UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

WHOLE WOMAN'S HEALTH ALLIANCE; ALL-OPTIONS, INC.; JEFFREY GLAZER, M.D.,	)	
Plaintiffs,	)	
v.	)	Case No.: 1:18-cv-01904-SEB-MJD
CURTIS T. HILL, JR., in his official capacity; KRISTINA BOX, M.D., in her official capacity; JOHN STROBEL, M.D., in his official capacity; and KENNETH P. COTTER, in his official capacity,	)	
Defendants.		

MOTION FOR STAY PENDING APPEAL

Pursuant to Federal Rule of Civil Procedure 62(d), Defendants Curtis T. Hill, Jr., Kristina Box, John Strobel, and Kenneth P. Cotter respectfully move this Court to stay the enforcement of its preliminary injunction, entered on May 31, 2019, pending their appeal to the United States Court of Appeals for the Seventh Circuit. Defendants-Appellants have this day filed their Notice of Appeal from the Court's preliminary injunction as well as their Docketing Statement.

In its preliminary injunction ruling, the Court held that Whole Woman's Health is entitled to operate an unlicensed pill-only abortion clinic in South Bend Indiana because requiring it to obtain a license would, with all the administrative hassle, impose an undue burden on South Bend women seeking abortion. But South Bend has been without an abortion provider for several years, yet Plaintiffs have identified no one from South Bend who during that time was unable to obtain an abortion. The theory behind the Court's undue burden analysis appears to be that every large

city in the State is entitled to its own abortion clinic, and that state licensing requirements must give way whenever a clinic proposes to open in a city without one. The Supreme Court has never even remotely implied that such a rule exists, and this Court's decision appears to be the first that proposes to adapt the undue burden standard to a geographic area smaller than an entire State. Because the Court's decision exceeds the bounds of the right to abortion as established by the Supreme Court—whether facial or as-applied—it is likely to be reversed on appeal. The Court should accordingly stay its preliminary injunction, lest women seeking abortion risk harm at the hands of an unsupervised clinic whose affiliates have a checkered past and that will dispense medication that ends pregnancy, expels fetal remains, may cause substantial loss of blood, and may prompt years of regret, depression, and other emotional harm.

STANDARD FOR GRANTING A STAY

Federal Rule of Civil Procedure 62(d) provides that "[w]hile an appeal is pending from an interlocutory order or final judgment that grants . . . an injunction, the court may suspend [that] injunction . . . ." The purpose of a stay is to "maintain the status quo pending appeal, thereby preserving the ability of the reviewing court to offer a remedy and holding at bay the reliance interests in the judgment that otherwise militate against reversal[.]" *In re CGI Indus., Inc.*, 27 F.3d 296, 299 (7th Cir. 1994). If a stay is not granted and action is taken in reliance on the judgment, "the positions of the interested parties have changed, and even if it may yet be *possible* to undo the transaction, the court is faced with the unwelcome prospect of 'unscrambl[ing] an egg.'" *Id.* (citation omitted).

In considering whether to issue a stay, the Court must "consider the relative hardships to the parties of the relief sought, in light of the probable outcome of the appeal," and "should grant the stay" if the party seeking it "both has a good chance of winning the appeal and would be hurt

more by the injunction . . . than the [opposing party] would be hurt by a stay of the injunction pending appeal." *Indianapolis Colts v. Mayor & City Council of Baltimore*, 733 F.2d 484, 486 (7th Cir. 1984).

The nature of the showing required to justify a stay pending appeal varies with the facts of each case. The "[p]robability of success is inversely proportional to the degree of irreparable injury evidenced. A stay may be granted with either a high probability of success and some injury, or *vice versa*." *Cuomo v. NRC*, 772 F.2d 972, 974 (D.C. Cir. 1985); *see also FTC v. Mainstream Mktg. Servs., Inc.*, 345 F.3d 850, 852 (10th Cir. 2003) (per curiam) (granting stay of injunction against federal do-not-call law and holding that if the moving party can establish "that the three 'harm' factors tip decidedly in its favor, the 'probability of success' requirement is somewhat relaxed").

