THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

WOMEN'S HEALTH CENTER OF WEST VIRGINIA, *on behalf of itself, its staff, and its patients;* and DR. JOHN DOE, *on behalf of himself and his patients,*

*Plaintiffs,*

v.

ASHISH P. SHETH, *in his official capacity as President of the West Virginia Board of Medicine;* and MATTHEW CHRISTIANSEN, *in his official capacity as Secretary of the West Virginia Board of Medicine,*

*Defendants.*

Civil Action No. 2:23-cv-00079

Hon. Irene C. Berger

**RESPONSE IN OPPOSITION TO**
**MOTION FOR PRELIMINARY INJUNCTION**

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## INTRODUCTION

The Supreme Court "return[ed] the issue of abortion to the people's elected representatives." *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2243 (2022). State abortion laws are "entitled to a strong presumption of validity" and "must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests," including "preservation of prenatal life at all stages of development" and "the protection of maternal health and safety." *Id.* at 2284.

West Virginia enacted commonsense laws to protect the health and safety of women and children. This case attacks two modest regulations of the medical profession hoping to unwind the new post-*Dobbs* statutory regime and revive elective abortion on demand in West Virginia. And they seek to do so by asking for extraordinary relief against duly enacted health and safety laws in a policy area where legislatures receive maximum deference.

Plaintiffs fail on each prong of the injunctive standard. They are unlikely to succeed on their strained claim that it is *irrational* to ensure surgical abortions are performed in a hospital setting or to require physicians initiating or performing abortions to possess admitting privileges to a hospital. They have not shown irreparable harm – particularly when they can identify no constitutional right to perform or obtain an abortion. And both the balance of equities and public interest tip strongly in favor of permitting duly enacted health-and-safety laws to remain in effect.

The Supreme Court returned abortion policy to the hands of West Virginia's elected representatives, and Plaintiffs' motion for a preliminary injunction fails to establish support for extraordinary relief in the face of the legitimate exercise of state powers.

## STATEMENT OF FACTS

## I. Abortion procedures present risks to the health and safety of West Virginians.

It is important to be aware of basic information regarding the processes and procedures regarding abortions. During the first trimester, doctors use two types of abortion procedures: surgical and chemical. Doe Decl ¶ 14, ECF No. 3-2; Skop Decl. ¶¶ 30–32, 41–43, attached as Exhibit 1. Surgical, or aspiration, abortion uses vacuum suction to remove the baby from the uterus. Skop Decl. ¶ 31. Complications of surgical abortion include hemorrhage, uterine perforation, cervical laceration, infection, sepsis, and death. *Id*. ¶¶ 30–40.

In the unfortunate circumstances where a surgical abortion occurs, women are safer in a hospital because hospitals, unlike outpatient facilities, are fully equipped to handle emergency situations that can occur during or after a surgical abortion. *Id*. ¶¶ 56–57. And hospitals can provide patients with a larger team of medical professionals to deal with any complications that occur. *Id*. ¶¶ 17–19, 36, 49, 56–57.

Chemical abortion uses two drugs to abort the fetus. Doe Decl. ¶ 18. The first drug—mifepristone—blocks progesterone, a hormone that enables a woman's body to maintain a pregnancy. *Id.* The second drug, misoprostol, is taken 24 to 48 hours later to induce uterine contractions. *Id.* In other words, the first drug works to block bodily support to an unborn child, and the second drug causes the woman's body to expel the womb's contents, including the fetus in whatever condition it may be. Chemical abortion causes significant bleeding and cramping even when the procedure goes as intended. Complications of chemical abortion include hemorrhage, incomplete abortion, failed abortion, infection, sepsis, and death. Skop Decl. at ¶¶ 43–53; citing Christopher M. Gacek, *RU-486 (Mifepristone) Side-Effects, 2000–2012*, FAMILY RESEARCH COUNCIL, at 4, https://downloads.frc.org/EF/EF12F08.pdf.

