations that depart from accepted medical practice." *Akron*, 462 U.S. at 431; *see also id.* at 435-37 (relying on the standards of the American College of Obstetricians and Gynecologists, among others, to demonstrate lack of

justification for hospitalization requirement); *Simopoulos v. Virginia*, 462 U.S. 506, 516 (1983) (state is not permitted "to adopt abortion regulations that depart from accepted medical practice"). Yet, as the expert testimony in this case clearly demonstrates, the staff privileges requirement does precisely that: it relies on the outdated and unsupported presumption that the same physician who provides outpatient care will provide hospital-based care to his or her patients should such care be necessary.[23] *See* Fine Decl. ¶ 25.

As the record shows, hospitals today increasingly rely on their own dedicated staff, or "hospitalists," and limit privileges to those physicians whose outpatient practices will necessarily generate a lot of inpatient admissions, as well. *Id.* at ¶ 26. Thus, if a patient suffers a complication after undergoing any outpatient procedure and needs follow-up care at the hospital, it is increasingly the case that that patient will be treated by a "hospitalist" or a doctor who regularly provides hospital-based care, and not by his or her regular physician. *Id.* at ¶¶ 26-27. As Dr. Fine explains, the growing divide between ambulatory and hospital-based care means that more and more highly qualified outpatient physicians must hand off the care of their patients experiencing complications at the hospital door. This is not patient abandonment, but the way that good medicine is practiced today. *See id.* at ¶¶ 31-32.

Indeed, the standards issued by leading medical and professional organizations, such as the American Congress of Obstetricians and Gynecologists ("ACOG") and the National Abortion Federation ("NAF"), which are generally recognized as setting the standard of care and are routinely relied upon by courts evaluating abortion safety regulations, make no mention of

[23] The staff privileges requirement also presumes—incorrectly—that it is accepted medical practice to limit the provision of abortion care to ob-gyns (no less to only those ob-gyns that routinely perform complex obstetric surgeries, as is the case here). Fine Decl. at ¶ 24.

staff privileges.[24] *Id.* at ¶ 23. ACOG has explicitly stated on more than one occasion that admitting privileges are not necessary to the provision of safe abortion care and has publicly opposed laws, such as this one, that make abortion access contingent on the availability of such privileges.[25]

Instead of admitting privileges, ACOG and others emphasize the need for clearly established policies and protocols to govern the *transfer* of a patient needing emergency care to a hospital. *See* Fine Decl. ¶ 23 (citing *Guidelines for Women's Health Care: A Resource Manual* 433 (Paula Hillard, et al., eds. 2007, ACOG) ("Clinicians who perform abortions in their offices, clinics, or freestanding ambulatory care facilities should have a plan to provide prompt emergency services if a complication occurs and should establish a mechanism for transferring patients who require emergency treatment.")); *2013 Clinical Policy Guidelines* 55 (NAF Dec. 2012) ("Protocols for the management of medical emergencies must be in place. These protocols must include indications for emergency transport and written, readily available directions for contacting external emergency assistance (i.e., an ambulance). Plaintiffs' own policies and protocols are fully consistent with this standard of care. *See* Fox Decl. ¶¶ 13-21; Ayers Decl. ¶¶ 9-15.

[24] These standards are also routinely relied upon by courts evaluating abortion safety regulations. *See e.g.*, *Akron*, 462 U.S. at 435-37; *Danforth*, 428 U.S. at 77-78.

[25] *See Statement on State Legislation Requiring Admitting Privileges for Physicians Providing Abortion Services*, ACOG, Apr. 25, 2013, available at http://www.acog.org/About_ACOG/News_Room/News_Releases/2013/Hospital_Admitting_Privileges_for_Physicians_Providing_Abortion_Services ("ACOG opposes laws or other regulations that require abortion providers to have hospital admitting privileges."); ACOG, Analysis of the Possible FDA Mifepristone Restrictions (July 27, 2000) at 3 ("Privileges at a hospital are not necessary for prescribing [medication abortion] safely. . . . The prescribing physician does not need to be in the emergency room or to be the admitting physician if a patient requires follow-up emergency care. Women experiencing miscarriages and spontaneous abortions frequently require the same services and care and appropriately receive this care at their physicians' offices.")