With respect to success on the merits, the Supreme Court has held that there must be a "strong showing" of likely success, not necessarily a definitive likelihood of success as in the preliminary injunction context. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). Indeed, "the movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay." *Wildmon v. Berwick Universal Pictures*, 983 F.2d 21, 23 (5th Cir. 1992) (citations and internal quotations omitted; emphasis omitted).

ARGUMENT

I. The State Is Likely To Succeed on the Merits

The Court's Order appropriately rejects Plaintiffs' vagueness claim, ECF 116 at 50, and properly recognizes that "Plaintiffs cannot expand the substantive scope of the abortion right by resort to the Equal Protection Clause," ECF 116 at 53. Their "as applied" due process and equal

protection claims present a single question—whether the State's Licensing Law "has placed a substantial obstacle in the path of women in northern Indiana seeking previability abortions by prohibiting [Plaintiffs] from providing medical abortions at the South Bend Clinic," ECF 116 at 51.

Yet the Order's answer to this question—that the Licensing Law creates "unmet demand for abortions in and around South Bend . . . without any appreciable benefit to maternal health or fetal life," ECF 116 at 69—is fatally flawed. Indeed, each element of this conclusion is mistaken. "As applied" challenges to statewide licensing regimes are not cognizable under the Supreme Court's "undue burden" framework in the first place. But even if they were, there is simply no evidence that the lack of an abortion clinic in South Bend imposes an undue burden on a "large fraction" of relevant women. And beyond this flaw in the Order's analysis of the law's burdens, its consideration of the State's interests repudiates decades of case law in contending that licensing regimes further *no* state interest. Finally, the Order's balancing of the benefits and burdens contravenes the Supreme Court's established "undue burden" standard. The State is thus likely to succeed in its defense against Plaintiffs' undue burden claim.

A. The Court improperly subjected the Indiana licensing law to an "as applied" version of the facial undue burden standard

The Court's preliminary injunction ruling holds that the Indiana licensing law imposes an undue burden only on women in South Bend, such that even if the licensing law is otherwise valid, it must give way so that South Bend may have a clinic to which it is somehow entitled. ECF 116 at 68–69. As the State pointed out in its preliminary injunction brief, Whole Woman's Health never established that as-applied challenges to licensing regimes are even cognizable. It cited only one case, *Planned Parenthood of Kansas v. Drummond*, No. 07-4164-CV-C-ODS, 2007 WL 2463208 (W.D. Mo. Aug. 27, 2007), that involved any "as applied" undue-burden challenge, but that case

had only to do with application of physical-plant specifications for surgical clinics to pill-only clinics, not licensing, and provided no rationale for exempting particular clinics from such a basic regulatory requirement as licensing and inspection.

Nor does the Court's order explain how it is appropriate to adapt the undue burden standard to an as-applied challenge focused on a particular city. The undue burden standard is a standard for *facial* validity, *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 887 (1992), which can be understood only in terms of statewide impact. Indeed, that is the only way the Supreme Court has ever used it. *See Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292 (2016) (finding admitting privileges and surgical center restrictions unconstitutional because they greatly reduced the number of clinics in the State and thereby substantially increased the percentage of women who would have to travel more than 150 miles to an abortion clinic); *Gonzales v. Carhart*, 550 U.S. 124 (2007) (upholding federal Partial Birth Abortion Ban because it left open safe, effective and available options for women seeking abortion in the United States); *Stenberg v. Carhart*, 530 U.S. 914 (2000) (invalidating Nebraska partial-birth abortion ban in view of impact on women seeking late-term abortions in Nebraska); *Casey*, 505 U.S. 833 (1992) (holding abortion restrictions unconstitutional because they would have created an undue burden for all women in the State). Indeed, in *Hellerstedt*, the majority tacitly rejected an argument favored by Justice Alito that the Texas surgical center requirement could be invalidated only in specific cities. *See id.* at 2350 (Alito, J., dissenting) ("Simply put, the requirement must be upheld in every city in which its application does not pose an undue burden.").