The dangers of chemical abortion can be moderated if the physician prescribing the abortion drugs has admitting privileges at a hospital. These privileges allow the physician to

personally provide care to a patient experiencing complications. Because the physician providing the abortion has a more intimate knowledge of the patient's condition and circumstances, that physician is better able to quickly assess the problem and provide appropriate care to prevent further complications in a setting capable of providing broad capabilities with considerable support. Thus, admitting privileges are a critical component of continuity of care. Admitting privileges also serve a credentialing function, by ensuring that doctors performing abortions are certified, reviewed for their standard of care, and have access to emergency assistance in the case of complications. Skop Decl. ¶¶ 54–57.

## II. The Legislature passed the Unborn Child Protection Act, in part, to combat these risks of harms.

After *Roe v. Wade*, 410 U.S. 113 (1973), was overturned and the Supreme Court "return[ed] the issue of abortion to the people's elected representatives," *Dobbs*, 142 S. Ct. at 2243, West Virginia took swift action to make a sea-change in its regulation of abortion. And rightly so.

As the Supreme Court recognized, "[a]bortion destroys what [*Roe* and *Casey*] call 'potential life' and what the law at issue in this case regards as the life of an 'unborn human being,'" *id.* at 2258; therefore, States may regulate abortion to promote "respect for and preservation of prenatal life at all stages of development" and to "protect[] maternal health and safety," *id.* at 2284.

Governor Jim Justice called a special legislative session to consider new abortion legislation in light of *Dobbs* restoring power to the people of West Virginia. During that special session, the Legislature passed the the Unborn Child Protection Act, W. Va. Code §16-2R-1 et seq. ("the Act"). The Act provides that "[a]n abortion may not be performed or induced or be attempted to be performed or induced unless in the reasonable medical judgment of a licensed medical professional: (1) The embryo or fetus is nonviable; (2) The pregnancy is ectopic; or (3) A

medical emergency exists." W. Va. Code § 16-2R-3(a). The law provides an exception for "an adult within the first 8 weeks of pregnancy if the pregnancy is the result of sexual assault . . . or incest," and for "a minor or an incompetent or incapacitated adult within the first 14 weeks for pregnancy if the pregnancy is the result of sexual assault . . . or incest." *Id.* § 16-2R-3(b)–(c).

For the few abortions that may be performed under the Act, the Legislature strengthened the health-and-safety measures for abortion procedures. Plaintiffs challenge two such provisions: the requirement that "a surgical abortion performed or induced or attempted to be performed or induced pursuant to this section shall be in a hospital," *id.* § 16-2R-3(f) ("the hospital requirement"); and the requirement that an "abortion performed or induced or attempted to be performed or induced shall be performed by a licensed medical professional who has West Virginia hospital privileges," *id.* § 16-2R-3(g) ("the admitting privileges requirement").

Nearly five months after the Act's passage, Plaintiffs filed this lawsuit, alleging that the hospitalization and admitting privileges requirements violate the Fourteenth Amendment rights of others. Plaintiffs now ask this Court to enter a preliminary injunction against the Act in its entirety.

**ARGUMENT**

Plaintiffs seek extraordinary relief against any enforcement action by Defendants relative to the Act, based on Plaintiffs' constitutional arguments against the hospital requirement and the admitting privileges requirement, both of which have been in effect for several months. "To obtain a preliminary injunction, a plaintiff must establish four elements: 1) that the plaintiff is likely to succeed on the merits; 2) that the plaintiff will likely suffer irreparable harm in the absence of preliminary relief; 3) that the balance of equities weighs in the plaintiff's favor; and 4) that a preliminary injunction is in the public's interest." *Scott v. Bierman*, 429 F. App'x 225, 228–29 (4th Cir. 2011). Plaintiffs have not met that burden here.

