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

YASHICA ROBINSON, M.D.; ALABAMA WOMEN'S CENTER; PLANNED PARENTHOOD SOUTHEAST, INC.; REPRODUCTIVE HEALTH SERVICES; and WEST ALABAMA WOMEN'S CENTER, on behalf of themselves, their staff, physicians, and their patients, Plaintiffs, v. STEVEN MARSHALL, in his official capacity as Alabama Attorney General, Defendant.	CIVIL ACTION Case No. 2:19-cv-365-MHT-SMD

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

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INTRODUCTION[1]

Alabama has enacted a near-total ban on abortion. The Ban is indefensible and unprecedented, though perhaps not unexpected. Alabama House Bill 314 of the 92nd General Assembly ("H.B. 314" or "the Ban") was signed into law on May 15, 2019, with the full knowledge that the Ban is unconstitutional and would draw a legal challenge. Compl. (doc. no. 1) ¶¶ 5–6. Indeed, the Ban—which would make it a felony to provide or attempt to provide abortion care at all points in pregnancy—is unquestionably unconstitutional under forty-six years of Supreme Court precedent, beginning with *Roe v. Wade*, 410 U.S. 113 (1973), which unequivocally holds that the State may not ban abortion before the point of viability.

The right to abortion is constitutionally protected because it involves one of "the most intimate and personal choices a person may make in a lifetime." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992). The Supreme Court has long recognized and repeatedly affirmed that the right to choose abortion—and to "retain the ultimate control over her destiny and her body," *id*. at 869—is essential to a person's dignity, equality, and ability to shape a meaningful life—freedoms which lie at the core of the protections guaranteed by the Due Process Clause, *see id.* at 851. As the Court made clear, access to abortion is nothing less than a prerequisite to full participation in society:

> [F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.

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

Id. at 856. By depriving them of the most basic control over their bodies, their health, and their lives, the Ban imposes on Plaintiffs' patients—and, in particular, Black women and low-income women—a unitary and unbending vision of their reproductive lives, forcing them to define their lives by the State's prerogatives, as opposed to their own. Time and again, the Supreme Court has held that the Due Process Clause prohibits such a result.

Therefore, pursuant to Rule 65 of the Federal Rules of Civil Procedure, Plaintiffs Yashica Robinson, M.D., Alabama Women's Center ("AWC"), Planned Parenthood Southeast, Inc. ("PPSE"), Reproductive Health Services ("RHS"), and West Alabama Women's Center ("WAWC") (together, the "Plaintiffs"), move to preliminarily enjoin H.B. 314. The Ban is scheduled to take effect on November 15, 2019, and, absent an order from this Court, will inflict significant and irreparable harm on Plaintiffs' patients for which there is no adequate remedy at law. Plaintiff thus seek to enjoin Defendant, his officers, agents, servants, employees, attorneys, successors, and any persons in active concert or participation with him from enforcing or complying with H.B. 314.

STATEMENT OF FACTS

Statutory Framework

The Ban makes it a crime "for any person to intentionally perform or attempt to perform an abortion" at any stage in pregnancy, except to avert death or "serious health risk." H.B. 314 § 4. However, the Ban's exception for "serious health risk[s]" is extremely limited and would be difficult, if not impossible, to comply with. For example, the exception requires sign-off from a second, and in some cases third, physician, *see* H.B. 314 § 4(b), H.B. 314 § 3(6); it requires that certain abortions be performed in a hospital, *see* H.B. 314 § 3(6); and because the definitions are nearly identical, it provides no guidance for physicians to distinguish between a "serious health

risk," *see* H.B. 314 § 3(6), and a "medical emergency," *see* H.B. 314 § 3(4).[2]