Manipulating the undue burden standard to apply at the level of a city rather than a State is an entirely random designation that has no grounding in law. To begin, this Court itself struggled to define the relevant geographic area, first mentioning South Bend, then referencing northwest

Indiana more generally, then settling back on South Bend not because of any legal rule, but simply because that is the area designated by Plaintiffs. ECF 116 at 67 ("But as Plaintiffs' evidence bears more heavily on the South Bend area's population of college- and university students, so too does our analysis."). Nothing in abortion doctrine, or constitutional law more generally, even remotely suggests that plaintiffs enjoy such power to define the field of battle. Given that power, abortion clinics and physicians could focus only on remote corners of the State to challenge application of any number of abortion regulations in particular regions. So, for example, while in-person counseling may be valid statewide, *see A Woman's Choice-E. Side Women's Clinic v. Newman*, 305 F.3d 684 (7th Cir. 2002), under this Court's rationale, an abortion clinic might theoretically challenge it as applied to women in the smallest hamlet in, say, Steuben or Ohio county, where there would be a greater chance that a "large fraction" of women seeking abortion would have a long distance (whatever that might mean) to both pre-abortion counseling and the abortion itself.

The undue burden standard is inherently imprecise, but at least where courts adhere either to facial-challenge standards that apply to the State as a whole, or to as-applied standards that apply only at the individual level, States can grapple with relevant universe of impact when contemplating abortion regulation. If individual communities, or even census blocks, become fair game for targeted as-applied challenges, abortion doctrine truly becomes a free-for-all with literally no boundaries. The State is the irreducible sovereign entity that creates and defends regulation. It is the unit by which the undue burden analysis is analyzed and measured—the "ultimate question" is not if the Licensing Law creates an undue burden for the women of *South Bend*, but if it creates an undue burden for the women in the State of *Indiana*.

Finally, applying the undue burden standard in as-applied context creates an unfair advantage for Whole Women's Health Alliance because it is the first to attempt to open a clinic in

the community. Under the preliminary injunction's reasoning, once Whole Woman's Health opens its unlicensed doors, and has fulfilled the "state-created" "unmet demand for abortions in and around South Bend" the undue burden will be lifted. ECF 116 at 69. Presumably, a clinic seeking to compete with Whole Woman's Health in South Bend will not similarly be entitled to a business-protection injunction by a Federal Court. The constitutional law of abortion is not designed to provide advantages to certain abortion clinics at the expense of others. The "as applied" theory applied here would do just that, which, again, indicates that it is wrong.

B. The Court misapplies the large fraction test

Moreover, even when focusing only on South Bend, the Court's order misapplies the large-fraction test. The Supreme Court's abortion doctrine makes clear that an abortion regulation cannot be declared invalid unless it imposes a substantial obstacle for a large fraction of women who seek an abortion. *Casey*, 505 U.S. at 895. For purposes of applying that test, this Court has defined the denominator as the "South Bend area's population of college- and university students" simply because most of the plaintiff's evidence focuses on that group. ECF 116 at 67. But this narrow group is precisely the same as the group supposedly burdened by the law. *Id.* at 67–69. In other words, the Court has improperly defined the denominator to be the same as the numerator, which ensures that the State could never prevail under the large fraction test. If only those women who are burdened by the law are included in the denominator (rather than the larger group of women for whom the law is relevant), then the test always creates a 1:1 fraction, which negates the entire purpose of the "large fraction" standard.