## I. The preliminary injunction should be denied because Plaintiffs are not likely to succeed on the merits.

### A. Plaintiffs do not have standing.

First, Plaintiffs have not properly established Article III standing. "To establish standing, a party must establish, as 'the irreducible constitutional minimum,' three elements: (1) that it has suffered an injury in fact that is both concrete and particularized and 'actual or imminent, not conjectural or hypothetical'; (2) that there is a causal connection between the injury and the conduct complained of, i.e. the injury is 'fairly traceable' to the challenged action; and (3) that it is 'likely . . . that the injury will be redressed by a favorable decision.'" *Star Sci. Inc. v. Beales*, 278 F.3d 339, 358 (4th Cir. 2002). Here, Plaintiffs' alleged injury is not traceable to the hospital and admitting privileges requirements, but to their own business decisions.

#### 1. WHC has not suffered an injury traceable to the admitting privileges requirement because one of its physicians already has admitting privileges.

To establish standing, a plaintiff must allege an injury that is "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). In other words, "where a third party such as a private school or hospital makes the independent decision that causes an injury, that injury is not fairly traceable to the government." *Doe v. Obama*, 631 F.3d 157, 162 (4th Cir. 2011).

The Women's Health Center of West Virginia ("WHC") has suffered no injury traceable to the admitting privileges requirement because one of its two physicians already has admitting privileges at a West Virginia hospital as required by the law. Quiñonez Decl. ¶ 18, ECF No. 3-1 (Dr. X "is based in Charleston and has local hospital privileges."); *see also* Pls.' Mem. in Supp. of Mot. for Prelim. Inj. 13 n.3, ECF No. 10. So this doctor may legally perform chemical abortions

at WHC, subject to other the other laws governing abortion. *See* W. Va. Code § 16-2R-3(g) (requiring only that the physician performing the abortion have admitting privileges at a West Virginia hospital).

While Plaintiffs do not provide a declaration from this doctor, WHC's Executive Director Katie Quiñonez states that "due to his schedule and the obligations of his private and hospital practice, he can only work two half-days per month at WHC." Quiñonez Decl. ¶ 18. In other words, WHC's inability to provide abortions more frequently is traceable to the doctor's decisions or to WHC's decision not to hire another abortion doctor with admitting privileges, or to WHC's other abortion doctor's decision not to seek admitting privileges. Because WHC's alleged injury results from employees' independent action or inaction and its own choices, its alleged injury is not traceable to the admitting privileges requirement.

**2. Dr. Doe does not have standing to challenge the admitting privileges requirement because he has not even attempted to obtain privileges.**

Dr. Doe has not alleged an injury fairly traceable to the admitting privileges requirement. "West Virginia has 70 hospitals located in 42 counties.,"[1] and Dr. Doe alleges that he has "reviewed the requirements for obtaining and exercising privileges" at only *one*, namely Charleston Area Medical Center (CAMC). Doe Decl. ¶ 40. Although Dr. Doe claims he does not "satisfy the criteria for obtaining hospital privileges at CAMC," *id.* ¶ 51, "the CAMC Credentials Policy appears to provide for the possibility of seeking a waiver of certain threshold eligibility criteria," *id.* ¶ 50. And while Dr. Doe states his "opinion that [he] would be similarly unable to obtain privileges at other hospitals in West Virginia," *id.* ¶ 52, he does not allege that he has even reviewed other hospitals' policies for granting privileges. Dr. Doe has not applied for any

[1] West Virginia Hospital Ass'n, *Hospital Community Benefits Report,* 12, available at https://bit.ly/3mcTV7d.

admitting privileges, and has no interest in doing so; in fact, he appears strongly opposed for personal reasons. *Id.* ¶ 51. And as Dr. Skop opines, Dr. Doe might be able to gain admitting privileges as courtesy or consulting staff. Skop Decl. ¶¶ 54, 55.