The Ban mandates the imposition of steep penalties for non-compliance. Performance of an abortion in violation of the Ban constitutes a Class A felony, which is punishable by imprisonment for ten to ninety-nine years. H.B. 314 § 6(a); Ala. Code § 13A-5-6(a)(1). Attempted performance of an abortion in violation of the Ban constitutes a Class C felony, which is punishable by imprisonment for one year to ten years. H.B. 314 § 6(b); Ala. Code § 13A-5-6(a)(3). Moreover, any physician who performs or attempts to perform an abortion in violation of the Ban may also be subject to medical license probation, suspension, revocation, or restriction and/or fines or other disciplinary action. *See* Ala. Code § 34-24-360; Ala. Admin. Code r. 545-X-1-.06; Ala. Admin. Code r. 545-X-4-.06; Ala. Code § 34-24-53; Ala. Code § 34-24-361; Ala. Admin. Code r. 540-X-1-.07. Further, any administrator of a licensed abortion clinic who "knowingly and willfully permits" a physician to perform abortions in violation of H.B. 314 shall be guilty of a Class C felony, which is punishable by imprisonment for one to ten years. *See* Ala. Code § 26-23E-12; Ala. Code § 26-23E-6; Ala. Code § 13A-5-6(a)(3). Finally, someone who refers a person for an abortion performed in violation of the Ban may be subject to conspiracy or accomplice liability, which is punishable by imprisonment for up to twenty years. *See* Ala. Code § 13A-4-3; Ala. Code § 13A-2-23; Ala. Code § 13A-5-6; Ala. Code § 13A-5-7.

The Ban is set to take effect on November 15, 2019. *See* Compl. ¶¶ 7, 34; H.B. 314 § 10. Upon that date, the Plaintiffs will face, *inter alia*, severe criminal penalties and the risk of adverse licensure and/or disciplinary action, if they continue to perform or refer for abortions.

[2] In addition to the foregoing exceedingly narrow exception, the Ban excludes from the definition of abortion a procedure to terminate the pregnancy in cases where the fetus "would die after birth or shortly thereafter or be stillborn." H.B. 314 § 3(1), (3).

Abortion in Alabama

There are only three outpatient clinics currently providing abortions in the state of Alabama—Plaintiff AWC in Huntsville; Plaintiff RHS in Montgomery; and Plaintiff WAWC in Tuscaloosa. Compl. ¶ 35. While Plaintiff PPSE's health centers in Birmingham and Mobile are not currently providing abortion services, they have done so in the past and currently refer their patients, *inter alia*, to the other Plaintiffs; PPSE intends to provide abortions again before the end of the year. *Id.* at ¶ 35. According to published statistics, less than 0.001% of abortions performed in the entire state were provided in Alabama hospitals in 2017. *Id.* at ¶ 36.

Abortion is one of the safest medical procedures in the United States and is substantially safer than continuing a pregnancy through to childbirth. *Id.* at ¶ 37. Abortion is also extremely common; approximately one in four women in this country will have an abortion by age forty-five. *Id.* at ¶ 38.[3] The decision to terminate a pregnancy is informed by a combination of diverse, complex, and interrelated factors that are intimately related to the individual's values and beliefs, culture and religion, health status and reproductive history, familial situation, and resources and economic stability. *Id.* at ¶¶ 39–43. Some people have abortions because they conclude that it is not the right time to become a parent given their age, desire to pursue their education and/or career, or because they feel they lack the necessary financial resources or level of partner or familial support or stability. *Id.* at ¶ 39. Many are already mothers; indeed, a majority of women having abortions (59%) already have at least one child. *Id.* Some people seek abortions to preserve their life or health; some because they have become pregnant as a

[3] Although abortion bans like H.B. 314 have a disparate impact on women—in particular, women of color, low-income women, and young women—these bans also inflict irreparable constitutional and dignitary harm on members of transgender and gender-non-binary communities who likewise need access to abortion services.

result of rape; and others because they decide not to have children at all. *Id.* at ¶ 40. Some people who have suffered trauma, such as sexual assault or domestic violence, may be concerned that pregnancy, childbirth, and/or an additional child may exacerbate already extremely difficult and dangerous situations for them and put them at risk of greater sexual or physical violence or worse. *Id.* at ¶ 41. Some people decide to have an abortion because of an indication or diagnosis of a fetal medical condition or anomaly. *Id.* at ¶ 42. Some families do not feel they have the resources—financial, medical, educational, or emotional—to care for a child with special needs or to simultaneously provide for the children they already have. *Id.*

H.B. 314 would have a devastating impact on the lives of individuals seeking abortion in Alabama, and a disproportionate impact on the lives of Black women and women with low incomes. *Id.* at ¶¶ 53–61.