Here, even if the large-fraction test can apply only to South Bend, the denominator must be all women in South Bend seeking an abortion, as that is the group for whom the lack of an abortion clinic is relevant. The numerator, then, is women in South Bend seeking an abortion, but

who will not be able to get one because there is no abortion clinic in South Bend. Plaintiffs have supplied *zero* evidence that any such women exist, let alone that they constitute a "large fraction" of the denominator. In other words, there is no proof of any "unmet demand" for abortions in South Bend. The court posits that some women in South Bend cannot get abortions based on an infinite variety of factors unrelated to the licensing law itself, but without proof of women who have been unable to get abortions, that is not a proper analysis. Particularly with an as-applied challenge, the court must "examine the facts of the case . . . exclusively . . . not any set of hypothetical facts under which the statute might be unconstitutional." *Hegwood v. City of Eau Claire*, 676 F.3d 600, 603 (7th Cir. 2012). Whole Woman's Health has not shown that *any* women are actually burdened by the Licensing Law, much less a substantial burden for a large fraction of them. Even under the standard applied by this Court, therefore, the State is likely to succeed on appeal.

C. Decades of precedent foreclose rejection of the Licensing Law's benefits

The Supreme Court and federal appellate courts have long upheld state licensing of abortion: *Roe* itself observed that "[t]he State may define the term 'physician,' . . . to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined," *Roe v. Wade*, 410 U.S. 113, 165 (1973), and two years later the Court reiterated that "[e]ven during the first trimester . . . prosecutions for abortions conducted by nonphysicians infringe upon no realm of personal privacy secured by the Constitution against state interference," *Connecticut v. Menillo*, 423 U.S. 9, 11 (1975). The Court has similarly upheld laws requiring licensure of the abortion clinics themselves. *See Simopoulos v. Virginia*, 462 U.S. 506 (1983). *Casey* thus noted that the Court had long upheld "various licensing and qualification provisions," 505 U.S. at 917, and five years after *Casey* the Court again reaffirmed that States may require abortion providers to have a license, *see Mazurek v. Armstrong*, 520 U.S. 968 (1997). The

federal circuit courts have accordingly upheld state licensing of abortion clinics, s*ee, e.g.*, *Greenville Women's Clinic v. Comm'r, S.C. Dep't of Health & Envtl. Control*, 317 F.3d 357 (4th Cir. 2002); *Women's Med. Ctr. of Nw. Houston v. Bell*, 248 F.3d 411 (5th Cir. 2001); *Greenville Women's Clinic v. Bryant*, 222 F.3d 157 (4th Cir. 2000), including specific licensing regulations for chemical abortions, *see Planned Parenthood of Sw. Ohio Region v. DeWine*, 696 F.3d 490 (6th Cir. 2012).

This long series of decisions upholding licensing regimes are all premised, of course, on the proposition that these licensing laws further "valid state interest[s]," such as the State's interest in protecting the health of the mother and preserving the life of the fetus. *Casey*, 505 U.S. at 875–77. The Court's Order, however, asserts—without addressing these holdings—that the Licensing Law does not further *any* state interest, on the ground that it does nothing to add to what is already accomplished by *other* provisions of the State's abortion laws: The Order claims that the "most useful feature" of licensing is the deterrent value of license revocation and that there is no "marginal benefit [of] this *ex post* enforcement mechanism . . . over the similarly *ex post* enforcement mechanisms of prosecution[,] . . . physician-license suspension[,] . . . or a civil action for medical negligence or other torts." ECF 116 at 65.

This reasoning is not limited to the application of the Licensing Law to these specific Plaintiffs or even to Indiana's Licensing Law in general; it would invalidate *any abortion* licensing law, for such licensing laws are invariably accompanied by other statutory requirements enforced by criminal and civil proceedings. The Pennsylvania abortion statute challenged in *Casey*, for example, enforced its provisions with both licensing sanctions *and* criminal and civil penalties. *See* 505 U.S. at 903–04, 907, 909. If the mere existence of other enforcement mechanisms makes Indiana's Licensing Law superfluous—and thus unconstitutional—then other State's licensing

regimes are necessarily unconstitutional too. No court has ever even suggested such a far-reaching conclusion, and for good reason—it is belied by the decades of precedent upholding state licensing regimes.