Because Dr. Doe has not shown a good faith effort to apply for admitting privileges, his alleged injury of not being able to perform abortions now is not traceable to the admitting privileges requirement. Moreover, Dr. Doe notes that his own purely speculative interests, not those of his patients', have discouraged him from applying for such privileges. *See id.* ¶ 51 ("If I were to report a denied or withdrawn privilege application, that could lead to greater difficulty in renewing my license.").

The Fifth Circuit's decision in *June Medical Servs. L.L.C. v. Gee*, upholding Louisiana's admitting privileges law further illustrates why Dr. Doe lacks standing here. 905 F.3d 787 (5th Cir. 2018). In *June Medical*, Plaintiffs had "failed to establish a causal connection between the regulation and its burden—namely, doctors' inability to obtain admitting privileges." *Id*. at 807. The Fifth Circuit explained that "there is insufficient evidence to conclude that, had the doctors put forth a good-faith effort to comply with Act 620, they would have been unable to obtain privileges." *Id.* Although a plurality of the Supreme Court rejected that argument, *June Medical Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2121 (2020), *Dobbs* overturned that decision, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022) (overruling *Roe*, *Casey*, and their progeny); *id.* at 2272–76 (discussing *June Medical*).

**3. Plaintiffs do not have third-party standing to assert claims on behalf of hypothetical pregnant women whose interests conflict with their own.**

Plaintiffs allege that the Act "violates the due process and/or equal protection rights of Plaintiffs' patients because the Care Restrictions prevent them from accessing otherwise lawful medical care and are not rationally related to any legitimate state interest." Compl. ¶ 151; *see also*

Pls.' Mem. 32 (alleging "irreparable harm" to "pregnant people seeking abortion"). But after *Dobbs*, Plaintiffs do not have standing to assert those rights.

In *Dobbs*, the Supreme Court criticized its abortion cases for "ignor[ing] the Court's third-party standing doctrine," relying in part on the dissents of Justice Alito and Justice Gorsuch in *Dobbs*, 142 S. Ct. at 2275 & n.61. Generally, a plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Although the Supreme Court has recognized a "limited exception" to this rule where "the party asserting the right has a 'close' relationship with the person who possesses the right" and "there is a 'hindrance' to the possessor's ability to protect his own interests," *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004), Plaintiffs have neither alleged nor established a close relationship or hindrance here. And "[e]ven when a plaintiff can identify an actual and close relationship, [the Supreme] Court will normally refuse third-party standing if the plaintiff has a potential conflict of interest with the person whose rights are at issue." *June Medical*, 140 S. Ct. at 2174 (Gorsuch, J., dissenting). And there is a conflict of interest here.

First, Plaintiffs have not shown that they have a close relationship with their patients, who they typically see only once and for a matter of minutes. "[A] woman who obtains an abortion typically does not develop a close relationship with the doctor who performs the procedure," but instead, "their relationship is generally brief and very limited." *June Medical*, 140 S. Ct. at 2168 (Alito, J., dissenting). The facts in this case appear to align with this statement. Dr. Doe testified in his declaration that a surgical abortion procedure "is short in duration—it typically takes about five to eight minutes." Doe Decl. ¶ 15. In a chemical abortion, only the first drug "is taken orally at the Center in the presence of the prescribing physician." *Id.* ¶ 18. And "patients leave WHC shortly after taking the mifepristone." *Id.* ¶ 31. This cursory relationship is not sufficient to meet

the first prong of the third-party standing test. *See June Medical*, 140 S. Ct. at 2168 (Alito, J., dissenting); *see also Kowalski*, 543 U.S. at 126 (holding that attorneys had not established close relationship with hypothetical future clients).

Second, Plaintiffs have presented no evidence that women are unable to bring suit on their own behalf. "[A] woman who challenges an abortion restriction can sue under a pseudonym, and many have done so." *June Medical*, 140 S. Ct. at 2168 (Alito, J., dissenting). Indeed, Dr. Doe himself has sued under a pseudonym in this case. "And there is little reason to think that a woman who challenges an abortion restriction will have to pay for counsel." *Id.* at 2168–69. Moreover, an individual woman's claim would "survive the end of her pregnancy under the capable-of-repetition-yet-evading-review exception to mootness." *Id.* at 2169.