The Alabama Legislature's Targeted Campaign Against Abortion

The Ban is the culmination of a near-decade-long campaign by the Alabama legislature to eliminate legal abortion in Alabama. Since 2011, the Alabama legislature has enacted a multitude of laws aimed at restricting and ultimately outlawing abortion in the state. As this Court has recognized, this campaign has contributed to "a climate of extreme hostility" for "abortion providers and women seeking abortions in Alabama today." *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1334 (M.D. Ala. 2014) ("*Strange III*"). A brief chronology is demonstrative.

In 2011, the Legislature banned abortions starting at twenty weeks of pregnancy, with exceptions only for abortions necessary to avert death or "serious risk of substantial and irreversible physical impairment of a major bodily function." Ala. Code § 26-23B-5; Compl. ¶ 46.

Two years later, in 2013, the Legislature imposed burdensome building requirements on abortion clinics, *see* Ala. Code § 26-23E-9, which forced multiple Alabama abortion clinics to undergo extensive and expensive renovations, and even purchase and relocate to entirely new properties, Compl. ¶ 47, and also mandated that all physicians performing abortions in Alabama hold staff privileges at a hospital within the same statistical metropolitan area as the clinic, *see* Ala. Code § 26-23E-4(c); Compl. ¶ 48. The staff privileges requirement, which would have forced the closure of the majority of the clinics in the state, was found unconstitutional by this Court.[4] *See, e.g.*, *Strange III*, 33 F. Supp. 3d at 1332–1333; *see also Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2310–11 (2016) (holding virtually identical law unconstitutional).

In 2014, the Legislature increased the mandatory delay between when physicians must provide state-mandated information to abortion patients and when patients can lawfully obtain an abortion from twenty-four hours to forty-eight hours. *See* Ala. Code § 26-23A-4; Compl. ¶ 49. That same year, the Legislature also altered the judicial bypass process through which a minor may obtain an abortion without parental consent. *See* Ala. Code §§ 26-21-1, *et seq.*; Compl. ¶ 50. "Appl[ying] 38 years of Supreme Court authority on the subject, as all lower federal courts are bound to do," this Court declared the revisions violated "a pregnant minor's long-established constitutional right[s]." *Reprod. Health Servs. v. Marshall*, 268 F. Supp. 3d 1261, 1295 (M.D. Ala. 2017) (Walker, M.J.), *appeal pending*, No. 17-13561 (11th Cir.).

In 2016, the Legislature passed statutes (1) prohibiting the Alabama Department of Public Health from issuing or renewing licenses for abortion clinics located within 2,000 feet of

[4] Similarly, in 2015, this Court enjoined as unconstitutional a regulation requiring clinics to *contract* with a physician with staff privileges, *see W. Ala. Women's Ctr. v. Williamson*, 120 F. Supp. 3d 1296, 1317 (M.D. Ala. 2015) ("*WAWC I*"), which would have forced the closure of the sole abortion clinic in Tuscaloosa.

a K-8 public school, *see* Ala. Code § 22-21-35(b), which would have had the effect of closing two of the state's then-five clinics and the only clinics in the state providing abortions in the second trimester, and (2) effectively banning abortion in Alabama starting at fifteen weeks by prohibiting physicians from providing the most common method of second-trimester abortion and the only method available in the outpatient setting. Compl. ¶¶ 51–52. This Court declared both laws to be unconstitutional and enjoined their enforcement. *See W. Ala. Women's Ctr. v. Miller*, 299 F. Supp. 3d 1244, 1264, 1280–81 (M.D. Ala. 2017) ("*WAWC III*"), *aff'd sub nom. W. Ala. Women's Ctr. v. Williamson*, 900 F.3d 1310 (11th Cir. 2018) ("*WAWC IV*"), *pet. for cert. pending Harris v. W. Ala. Women's Ctr.*, No. 18-837 (2019).