In departing from this precedent, the Order's analysis of the benefits of the Licensing Law improperly disregards the crucial *preventative* value of licensing. Unlike after-the-fact punishments, the "the purpose of a licensing system is to *prevent* unscrupulous or incompetent persons from engaging in the licensed activity and to *protect* the public from those persons." *Garrity v. Maryland State Bd. of Plumbing*, 135 A.3d 452, 470 (Md. Ct. App. 2016) (internal quotation marks and citations omitted; emphasis added). Criminal and civil penalties can only punish violations of the law after it occurs, while licensing makes violations less likely to occur in the first place. This is precisely why States have licensed the legal and medical professions since the mid-nineteenth century: Licensing prevents serious harms to the public that can be difficult or impossible to fully remedy after the fact. Morris M. Kleiner, *Licensing Occupations: Ensuring Quality or Restricting Competition?*, 20, 22 (2006), https://research.upjohn.org/up_press/18/.

In particular, Indiana's Licensing Law prevents violations of the State's abortion laws—including the State's safety regulations and informed-consent requirements—in two ways. First, by permitting individuals and organizations to perform abortions only *after* they have demonstrated their "reputable and responsible character," the Licensing Law ensures that dishonest individuals likely to evade or ignore the law never perform abortions Indiana in the first place. The Court's Order itself recognizes this, observing that the Licensing Law's "'reputable and responsible character' requirement has obvious utility as an *ex ante* credentialing mechanism." ECF 116 at 61; *see also id.* ("Plaintiffs have not argued (nor could they) that, in the abstract, the state gains nothing by licensing only those health care providers shown to have reputable and

responsible characters in respects relevant to the provision of health care and to the soundness of the licensing procedure itself."). Yet the Order disregards this *ex ante* function of the Licensing Law in focusing exclusively on how *one* of its enforcement mechanisms—the *ex post* penalty of license revocation—compares to "the similarly *ex post* enforcement mechanisms of prosecution [or] . . . physician-license suspension." ECF 116 at 65. The Order never explains why the *ex ante* certification function of the Licensing Law fails to further the State's interests in protecting women's health, fetal life, and the integrity of the medical profession.

Second, the Licensing Law, like other *ex ante* regulations, also differs from *ex post* criminal and civil penalties by "leverag[ing] enforcement resources to greater effect by *always* sanctioning negligent conduct (when a firm is monitored) *rather than only sanctioning such conduct when an accident occurs*." Robert Innes, *Enforcement Costs, Optimal Sanctions, and the Choice Between Ex-Post Liability and Ex-Ante Regulation*, 24 Int'l Rev. L. & Econ. 29, 31 (2004) (second emphasis added). That is, even after a particular clinic is initially licensed, licensing allows the State to continually monitor the clinic to ensure it complies with applicable laws and regulations—rather than merely punishing those violations that produce complaints from patients or third parties. As the Assistant Commissioner and Special Counsel for Consumer Services and Health Care Regulation explained, licensure enables the State "to do regular surveys of abortion clinics, and to perform complaint investigations according to standardized protocols and criteria." ECF 92-2 ¶ 8.

The Court's Order dismisses this function of the Licensing Law, apparently on the assumption that abortion clinics fully complied with Indiana's abortion laws before the Indiana legislature enacted the Licensing Law. ECF 116 at 64–65. This assumption, however, is unsupported by any evidence and is contradicted by common sense: Violations of the State's informed-consent requirement in particular will almost certainly go unreported, for a pregnant

woman who obtains an abortion without hearing the disclosures required under Indiana law, Ind. Code § 16-34-2-1.1, is highly unlikely to later discover those disclosures were required—much less report the abortion clinic's failure to provide them.