Finally, "[t]his case features a blatant conflict of interest between an abortion provider and its patients." *Id.* at 2166; *Kowalski*, 543 U.S. at 126. The laws challenged here are health and safety regulations to ensure that abortions in West Virginia are performed by doctors in circumstances that help minimize the known serious risks of abortion. But "an abortion provider has a financial interest in avoiding burdensome regulations," whereas "[w]omen seeking abortions . . . have an interest in the preservation of regulations that protect their health." *Id.* The Act "expressly aims to protect women from the unsafe conditions maintained by at least some abortion providers who, like Plaintiffs, are either unwilling or unable to obtain admitting privileges." *Id.* at 2174 (Gorsuch, J., dissenting). In other words, Plaintiffs would profit by being able to perform more abortions free from the Act's challenged requirements, yet those very provisions exist to help protect women who may receive legal abortions from risks associated with surgical and chemical abortions. The conflict of interest is obvious.

For these reasons, Plaintiffs do not have standing to assert the rights of their patients in this case.

### B. The hospital and admitting privileges requirements are rationally related to the State's legitimate interests in protecting fetal life and protecting women's health.

The Supreme Court's decision in *Dobbs* reinstated the States' ability to regulate abortion both to protect fetal life and to protect women's health and safety. The Court held that "[a] law regulating abortion, like other health and welfare laws, is entitled to a 'strong presumption of validity.'" *Dobbs*, 142 S. Ct. at 2284. Consequently, an abortion regulation "must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests." *Id.*

In determining whether an abortion-related law serves a legitimate interest, "courts cannot 'substitute their social and economic beliefs for the judgment of legislative bodies.'" *Id.* Specifically addressing state interests, the Court held that "[t]hese legitimate interests include. . . protection of maternal health and safety . . . [and] preservation of the integrity of the medical profession." *Id.* (internal citation omitted).

Here, the hospitalization and admitting privileges requirements help protect women's health and safety, and maintain integrity in the medical profession.

#### 1. The hospital requirement helps protect women's health and safety.

The Legislature could have rationally concluded that surgical abortions can be more safely provided in hospitals because hospitals are better equipped to address any complications that arise. No more is required to pass constitutional muster. *See Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955) ("The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."); *see*

*also Dobbs*, 142 S. Ct. at 2284 ("[C]ourts cannot 'substitute their social and economic beliefs for the judgment of legislative bodies.'"); *Whole Woman's Health v. Rokita*, Nos. 21-2480 & 21-2573, 2022 WL 2663208, at *1 (7th Cir. July 11, 2022) (vacating injunctions against various abortion statutes and remanding for reconsideration under rational basis test).

Surgical abortions can have serious complications, including hemorrhage, infection, cervical laceration, uterine perforation, sepsis, and even death.[2] When these complications occur, recommended treatment may include "an interprofessional team that includes an obstetrician, radiologist, triage nurses, nurse practitioner, general surgeon, urologist, and an infectious disease expert." *Id.* The Legislature could have reasonably concluded that hospitals have the necessary staff and equipment to handle these complications.