In sum, the Ban is simply the State's latest (and most egregious) effort in a protracted campaign to eliminate abortion in Alabama, irrespective of the impact this would have on Alabamians' health and well-being, constitutional rights, and ability to autonomously pursue their own values, beliefs, visions, and opportunities for their futures.

ARGUMENT

Plaintiffs seek a preliminary injunction to prevent the Ban from inflicting constitutional, medical, emotional, psychological and other irreparable harms on Plaintiffs' patients. In ruling on such a motion, the Court considers four factors, all of which weigh heavily in Plaintiffs' favor: (1) whether the movant has a substantial likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether threatened injury to the movant outweighs any damage the proposed injunction would cause the opposing party; and (4) whether entry of relief in Plaintiffs' favor is in the public interest. *See McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998).

As set forth below, Plaintiffs readily satisfy this standard. H.B. 314 expressly bans abortions at all pre-viable points in pregnancy. For more than four decades, the U.S. Supreme Court has repeatedly and unequivocally held that, under the Due Process Clause of the Fourteenth Amendment, a state may not ban abortion at any point prior to viability. *See, e.g.*, *Casey*, 505 U.S. at 878; *Roe*, 410 U.S. at 153–54, 164–65; *see also Whole Woman's Health*, 136 S. Ct. at 2300; *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000). Because H.B. 314 directly contravenes this binding precedent, Plaintiffs will succeed on the merits. In addition, enforcement of the Ban will inflict severe and irreparable harm on Plaintiffs' patients' constitutional rights, as well as their health, safety, and well-being; the balance of hardships weighs decisively in Plaintiffs' favor; and the public interest would be served by blocking the enforcement of this unconstitutional and harmful statute. This Court should, therefore, grant injunctive relief.

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

As the Ban's sponsors and supporters have conceded, *see* Compl. ¶¶ 5–6, Plaintiffs are certain to succeed on the merits of their claim that the Ban violates Plaintiffs' patients' liberty rights under the Fourteenth Amendment under binding Supreme Court precedent. Nearly five decades ago, in *Roe v. Wade*, the Supreme Court struck down as unconstitutional a state criminal abortion statute proscribing all abortions except those performed to save the life of the pregnant woman. 410 U.S. at 166. Specifically, the Supreme Court held that (1) the Due Process Clause protects the right to choose abortion, *id.* at 153–54, and, (2) prior to viability, the State has no interest sufficient to justify a ban on abortion, *id.* at 163–65. Rather, the State may "proscribe" abortion only *after* viability—and even then, it may not ban abortion where necessary to preserve the life or health of the woman. *Id.* at 163–64.

Since then, the Supreme Court has repeatedly affirmed that "the woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce." *Casey*, 505 U.S. at 871; *see also Whole Woman's Health*, 136 S. Ct. at 2300.[5] Therefore, under binding Supreme Court precedent, a ban on abortion at *any* point prior to viability, whether partial or total, is *per se* unconstitutional, no matter what interests the state asserts to support it. In other words, "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion. . . . Regardless of whether exceptions are made for particular circumstances, a State may not prohibit *any* woman from making the ultimate decision to terminate her pregnancy before viability." *Casey*, 505 U.S. at 846, 879.

Unsurprisingly, attempts to ban abortion prior to viability have been uniformly rejected by lower courts. *See, e.g.*, *Edwards v. Beck*, 786 F.3d 1113, 1117–19 (8th Cir. 2015), *cert. denied*, 136 S. Ct. 895 (2016) (striking down ban on abortion starting at twelve weeks); *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 772–73 (8th Cir. 2015) (striking down ban on abortion starting when fetal cardiac activity is detectable), *cert. denied*, 136 S. Ct. 981 (2016); *Isaacson v. Horne*, 716 F.3d 1213, 1217, 1231 (9th Cir. 2013) (striking down ban on abortion starting at twenty weeks), *cert. denied*, 134 S. Ct. 905 (2014); *Jane L. v. Bangerter*, 102 F.3d 1112, 1117–18 (10th Cir. 1996) (striking down ban on abortion starting at twenty-two weeks), *cert. denied*, 520 U.S. 1274 (1997); *Sojourner T. v. Edwards*, 974 F.2d 27, 28–30 (5th Cir. 1992) (striking down ban on all abortions), *cert denied*, 507 U.S. 972 (1993); *Guam Soc'y of Obstetricians &*