The Order's only other argument for its conclusion that the Licensing Law produces only "*de minimis* benefits" is that any interests the law furthers could "be equally well advanced by a registration requirement." ECF 116 at 69. The idea seems to be that Indiana could create a "registration" system that does not require certification of abortion providers before they begin performing abortions but that would otherwise be identical to the current licensing regime; because the Licensing Law has no marginal benefit compared to the more narrowly tailored hypothetical "registration" policy, the argument goes, the Licensing Law furthers no state interests. *See id.* *Casey*, however, forecloses this argument: "A restriction on pre-viability abortions no longer needs to be narrowly tailored to serve a compelling interest; rather, if the restriction does not constitute an undue burden it needs only to be reasonably related to the legitimate state interest in protecting fetal life." Gillian E. Metzger, *Unburdening the Undue Burden Standard: Orienting Casey in Constitutional Jurisprudence*, 94 Colum. L. Rev. 2025, 2032 (1994) (citing *Casey*, 505 U.S. at 877–79). And even beyond this fundamental difficulty, this argument ignores the Licensing Law's important *ex ante* function, discussed above, in preventing unscrupulous abortion providers from ever practicing in Indiana in the first place: The distinguishing feature of a "registration" system, after all, is that it would *not* require providers to first obtain a license.

D. The Court's balancing of benefits and burdens contravenes established legal doctrines

The Court next notes that "there is a demand for abortion care in and around South Bend which is currently unmet" due to "a confluence of factors," including "the long-distance travel burden, compounded by the eighteen-hour informed-consent waiting-period requirement; high

monetary costs undefrayed by state aid to those whose poverty would otherwise entitle them to it or by university-sponsored coverage in the case of students; the necessity of securing the help and support of others in the exercise of a right to which the social environment is reportedly hostile (applying with special force to students, who are likely to be young and unmarried); the high opportunity costs incurred by operation of all the foregoing, including lost wages, missed educational opportunities, and missed rent and utility payments; and the prospect of undergoing the abortion in an unfamiliar, unsupportive setting, undermining one of the chief virtues of the mifepristone-misoprostol regimen." ECF 116 at 68.

Even assuming that the Court is correct in its unsupported assertion that these burdens have created an "unmet demand" for abortion in South Bend, none is imposed by the challenged Licensing Law. To begin, the travel burden here is neither substantial nor a function of state diktat. Notably, while the Supreme Court has never declared a right to an abortion clinic within a specified number of miles from one's residence, when in *Hellerstedt* the average distance of women to abortion clinics became relevant, the Court discussed the percentage of women more than 150 miles from a Texas abortion clinic. 136 S.Ct. at 2313. Here, South Bend is less than 65 miles from the nearest abortion clinic in Merrillville, where women can receive both surgical and chemical abortions (where the actual discharge of the fetus can still occur at home).

In any event, travel distance is as much as anything the function of market factors such as the actual level of demand for abortions, the availability of qualified physicians, medication costs, and capital costs. It is manifestly *not* a function of state central planning. Just this past week, Whole Woman's Health announced its plans to close its apparently unlicensed abortion clinic in Peoria, Illinois. Andy Kravetz, *Whole Woman's Health to Close in Peoria*, JournalStar (updated May 30, 2019, 8:32 PM), https://www.pjstar.com/news/20190530/whole-womans-health-to-close-in-

peoria; *Pregnancy Termination Centers*, Illinois Department of Public Health (last updated April 8, 2019), https://data.illinois.gov/dataset/440idph_pregnancy_termination_center (list of licensed pregnancy termination centers in Illinois as of March 2019, excluding the Whole Woman's Health Peoria clinic). The point is that many factors—not simply state licensing—contribute to whether an abortion clinic can attain economic viability in a given community.