Plaintiffs attempt to rely on several Supreme Court cases to refute this conclusion, *see* Pls.' Mem. 21, but none of those cases apply the rational-basis test, and none remain good law after *Dobbs*, *see Doe v. Bolton*, 410 U.S. 179, 195 (1973) (applying *Roe* trimester framework); *City of Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416, 428–31 (1983) (same); *Planned Parenthood Ass'n of Kan. City, Inc. v. Ashcroft*, 462 U.S. 476, 481 (1983) (same); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309–10 (2016) (applying *Casey* undue burden test). It has never been irrational, as Plaintiffs claim, to treat a surgical abortion differently from other medical procedures, such as completing a miscarriage, Pls.' Mem. 17. Even before *Dobbs*, the Supreme Court held that it is permissible for legislatures to treat abortion differently than other medical procedures: "Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." *Harris v. McRae*, 448 U.S. 297, 325 (1980). And even if other procedures were similarly risky such that a hospital requirement

[2] Karima Sajadi-Ernazarova and Christopher Martinez, *Abortion Complications*, STATPEARLS (2022), https://bit.ly/3IVRJdc.

would be rational, a state legislature "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Lee Optical*, 348 U.S. at 489; *see also Heller v. Doe by Doe*, 509 U.S. 312, 321 (1993) ("[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends.").

Plaintiffs cite no cases on point. *See* Pls.' Mem. 19. The only Fourth Circuit case Plaintiffs reference was a First Amendment case that applied heightened scrutiny. *See Stuart v. Camnitz*, 774 F.3d 238, 245 (4th Cir. 2014). Plaintiffs also turn to out-of-circuit cases that are no more applicable. *Ragsdale v. Turnock* is a decades-old case that applies the long-outdated trimester framework from *Roe*. 841 F.2d 1358, 1367 (7th Cir. 1988). And Plaintiffs rely on dicta from *Planned Parenthood of Wis., Inc. v. Van Hollen*, which applied the now-defunct undue burden test. 738 F.3d 786, 790 (7th Cir. 2013). Finally, Plaintiffs rely on a district court case that invalidated under equal protection an Indiana law for distinguishing *between abortion providers*, not between abortion providers and providers of other medical procedures. *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, 64 F. Supp. 3d 1235, 1257 (S.D. Ind. 2014).

Next, Plaintiffs argue the hospitalization requirement is irrational because serious complications and death following surgical abortion are "rare." Pls.' Mem. 17–18 & n.5. But the Supreme Court recognized in *Dobbs* that many state health and safety regulations validly "aim to avoid adverse health consequences short of death." 142 S. Ct. at 2268. And Plaintiffs admit that "there are limited circumstances in which it is medically indicated for procedural abortion to be performed in a hospital." Pls.' Mem. 18. This alone would be enough to support the law. Plaintiffs' peculiar argument that "it would make no sense to require all medical procedures . . . to occur in hospitals simply because some patient somewhere might require a specialized, heightened degree

of care," Pls.' Mem. 18–19, misses the point; the fact that *some* patients need heightened care is reason enough for the Legislature to conclude, as a legitimate exercise of its authority, that the laws should change to ensure such care is present. Besides, it is impossible to know in advance who will experience medical emergencies. As the Supreme Court has held, even if a law "may exact a needless, wasteful requirement in many cases[,] . . . it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement." *Lee Optical*, 348 U.S. at 487.

Once again, Plaintiffs' cases are inapposite. *See* Pls.' Mem. 19–20. In *City of Cleburne v. Cleburne Living Ctr.*, the Supreme Court invalidated a permitting requirement for housing for people with disabilities due to concerns about "irrational prejudice." 473 U.S. 432, 450 (1985). But the Court held in *Dobbs* that "the 'goal of preventing abortion' does not constitute 'invidiously discriminatory animus' against women." 142 S. Ct. at 2246. Plaintiffs also cite three out-of-circuit cases that invalidate state regulations due to concerns about economic protectionism, which Plaintiffs do not allege is an issue here. *See St. Joseph Abbey v. Castille*, 712 F.3d 215, 226–27 (5th Cir. 2013) ("The principle we protect from the hand of the State today protects an equally vital core principle—the taking of wealth and handing it to others when it comes not as economic protectionism in the service of the public good but as 'economic' protection of the rulemakers' pockets."); *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) ("Courts have repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose."); *Brantley v. Kuntz*, 98 F. Supp. 3d 884, 891 (W.D. Tex. 2015) (relying on *St. Joseph Abbey* to invalidate regulation distinguishing between African hair braiding schools and barber schools that teach African hair braiding).