[5] Although *Casey* abandoned *Roe*'s strict scrutiny standard in favor of the "undue burden" test, under which a restriction on pre-viability abortion is permitted as long as the law does not have the purpose or effect of placing a "substantial obstacle" in the path of a woman seeking abortion, the Court emphasized: "Our adoption of the undue burden analysis does not disturb the central holding of *Roe v. Wade*, and we reaffirm that holding." 505 U.S. at 879.

Gynecologists v. Ada, 962 F.2d 1366, 1368–69, 1371–72 (9th Cir. 1992) (striking down ban on all abortions), *cert. denied*, 506 U.S. 1011 (1992); *Jackson Women's Health Org. v. Dobbs*, No. 3:18-CV-171-CWR-FKB, 2019 WL 2240532, at *2–3 (S.D. Miss. May 24, 2019) ("*JWHO*") (preliminarily enjoining ban on abortion starting when embryonic cardiac activity is detectable); *Bryant v. Woodall*, 363 F. Supp. 3d 611, 630–32 (M.D.N.C. 2019) (striking down ban on abortions starting at twenty weeks); *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, No. 3:19-CV-178-DJH, 2019 WL 1233575, at *2 (W.D. Ky. Mar. 15, 2019) (issuing temporary restraining order against ban on abortion starting when embryonic cardiac activity is detectable); *Jackson Women's Health Org. v. Currier*, 349 F. Supp. 3d 536, 537–38, 544–45 (S.D. Miss. 2018) (striking down ban on abortions starting at fifteen weeks), *appeal filed*, No. 18-60868 (5th Cir. Dec. 17, 2018).

Indeed, this Court has already faithfully applied Supreme Court precedent to strike numerous Alabama laws restricting abortion that were, at least on their face, far less restrictive than this one. For example, as noted *supra*, this Court held unconstitutional a staff-privileges requirement finding, *inter alia*, that "eliminating abortion services in [] three cities . . . would cause some women to forgo abortion." *Strange III*, 33 F. Supp. 3d 1330, 1377 (M.D. Ala. 2014), *as corrected* (Oct. 24, 2014), *supplemented*, 33 F. Supp. 3d 1381 (M.D. Ala. 2014), *and amended*, No. 2:13CV405-MHT, 2014 WL 5426891 (M.D. Ala. Oct. 24, 2014). As this Court observed at the time, "if this requirement would not, in the face of all the evidence in the record, constitute an impermissible undue burden, then almost no regulation, short of those imposing an outright prohibition on abortion, would." *Id.* at 1332–33. And, as also noted *supra*, this Court struck two laws—one that would have forced the closure of the only clinics providing second-trimester abortions in the state, and another that would have banned the most common and only

outpatient abortion method available in the second trimester—upon its finding that, under either law, "women would lose the right to obtain an abortion in Alabama altogether when they reached 15 weeks of pregnancy." *WAWC III*, 299 F. Supp. 3d at 1261; *see also id.* at 1267.

Although in each of the foregoing cases the State proclaimed its interests to be something other than banning abortion outright, the State claims no such pretense anymore. Here, the stated purpose and effect of H.B. 314 is to ban virtually all previability abortions. Therefore, while in each of the foregoing cases, this Court balanced the State's asserted interests against the burdens each law imposed on people seeking abortions to determine if the law was an undue burden, no such balancing is necessary or, indeed, permitted here. The Supreme Court has squarely rejected the claim that any State interest, including its interest in potential life, can ever justify a ban on abortion prior to viability. *See Casey*, 505 U.S. at 846. In other words, "*Casey*'s holding that a woman has the right to terminate her pregnancy prior to viability is categorical," and this Court "cannot reweigh a woman's privacy right against the State's interest." *Planned Parenthood of Ind. & Ky, Inc. v. Comm'r of Ind. State Dep't of Health*, 888 F.3d 300, 305, 307 (7th Cir. 2018) (striking abortion ban based on reason for the abortion), *cert. denied, Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780 (2019).[6]