Plaintiffs' own experiences trying to comply with the staff privileges requirement only underscore what the evidence in this case makes plain: that staff privileges are simply unrelated to, and therefore unnecessary for, the provision of abortion services. *See* Fox Decl. ¶¶ 23-29; Ayers Decl. ¶¶ 17-24. As Dr. Fine's testimony confirms, consistent with national trends, most, if not all, of the hospitals in Birmingham, Mobile, and Montgomery require a minimum number of admissions each year to maintain those privileges. Fox. Decl. ¶ 27; Ayers Decl. ¶ 17; Fine Decl. ¶¶ 25, 31-32. Thus, the staff privileges requirement puts Plaintiffs' physicians in a catch-22: Because the rate of serious complications from abortion is so exceedingly low, too few abortion patients will ever suffer complications requiring hospital-based care to enable Plaintiffs to comply with the law. In other words, the staff privileges requirement would eliminate the majority of the State's abortion providers because abortion is *too* safe. Such an absurd result, particularly where the State claims to be acting to protect maternal health, is plainly unconstitutional.

In sum, given the inherent safety of abortion, the total lack of medical evidence supporting the staff privileges requirement, and the obvious harm that would befall women who are deprived access to legal abortion, Defendants' purported interest in maternal health is difficult to credit. At a minimum, Defendants cannot meet their burden of proof, and the staff privileges requirement cannot withstand constitutional scrutiny. Plaintiffs are thus extremely likely to succeed on the merits of their claim that the staff privileges requirement constitutes an unnecessary, and therefore unconstitutional, regulation of abortion.

### B. The Admitting Privileges Requirement Is Unconstitutional Because it Will Force Three of the Five Clinics in the State to Close, Thereby Posing an Undue Burden on Women Seeking Abortions.

Even assuming *arguendo* the State could prove that the staff privileges requirement advanced maternal health in any meaningful way, which it cannot, a law that "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" is not "a permissible means of serving [a] legitimate end[]." *Casey*, 505 U.S. at 877; *see also Akron,* 462 U.S. at 438 (holding that even if acting in the interest of maternal health the state may not impose "a heavy, and unnecessary, burden on women's access to *a relatively inexpensive, otherwise accessible, and safe abortion procedure*.") (emphasis added). The staff privileges requirement, which outright eliminates the availability of abortion services throughout much of the state, is undoubtedly such a law.

Indeed, there is no question that the staff privileges requirement would place a substantial obstacle in the path of women seeking abortions in Alabama. It would force three of the state's five licensed abortion clinics to cease performing abortions altogether, leaving only two licensed clinics, one on the northern border (Huntsville) and the other near the eastern border (Tuscaloosa). Courts have not hesitated to conclude that a measure, such as this one, "that has the effect of forcing all or *a substantial portion of a state's abortion providers to stop offering such procedures creates a substantial obstacle* to a woman's right to have a pre-viability abortion, thus constituting an undue burden under *Casey*." *Okpalobi v. Foster*, 190 F.3d 337, 357 (5th Cir. 1999) (citation omitted, emphasis added), *superseded on reh'g en banc on other grounds*, 244 F.3d 405 (5th Cir. 2001); *accord Tucson Woman's Clinic*, 379 F.3d at 541 ("A significant increase in the cost of abortion or [decrease in] the supply of abortion providers and clinics can, at some point, constitute a substantial obstacle to a significant number of women choosing an abortion."); *see also Tucson Woman's Clinic*, 379 F.3d at 542 (a factfinder could find that a regulation "limiting the supply of abortion providers" in the state "imposes a

substantial obstacle"); *Jackson Women's Health*, 2013 WL 1624365, at *5; *Planned Parenthood of Kan. v. Drummond*, No. 07-4164-CV, 2007 WL 2811407, at *7-8 (W.D. Mo. Sept. 24, 2007) (finding likelihood of success on the merits of undue burden claim where, *inter alia*, law could have the effect of "shutting down Missouri's only abortion facilities located outside the St. Louis area.").