For these reasons, the hospitalization requirement is rationally related to the State's legitimate interest in women's health and safety.

**2. The admitting privileges requirement protects women's health and safety by ensuring that physicians performing abortions are properly credentialed and able to treat emergency complications.**

The Legislature could have rationally concluded that the admitting privileges requirement would help to ensure chemical abortion patients' continuity of care when hospital treatment is necessary for complications and would serve as a credentialing mechanism for abortion doctors. As with the hospitalization requirement, this alone is enough to pass the rational-basis test. *See Lee Optical*, 348 U.S. at 488; *see also Dobbs*, 142 S. Ct. at 2283–84.

Complications of chemical abortion are even more common than those of surgical abortion.[3] Serious complications include hemorrhage, infection, incomplete abortion, failed abortion, missed ectopic pregnancy, and even death.[4] Dr. Doe admits that chemical abortion patients are usually left to deal with complications at home and apparently alone. Doe Decl. ¶¶ 30–31. He further states that these patients "seek follow-up care at a local emergency room." *Id.* ¶ 32. It is utterly rational that admitting privileges could offer these patients better continuity of care than showing up at an ER with physicians unfamiliar with their condition and medical history.

Moreover, according to the American Medical Association, "[t]he purpose of medical staff privileging is to improve the quality and efficiency of patient care in the hospital."[5] Privilege decisions should be based, at least in part, on "the candidate's training, experience, and demonstrated competence."[6] The Legislature could have rationally concluded that requiring

[3] Christopher M. Gacek, *RU-486 (Mifepristone) Side-Effects, 2000–2012*, FAMILY RESEARCH COUNCIL, at 4, https://downloads.frc.org/EF/EF12F08.pdf (finding that "medical abortion had roughly four times the rate of adverse events than surgical abortion did).
[4] *Id.*; Mayo Clinic, *Medical Abortion*, http://bit.ly/3KHiPG8 (last visited Feb. 27, 2023).
[5] Am. Med. Ass'n, *Staff Privileges*, http://bit.ly/41tGekv.
[6] *Id.*

admitting privileges for abortion doctors would ensure that they are well-trained, experienced, and competent.

Plaintiffs argue that the admitting privileges requirement is irrational because "West Virginia law imposes no privileges requirement" on comparable procedures or medications. Pls.' Mem. 26. But the Supreme Court has long held that state legislatures may treat abortion differently than other medical procedures; it is, in a word, incomparable. *Harris*, 448 U.S. at 325. On this point, Plaintiffs again rely only on overruled cases that apply the wrong legal standard. *See* Pls.' Mem. 27; *see also June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2120 (2020) (plurality) (applying *Casey* undue burden test); *Hellerstedt*, 136 S. Ct. at 2309–10 (same); *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 919 (7th Cir. 2015) (same). They offer *no* case finding that admitting privileges for abortion fails rational basis.

## II. Plaintiffs will not suffer irreparable harm absent an injunction.

Plaintiffs will suffer no irreparable harm absent an injunction because there is no constitutional injury. *See supra* Part I. Plaintiffs allege two specific "harms" of the hospitalization and admitting privileges requirements. First, that the Act "is imposing ongoing irreparable harm to Plaintiffs' ability to practice their profession and operate their business, as well as to satisfy their personal and professional missions and obligations of providing comprehensive reproductive health care to people in West Virginia." Pls.' Mem. 30. Those alleged harms, even if they were cognizable (they are not), would be compensable by damages and therefore not irreparable. *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land, Owned by Sandra Townes Powell*, 915 F.3d 197, 218 (4th Cir. 2019). Even under *Roe* and *Casey*, an abortion provider had no constitutional right to perform an abortion using his or her preferred methods. *See Gonzales v. Carhart*, 550 U.S. 124, 158 (2007).