As such, H.B. 314 is unconstitutional on its face.[7] For this Court to entertain any other outcome would be to presume the ability to overrule the central holdings of *Roe* and *Casey*,

[6] While the Supreme Court granted certiorari and reversed the Seventh Circuit on a separate issue in the same case, the Supreme Court left undisturbed the Court of Appeals's decision relying on *Casey* to strike the reason ban. *See id.*

[7] Even if it were appropriate to apply the undue burden test to a previability ban such as H.B. 314, *see Isaacson*, 716 F.3d at 1226 (explaining that it is a "bright-line rule that the state may not proscribe abortion before viability," and courts need not apply the "undue burden" standard to previability bans), there is no question that H.B. 314 fails that test because its purpose and effect

which of course it cannot do. *See, e.g.*, *Strange III*, 33 F. Supp. 3d at 1380 (recognizing that "the Supreme Court gave . . . us our marching orders in *Casey*"); *WAWC IV*, 900 F.3d at 1329 (upholding decision striking abortion procedure ban and recognizing "[i]n our judicial system, there is only one Supreme Court, and we are not it. As one of the inferior Courts, we follow its decisions"); *MKB Mgmt. Corp.*, 795 F.3d at 771–72 (rejecting argument that "the Supreme Court has called into question the continuing validity of its abortion jurisprudence" and holding all federal courts "are bound by those decisions"); *see also Richmond Med. Ctr. for Women v. Gilmore*, 219 F.3d 376, 376 (4th Cir. 2000) (Luttig, J., concurring) ("I understand the Supreme Court to have intended its decision in [*Casey*] to be a decision of super-*stare decisis* with respect to a woman's fundamental right to choose whether or not to proceed with a pregnancy.").

Plaintiffs have therefore established they will succeed on the merits of their claim that the Ban violates the substantive due process rights of their patients.

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

Plaintiffs' patients will suffer serious and irreparable harm in the absence of a preliminary injunction. To begin with, the Ban violates the constitutional right to privacy, which inflicts *per se* irreparable harm. *See Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 896 F.2d 1283, 1285 (11th Cir. 1990) (citing *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981)); *Planned Parenthood Se., Inc. v. Bentley*, 951 F. Supp. 2d 1280, 1289 (M.D. Ala. 2013) ("*Strange I*") ("[C]ourts presume that violations to the fundamental right to privacy are irreparable.").

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is to pose a substantial—indeed, insurmountable—obstacle in the path of virtually anyone seeking a previability abortion.

The Ban will also impose irreparable physical, emotional, and psychological harms on Plaintiffs' patients by forcing them to remain pregnant against their will, putting them at "increased risk of death and childbirth complications." *Strange I*, 951 F. Supp. 2d at 1289. As the Supreme Court held in *Roe*:

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

Roe, 410 U.S. at 153. Because "[t]he mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear . . . [h]er suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role." *Casey*, 505 U.S. at 852.[8]

[8] The Ban's narrow exception for "serious health risk[s]" does not "does not nullify [its] burden[s]." *WAWC III*, 299 F. Supp. 3d at 1283. First, as this Court has noted, "a medical exception cannot save an otherwise unconstitutional ban," *id.*, like the one at issue here, which flies directly in the face of *Roe*'s unequivocal rule that a state cannot ban abortion prior to viability. Second, the Act's exception is defined so narrowly so as to permit abortion only in cases where the patient has "a condition that so complicates her medical condition that it necessitates the termination of her pregnancy to avert her death or to avert *serious risk* of *substantial* physical impairment of a major bodily function." H.B. 314 § 3(6). Such an exception is "cold comfort," particularly to the patient facing "substantial physical impairments of a minor bodily function (whatever that is)—or two or three of them for that matter." *WAWC IV*, 900 F.3d at 1328–29. Third, as noted *supra*, the exception's vague and onerous requirements make it extremely unlikely any provider would risk the "tender mercies of a prosecutor's discretion and the vagaries of a jury's decision." *Id.* at 1329.