In fact, Plaintiffs are aware of no decision upholding a law, such as the staff privileges requirement, that would have forced the majority of abortion providers in a state to cease providing such services altogether. *See Okpalobi*, 190 F.3d at 357 (holding such a law would impose an undue burden). To the contrary, those few decisions to have addressed the constitutionality of laws that would force specific clinics or providers to stop performing abortions have done so in the context of laws that would impact only a single medical professional or clinic, and have emphasized the fact that those laws would *not* significantly reduce the availability of abortion services in the state. *See*, *e.g.*, *Mazurek v. Armstrong*, 520 U.S. 968, 974 (1997) (upholding law that would impact single medical provider where "no woman seeking an abortion would be required by the new law to travel to a different facility than was previously available"); *Baird*, 438 F.3d at 604-06 (addressing closure of a single clinic where the evidence showed twelve remaining providers in the state); *Women's Health Ctr. of West County, Inc. v. Webster*, 871 F.2d 1377, 1380 n.7 (8th Cir. 1989) (addressing law that would impact a single doctor where other physicians at the same clinics could continue to provide abortions, and emphasizing that "Dr. Escobedo apparently is the only doctor in the State of Missouri who desires to perform abortions [that] is prevented from doing so by reason of the statute").[26] By contrast, where, as here, a law would cause the majority of providers in a state to

[26] Indeed, even where a law would affect a small number of providers, it has been recognized that the law may impose an undue burden. *See Tucson Woman's Clinic*, 379 F.3d at 542 (holding plaintiffs were

cease performing abortions, courts have found that the law would unduly burden women seeking abortions. *See, e.g.*, *Okpalobi*, 190 F.3d at 357; *Planned Parenthood of the Heartland v. Heineman*, 724 F. Supp. 2d 1025, 1044-45 (D. Neb. 2010) (a measure that would deter most or all abortion providers from performing such procedures imposes a substantial obstacle on access to abortion care); *Jackson Women's Health*, 2013 WL 1624365, at *5; *Planned Parenthood of Kansas*, 2007 WL 2811407, at *7-8. There simply is no precedent for upholding against constitutional challenge a law that would force the majority of abortion clinics in the state to stop performing abortions: Eliminating outright a substantial majority of the abortion clinics in a state is the very essence of an undue burden on the right to abortion. *See Okpalobi*, 190 F.3d at 357; *Tucson Woman's Clinic*, 379 F.3d at 541.

Moreover, the evidence confirms what should be self-evident: that forcing three-fifths of the state's licensed abortion clinics (the only clinics in the three most populous cities in the State) to stop providing abortions would impose significant burdens on women seeking such services in Alabama by significantly increasing the distance many women would have to travel to obtain abortions, and that for a significant number of those women, these burdens will be insurmountable. Henshaw Decl. ¶¶ 9-10. By eliminating the majority of abortion providers in the state and leaving only two licensed clinics near the northern and eastern borders, the Act would force women to travel significant distances—for many women, hundreds of miles—in order to obtain an abortion in Alabama. *Id.* ¶¶ 11-13. For example, women in and around Mobile can presently obtain abortions at the PPSE health center in Mobile. *Id.* ¶ 12. Upon enforcement of the staff privileges requirement, however, women in Mobile seeking abortions in Alabama would be forced to travel more than 400 miles round-trip to access the next-closest

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entitled to go forward with their undue burden claims where they presented evidence that regulations would force one provider to cease providing abortions all together and another provider would lose two-thirds of its physicians).

abortion clinic in Tuscaloosa or more than 700 miles round-trip to access the only other clinic in Huntsville. *Id.* Women in and around Montgomery can presently obtain abortions in that city at RHS, but if the staff privileges requirement were to go into effect they would be forced to travel more than 200 miles round-trip to and from Tuscaloosa and nearly 400 miles round-trip to and from Huntsville to obtain an abortion in Alabama. *Id.* ¶ 11. And women in and around Birmingham can presently obtain an abortion at the PPSE center in Birmingham, but would be forced to travel nearly 120 miles round-trip to access the clinic in Tuscaloosa, or more than 200 miles round-trip to access the clinic in Huntsville, in order to obtain an abortion in Alabama if the staff privileges requirement were to go into effect. *Id.*; *see also* Fox Decl. ¶ 34; Ayers Decl. ¶¶ 25-26.