Moreover, neither the monetary costs nor the opportunity costs associated with abortion are the fault of the State; the State does not set abortion prices and is not obligated to subsidize them. *See Harris v. McRae*, 448 U.S. 297 (1980). Further, the State may prefer childbirth over abortion, *Casey*, 505 U.S. at 883, 886, and has no responsibility to help women seeking abortion to "secur[e] the help and support of others" or to ensure that abortion is provided in a familiar, supportive environment. ECF 116 at 68. The Licensing Law does not even prevent some other clinic from opening in South Bend to assuage these burdens; it simply requires that clinic to first obtain a license from the State.

Next, this Court suggests that even if the burdens allegedly imposed by the Licensing Law "do not preclude obtaining an abortion, each delay imposed by them increases the costs to the patient and the risks to her health." ECF 116 at 68. But "[t]he fact that a law which serves a valid purpose . . . has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." *Casey*, 505 U.S. at 874. In other words, an increase in cost alone is not enough to invalidate the law: "Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause." *Id.* (citations omitted). Particularly because Whole Woman's Health has failed to show the Licensing Law has prevented even a single woman from having an abortion, the State is likely to prevail on the balancing issue on appeal.

II. Injury to the State, Public Policy, and Balance of Hardships Weigh in Favor of a Stay

The preliminary injunction enjoins the State from "enforcing provisions of Indiana Code § 16-21-2-2(4) (requiring Department to license); Indiana Code § 16-21.2-2.5(b) (penalty for unlicensed operation); and Indiana Code § 16-21-2-10 (necessity of license) against WWHA with respect to the South Bend Clinic." ECF 116 at 72.

The Court's preliminary injunction threatens irreparable harm to Indiana women because it allows Whole Woman's Health to open an unlicensed and unregulated abortion clinic. According to multiple news reports, Amy Hagstrom Miller plans to open the clinic and begin providing abortions in the coming weeks. *See* NewsCenter 16, *Judge Allows South Bend Abortion Clinic to Move Forward in Plans to Open*, WNDU (June 1, 2019, 10:41 PM), https://www.wndu.com/content/news/Judge-allows-South-Bend-abortion-clinic-to-move-forward-in-plans-to-open-510721821.html; Tiffany Salameh, *South Bend Abortion Clinic Set to Open; Opponents and Clinic Officials React to Judge's Ruling*, ABC 57 (June 1, 2019, 10:18 PM), https://www.abc57.com/news/south-bend-abortion-clinic-set-to-open-opponents-and-clinic-officials-react-to-judges-ruling.

The public interest in patient health and safety and the balance of equities also favor a stay. Whole Woman's Health is asking for special judicial permission to dispense powerful hormone-curbing, abortion-inducing, uterus-contracting prescription drugs without any state regulatory oversight whatsoever. Indiana has no way of ensuring that an unlicensed abortion clinic is complying with its other requirements, including informed consent, the 18-hour waiting period, the ultrasound requirement, reporting requirements, and general physical plant requirements that ensure patient safety, for legal abortion which promote the State's interests in fetal life and women's health. Licensure enables the State to conduct regular surveys of abortion clinics, and to

perform complaint investigations according to standardized protocols and criteria. Without licensure, the State would be unable to perform such standardized surveys and investigations, ECF 92-2, Foster Decl. ¶8, and therefore unable to ensure that patients are being given safe and proper care.

The State's diligence in licensing is important for the life and health of Indiana women. The importance of gathering information on those applying for an abortion clinic license (and all affiliates for licensure) is the ability to make a determination of the clinics practices. This Court held that "WWHA's 'affiliates' are abortion clinics under the control of Hagstrom Miller. Plaintiffs tilt at windmills in steadfastly maintaining the contrary." ECF 116 at 60. The Whole Woman's Health abortion clinics run by Hagstrom Miller at issue in this case, which were not freely disclosed to the State, have been cited for several violations, including (at the Austin clinic) failure to account for Fentanyl, a highly addictive Schedule II drug. ECF 92-2, ¶21. Were patients getting excessive doses? Were workers secreting recreational drugs and then attending to patients while high or even addicted? Failing to account for such a powerful opioid, which has contributed dramatically to the Nation's opioid epidemic, is not some technical, administrative oversight. It portends serious consequences. The deficiencies at the Beaumont clinic were are also severe, and included several failures related to instrument sterilization and sanitary conditions, in addition to failure to staff the clinic with qualified medical personnel. ECF 92-2, ¶21.