Second, Plaintiffs argue that the Act "now leaves those seeking abortion care . . . no option but to try to obtain that care out of state, continue their pregnancies to term against their will, or manage their abortion outside of the formal medical system." Pls.' Mem. 30. Plaintiffs assertions do not appear to refer to those cases within the Act's exceptions to the general prohibition on abortion; this statement presumably refers only to those seeking purely elective abortions, which are clearly prohibited under the Act. But regardless, under *Dobbs*, there is no constitutional right to abortion impacted by the Act's requirements. 142 S. Ct. 2228, 2242 (2022). Nor would Plaintiffs have standing to assert such a right on behalf of third parties. *See supra* Part I.A.

Irreparable harm runs in the other direction. Preliminarily enjoining any action to enforce *any* part of the Act, which Plaintiffs seek, would cause great harm to both pregnant women and their unborn babies. As explained above, the hospitalization and admitting privileges requirements are specifically designed to protect women's health, *see supra* Part I.B, as *Dobbs* explicitly allows, 142 S. Ct. at 2284. And all of the Act serves the purpose of protecting fetal life. *Id.* An injunction would remove all of these protections to women's and unborn babies' health and safety. Also, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012). Because these state interests, as legitimately advanced, are constitutional, enjoining the Act would not avoid any irreparable harm to Plaintiffs but, in fact, would irreparably harm the people of West Virginia.

**III. The public interest and the balance of the equities favor the State.**

"The equities and public interest . . . generally weigh in favor of enforcing duly enacted state laws." *Strange v. Searcy*, 574 U.S. 1145, 1145 (2015) (Thomas, J., dissenting); *see also Hollingsworth v. Perry*, 570 U.S. 693, 709–10 (2013) ("No one doubts that a State has a cognizable interest 'in the continued enforceability' of its laws that is harmed by a judicial decision declaring

a state law unconstitutional."); *King*, 567 U.S. at 1303 ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."); *N.C. State Conference of the NAACP v. McCrory*, 156 F. Supp. 3d 683, 708 (M.D.N.C. 2016) ("[T]he public interest is also served by permitting legitimate and duly enacted legislation to be enacted.").

Here, the public has an especially strong interest in the entire Act's enforcement because it furthers the State's important interests in "respect for and preservation of prenatal life at all stages of development" and "the protection of maternal health and safety." *Dobbs*, 142 S. Ct. at 2284. The Supreme Court recently returned the ability to protect to the people of the states and their elected representatives. *Id.* at 2243. West Virginians' elected representatives have democratically made their voice heard on how they wish to advance these important interests, and it would be inequitable to permit the will of the people to be blocked through extraordinary relief to a business that disagrees with two basic regulatory requirements.

**CONCLUSION**

For the foregoing reasons, the Court should deny Plaintiffs' motion for preliminary injunction.

Respectfully submitted,

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THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

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| WOMEN'S HEALTH CENTER OF WEST VIRGINIA, *on behalf of itself, its staff, and its patients;* and DR. JOHN DOE, *on behalf of himself and his patients,*<br><br>*Plaintiffs,*<br><br>v.<br><br>ASHISH P. SHETH, *in his official capacity as President of the West Virginia Board of Medicine;* and MATTHEW CHRISTIANSEN, *in his official capacity as Secretary of the West Virginia Board of Medicine,*<br><br>*Defendants.* | Civil Action No. 2:23-cv-00079<br><br>Hon. Irene C. Berger |

**CERTIFICATE OF SERVICE**

I hereby certify that on February 27, 2023, I electronically filed the foregoing "Response in Opposition to Motion for Preliminary Injunction" with the Clerk of Court using the ECF system which will send notification of such filing to all counsel of record.

*s/Curtis R. A. Capehart*
Curtis R. A. Capehart
*Deputy Attorney General*