This increased travel burden will raise the cost of obtaining an abortion for Plaintiffs' patients, many of whom are unable to afford such additional costs. As the record makes clear, a significant number of Plaintiffs' patients have poverty-level incomes. Fox Decl. ¶ 36; Ayers Decl. ¶ 26; *see also* Henshaw Decl. ¶ 14. Many of these women do not have cars, and of those who do, many already struggle to pay for gas and childcare and to arrange time off from work, on top of the costs of the abortion procedure itself. Fox Decl. ¶ 36; Ayers Decl. ¶ 26. Some women will be forced to delay obtaining care as they struggle to scrape together additional funds for this additional travel or make arrangements for rides, childcare, and additional time off from work. *See e.g.*, Fox Decl. ¶ 36. And, in the case of medication abortion, which is provided only early in the first trimester, if the woman is unable to obtain an abortion until later in pregnancy, she loses this nonsurgical option. *Id.* These additional costs and delays imposed as a result of a medically unnecessary requirement unduly burden women seeking abortions. *See Tucson Woman's Clinic*, 379 F.3d at 542 (recognizing that increased costs and delays can impose an

undue burden). Indeed, imposing such travel burdens will in fact prevent a significant number of women seeking abortions from being able to obtain them. *See* Henshaw Decl. ¶¶ 3-9.

In sum, the implications of these data for the staff privileges requirement are clear. This requirement would force many women seeking abortions to travel long distances—in some cases, hundreds of miles—to obtain an abortion in the state. Some women will be unable to overcome the burdens the Act would impose, and will be prevented from obtaining abortions; these burdens are likely to be felt with particular acuity by low-income women who make up a majority of Plaintiffs' patients. A law, such as this one, that compels "a substantial portion of a state's abortion providers to stop offering such procedures creates a substantial obstacle to a woman's right to have a pre-viability abortion, thus constituting an undue burden under *Casey*." *Okpalobi*, 190 F.3d at 357. As such, Plaintiffs are extremely likely to succeed on the merits of their claim that the Act imposes an undue burden on a woman's right to choose abortion and is therefore unconstitutional. *Casey*, 505 U.S. at 877.[27]

[27] Finally, as a legal and factual matter, the prospect that some women may attempt to travel out of state to obtain abortion care does not in any way alter the analysis here. First, as a matter of law, it is irrelevant to the undue burden analysis whether Alabama women might be able to travel to another state to obtain an abortion. *See Isaacson v. Horne*, No. 12–16670, 2013 WL 2160171, at *16 (9th Cir. May 21, 2013) (Kleinfeld, J., concurring) ("Arizona has unquestionably put a substantial obstacle in the path of a woman seeking to abort a previability fetus. . . . True, she might be able to go to another state for it, but *I am unaware of any case in which one state may deprive someone of a constitutional right because the individual could exercise it in another state*.") (quotation marks omitted) (emphasis added); *Jackson Women's Health*, 2013 WL 1624365, at *5; *Jackson Women's Health Org., Inc. v. Amy*, 330 F. Supp. 2d 820, 823 (S.D. Miss. 2004) ("[T]he court is not persuaded that this burden is adequately ameliorated by the possible availability of abortions in surrounding states."). Indeed, given that efforts to enforce a law identical in all relevant respects to the Act have threatened to close the only abortion provider in Mississippi, it would be especially inappropriate here to uphold the Act on the basis that Alabama women might travel to neighboring states in an effort to obtain an abortion. *See Jackson Women's Health*, 2013 WL 1624365, at *5 ("[T]he State's position would result in a patchwork system where constitutional rights are available in some states but not others. It would also nullify over twenty years of post-*Casey* precedents because states could survive the undue-burden test by merely saying that abortions are available elsewhere."). And as a factual matter, traveling out of state would not alleviate the burdens addressed herein for many Alabama women—including women in Montgomery and Birmingham—since the travel distance to an out-of-state provider is comparable to, if not greater than, the distance to one of the two remaining clinics in the state. Henshaw Decl. ¶ 13.