These irreparable harms will fall most heavily on people of color and people with low incomes, communities that already face multiple barriers to achieving equality. *See* Compl. ¶ 54–62; *accord Strange III*, 33 F. Supp. 3d at 1357. And Black Alabamians are likely to suffer some of the gravest consequences from forced pregnancy. Compl. ¶ 59. Black women in Alabama are nearly five times more likely to die of causes related to pregnancy than White women. Compl. ¶ 61. Additionally, Alabama is among the five states with the highest infant mortality rate in the country. Compl. ¶ 62. Denying women desired abortions in the face of these existing disparities will only result in an increase in deaths of Black women and the children they are forced to bear.

Moreover, if the Ban were allowed to take effect, some people "who desperately seek to exercise their ability to decide whether to have a child [will] take unsafe measures to end their pregnancies." *Strange III*, 33 F. Supp. 3d at 1363. For example, as this Court has documented, when Plaintiff WAWC was temporarily closed in 2015, "women would nonetheless come to the clinic seeking an abortion—including one woman who threatened to stab herself in the stomach." *WAWC III*, 299 F. Supp. 3d at 1264; *see also id.* (describing testimony from Plaintiff WAWC's medical director about a woman who unsuccessfully attempted her own abortion with turpentine). During that same period, Plaintiff AWC "experienced an increased number of calls from women . . . some of whom said outright that they would try to self-induce an abortion because they could not reach a provider." *Id*; *see also WAWC I*, 120 F. Supp. 3d at 1311–12.

In sum, the Ban will cause irreparable injury to Plaintiffs' patients, warranting the entry of injunctive relief.

III. THE BALANCE OF HARMS TIPS DECIDELY IN PLAINTIFFS' FAVOR.

While Plaintiffs' patients will suffer numerous irreparable harms without an injunction, Defendant will suffer no injury whatsoever; Plaintiffs' requested relief will simply preserve the

status quo that has been in place for nearly five decades. *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 one] 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."); *see also JWHO*, 2019 WL 2240532, at *3 ("By banning abortions after the detection of a fetal heartbeat, S.B. 2116 prevents a woman's free choice, which is central to personal dignity and autonomy. This injury outweighs any interest the State might have in banning abortions . . . ."); *EMW Women's Surgical Ctr., P.S.C.*, 2019 WL 1233575, at *2 (holding balance of hardships favors temporary injunctive relief in challenge to six-week abortion ban). Further, the State of Alabama cannot seriously claim to be harmed by an injunction against a law that numerous state officials have already conceded is unconstitutional under prevailing precedent. *See* Compl. ¶¶ 5–6; *see also JWHO*, 2019 WL 2240532, at *2 (granting preliminary injunction against six-week abortion ban where defendants conceded that no fetus is viable at six weeks and that "[the court] must follow Supreme Court precedent"). Thus, the equities tip sharply in favor of granting a preliminary injunction. *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).

IV. A PRELIMINARY INJUNCTION SERVES THE PUBLIC INTEREST.

Finally, the public interest is not served by permitting the state to enforce unconstitutional statutes and regulations. *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). Thus, Plaintiffs satisfy the fourth and final requirement for injunctive relief.

V. SECURITY IS NOT NECESSARY IN THIS CASE.

This Court should waive the Federal Rule of Civil Procedure 65(c) security requirement. As the Eleventh Circuit held in *BellSouth 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) (quoting *City of Atlanta v. Metro. Atlanta Rapid Transit Auth.*, 636 F.2d 1084, 1094 (5th Cir. 1981)). The Court should use its discretion to waive the requirement in this case, as the preliminary injunction will not result in a monetary loss for Defendant. Moreover, Plaintiffs are healthcare providers dedicated to serving low-income and underserved communities, and a bond would strain their already-limited resources. If security is required, Plaintiffs request it be set at $1.00.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' Motion for Preliminary Injunction.

Dated: June 21, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of June 2019, I electronically filed the foregoing with the Clerk of Court for the United States District Court for the Middle District of Alabama using the CM/ECF system, thereby serving all counsel of record.

/s/Alexa Kolbi-Molinas
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