These numerous health and safety violations, which Texas discovered because it licenses and inspects abortion clinics, underscore the risks to women when they seek services from an unlicensed clinic. The Court's Order minimizes the findings by the Texas Department of Health by quoting the Plaintiff's expert, who suggests that deficiencies are "common" and "not indicative of a threat to patient health and safety." ECF 116 at 62. However, the Whole Woman's Health

violations uncovered in Texas involved issues with patient care—such as missing schedule II drugs and improper sanitation—not simply deficient policies and procedures. No expert testimony is required to justify the Department of Health's concerns about a provider with that sort of record. Indeed, the Court in *Hellerstedt*, in the course of invalidating Texas's admitting privileges requirement, specifically relied on the availability of licensing and inspections in Texas as a sufficient safeguard against wrongdoing. *Hellerstedt*, 136 S.Ct. at 2313 ("Pre-existing Texas law already contained numerous detailed regulations covering abortion facilities, including a requirement that facilities be inspected at least annually.").

Without licensing requirements, the State of Indiana may not catch malfeasance of the sort demonstrated by Dr. Ulrich Klopfer—the former South Bend abortion doctor who voluntarily surrendered his license in 2016 after the State of Indiana uncovered several serious issues. ECF 92-2, ¶26; ECF 93, Fox Decl. ¶ 8. Klopfer was the medical director and abortionist at three different clinic locations spanning Northern Indiana. State surveys of the clinics revealed that Klopfer was (1) failing to follow state-mandated abortion counseling, (2) giving sedation meds to any patients 16 years old and younger without proper equipment, monitoring, and licensure, Exhibit A to ECF 93, ¶¶ 3–8, 13, and (3) most notably, performing abortions on children younger than 14 without timely reporting to DCS, and in at least one case not reporting the rape at all. *Id.* at ¶¶ 21-24, 27-30. Without State licensing and surveys, clinics may avoid accountability for such outrageous violations of the law.

It is insufficient that women injured by unsanitary, unsafe, or unlawful clinic practices may have a route to seek recompense via a civil claim or justice via criminal prosecution. The whole point of professional licensing regulation is to protect consumers from suffering injury in the first instance. Unfortunately, when abortion clinics are permitted to operate without regular government

inspection and oversight, women can get hurt. Kermit Gosnell's clinic went uninspected by the State for 15 years before the horrid tales of "[d]irty facilities; unsanitary instruments; an absence of functioning monitoring and resuscitation equipment; the use of cheap, but dangerous, drugs; illegal procedures; and inadequate emergency access for when things inevitably went wrong" came to light. *See Hellerstedt*, 136 S. Ct. at 2313–14 (citations omitted).

Mifepristone is not aspirin. It is a powerful drug that curbs a woman's hormone production with the goal of ending the life of her fetus. It must be administered carefully and responsibly by qualified personnel who take seriously the State's restrictions and regulations pertaining to abortion. Only a system of state licensing and inspection can achieve these objectives. The risk of harm to women by allowing unlicensed clinics to dispense chemical abortions outweighs any speculative burdens Whole Woman's Health or women in South Bend who must otherwise travel a mere 65 miles for an abortion (at a licensed clinic) may incur in the near term. Accordingly, the State's interests in enforcement outweigh Whole Woman's Health's interest in offering unlicensed abortion clinic services pending a final decision on the merits.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court say enforcement of its preliminary injunction pending disposition of this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2019, a copy of the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the following:

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