## III. IRREPARABLE HARM

Plaintiffs satisfy the second requirement for injunctive relief because enforcement of the staff privileges requirement will inflict irreparable harm on Plaintiffs and their patients for which there is no adequate remedy at law.

It is plain that it will be impossible for Plaintiffs to comply with the privileges requirement. Starting July 1, 2013, absent relief from this Court, Plaintiff RHS – the sole abortion provider in Montgomery and Plaintiff Ayers' entire livelihood – will have to close after more than thirty years in operation. Ayers Decl. ¶¶ 1, 3, 25; *see also ABC Charters, Inc. v. Bronson*, 591 F. Supp. 2d 1272, 1307 (S.D. Fla. 2008) (finding irreparable harm where "preponderance of evidence at preliminary injunction establishes that [plaintiffs] will be forced to close their businesses" thus depriving plaintiffs of sole source of income and means of retirement). Likewise, starting July 1, 2013, Plaintiff PPSE will be forced to cease providing abortion services. Fox Decl. ¶¶ 4, 31. This, in turn, will result in significant cuts to staff and hours. *Id.*; *see also ABC Charters, Inc.*, 591 F. Supp. 2d at 1309 ("Numerous courts have recognized that irreparable harm may result from the loss of a central, key component of the business, even if the business as a whole is not destroyed immediately.").[28]

Moreover, the violation of Plaintiffs' and their patients' constitutional rights further supports a determination of irreparable harm. *See Touchston v. McDermott*, 234 F.3d 1133, 1159 n.4 (11th Cir. 2000) (noting "we have presumed irreparable harm to a plaintiff when certain core rights are violated" and "cannot be undone through monetary remedies"). Indeed, the potential denial of Plaintiffs' patients constitutional right to abortion is the very exemplar of

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[28] This is particularly true where, as here, Plaintiffs are barred from seeking retroactive damages from defendants because of Eleventh Amendment immunity. *Clark Constr. Co., Inc. v. Pena,* 930 F. Supp. 1470, 1479–80 (M.D. Ala. 1996).

irreparable harm: once lost, the right to choose abortion is lost forever. *See e.g.*, *Ne. Florida Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla*., 896 F.2d 1283, 1285 (11th Cir. 1990), *overturned on other grounds*, 508 U.S. 656 (1993) (recognizing Eleventh Circuit holding that "an on-going violation [of the constitutional right to privacy] constitutes irreparable harm" because "invasions of privacy, because of their intangible nature, could not be compensated for by monetary damages; in other words, plaintiffs could not be made whole") (internal citations omitted); *Women's Medical Ctr. of Nw. Houston*, 248 F.3d at 422 (affirming district court's finding of irreparable harm based on threat to women's constitutional right to privacy); *Mississippi Women's Med. Clinic v. McMillan*, 866 F.2d 788, 795 (5th Cir. 1989) (holding that denial of the right to obtain an abortion at a specific clinic due to clinic protesters *"would constitute irreparable harm even if other abortion facilities were available"* because "the clinic has the right to provide such services as the law permits") (emphasis added); *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981) (finding of irreparable injury is mandated where constitutional right to privacy is being threatened or impaired); *cf. League of Women Voters of Florida v. Browning*, 863 F. Supp. 2d 1155, 1167 (N.D. Fla. 2012), *appeal dismissed*, Aug. 24, 2012 ("The plaintiffs will suffer irreparable harm if an injunction is not issued, first because the denial of a right of this magnitude under circumstances like these almost always inflicts irreparable harm, and second because when a plaintiff loses an opportunity to register a voter, the opportunity is gone forever. If an injunction does not issue now, there will be no way to remedy the plaintiffs' continuing loss through relief granted later in this litigation.").

Finally, closure of more than half of the state's abortion clinics, and the elimination of any licensed abortion services south of Tuscaloosa, will cause irreparable harm to Plaintiffs'

patients' health and wellbeing by causing undue delay and, for some, forcing them to continue their pregnancies to term—regardless of risk—against their will. *See* pp. 13-15, *supra*; *see also Harris v. Bd. of Supervisors*, 366 F.3d 754, 766 (9th Cir. 2004) (plaintiffs established likelihood of irreparable harm where evidence showed they would experience pain, complications, and other adverse effects due to delayed medical treatment).

## IV. BALANCE OF EQUITIES

A preliminary injunction will impose only minimal harm on Defendants because Plaintiffs ask merely for the status quo – under which Plaintiffs safely provide care to their patients under the state's existing regulatory and inspection scheme – to be maintained while questions about the law's constitutionality are adjudicated. This is precisely the purpose of a preliminary injunction. *See Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1101 n.13 (11th Cir. 2004) ("[T]he textbook definition of a preliminary injunction [is that it is] issued to preserve the status quo and prevent allegedly irreparable injury until the court ha[s] the opportunity to decide whether to issue a permanent injunction."). There can be no harm to Defendants from maintaining the status quo: Given that abortion is a safe procedure with very few complications, and given the existing regulatory structure as well as Plaintiffs' own quality care, no patient's safety would be compromised. Thus, the equities tip sharply in favor of granting a preliminary injunction while the constitutionality of the staff privileges requirement is decided. *See Scott v. Roberts*, 612 F.3d 1279, 1297 (11th Cir. 2010); *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006).

## V. A PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST

The interests of Plaintiffs and the general public are aligned in favor of a preliminary injunction in this case. The public interest is not served by allowing an unconstitutional law to

take effect. *See Scott*, 612 F.3d at 1297; *KH Outdoor*, 458 F.3d at 1272. Particularly where civil rights are at stake, an injunction *serves* the public interest because the injunction "would protect the public interest by protecting those rights to which it too is entitled." *Nat'l Abortion Fed'n v. Metro. Atlanta Rapid Transit Auth.*, 112 F. Supp. 2d 1320, 1328 (N.D. Ga. 2000). Furthermore, without an injunction, three-fifths of the licensed abortion clinics in the state will close, causing Plaintiffs' patients to suffer a significantly reduced ability to access constitutionally protected abortion services. Ensuring continued access to constitutionally protected health care services is undoubtedly in the public interest.

## VI. A BOND IS NOT NECESSARY IN THIS CASE

Finally, the Court should waive the Fed. R. Civ. P. 65(c) bond requirement. As the Eleventh Circuit held in *Bell South Telecomm., Inc. v. MCIMetro Access Transmission Servs., LLC*, "it is well-established that 'the amount of security required by the rule is a matter within the discretion of the trial court . . . [, and] the court may elect to require no security at all.'" 425 F.3d 964, 971 (11th Cir. 2005) (citing *City of Atlanta v. Metro. Atlanta Rapid Transit Auth.*, 636 F.2d 1084, 1094 (5th Cir. 1981)); *see also AFC Enterprises, Inc. v. THG Rest. Grp., LLC*, 416 F. App'x 898, at *1 (11th Cir. 2011) (affirming that the court does not have to require a bond). The Court should use its discretion to waive the bond requirement in this case, as the preliminary injunction will not result in a monetary loss for the Defendants. Moreover, the Plaintiffs are healthcare providers dedicated to serving women in low-income and underserved communities, and a bond would strain the providers' already-limited resources.

## CONCLUSION

For all the reasons set forth above, the staff privileges requirement violates the nondelegation doctrine and a woman's constitutional right to privacy and should be enjoined by this Court.

Respectfully submitted,

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**motion for admission pro hac vice pending*